

ACTUAL INNOCENCE WRITS

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TABLE OF CONTENTS

Table of Contents	i
I. Introduction	1
A. Brief History of Post-Conviction Relief	1
II. Actual Innocence Writs	3
A. The Legal Standard.....	3
B. <i>Herrera/Elizondo</i> Innocence Claims	3
C. <i>Schlup</i> Innocence Claims	5
III. Texas Cases	5
A. When is Evidence Newly Discovered	6
B. Actual Innocence Claims Based on DNA	7
C. Actual Innocence Claims Based on Recantations	13
D. Other Scientific Evidence	16
E. Other Actual Innocence Writ Examples	21
IV. Pardons for Innocence	23
V. Wrongful Conviction Compensation	24
VI. Information From The Innocence Project of Texas and The National Registry of Exonerations	26

ACTUAL INNOCENCE WRITS

I. INTRODUCTION

Post-conviction writs of habeas corpus are cognizable in State and Federal Court and provide the exclusive judicial remedy for a wrongful final conviction in Texas. Actual innocence is one of many grounds for relief that can be sought through a post-conviction writ of habeas corpus but the last three decades advances in scientific evidence such as DNA testing coupled with the courts' expanded purview of the scope of habeas writs have seen a dramatic increase in actual innocence work, which has led to the exoneration of at least forty-nine prisoners in Texas on the basis of DNA evidence alone. *See* Innocence Project of Texas, www.ipottexas.org/at-a-glance. In addition to actual innocence based on newly discovered scientific evidence, recantations have provided another area ripe for post-conviction relief in Texas.

A. Brief History of Post-Conviction Relief

The origins of “the great writ” in American jurisprudence dates back to the common law of seventeenth-century England but the central purpose remained the same for centuries – to permit judicial review of the lawfulness of the restraint of liberty. Writ review is a constitutional mandate. The U.S. Constitution provides, “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.” U.S. Const. art. I, § 9, cl. 2.

Likewise, the Texas Constitution states, “[t]he writ of habeas corpus is a writ of right, and shall never be suspended.” Tex. Const. art. 1 § 12. This right is codified in Chapter 11 of the Texas Code of Criminal Procedure with section 11.07 governing writ applications on non-death penalty felony cases, section 11.071 governing death penalty cases, and section 11.072 governing misdemeanor and community supervision cases. Section 11.07 was enacted by the Texas legislature in 1970 and was revised by the Texas Corpus Act of 1995. Federal writs of habeas corpus are primarily governed by Chapter 153 of the United States Code with 28 U.S.C.A. § 2255 attacking a federal conviction and 28 U.S.C.A. § 2254 providing for the limited review of state convictions in federal habeas proceedings.

Despite the deep-seated roots of the habeas privilege, the viability of constitutional claims, such as a violation of due process, is a relatively new concept. Historically, writs served “almost exclusively to contest a court’s jurisdiction.” *Ex Parte Graves*, 70 S.W.3d 103, 107 (Tex. Crim. App. 2002) (“the common law writ was not a mechanism to ensure the accuracy or fairness of a trial”). It was not until 1942 that the jurisdictional limitation was abandoned and the Supreme Court recognized that constitutional claims were cognizable in federal writs. *Id*; *See Waley v. Johnston*, 316 U.S. 101, 104 (1942); *see also Ex Parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967) (habeas corpus relief available under theory that trial court “lost its jurisdiction” to convict without due process of law). Ten years later, the Supreme Court expanded the power of post-conviction writs again holding that federal habeas writs could remedy errors in the state criminal process. *See Brown v. Allen*, 344 U.S. 443 (1953).

Today, “both federal and Texas courts have confined the scope of post-conviction writs of habeas corpus to jurisdictional or fundamental defects and constitutional claims.” *Ex Parte Graves*, 70 S.W.3d at 104. However, in most jurisdictions claims of actual innocence were not contemplated in habeas proceedings until even more recently. *See Shaver v. Ellis*, 255 F.2d 509 (5th Cir. 1958); *Widener v. Harris*, 60 F.2d 956 (4th Cir. 1932); *Ex Parte Banspach*, 130 Tex. Crim. 3, 91 S.W.2d 365 (Tex. Crim. App. 1936). For example, in *Shaver*, a Texas defendant convicted of murder and sentenced to death, having exhausted available state habeas proceedings, sought federal habeas relief on the grounds that another inmate confessed to the murder on the eve of his execution. *Shaver*, 255 F.2d at 511. However, the writ was flatly denied because the court found, “it is clear that questions of guilt or innocence are not matters to be

considered upon petition for habeas corpus.” *Id.* The Fifth Circuit also noted that there was no such remedy for actual innocence under Texas law. *Id.*

As recently as 1983, the Texas Court of Criminal Appeals held that newly discovered evidence is not grounds for relief under Article 11.07. *Ex Parte Binder*, 660 S.W.2d 103 (1983). Historically, claims of actual innocence based on newly discovered evidence were viable only through direct appeals, such as motions for new trials subject to statutes of limitations, or non-judicial relief such as clemency. Daryl E Harris., *By Any Means Necessary: Evaluating the Effectiveness of Texas’ DNA Testing Law in the Adjudication of Free-Standing Claims of Actual Innocence*, 6 Scholar 121, 128 (2003).

It was not until the early 1990s that courts began to reconsider whether freestanding claims of actual innocence were cognizable in habeas proceedings. Although, neither the Supreme Court has not expressly recognized a freestanding claim of innocence as grounds for a collateral post-conviction attack, the Supreme Court and Texas courts have found that actual innocence claims are cognizable in habeas proceedings through constitutional claims. *See Herrera v. Collins*, 506 U.S. 390 (1993); *see also Holmes v. Honorable Court of Appeals for the Third Dist.*, 885 S.W.2d 389 (Tex. Crim. App. 1994); *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

In *Herrera*, a Texas man convicted of capital murder and sentenced to death sought federal habeas corpus relief on the ground that his conviction and sentence violated his Eighth Amendment (cruel and unusual punishment) and Fourteenth Amendment (due process guarantee) rights because newly discovered evidence demonstrated that he was “actually innocent.” *Herrera*, 947 S.W.2d at 390-91. The Court found that actual innocence based on newly discovered evidence was not a ground for relief in federal habeas proceedings or under Texas law as it stood. *Id.* However, for the first time, the Court left open the possibility of the viability for such a freestanding claim, by assuming *arguendo* that a claim of actual innocence in a capital case would render a defendant’s execution unconstitutional, but found that *Herrera*’s claim would not meet the necessary “extraordinarily high threshold” in such a case. *Id.* at 417 (The Court commented in dicta that “[A]fter all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent.”).

Three years later, in *Elizondo*, the Texas Court of Criminal Appeals held that actual innocence is a ground for collateral attack in state habeas proceedings finding that both the execution and incarceration of an innocent person violates the due process clause of the constitution. *Elizondo*, 947 S.W.2d at 205. The defendant in *Elizondo* sought state habeas relief from his aggravated sexual assault conviction after the victim recanted. *Id.* The court found that the actual innocence claim based on this newly discovered evidence was a ground for habeas relief but that an applicant in such a case must show that new facts “unquestionably establish” applicant’s innocence. *Id.* Ultimately, in *Elizondo*, the court found that the record supported a finding that the recantation testimony was more credible than the victim’s trial testimony and in light of this new evidence no rational jury would convict applicant. *Id.* at 210. Therefore, *Elizondo* was granted habeas relief. *Id.*

It is on the heels of *Herrera* and *Elizondo* that actual innocence claims have become a focal point for post-conviction habeas relief in state and federal courts in Texas over the past few decades. This represents a departure from the historical purview of habeas proceedings and coincides with revolutionary advancements in DNA testing and the corresponding exonerations of wrongfully convicted prisoners. Garret, Brandon L., *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 5 (2011).

Today, the three most common issues raised in writ applications are ineffective assistance of counsel, suppression of exculpatory evidence and new evidence establishing actual innocence. The remainder of this paper will discuss the current state of actual innocence claims in Texas, with a focus on actual innocence claims based on new scientific evidence and recantations, relevant procedural considerations, and briefly federal review of such claims.

II. ACTUAL INNOCENCE WRITS

Claims of actual innocence based on newly discovered evidence are cognizable in post-conviction writs of habeas corpus whether the applicant pleaded guilty or had a jury trial and whether the applicant is sentenced to death or confinement. *See Elizondo*, 947 S.W.2d at 205; *Ex Parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006); *Ex Parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002). The actual innocence jurisprudence of the State of Texas has developed primarily in the area of recantations and newly discovered scientific evidence such as DNA testing and the attendant exonerations.

A. The Legal Standard

Assertions of actual innocence are categorized as either *Herrera*-type claims or *Schlup*-type claims. *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *See Elizondo*, 947 S.W.2d at 208; *Ex Parte Franklin*, 72 S.W.3d 671 (Tex. Crim. App. 2002). A *Herrera* claim is a substantive claim of innocence based solely on newly discovered evidence. *Ex Parte Brown*, 205 S.W.3d at 545; *Ex Parte Tuley*, 109 S.W.3d at 390 (citing *Herrera v. Collins*, 506 U.S. 390 (1993)). The other type of claim, a *Schlup* claim, is a procedural one that “does not itself provide a basis for relief” but is intertwined with a constitutional error that renders an applicant’s conviction constitutionally invalid. *Id* (citing *Schlup v. Delo*, 513 U.S. 298 (1995)). For example, a *Schlup* type innocence claim is implicated where the actual innocence is used as a gateway to raise another constitutional violation such as an ineffective assis . *See Ex Parte Billy Fredrick Allen*, 2009 WL 282739 (Tex. Crim. App. 2009) (subsequent writ of habeas corpus entitled Allen to relief where the *Schulp* claim implicated actual innocence through ineffective assistance of counsel because counsel failed to raise newly discovered evidence - that the victim identified a different attacker - in a motion for new trial).

B. Herrera/Elizondo Innocence Claims

To succeed on a habeas claim of actual innocence based solely on newly discovered evidence (*Herrera*), the applicant must show by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in the light of the new evidence. *Ex Parte Elizondo*, 947 S.W.2d at 206; *see also Ex Parte Brown*, 205 S.W.3d at 548; *but see Ex Parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007) (in the context of death penalty claims, the standard pursuant to 11.071 § 5(a)(3) is that no rational juror would have answered in the state’s favor one or more of the special issues). “Establishing a bare claim of actual innocence is a Herculean task.” *Id*.

First, Applicant must show that the evidence presented is “newly discovered” or “newly available” and that it is affirmative proof of his innocence. *Ex Parte Spencer*, 337 S.W.3d 869 (Tex. Crim. App. 2011). In *Brown*, habeas relief was denied because evidence presented at habeas hearing was not “newly discovered” as required to succeed on claim of actual innocence where defendant simply attached the same affidavits to his writ application that were attached to his motion for new trial two years prior *Ex Parte Brown*. 205 S.W.3d 538. However, evidence can be newly discovered if it was previously known but was not available to the defendant to use for some reason outside of his control. *See Ex Parte Calderon*, 309 S.W.3d 64 (Tex. Crim. App. 2010); *see also Ex Parte Zapata*, 235 S.W.3d 794, 795 (Tex. Crim. App. 2007).

Next, the reviewing court’s inquiry is “whether the newly discovered evidence would have convinced the jury of applicant’s innocence. *Ex Parte Elizondo*, 947 S.W.2d at 207. The new evidence is examined in light of the evidence presented at trial. *See Ex Parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). In *Elizondo*, the Texas Court of Criminal Appeals explained:

Because, in evaluating a habeas claim that newly discovered or newly available evidence proves the applicant to be innocent of the crime for which he was convicted, our task is to assess the probable impact of the newly available evidence upon the

persuasiveness of the State's case as a whole, we must necessarily weight such exculpatory evidence against the evidence of guilt adduced at trial. *Elizondo*, 947 S.W.2d at 206; *Ex Parte Franklin*, 72 S.W.3d 671, 677-78 (Tex. Crim. App. 2002) (same). Relief is not warranted without applicant having made "an exceedingly persuasive case that he is actually innocent." *Elizondo*, 947 S.W.2d at 206; *see also id.* at 209 (stating that, in a case of freestanding claim of innocence, the habeas court "must be convinced" that the new facts "unquestionably establish" the applicant's innocence; "unquestionably establish" means the same thing as by "clear and convincing" evidence.)

Upon review of a post-conviction application for a writ of habeas corpus, the convicting court is the original fact-finder, and the Texas Court of Criminal Appeals is the ultimate fact-finder. *See Ex Parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014) (citing *Ex Parte Chavez*, 371 S.W.3d 200, 2007 (Tex. Crim. App. 2012)). The Court of Criminal Appeals affords deference to the habeas courts findings as to credibility and demeanor (implicated most often when the convicting court decides to hold a writ hearing) if the record supports those findings. *Id.*

"When an applicant presents new exculpatory evidence under Article 11.07 of the Texas Code of Criminal Procedure alleging facts that, if true, prove his or her actual innocence, the habeas court may conduct a live evidentiary hearings and consider affidavits, depositions, interrogatories, and the judge's won personal recollection if the habeas judge was also the trial judge. . ." *Ex Parte Harleston*, 431 S.W. 3d 67, 70 (Tex. Crim. App. 2014) (citing Tex. Code. Crim. Pro. art. 11.07 § 3(d); *see also Ex Parte Brown*, 205 S.W.3d at 546). Whether a live hearing is held or not the habeas court is to assess the impact of the new evidence and weigh it against inculpatory evidence

However, the Court of Criminal appeals is to conduct an independent review of the record if necessary and "may exercise [its] authority to make contrary or alternative findings and conclusions" when the record reveals the trial judge's habeas findings are not supported. *Ex Parte Flores*, 387 S.W.3d 626, 634-35 (Tex. Crim. App. 2012). Mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor are reviewed de novo by the Court of Criminal Appeals. *See Ex Parte Weinstein*, 421 S.W.3d at 664.

It should now be apparent that applicant's proceedings on a bare claim of innocence based on newly discovered evidence seeking post-conviction relief are subject to an "extraordinarily high" standard of review. *Ex Parte Elizondo*, 947 S.W.2d at 208 (quoting *Herrera*, 506 U.S. at 404 (O'Connor, J., concurring)). This is because an applicant alleging a *Herrera* claim is directly attacking the propriety of his conviction, although the applicant does not dispute that he received an error-free trial. *Id.* at 209 ("[A]n exceedingly high standard applies to the assessment of claims of actual innocence that are not accompanied by a claim of constitutional error at trial."). Once an applicant "has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears[.]" and "in the eyes of the law, [the applicant] does not come before the Court as one who is 'innocent,' but ... as one who has been convicted by due process of law...." *Herrera*, 506 U.S. at 399.

C. *Schlup* Innocence Claims

The standard in a *Schlup*-type claim where the evidence of actual innocence is tied to another constitutional violation claim such as the right to effective assistance of counsel or a *Brady* violation is different from that in a *Herrera* claim. *Ex Parte Franklin*, 72 S.W. 3d at 675-76; *See Schlup*, 513 U.S. at 301 (petitioner asserted a claim of actual innocence by claiming that constitutional error deprived the jury of critical evidence that would have established his innocence). In *Schlup*, the Supreme Court noted that this type claim differs from a *Herrera* claim in that the claim of innocence does not provide a basis for relief itself but rather depends on the validity of the other constitutional claims i.e. the validity of the *Strickland* and *Brady* claims. *Id*; *see also Strickland v. Washington*, 466 U.S. 668 (1984); *Brady v. Maryland*, 373 U.S. 83 (1969). “*Schlup*’s claim of innocence is thus not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have this otherwise barred constitutional claim considered on the merits.” *Id*.

Therefore, a *Schlup* claim is not subject to the “extraordinarily high” standard of review and burden placed on a *Herrera* petitioner. *Ex Parte Franklin*, 72 S.W.3d at 676. In a *Schlup* claim, “the petitioner must show that the constitutional error probably resulted in the conviction of one who was actually innocent,” meaning “[T]he petitioner must show that it more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Id* (citing *Schlup*, 513 U.S. at 326-27). “Consequently, *Schlup*’s evidence of innocence need carry less of a burden . . . the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was a product of a fair trial. *Id*.

While the burden is less exacting, a petitioner with a *Schlup* claim should keep in mind that in addition to adducing evidence of actual innocence he must meet the burden of proving the underlying constitutional violation. For example, a petitioner claiming actual innocence through ineffective assistance of counsel would have to meet the exacting burden in *Strickland* while demonstrating that “it is more likely than no” that no reasonable juror would have convicted him in light of the evidence of his actual innocence. *See Ex Parte Franklin*, 72 S.W.3d at 675-76; *See also Ex Parte Billy Fredrick Allen*, 2009 WL 282739 (Tex. Crim. App. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2nd 674 (1984)).

It is critical that before filing a writ of habeas corpus on the basis of newly discovered evidence you understand the nuanced differences in the standard of review and burden for a *Herrera* versus *Schlup* claim. A *Herrera* claim presents its own substantive constitutional claim based on actual innocence whereas a *Schlup* claim presents actual innocence evidence procedurally through a separate constitutional error. The burden related to the evidence of actual innocence itself is higher in a *Herrera* claim, wherein the petitioner must demonstrate that the evidence “unquestionably establishes” his innocence. *Herrera*, 506 U.S. at 399. Finally, a *Schlup* claim may enable a petitioner to present an otherwise barred constitutional claim, for example, in a subsequent writ but success on the actual innocence claim depends on the validity of the constitutional claim. *See Schlup*, 513 U.S. at 326-27; Tex. Code. Crim. Pro. art. 11.07 § 4(a)(2); *But see Ex Parte Villegas*, 415 S.W.3d 885 (Tex. Crim. App. 2013) (J. Price, concurring, argues Article 11.07 § 4(a)(2) and 11.071 § 5(a)(2) codify the “gateway” implicated in federal *Schlup* claims such that there is no need to recognize a second “so-called *Schlup* innocence claim in Texas).

III. TEXAS CASES

There is no specific statutory or judicial limitation on what types of evidence may constitute “newly discovered evidence” in the context of an actual innocence claim. Newly discovered evidence may include DNA testing, other advances in science and technology, witness/victim recantations, and may present itself in the form of affidavits, expert reports, depositions, etc. The only requirement is that the evidence is newly discovered or newly available. *Ex Parte Brown*, 205 S.W.3d at 545.

A. When is Evidence Newly Discovered?

The term “newly discovered evidence refers to evidence that was not known to the applicant at the time of trial and could not be known to him even with the exercise of due diligence. He cannot rely upon evidence or facts that were available at the time of his trial, plea, or post-trial motions, such as a motion for new trial.” *Id.*

The Court of Criminal Appeals has cautioned that, “[A] claim of actual innocence is not an open window through which an applicant may climb in and out of the courthouse to relitigate the same claim before different judges at different times.” *Id.* at 546. Likewise, a claim of actual innocence is not cognizable on habeas review if already raised and rejected on direct appeal. *Id.* (citing *Ex Parte Acosta*, 672 S.W.2d 470, 476 (Tex. Crim. App. 1984) (refusing to address a claim which was previously raised and rejected on direct appeal)).

However, courts have recognized an exception to this rule when, “direct appeal cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathering in a habeas proceeding.” *Id.* (citing *Ex Parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997)). Therefore, a writ applicant may be afforded the opportunity to proffer additional evidence to establish his innocence claim even if a small portion of that evidence was previously available. *See Ex Parte Brown*, 205 S.W.3d at 546-47. The following case law is instructive on the threshold issue of whether evidence is “newly discovered:”

***Ex Parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006)**

Brown pleaded guilty to aggravated sexual assault of a child but then filed a motion for new trial claiming actual innocence. Brown attached a recantation affidavit signed by the child victim and an affidavit from the child’s mother stating the child had lied about the molestation. The judge denied the motion for new trial stating he did not believe the child’s recantation. In Brown’s application for a writ of habeas corpus he raised the same claim of actual innocence based on the same affidavits. The court found that the evidence presented was not newly discovered because Brown “simply attached the same affidavits to his writ application.” However, the court remanded the case for a live evidentiary hearing to allow Brown to present any “new” evidence to support the “old” claim.

Ultimately, the court found that Brown failed to provide any rationale as to why his claim or evidence was differing in quality from the evidence presented at the earlier motion for new trial. Thus, the court denied relief because the habeas record failed to contain any new exculpatory evidence.

Although, Brown ultimately failed to provide new evidence, this case is illustrative of the “exception” to the general rule regarding new evidence. Courts, in their discretion, may allow for additional evidence gathering through a live evidentiary hearing even when an initial writ application fails to produce new evidence. However, that additional evidence would still have to provide something newly discovered on which an applicant bases his claim of innocence. *Brown* also leaves open the possibility that “new” evidence supporting a writ claim of actual innocence could be based on a difference in the quality of that evidence if it was presented earlier.

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

Calderon pleaded no contest to indecency with a child and filed an application for a writ of habeas corpus claiming actual innocence based on the victim’s recantation. The victim had written a recantation note prior to Calderon’s plea and later provided the same recantation in affidavit attached to his writ application. The complex factual nature of this case led to four remands and two evidentiary hearings on the issue of whether the claim was based on newly discovered or newly available evidence. Evidence was conflicting about whether Calderon was aware of the recantation note prior to this hearing. The court found

that Calderon was not aware of the earlier note and that even if the note and its contents were known or discoverable through the exercise of due diligence before his plea, the evidence was still “unavailable” to him in light of testimony from the victim regarding pressure from her father not to recant.

The court found her recantation credible and in light of this “newly discovered evidence” habeas corpus was granted on actual innocence and the verdict was set aside.

***Ex Parte Zapata*, 235 S.W.3d 794 (Tex. Crim. App. 2007)**

Zapata pleaded guilty to aggravated sexual assault of a child and was sentenced to 15-years imprisonment. Zapata learned of the victims’ recantation after his plea but prior to his sentencing. However, Zapata was not able to produce the “victims” to testify at the sentencing hearing because the mother failed to produce them. Zapata moved to withdraw his plea at sentencing, filed a motion for new trial, and a direct appeal all of which were denied. The court found that he was unable to produce the recantation testimony earlier through “no fault of his own” and in light of the “new evidence” presented at the habeas hearing his plea was not knowingly and voluntarily entered.

These cases illustrate the importance of providing the reviewing court with *new* evidence, which if true, would establish the applicant’s innocence. However, it’s also clear that the courts are willing to provide an applicant with the opportunity to develop new evidence related to old innocence claims at an evidentiary hearing and it is possible that, although evidence was previously known or discoverable with due diligence, an applicant could establish that said evidence was unavailable through no fault of their own. *See Brown*, 205 S.W.3d 538; *see also Calderon*, 309 S.W.3d 64; *Zapata*, 235 S.W.3d 794. Therefore, even if upon first review the innocence claim appears to be based on old evidence or a previously litigated issue there are exceptions and arguments, which may allow the habeas court to review the evidence and claim.

Once an applicant has presented newly discovered evidence, whether in an original writ application or an evidentiary hearing granted to allow the applicant to adduce new evidence in support of his claim, the new evidence is weighed against the “old” evidence of applicant’s guilt. *Ex Parte Elizondo*, 947 S.W.2d at 206-07. The reviewing court’s inquiry is “whether the newly discovered evidence would have convinced the jury of applicant’s innocence.” In a bare innocence claim, the applicant must establish “by clear and convincing evidence, that despite the evidence of guilty that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.” *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) (quoting *Ex parte Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002)); *see Ex parte Elizondo*, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996).

Three areas that have proven ripe for these actual innocence claims have been recantations often in sexual assault cases, DNA exonerations, and advances in scientific evidence. The remainder of this section will provide an overview of these areas.

B. Actual Innocence Claims Based on DNA

It is no coincidence that the expansion of post-conviction habeas relief corresponded with a revolution in and judicial acceptance of forensic Deoxyribonucleic acid (“DNA”) testing and analysis, “which allows inmates to prove innocence, even decades after their conviction.” Garrett, Brandon L., Kovarasky, Lee, Federal Habeas Corpus Executive Detention and Post-Conviction Litigation 150 (Robert C. Clark et al. 2013). Nationwide, as of 2013, DNA testing is responsible for more than 300 exonerations. *Id.* In Texas alone, at least forty-nine prisoners have been exonerated on the basis of DNA evidence. *See* Innocence Project of Texas, www.ipottexas.org/at-a-glance. Those exonerated on the basis of DNA evidence establishing their actual innocence have spent an average of thirteen years in prison and frequently had their previous claims dismissed. *See* Garrett, *supra* at 150.

In 1992, the Court of Criminal Appeals held that DNA profiling evidence was admissible in Texas. *Kelly v. State*, 824 S.W.2d 568, 574 (Tex. Crim. App. 1992) (holding that the trial court had sufficient grounds to find DNA evidence valid and relevant). The court held that a proponent of novel scientific evidence must prove by clear and convincing evidence that the evidence is reliable and relevant. *Id*; see also Tex. R. Evid. 702. At that time, the DNA analysis in question, which identifies an unknown sample of DNA by comparing it with a known sample, was novel science. See Harris, *supra* at 141. The legal standard for the admissibility of scientific evidence will be addressed in greater detail below but, with regard to DNA evidence, it has been noted that “[N]o other scientific technique has gained such widespread acceptance so quickly” and “no other technique has been as potentially valuable to the criminal justice system. DNA evidence has been called the single greatest advance in the search for truth . . . since the advent of cross-examination.” *Roberson v. State*, 16 S.W.3d 156, 165 (Tex. App. – Austin, 2000). While an entire article could be devoted to interplay between the science, legal admissibility and legal effect of DNA analysis in criminal convictions the following is a summary of relevant Texas post-conviction habeas cases involving DNA:

***Ex Parte Chatman*, No. AP-75829 2008 WL 217860 (Tex. Crim. App. Jan. 23 2008).**

Chatman was convicted of aggravated rape and sentenced to ninety-nine years imprisonment and his conviction was affirmed on appeal in 1982. Post-conviction DNA testing, which was previously unavailable to Chatman, indicated that he was excluded from being the perpetrator. The Court of Criminal Appeals held that judgment of conviction would be set aside, where no rational jury would have convicted applicant in light of new DNA evidence indicating that he was excluded from being the perpetrator.

***Ex Parte Waller*, Nos. AP-76000, AP-76002 2008 WL 4356811 (Tex. Crim. App. Sept. 24, 2008)**

Waller was found guilty of aggravated robbery by a jury and sentenced to life imprisonment; his conviction was affirmed in 1993. He pleaded guilty to aggravated kidnapping stemming from the same incident and his subsequent appeal was dismissed. Waller filled two applications for post-conviction writs of habeas corpus challenging the aggravated robbery and kidnapping convictions on the grounds that DNA evidence showed he did not commit the underlying sexual assault relevant to those offenses. DNA evidence established another man committed the sexual assault. Waller also submitted evidence that the other man committed to these offenses. Waller was granted habeas relief on these convictions.

Interestingly, when Waller was originally convicted of the robbery and kidnapping he had been on deferred adjudication for possession of a controlled substance and following his convictions the trial judge adjudicated his guilt on the possession charge and sentencing him to twenty-years imprisonment. In a separate application for a writ of habeas corpus, Waller challenged the revocation of his deferred adjudication on the grounds that the revocation violated his due process rights because there was no evidence to show he violated his probation other than the erroneous convictions described above. Waller was also granted relief as to the revocation.

***Ex Parte Blair*, No. AP-75954 2008 WL 2514174 (Tex. Crim. App. June 25, 2008)**

In 1994, Michael Blair was convicted of capital murder and sentenced to death based on misidentification of witness and invalid forensic science. DNA testing of hair and fingernail scrapings from the victim’s body excluded Blair as a contributor and evidence used to convict him was contradicted by DNA testing. Judgment of guilt and sentence of death were set aside.

Richard Danziger and Christopher Ochoa, 2002 (Opinion Unavailable)

Danziger was convicted of aggravated sexual assault based on the coerced confession and testimony implicating Danziger and his friend Christopher Ochoa who was also convicted, of the murder and sexual assault. Evidence from a lab analysis at trial detected similar blood types of Danziger and the victim.

Years later, the true perpetrator confessed to the crime and new tests were performed which excluded Danziger and Ochoa, both of whom were exonerated in 2001. *See* Jordan Smith, *Danziger and Ochoa: Why Did Freedom Take so Long?* AUSTIN CHRONICLE, Nov. 22, 2002, www.austinchronicle.com/2002-11-22/108660.

***Ex Parte Evans*, No. AP-76242 2009 WL 3368699 (Tex. Crim. App. Oct. 21, 2009)**

Jerry Evans was convicted of sexual assault in 1986 based on out-of-date police identification procedures and faulty eyewitness testimony. Evans spent 23 years in prison for a crime he did not commit. Evans contended that post-conviction DNA testing, which was not available at the time of trial, reflects that he is actually innocent. DNA testing would later prove his innocence and he was exonerated in 2009. *See* Kimberly Thorpe, *Says DNA Exonerates Jerry Lee Evans of His Freedom, "I knew it Would Come One Day,"* DALLAS OBSERVER, May 27, 2009, <http://www.dallasobserver.com/news/says-dna-exonerates-jerry-lee-evans-of-his-freedom-i-knew-it-would-come-one-day-7140064>.

***Ex Parte Giles*, No. AP-75712 2007 WL 1776009 (Tex. Crim. App. June 20, 2007)**

James Giles was convicted in 1983 for allegedly raping a victim with two other men and was sentenced to thirty years in prison. He was released on parole in 1993 but continued to pursue legal action to prove his innocence. The Innocence Project began investigating his case in 2000 and DNA evidence proved that Giles was innocent. He was finally exonerated in 2007. *See* Thomas Korosec, *DNA Exonerates Wrongfully Convicted Dallas Man*, HOUSTON CHRONICLE, April 10, 2007, www.chron.com/news/houston-texas/article/DNA-exonerates-wrongly-convicted-Dallas-man-1534295.php

***Ex Parte Good*, No. AP-75042 2004 WL 3259016 (Tex. Crim. App. Nov. 14, 2004)**

Donald Wayne Good was convicted in 1984 of committing a 1983 rape and burglary. He was sentenced to life in prison. He was paroled in 1993, but his parole was revoked in 2002 (for a minor property crime). In 2004, DNA testing proved that Good could not have been the man who committed the 1983 crimes, and the Texas Court of Criminal Appeals exonerated him in 2004.

The evidence presented at Good's trials included the eyewitness testimony from the victim and her daughter. The rape kit was examined by the Southwestern Institute of Forensic Sciences (SWIFS). The laboratory found spermatozoa in the rape kit, on the victim's jumpsuit, and on a blanket. An analyst testified that blood group markers on the blanket must have come from a Type O secretor, which matched Good's blood type. In 2002, Good filed a handwritten motion requesting DNA testing of the evidence, test results excluded Good as a contributor to the spermatozoa on the vaginal swab. The Texas Court of Criminal Appeals vacated the conviction.

Opinion Available: <http://www.cca.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=12780>

***Ex Parte Gossett*, No. AP-75642 2007 WL 841121 (Tex. Crim. App. March 21, 2007)**

In February 2000, Andrew Gossett was convicted of aggravated sexual assault and sentenced to 50 years imprisonment. Gossett was finally released on January 4, 2007, after DNA test results proved his innocence. The victim then identified Gossett from a photo array, no physical evidence linked Gossett to the crime. Initial DNA testing in his case was inconclusive, hair samples retrieved from the victim's vehicle did not match Gossett. The victim testified that her assailant had a state of Texas map ring on his finger, but detectives who searched Gossett's residence did not find a ring. Also, a videotape recovered from a convenience store showed Gossett shortly after the attack, wearing clothing that was inconsistent with the victim's description. However, Gossett was found guilty and spent seven years in prison before DNA testing exonerated him.

***Ex Parte Henton*, No. AP-75344 2006 WL 362331 (Tex. Crim. App. Feb. 15, 2006)**

Eugene Ivory Henton pleaded guilty to sexual assault in 1984 and sentenced to four years. He served 18 months in prison on that charge. DNA testing exculpated Henton in 2005, and he was exonerated the following year.

***Carlos Lavernia*, 2000 (Opinion Unavailable)**

Carlos Lavernia was convicted in 1985 of aggravated rape and sentenced to ninety-nine years based on eyewitness misidentification and improper forensic science. Lavernia was stabbed while serving time in prison. In 2000, via DNA testing, Carlos was proven innocent and exonerated but remained detained on immigration holds. *See* Amy Smith, *Carlos Lavernia Spent 16 years in Prison for a Crime He Did Not Commit. Should We Now Send Him Back to Cuba?* AUSTIN CHRONICLE, February 23, 2001, <http://www.austinchronicle.com/news/2001-02-23/double-jeopardy/>

***Ex Parte McGowan*, No. AP-75935 2008 WL 2390986 (Tex. Crim. App. June 11, 2008)**

Thomas McGowan was convicted of aggravated sexual assault and burglary of a habitation based largely on eyewitness misidentification; his conviction was affirmed in 1987. After the Innocence Project accepted the case, DNA testing would prove that another man committed the crime and the Texas Court of Criminal Appeals exonerated McGowan in 2008 after twenty-three years in prison.

See Innocence Project, *23 Years After Improper Photo Lineup Led to Wrongful Conviction, DNA Proves Thomas McGowan's Innocence in Dallas County*, www.innocenceproject.org/news-events-exonerations/press-releases/

***Ex Parte Phillips*, Nos. AP-76010, AP-76011, AP-76014, AP-67102 2008 WL 4417288 (Tex. Crim App. Oct. 1, 2008)**

In three separate jury trials, Steven Phillips was convicted of aggravated rape, aggravated sexual abuse, and burglary in 1982 and 1983. In total six of eight victims shown photographic or in-person lineups identified Phillips as the offender in various sexual assaults that occurred in 1982. He was sentenced to thirty-years imprisonment. In 2002, Phillips filed motions seeking post-conviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. In 2005, the court of appeals affirmed the trial court's denial of his motions for post-conviction DNA testing on direct appeal. With the help of the Innocence Project, DNA testing was finally conducted in 2006 and proved that Phillips was actually innocent of the rape. A subsequent investigation by the district attorney's office revealed that Phillips was innocent of all the charges for which he served twenty-five years in prison. In 2008 Phillips was officially exonerated through a writ of habeas corpus from the Texas Court of Criminal Appeals. *See* Innocence Project, *Steven Phillips*, <http://www.innocenceproject.org/cases-false-imprisonment/steven-phillips>

***Ex Parte Rachell*, No. AP-7608 2009 WL 81471 (Tex. Crim. App. Jan. 14, 2009)**

In 2003, Ricardo Rachell was convicted of aggravated sexual assault of a minor based on the victim's testimony and his friend who were both eight years old. He was sentenced to forty-years imprisonment. Rachell offered and provided DNA evidence for testing to prove his innocence prior to trial, but it was never tested. After conviction, DNA testing provided newly discovered evidence and indicated that Rachell did not commit the crime and was entitled to relief. The Texas Court of Criminal Appeals exonerated him in 2009 after he served more than five-years in prison. *See* Innocence Project, *Ricardo Rachell*, <http://www.innocenceproject.org/cases-false-imprisonment/ricardo-rachell>

***Ex Parte Rodriguez*, Nos. AP-75,225 & AP-75,226, 2005 WL 2087750 (Tex. Crim. App. Aug. 31, 2005)**

George Rodriguez was convicted of aggravated sexual assault of a child and aggravated kidnapping in 1987 based on eyewitness misidentification and improper forensic science. Despite the confession of one of the perpetrators and his identifying an accomplice, the police put Rodriguez in a line-up where he was identified by the fourteen-year-old victim. A hair found in the victim's underwear was said to be microscopically similar to Rodriguez and the testing of semen could not exclude Rodriguez. Mitochondrial testing of the hair would later indicate that Rodriguez could not have been the perpetrator. In 2005 his conviction was vacated and in September 2005 the district attorney moved to dismiss all charges.

Opinion Available:

<http://www.cca.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=13172>

***Ex Parte Smith*, No. AP-75573 2006 WL 3691244 (Tex. Crim. App. Dec. 13, 2006)**

Billy James Smith was convicted of aggravated sexual assault while using and exhibiting a deadly weapon in 1986. He was sentenced to life in prison.

The police who searched Smith's belongings did not find clothing that the victim said the perpetrator wore. The clothes that police confiscated from Smith contained no DNA evidence whatsoever. Also, Smith's sister testified at trial, corroborating his alibi. A rape-kit was performed on the victim, semen was found, and at trial the state argued that the victim had not engaged in consensual sex prior to her rape. The prosecution used the presence of semen to prove that a rape had occurred, and Smith was convicted.

In 2001, Smith began a long fight to secure DNA testing under Texas Code of Criminal Procedure Chapter 64. The State opposed the testing and argued that the victim may have had sex with her live-in boyfriend prior to the rape such that a DNA test indicating that Smith's DNA did not match that in the seminal fluid would not exonerate him. After attempting to secure DNA testing for four years, Billy James Smith was finally granted DNA testing in 2005, which excluded him as the donor, following which he was exonerated. Smith was released in July 2006 and officially exonerated in December 2006. *See Smith v. State*, 165 S.W.3d 361, 365 (Tex. Crim. App. 2005); *See also*, Innocence Project, *Billy James Smith*, <http://www.innocenceproject.org/cases-false-imprisonment/Billy-James-Smith>

***Ex Parte Wallis*, No. AP-75586 2007 WL57969 (Tex. Crim. App. Jan. 10, 2007)**

Gregory Wallis was convicted in 1989 of burglary of a habitation with intent to commit sexual assault in 1988. He was sentenced to 50 years in prison. At trial, the victim testified that she knew for a fact Wallis was the man who raped her. She had picked him out of a photo line-up after another inmate told police that Wallis had a tattoo similar to the description given by the victim. In December 2005, results of a first round of DNA testing could not entirely exclude Wallis. He was offered his freedom if he would agree to be a life-time registered sex offender. He declined. In 2006, another (more advanced) DNA test was conducted and the results proved that Wallis was not the perpetrator. He was released from prison in March 2006, and in January 2007, the Texas Court of Criminal Appeals granted his writ of habeas corpus, officially exonerating him after he served seventeen-years in prison. *See* Innocence Project, *Gregory Wallis*, <http://www.innocenceproject.org/cases-false-imprisonment/Gregory-Wallis>

***Ex Parte Morton*, No. AP-76663 2011 WL 4827841 (Tex. Crim. App. Oct. 12, 2011)**

In 1987, Michael Morton was convicted of murdering his wife. Morton's young son was present during the murder and told his grandmother, who told the district attorney, that his father was not at home and that a "monster" had murdered his mother. In addition, neighbors told police that a man had parked a green van behind the Morton's home and walked off into the woods. Police records also indicated that the

wife's missing credit card had been recovered in a San Antonio jewelry store. Despite all of this exculpatory evidence and no direct evidence of Morton's guilt he was convicted and sentenced to life in prison.

In 2005, Morton filed a Chapter 64 motion for post-conviction DNA testing to be done on items of evidence from the crime scene. However, original testing could not exclude Morton. In 2011, Morton was granted additional testing on a bloody bandana found near the scene and it revealed the victim and an unknown male's blood. The additional blood matched a convicted felon, Mark Norwood, who lived in Texas at the time of the murder. Norwood's hair was also found at the scene of a similar murder committed two years after Morton's wife was killed.

Michael Morton was exonerated in 2011 after spending nearly twenty-five years in prison for a crime he did not commit in what has become perhaps the most publicized Texas exoneration of the last few years. In addition to his exoneration based on the DNA evidence, a Court of Inquiry mandated by the Texas Supreme Court found probable cause to believe that the prosecutor in Morton's case had concealed the exculpatory evidence in Morton's case.

See Innocence Project, *Michael Morton*, <http://www.innocenceproject.org/cases-false-imprisonment/Michael-Morton>

Morton's case led the Texas Legislature to pass the Michael Morton Act in 2013, codifying open-file policies and mandatory discovery rules in criminal cases. This was the first major change to the discovery rules governing Texas criminal cases since 1965. See Randall Sims, *Two Views of Morton*, Texas Bar Journal; see also Tex. Code Crim. Pro. § 39.14.

The DNA exoneration cases in Texas and nationwide implicate the need for compulsory DNA testing. In fact, "[E]very state now requires a DNA analysis of evidence for specified offenses. However, only a handful of states have passed legislation providing a process for convicted persons to request DNA testing of evidence for their trial. Texas is one of them." Harris, *supra* at 124. In 2001, the Texas legislature amended chapter 38 and 64 of the Texas Code of Criminal Procedure and mandated the preservation of biological evidence for post-conviction DNA testing. *Id*; see also Tex. Code Crim. Pro. §§ 38.39; 64.03.

Recently amended in 2015, Chapter 64 of the Texas Code of Criminal Procedure governs post-conviction forensic DNA analysis. Section 64.01 allows a convicted person to submit a motion to the convicting court for forensic DNA testing of evidence that "has a reasonable likelihood of containing biological material." The motion must be accompanied by an sworn affidavit containing statements of fact in support of the motion. Furthermore, DNA testing under this section can only be sought for evidence secured in relation to the offense of conviction, which was in the possession of the state during trial but was not tested or, if previously tested, can be subjected to newer techniques "that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test. Tex. Code. Crim. Pro. § 64.01(b). Section 64.03 provides that a court *shall* order forensic DNA testing *only* if the court finds the evidence sought to be tested:

- Still exists and is in a condition making DNA testing possible; and
- Has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and
- There is a reasonable probability that the evidence contains biological material suitable for DNA testing; and
- Identity was or is an issue in the case; and
- The convicted person establishes by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing; and

- The request for the proposed DNA testing is not made to unreasonably delay the execution or sentence or administration of justice

Tex. Code. Crim. Pro. § 64.03(a)-(c).

The amended statute, which requires a showing that there is reasonable probability that the evidence is suitable for DNA testing took effect in September 2015. A court may not find that identity is not or was not an issue on a Chapter 64 Motion for Post-conviction DNA testing solely because the convicted person confessed or pleaded guilty. *Id.* However, “[e]xculpatory DNA testing results do not, by themselves, result in relief from a conviction or sentence. Chapter 64 is simply a procedural vehicle for obtaining certain evidence which might then be used in a state or federal habeas proceeding.” *Ex Parte Gutierrez*, 337 S.W.3d 883, 890 (Tex. Crim. App. 2011); *see also Ex Parte Tuley*, 109 S.W.3d 388, 391 (Tex. Crim. App. 2002). Finally, a person is entitled to counsel under Chapter 64 if the court finds “reasonable grounds” for the motion and the person is indigent. Tex. Code Crim. Pro. § 64.01(c); *but see Ex Parte Baker*, 185 S.W.3d 894 (Tex. Crim. App. 2006) (holding that a post-conviction writ was not available to pursue a claim of ineffective assistance of counsel on a post-conviction motion for DNA testing).

In addition to the overwhelming importance and impact DNA testing has had in overturning wrongful convictions, the DNA-exoneration cases have shown the fallibility of eye-witness identifications especially when coupled with improper police procedure. A study of the first 325 DNA exonerations nationwide showed that 235 cases involved eyewitness misidentification, 125 involved improper or invalidated forensics, and 88 involved false confessions or admissions. *See Innocence Project, The Causes of Wrongful Conviction*, www.innocenceproject.org/causes-of-wrongful-conviction

C. Actual Innocence Claims Based on Recantations

In addition to DNA and other scientific evidence, recantations have provided another avenue for the wrongfully convicted to establish their claims of actual innocence. Recantations have been particularly relevant in actual innocence claims related to convictions for sexual assault. *See Ex Parte Calderon*, 309 S.W.3d 64 (Tex. Crim. App. 2010); *see also Ex Parte Zapata*, 235 S.W.3d 794 (Tex. Crim. App. 2007). Habeas review in recantations is particularly fact-intensive because courts must weigh the new evidence, the recantation, against the old evidence adduced at the applicant’s trial. *See Ex Parte Elizondo*, 947 S.W.2d at 206. The following is a non-exhaustive summary of relevant Texas cases concerning recantations in habeas proceedings.

***Ex Parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005)**

In 1991, Thompson was convicted by a jury of aggravated sexual assault of a child, his then five-year old daughter, and sentenced to thirty years imprisonment. His conviction was affirmed on appeal in 1993. The testimony at trial consisted of the testimony of the victim, the victim’s mother, the arresting officer, the victim’s torn dress, and the testimony of a doctor who testified that the victim’s examination was “completely normal” but that the lack of physical evidence of sexual abuse was “consistent with digital penetration.”

In a writ application, Thomas contended that he was actually innocent based on newly discovered evidence in the form of an affidavit provided by his now twenty-year old daughter. In the affidavit and in testimony provided at an evidentiary hearing, the daughter stated that the sexual abuse never occurred and that her mother pressured her into making the allegations. Applicant’s attorney also elicited testimony from the victim’s mother regarding the torn dress, incidents of physical abuse between the mother and daughter, and the mother’s doubts regarding the allegations. Finally, Thomas also provided an expert affidavit from a social worker who offered her opinion that the recantation in this case was valid.

In light of this new evidence, the habeas court recommended that habeas relief be granted and that the conviction be set aside. The court of criminal appeals found that the court's findings were supported by the record and set aside the conviction.

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

In 1999, Navarajo was convicted of aggravated sexual assault of a child, his daughter who was seven-years old at the time of trial, and sentenced to twenty-years imprisonment. The state's evidence consisted of testimony from the victim that Navarajo "hurt" her and had gone "inside her private area," and a medical expert stating that the victim's genitals showed signs of penetration. The defense presented evidence of a videotaped recantation from the victim several days after the initial outcry in which she said she "had told a lie" because of pressure from her grandmother. The defense also presented evidence that Navarajo had prostate cancer and was likely impotent at the time of the offense.

In 2012, Navarajo filed an application for a writ of habeas corpus alleging newly available evidence of his actual innocence in the form of a 2011 recantation from the victim who was, by that time, an adult. In addition, he included affidavits from his ex-wife, a psychologist who concluded that the recantation was credible, and several jurors stating they would not have convicted him in light of this new evidence. At an evidentiary hearing, the victim testified that she had been influenced by her grandmother to tell these lies. Based on its credibility determinations, the habeas court concluded that the recantation was more credible than the trial testimony and was affirmative of Navarajo's innocence. Therefore, the court recommended granting Navarajo's habeas relief.

However, the court of criminal appeals found that the recantation failed to establish that no reasonable juror would have convicted Navarajo in light of other evidence. The court of criminal appeals rested its decision on the fact that the recantation testimony lacked details, the jury had rejected the prior recantation at trial, and the inculpatory medical evidence at trial was not explained by the victim's recantation. Finally, the court reasoned that even if it were to accept the habeas court's credibility determination regarding the recantation testimony that alone was insufficient to grant relief.

***Ex Parte Harleston*, 431 S.W.3d 67 (Tex. Crim. App. 2014)**

Harleston was convicted by a jury of aggravated sexual assault of a child and sentenced to twenty-five years imprisonment. Harleston's direct appeal and petition for discretionary review were denied. Shortly after that the complainant wrote an affidavit recanting, for the first time, all of her allegations against Harleston. An evidentiary hearing was held and the habeas court recommended granting relief finding that the recantation testimony was credible.

However, as in *Navarajo*, the court declined to follow the habeas court's recommendation finding instead that Harleston failed to prove his actual innocence by clear and convincing evidence. First, the court conducted an independent review of the evidence at trial and in habeas proceedings and found that the sheer number of inconsistencies prevented Harleston from meeting the "Herculean" burden to unquestionably establish his actual innocence. The court reasoned, "[n]ewly discovered evidence that merely muddies the waters and only casts doubt on an applicant's conviction, such as the multiple recantations and repudiations in this case, is insufficient to prevail in a free-standing actual-innocence claim because the evidence does not affirmatively establish an applicant's factual innocence by clear and convincing evidence.

In both *Navarajo* and *Harleston*, we are reminded of the extraordinarily high burden placed upon an applicant claiming actual innocence in *Elizondo*. See *Ex Parte Navarajo*, 433 S.W.3d 558 (Tex. Crim. App. 2014); *Ex Parte Harleston*, 431 S.W.3d 67 (Tex. Crim. App. 2014); *Ex Parte Elizondo*, 947 S.W.2d at 209. In the case of recantation evidence, it is important to note that the court of criminal appeals has found that whether or not a recantation is credible or even more credible than the original inculpatory testimony is not determinative. Rather, the heart of the inquiry is whether in assessing the impact of that new evidence

on the state's case as a whole (i.e. weighing the new and old testimony) applicant establishes that no reasonable juror would have convicted him. *Id.* Finally, we are reminded that the court of criminal appeals is not bound by the trial court's determinations if it concludes that the record does not support them. *Id.*

***Ex Parte Byars*, 176 S.W.3d 841 (Tex. Crim. App. 2005)**

Byars was convicted of injury to a child. He filed an application for a writ of habeas corpus alleging that newly discovered evidence, the complainant's recantation, unquestionably establishes he is actually innocent. Here, the court of criminal appeals accepted the habeas court's conclusion, after an evidentiary hearing, that Byars had shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the newly discovered evidence. The court found the habeas court's determination was supported by its own review of the record. Thus, habeas relief was granted and the conviction was vacated. *See also Ex Parte Harmon*, 116 S.W.3d 778 (Tex. Crim. App. 2002) (applicant convicted of aggravated sexual assault contending actual innocence on the basis of a recantation, the habeas court found recantation credible and recommended relief which was granted).

***Ex Parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002)**

Tuley pleaded guilty to aggravated sexual assault before deadlocked jury could reach a verdict. As a matter of first impression, the court in *Tuley* found that he was not precluded from asserting a bare claim of actual innocence because he pleaded guilty although great respect is given to jury verdicts and guilty pleas, as knowingly, voluntarily and intelligently entered alike. Tuley's actual innocence claim rested on newly discovered recantation evidence. In addition, he explained that he pleaded guilty because he could not afford counsel, he was addicted to drugs, and he had already spent 10-months in jail. The trial judge, taking into account her own recollection of the trial and plea proceedings, found that the testimony in habeas proceedings was more credible than at trial and that after weighing the evidence from the trial, the plea, Tuley's reasons for pleading, and the newly discovered recantation evidence he had unquestionably established his actual innocence.

The court of appeals found that the record supported the habeas court's findings and granted relief because the court was convinced by clear and convincing evidence that no rational jury would convict Tuley in light of the new evidence.

***Ex Parte Montgomery*, Nos. AP-76146, AP-76147 2009 WL 1165499 (Tex. Crim. App. April 29, 2009)**

Montgomery was convicted of two counts of indecency with a child and sentenced to ten-years for each offense to be served consecutively. His conviction was affirmed in 1999. The complainants in these cases provided affidavits recanting their trial testimony alleging they were encouraged by their mother and other authoritative persons to testify falsely about sexual abuse, which never occurred. After an evidentiary hearing, the habeas court found that recantations were more credible than the trial testimony and that no rational jury would have convicted in light of the new evidence.

The court of criminal appeals found the habeas court's findings were supported by the record and vacated the judgments.

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

Elizondo was convicted by a jury of the aggravated sexual assault based solely on his stepson's testimony and the hearsay testimony of the stepson's grandmother and a police officer. The investigation in this case began after a sexually explicit picture and note written by the stepson were found although neither suggested he had been sexually abused. He testified that Elizondo and their mother sexually abused both him and his younger. More than thirteen-years later, both boys recanted saying their biological father

“relentless manipulated and threatened them into making such allegations against Elizondo and their mother.

The court of criminal appeals, in this groundbreaking case, which recognized bare innocence claims as cognizable due process violations on habeas review, noted they could not “know beyond all doubt whether this allegation is true. Their father, who is still alive and able to testify, denies it. But their claim is not implausible on its face, and particularly given the complete lack of any other inculpatory evidence, direct or circumstantial, we think that another jury hearing the evidence, including the newly discovered mature recantation of [the stepson’s] juvenile testimony, would view the new evidence as more credible and would acquit [Elizondo].” Therefore, the court was convinced by clear and convincing evidence that no rational jury would convict in light of the new evidence and habeas relief was granted.

D. Other Scientific Evidence

Advances in science and technology may also provide grounds for a claim of actual innocence based on newly discovered or newly available evidence. Writs on the basis of newly discovered scientific evidence have become increasingly common such that, in 2013, the legislature passed a new statute concerning writs based on scientific evidence. *See* Tex. Code Crim. Pro. § 11.073. The section governing the procedure related to certain scientific evidence provides:

(a) This article applies to relevant scientific evidence that:

- (1) was not available to be offered by the 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 a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(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 at a trial held on the date of the application; and

(2) the court makes the findings described in Subdivisions (1)(A) and (B) and also 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 Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or 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:

- (1) the applicable trial date or dates, for a determination made with respect to an original application; or
- (2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

Thus, on a habeas review, Article 11.073 requires the reviewing court to consider “whether the scientific knowledge or method on which the relevant scientific evidence is based has changed. Scientific method is defined as the process of generating hypothesis and testing them through experimentation, publication, and republication.” *Ex Parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014). To be cognizable on a post-conviction writ, new scientific evidence must be admissible under the Texas Rules of Evidence. Newly discovered scientific evidence in post-conviction writs will be dependent on the utilization of expert witnesses. Texas Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. Tex. R. Evid. 702.

In addition, the court of criminal appeals has held that in order for scientific evidence to be admissible it must be reliable and relevant. *See Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992); *see also Daubert v. Merrell Dow Pharm.*, 505 U.S. 579, 592-93 (1993) (decided after *Kelly v. State* but establishing an almost identical test under the Federal Rules of Evidence related to the admissibility of scientific evidence). Scientific evidence can be said to be reliable and relevant if it meets the following three criteria:

1. The underlying scientific theory must be valid;
2. The technique applying the theory must be valid; and
3. The technique must have been properly applied on the occasion in question. *Id.*

Furthermore, the court provided a non-exhaustive list of factors to consider when determining whether scientific evidence is reliable:

- The extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community
- The qualifications of the expert(s) testifying
- The existence of literature supporting or rejecting the underlying scientific theory and technique
- The potential rate of error of that technique
- The availability of other experts to test and evaluate the technique. *Id.* at 573.

Finally, with regard to the “soft sciences” such as social sciences or fields based primarily on experience and training versus a scientific method, the Court of Criminal Appeals applies a slightly modified standard governing admissibility. Specifically, court considers:

- Whether the field of expertise is a legitimate one;
- Whether the subject matter of the expert’s testimony is within the scope of that field, and

- Whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. See *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998).

The admissibility of scientific evidence in the context of the Texas Rules of Evidence, *Kelly*, *Daubert*, and relevant case law presents a topic worthy of an article unto itself. But in the context of actual innocence writs, we can look to the following cases for guidance:

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

The court held, that it would “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 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.”

Here, Spencer was originally convicted of murder and sentenced to thirty-five years imprisonment. He filed a motion for new trial, which was granted, but on retrial he was convicted of aggravated robbery and sentenced to life in prison. His conviction was affirmed in 1989. Spencer filed an application for a writ of habeas corpus alleging he received ineffective assistance of counsel, the state violated *Brady*, and actual innocence.

At his trial, several eyewitnesses identified Spencer and his cellmate testified that Spencer told him about the crime. Spencer's co-defendant was also found guilty based on the same eyewitness testimony raised in both of Spencer's trials.

In his application for a writ of habeas corpus, in addition to his constitutional claims, Spencer claimed actual innocence based on newly discovered scientific evidence in the field of forensic visual science. Specifically, Spencer produced habeas evidence in the form of an expert who testified that the “now developed field of forensic visual science establishes that it was physically impossible for the purported eyewitnesses to make the identification that they claimed.”

The habeas court concluded that a writ should issue on the basis of this newly discovered evidence because without the eyewitness testimony, the only remaining inculpatory evidence was the inadmissible hearsay testimony of Spencer's cellmate and thus, there was no remaining evidence of his guilt. The habeas court recommended that Spencer's additional two constitutional claims be denied.

The Court of Criminal Appeals, upon accepting the habeas courts recommendation that Spencer's *Brady* and ineffective assistance claims be denied, found itself left with a *Herrera* type claim of bare innocence. With regard to the “newly discovered scientific evidence” upon which Spencer based his claim of actual innocence, the court found that while the testing might be new, the evidence relied upon was not, pointing out that in 1987 investigators were able to observe the eyewitness vantage points when they were in similar condition. Furthermore, the court found that the issues related to lighting, distance, and witnesses' ability to identify Spencer were litigated at trial. Thus, the court found that the evidence was not “new” as required in habeas proceedings and, even if it were, it would fail to unquestionably establish Spencer's innocence. The writ was denied.

Spencer is illustrative of the dilemma presented to courts in considering actual innocence claims based on newly discovered scientific evidence in a world of increasingly rapid scientific change. Judge Cochran, of the Court of Criminal Appeals, has cautioned that, “[T]he judiciary must be ever vigilant to ensure that verdicts in criminal cases are based solely upon reliable, relevant scientific evidence—scientific evidence that will hold up under later scrutiny. I have previously expressed my concern about ‘the fundamental disconnect between the worlds of science and of law.’” *Ex Parte Overton*, 2012 WL 1521978 (Tex. Crim. App. 2012) (concurring on an order remanding a writ filed, in part, on the basis of newly

discovered scientific evidence; ultimately the writ was granted on the basis of ineffective assistance of counsel in *Ex Parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014)).

***Ex Parte Henderson*, 246 S.W.3d 690 (Tex. Crim. App. 2007)**

Henderson was convicted of capital murder in the death of an infant in May of 1995 and sentenced to death. Her conviction was affirmed in 1997. Her first writ of habeas corpus was denied relief in 1998. In this case, the Court of Criminal Appeals considered her first subsequent application for a writ of habeas corpus in which she alleged actual innocence based on newly discovered scientific evidence, and that but for constitutional errors she would not have been found guilty, and that she is no longer death penalty eligible.

In this case, the critical issue was causation – whether she intentionally caused the victim’s death or whether the death was the result of an accidental fall. In support of her application, Henderson submitted “significant recent scientific research,” affidavits, and reports of several scientists. The materials showed that scientific research related to infant head trauma, which began developing in the mid-nineties when she was convicted, now shows that the type of injury the victim in this case sustained could have been caused by an accidental short distance fall. Henderson has always maintained that the child fell from her arms when she was carrying him and he hit his head on a concrete floor.

At trial, an expert for the state had testified that it was “impossible” for the infant’s brain injuries in this case to occur the way Henderson stated. Two experts for the state testified that the injuries would have had to be caused by an intentional blow.

However, according to several affidavits Henderson submitted in Habeas proceedings, advances in the areas of biomechanics and physics suggests that it is possible that the injuries could have been caused by an accidental short-distance fall. Based on this information, the habeas court recalled Henderson’s death warrant to allow her more time to gather evidence in support of her writ.

Then the state’s expert from trial provided an affidavit recognizing the new scientific information, acknowledging that medical professionals now realize that even a relatively short distance fall unto a hard surface can caused injury of the degree in his case, and finally concluding that had this new scientific information been available prior to his testimony in 1995 he would have taken into account when formulating this opinion. The state’s expert agreed with Henderson’s expert that he could not “with a reasonable degree of medical certainty” determine whether the child’s injuries resulted from a short-distance fall or an intentional act.

The Court of Criminal Appeals found this evidence to be a material exculpatory fact, thus satisfying the burden placed on applicants in a subsequent death penalty writ in article 11.071 § 5(a), and remanded the writ to for further proceedings on her actual innocence and constitutional claims.

***Ex Parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012)**

Upon remand as detailed in the first *Henderson* case above the trial court held an evidentiary hearing and recommended granting a new trial finding that all of the expert witnesses were truthful and credible, including the state’s expert’s re-evaluation of his medical opinion in the original trial. The habeas court concluded that based on this newly discovered evidence no reasonable juror would have convicted Henderson of capital murder.

The Court of Appeals found that their deference to a trial court’s findings of fact “is particularly true in matters concerning the weight and credibility of the witnesses, and in the case of expert witnesses, the level and scope of their expertise.” The court concluded that the record supported the trial court’s

findings. Although the court declined to adopt the trial court's conclusion concerning Henderson's innocence, they accepted the court's recommendation to grant relief and remanded for a new trial.

***Ex Parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014)**

Robbins was convicted of capital murder in the death of his girlfriend's seventeen-month-old daughter, Tristen, and was sentenced to life in prison.

In 2007, Robbins filed his first writ alleging actual innocence based on new evidence and due process claims for the use of false testimony. At trial, the state's expert, Dr. Moore, testified that the cause of death was asphyxia due to compression of the chest and abdomen but ruled out CPR that had been performed on the child as the cause of death. Robbins called an expert at trial who testified that the cause of Tristen's death could not be determined. Upon a post-conviction review, the deputy chief medical examiner (who had not been involved in the original trial), Dr. Moore and the former Harris County medical examiner all agreed that a review of the records did not support a finding that the asphyxiation or any other specific findings caused the death. Moore explained that her change in opinion was related to additional experience she gained and additional information related to the adult-type of CPR done on the child.

In response to the original writ, the state recommended that Robbins be granted a new trial because he due process right to a fair trial impartial jury was violated because Moore's original opinion had now been recanted and confidence in the outcome undermined. However, the habeas court elected to appoint its own expert to conduct an independent examination. The court's expert concluded that he could not rule out asphyxia but did not see any physical findings that would support any particular cause of death.

A second expert, Dr. Norton, was appointed by the habeas court and stated that it was her opinion that the death was homicide and the manner of death was asphyxia by suffocation. Furthermore, based on the time of death she estimated, it was her opinion that CPS could not have caused the death. Accordingly, the court amended the death certificate to reflect the cause of death as asphyxia by suffocation. The trial court continued to investigate the issue, appointing an attorney to depose the medical experts, Norton was continuously unavailable to be deposed but adopted under oath her earlier findings. Based largely on Norton's opinion, the state filed a second supplemental response recommending that relief be denied.

With regard to this heavily litigated first writ, the Court of Criminal Appeals concluded that the newly available evidence of Moore's re-evaluation of her trial testimony did not unquestionably establish Robbins' innocence; it was not false and did not create a false impression and thus Robbins' due process rights were not violated. *See Ex Parte Robbins*, 360 S.W.3d 466 (Tex. Crim. App. 2011), *cert. denied*, 360 S.W.3d 466 (2012).

In 2013, Robbins filed this subsequent writ pursuant to the enactment of the newly discovered science statute articulated in Article 11.073. The Court of Appeals found that 11.073:

“[p]rovides a new legal basis for habeas relief in the small number of cases where the applicant can show by the preponderance of the evidence that he or she would not have been convicted if the newly available scientific evidence had been presented at trial. An applicant also must establish that the facts he alleged are at least minimally sufficient to bring him within the ambit of that new legal basis for relief.”

Here, the court found that there is relevant scientific evidence that contradicts the scientific evidence presented by the state at trial and that evidence was not previously available because Moore re-evaluated her opinion after the trial. There was no dispute that Moore's re-evaluated opinion regarding the cause of death would have been admissible at trial under the rules of evidence. The court concluded on a preponderance of the evidence that had this new evidence been presented Robbins would not have been convicted. Thus, relief was granted and the conviction was set aside.

The state's rehearing motion was subsequently granted and on January 7, 2016, the court denied the rehearing motion. *Ex parte Robbins*, ___ S.W.3d ___ (Tex. Crim. App. 2016), 2016 WL 370157.

E. Other Actual Innocence Writ Examples

In addition to DNA, other scientific evidence, and recantations, the following provides a non-exhaustive summary of additional actual innocence claims:

***Ex Parte Cantu*, No. AP-75214 2005 WL 1774119 (Tex. Crim. App. July 27, 2005)**

Cantu pleaded guilty to possession of cocaine and was sentenced to six-months confinement in the state jail. At the time of his plea, the substance alleged to have been cocaine had not been tested although a field test was positive for cocaine. Some time after Cantu's plea the crime laboratory tested the substance and it was found to contain no controlled substances. Thus, Cantu filed a writ asserting actual innocence based on this newly discovered evidence.

The Court of Appeals adopted the habeas court's finding that based upon the newly discovered evidence a jury would acquit Cantu. After a slew of attempts to register with several Texas law enforcement agencies in the midst of evictions and arrests for failure to provide proper notice of address changes Harbin was ultimately charged by indictment in the two underlying felonies and he pleaded guilty.

Although relief was granted this case presents a good argument for not pleading a client to a charge ultimately dependent on lab results until said lab results are available if at all avoidable. *See also Ex Parte Mack*, No. AP-75345, 2006 WL 475777 (Tex. Crim. App. 2006) (writ granted based on newly discovered evidence showing that substance was not cocaine)

***Ex Parte Mable*, 443 S.W.129 (Tex. Crim. App. 2014)**

Mable presents a similar case with a similar result under different reasoning. Mable pleaded guilty to possession of a controlled substance and was sentenced to two years imprisonment. Shortly after his plea, the forensic science center in Houston completed testing on the substance and found it contained no illicit materials. Mable filed a writ of habeas corpus alleging actual innocence.

The Court of Appeals declined to grant relief on the basis of actual innocence finding that the term "actual innocence" applies only where the accused did not actually commit the charge offense *or* any possible lesser included. The court found that it is possible that Mable was guilty of the lesser-included offense of attempted possession of a controlled substance. However, the court did grant relief on the basis that his plea was now knowingly and voluntarily entered. Mable was permitted to withdraw his plea and he was remanded to answer the charge against him.

Arguably *Mable* presents an even stronger argument for not pleading a client to a drug offense before the proper lab testing is complete.

***Ex Parte Harbin*, 297 S.W.3d 283 (Tex. Crim. App. 2009)**

Harbin has two convictions from California – lewd and lascivious acts with a child under the age of 14 and annoying and molesting a child. He was charged with two counts of failure to registered as a sex offender, he plead guilty and was sentenced to ten-years on each count to run concurrently.

Harbin then filed an application for a writ of habeas corpus seeking relief from these convictions alleging that he was not required to register as a sex offender and therefore was actually innocent.

Upon consideration of Harbin's claim of actual innocence, the Texas Court of Appeals reviewed the underlying California conviction and the Texas Sex Offender Registration Act. The court found that neither resulted in Harbin's having to register as a sex offender in Texas. Habeas relief was granted and his convictions for failure to register were vacated in 2009. *See also Ex Parte Rivera*, No. AP-75071, 2006 WL 774894 (Tex. Crim. App. 2005) (writ granted on the basis of actual innocence when applicant was no longer required to report when he plead guilty and was sentenced to two years imprisonment).

***Ex Parte Knipp*, 236 S.W.3d 214 (Tex. Crim. App. 2007)**

Knipp was indicted and pled guilty, pursuant to a plea agreement, to three counts of delivery of methamphetamine, he was sentenced to ten years imprisonment in each cause probated for five years. His probation was later revoked in all cases pursuant to his plea of true and he was sentenced to five years imprisonment.

Knipp filed an initial writ in 2006 alleging ineffective assistance of counsel for counsel's failure to assert actual innocence on the basis that Knipp was incarcerated on September 12, 2004 – the date of one of the deliveries named in the judgment for which the indictment alleged on offense date of September 12, 2003. The convicting court filed a *nunc pro tunc* judgment reflecting that the offense was committed September 12, 2003 and denied relief on Knipp's initial writ.

Knipp filed a subsequent writ asserting that the offense for which he was convicted delivering meth between 4 and 200 grams, as reflected in the *nunc pro tunc* judgment, is actually the same substantive offense alleged in count-two of the three-count indictment. Count 2 reflected a delivery of methamphetamine on September 12, 2003 between 1 and 4 grams. In fact, the state in response confirmed that their investigation revealed there was only one delivery on September 12, 2003 between 1 and 4 grams. The state confessed it erroneously believed that Knipp actually committed two offenses on the date in question as reflected in the indictment.

The state claims that the court can consider the merits of Knipp's subsequent writ under Texas Code of Criminal Procedure Article 11.07 § 4(a)(1), which provides that the court may not consider a subsequent writ unless the application contains sufficient facts that:

- (1) the current claims and issues have not been and could not have been presented or considered in previous application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
- (2) 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

Tex. Code. Crim. Pro. art. 11.07 § 4(a).

However, the Court of Criminal Appeals found that it did not need to determine whether Knipp satisfied the requirements of Article 11.07 § 4(a)(1). Instead, the court concluded that Knipp established by a preponderance of the evidence that but for the double-jeopardy no rational juror could have found the applicant guilty beyond a reasonable doubt. This analysis provides an example of the way that Texas has codified the *Schlup* type claim whereby an applicant need only establish his actual innocence by a preponderance when actual innocence is tied to a separate constitutional violation (rather than a clear and convincing standard in a bare innocence claim). *See Ex Parte Elizondo* 947 S.W.2d 202, 205-06 (Tex. Crim. App. 1996).

Ultimately, the court concluded that Knipp could not have been guilty of this offense and the conviction is set aside.

***Ex Parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005)**

Brigg's infant son, Daniel was sick from the time he was born, she repeatedly took him to the doctor but was never given a diagnosis. Daniel died at the age of two months after being admitted to the hospital several days earlier with hypoxia, lack of oxygen to the brain. This was exacerbated by emergency room personnel mistakenly placing an oxygen tube in Daniel's stomach. The original autopsy identified homicide as the cause of death but the medical examiner amended the report in 2003 to reflect "undetermined causes"

Briggs pleaded guilty to injury to a child for causing the death and was sentenced to seventeen years in prison. In 2004, she filed a writ claiming actual innocence, ineffective assistance of counsel, and that the prosecution failed to adequately investigate the case.

The habeas court recommended denying relief on the actual innocence claim noting that the victim's full medical records were available to Briggs prior to her guilty plea. The Court of Criminal Appeals agreed that the medical records did not constitute newly discovered or available evidence.

Thus, the court denied relief on the actual innocence claim finding that the evidence was not newly discovered and the expert opinions did not unquestionably establish Briggs' innocence. However, the court granted relief on the basis of ineffective assistance for counsel's failure to subpoena the treating doctors, withdraw from the case if Briggs' indigency and inability to pay his fee prevented him from providing effective assistance, or request state-funded expert assistance constituted deficient performance.

***Ex Parte Hobbs*, 393 S.W.3d 780 (Tex. Crim. App. 2013)**

Hobbs was convicted of possession of a controlled substance and sentenced to eight-years imprisonment. He subsequently filed a writ alleging a due process violation because the DPS forensic scientist did not follow accepted standards in analyzing evidence and therefore, the results are unreliable. The court found that the lab technician solely responsible for testing the evidence in this case has been found to have committed misconduct. Therefore, before the court believes his actions are unreliable, his custody was comprised, resulting in a due process violation.

IV. PARDONS FOR INNOCENCE

As discussed above, the use of post-conviction habeas review for actual innocence claims is a relatively new concept. In Texas, "clemency is the usual vehicle for addressing claims of actual innocence: the traditional remedy for claims of innocence based on new evidence, discovered too late in the day of file a new trial motion a new trial motion, has been executive clemency." *Graham v. Texas Bd. of Pardons and Paroles*, 913 S.W.2d 745, 748 (citing *Herrera v. Collins*, 506 U.S. at 417).

Today, the Texas Administrative Code still provides a procedure for the wrongfully convicted to seek a pardon on the basis of innocence. *See* Tex. Admin. Code 37 § 143.2. The governor has the authority to grant a full pardon upon a conviction or completion of a deferred adjudication community supervision. 37 § 143.1. The board will recommend a pardon 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 on 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. 37 § 143.2(a).

Documentary evidence of actual innocence may be in the form DNA or forensic testing or affidavits of witnesses upon which a recommendation of actual innocence is based. 37 § 143.2(b).

V. WRONGFUL CONVICTION COMPENSATION

The Texas Legislature has enacted the Wrongful Imprisonment Act, also known as the Time Cole Act, through which persons who have served sentences in prison for crimes that they did not convict may obtain compensation from the state. *See* Tex. Civ. Prac. & Rem. Code §§ 103.001 to 103.154. The act is intended to provide reparation for claimant's wrongful imprisonment. Timothy Brian Cole died in a Texas prison in 1999 while serving a twenty-five year sentence for a rape conviction based on the victim's photo-identification of Cole. Nearly a decade later, DNA evidence exonerated Cole.

A person is entitled to compensation under the Tim Cole Act if:

- He served in a whole or in part a sentence in prison
- He has received a full pardon on the basis of innocence for the crime for which he was sentenced
- 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
- He has been granted relief in a writ of habeas corpus and the state district court has issued an order dismissed 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.

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

A grant of habeas relief on an actual innocence claim based on a constitutional violation merits compensation under the statute but a reversal or acquittal on direct appeal based on legal sufficiency of the evidence does not. *See In re Allen*, 366 S.W.3d 696 (Tex. 2012); *but see State ex rel. Abbott v. Young*, 255 S.W.3d 697 (Tex. App. – Austin, 2008).

After serving twenty-five years in prison for a crime he did not commit and having previous writs denied, Allen filed a “*Schlup*” type claiming again arguing actual innocence but through the constitutional violation of ineffective assistance of counsel . Allen was granted relief and sought compensation for the time he served in prison through the Tim Cole Act. The Texas Comptroller denied his application so he filed a petition for a writ of mandamus. Although, the act does not define “actual” innocence the Supreme Court reasoned that the Texas legislature was area of both bare claims of innocence (*Herrera*) and claims of innocence brought through separate constitutional violations (*Schlup*). *In re Allen*, 366 S.W.3d at 706. Thus, the court found that Allen's case constituted one of the “narrow class of cases that satisfy the actual innocence standard.” *Id* at 710. The Court reasoned that through the *Schulp* claim, Allen was indirectly found to be actually innocent.

A person may not be compensated for any time in prison on a wrongful conviction that was being served concurrently with a separate offense. *See* Tex. Civ. Prac. & Rem. Code §§ 103.001(b).

An applicant must file an application for compensation with the Texas Comptroller's Judiciary Section attaching the information required above. The application and supporting documents must clearly indicate on their face that the applicant is entitled to compensation the claim will be denied but applicant will be given the opportunity to fix any default identified in the application. *See* Tex. Civ. Prac. & Rem. Code §§ 103.051(b). An applicant may pursue a mandamus claim challenging a denial of compensation. A claimant is ineligible for compensation for wrongful imprisonment if at the time of his application claimant is incarcerated on a subsequent offense. *See In re Blair*, 408 S.W.3d 843 (Tex. 2013). Likewise, the statute provides that compensation payments may terminate if the claimant is convicted of a crime punishable as a felony. *See* Tex. Civ. Prac. & Rem. Code §§ 103.154(a).

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.

See Additional Resources:

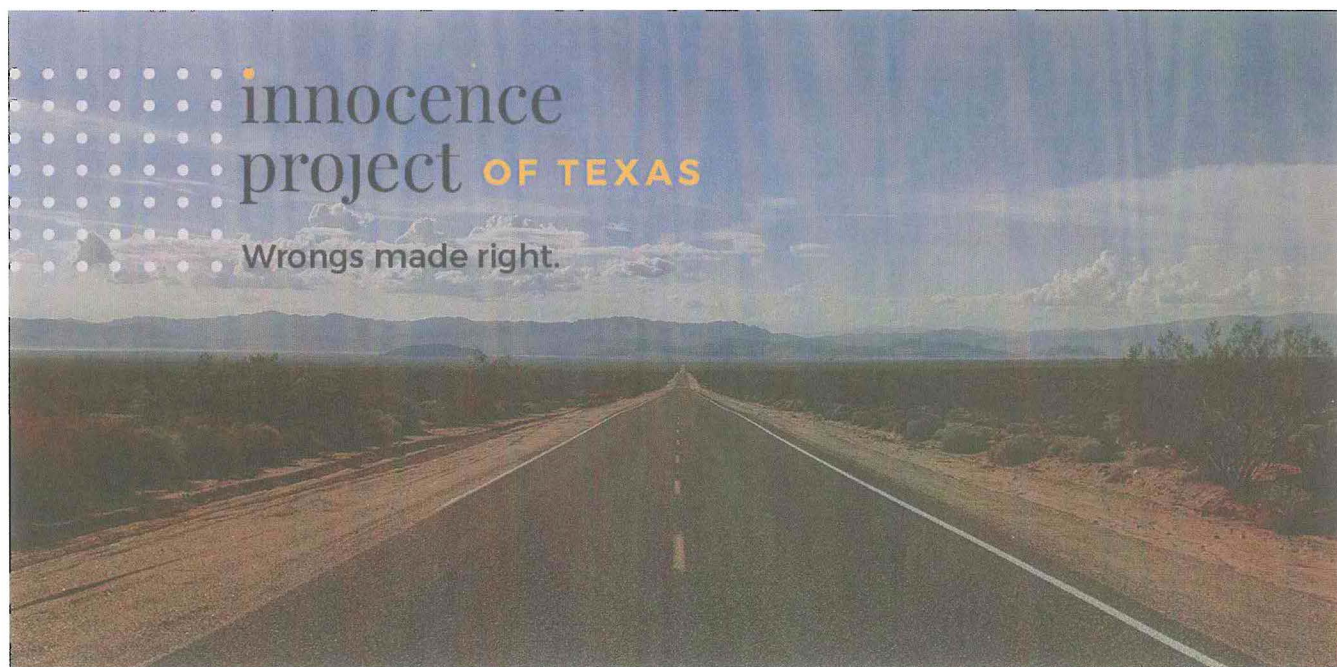
Innocence Project of Texas: www.ipoftexas.org

Application for Writ of Habeas Corpus Form:

http://www.txcourts.gov/media/913737/1107_WritForm01302014.pdf

VI. Information From The Innocence Project of Texas and the National Registry of Exonerations

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Risk Factors for Wrongful Convictions



The results of research conducted by wrongful convictions scholar Jon Gould of American University indicate that 10 factors help explain why an innocent defendant, once indicted, ends up erroneously convicted rather than released. These include:

- age and criminal history of the defendant
- punitiveness of the state (in other words, heavy on the law and order pedal)
- Brady violations (when information favorable to the defendant is not given to the defense attorney)
- forensic error
- inadvertent misidentification

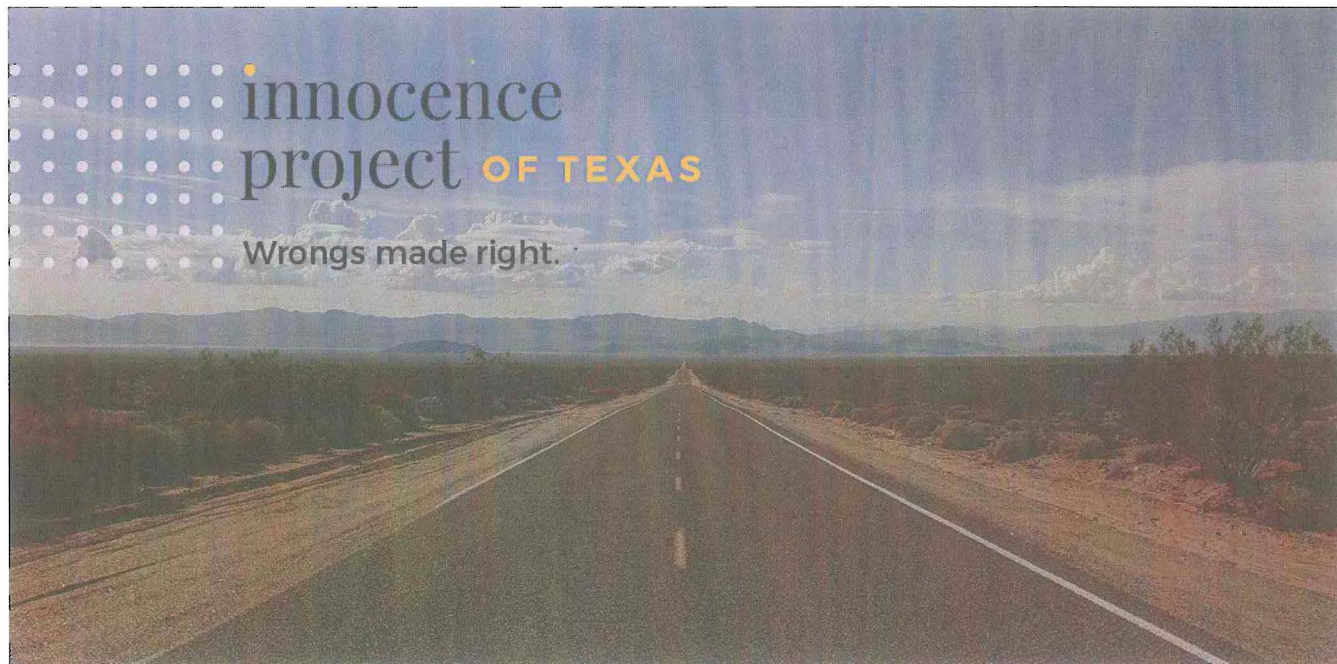
- lying by a non-eyewitness
- weak prosecution and defense case
- family defense witness

Other factors traditionally suggested as sources of erroneous convictions, including false confessions, criminal justice official error, and race effects, appear in statistically similar rates in both sets of cases, thus, they likely increase the chance that an innocent suspect will be indicted but not the likelihood that the indictment will result in a conviction. Finally, qualitative review of the cases reveals how the statistically significant factors are connected and exacerbated by tunnel vision, which prevents the system from self-correcting once an error is made. In fact, tunnel vision provides a useful framework for understanding the larger system-wide failure that separates erroneous convictions from near misses.



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Wrongful Convictions in Texas



"If you look for them, you will find them "

Keith Findley, Director of the Wisconsin Innocence Project
Assistant Professor of Law at the University of Wisconsin Law School

There was a time when we just thought only guilty people were convicted To think otherwise was, in some corners, to literally engage in fantasy

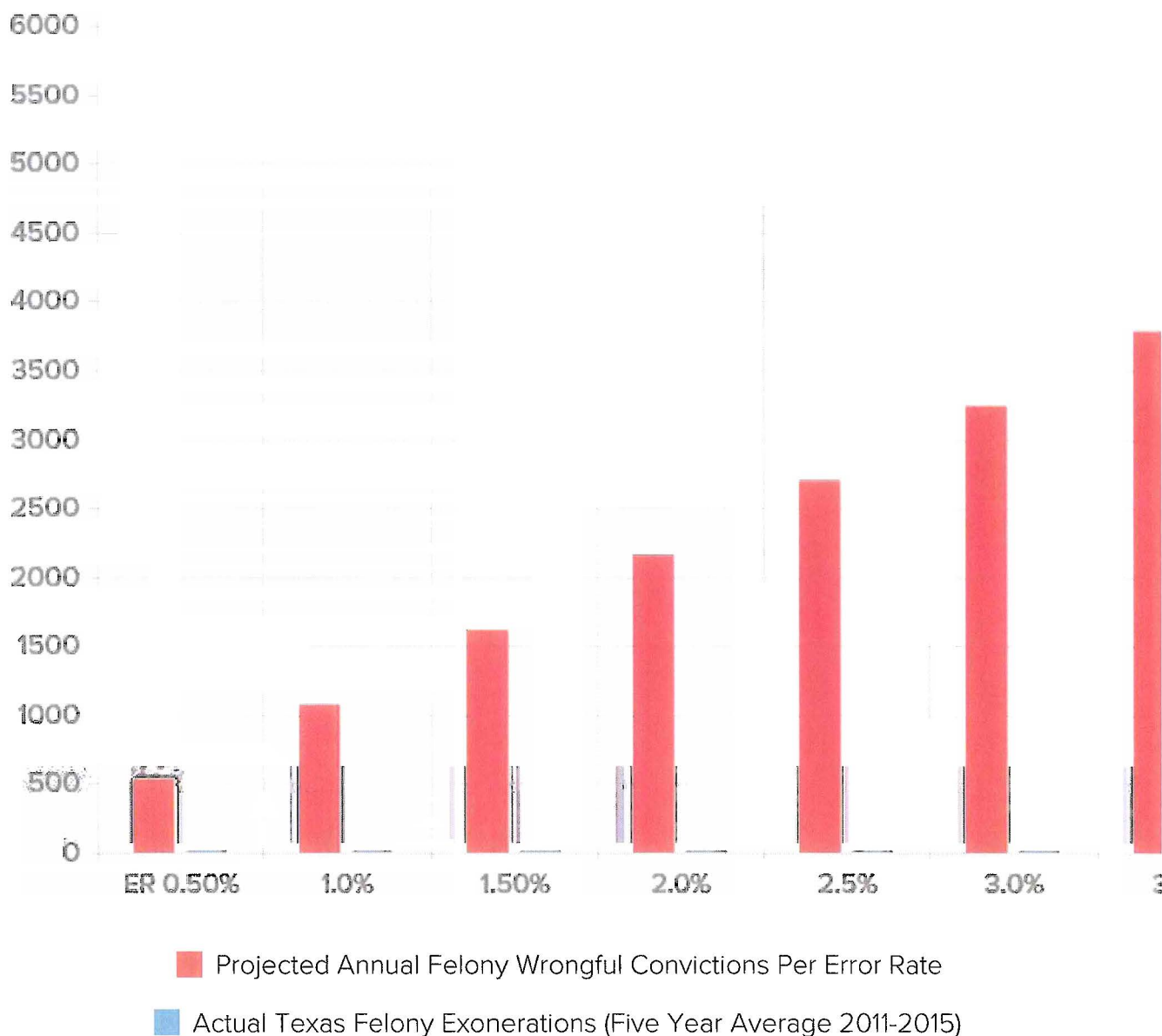
Over recent years, however, facts and the laws of probability have updated our perception and knowledge The science of DNA testing has indisputably proven scores of citizens actually

innocent. And we have come to embrace a broader understanding that humans (and the systems they design) are not, and can never be, perfect.

The chart below illustrates the potential scope of the wrongful conviction problem in Texas. We apply various error rates (ER) to the total number of felony convictions in Texas (most recent period is September 14, 2014 to August 31, 2015) to get a range of potential wrongful convictions annually. We plot that number against the known number of Texas exonerations (average from 2011-2015). Additional details about how we constructed this chart can be found below the chart.

There are two unavoidable takeaways from this illustration. First, due to the volume of felony convictions in Texas (108,405 in the most recent year) even a small error rate has enormous impact on the lives of affected citizens and their families. Second, the gap between wrongful convictions being generated and the actual number of wrongful convictions being corrected through exonerations is significant, even at lower error rates. Indeed, the gap is so large you can hardly see the bar representing the five-year Texas exoneration average (22).

The Potential Scope of Felony Wrongful Convictions in Texas



Sources. 2015 Annual Statistical Report for the Texas Judiciary; National Registry of Exonerations

First, a note about wrongful conviction error rates (the numerator in the calculation). The actual error rate for wrongful convictions can never be known. However, over the years, there have been several studies done that point to an error rate range of one half of one percent to over ten percent. For our chart, we use the lower range of the error rate estimates that have been documented. Also, we apply the error rate only to felony convictions, which have been the focus of wrongful conviction error rate studies.

Second, a note about the population to which we apply the error rates. We use only felony convictions in Texas as documented by the Texas Office of Court Administration (OCA). Those felonies include homicide, assault, robbery, burglary, auto theft, drug offenses, DWI, and "other" felonies. We exclude misdemeanors, again because felony convictions have been the focus of wrongful conviction error rate studies. The "baseline" number for total felony convictions in Texas used for this chart is 108,405. So for example, $108,405 \times 1.0\%$ error rate = 1,084 potential wrongful convictions.

To summarize, we *know* the number of felony convictions each year. We *know* the number of actual exonerations through the National Registry of Exonerations (if anything, this number is likely low due to underreporting). We don't know the exact error rate, but we know there is one. More importantly, we now *know* that even a small error rate tells us that there is much cause for concern and much more work to be done



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The National Registry of **EXONERATIONS**

CURRENTLY 1,900 EXONERATIONS

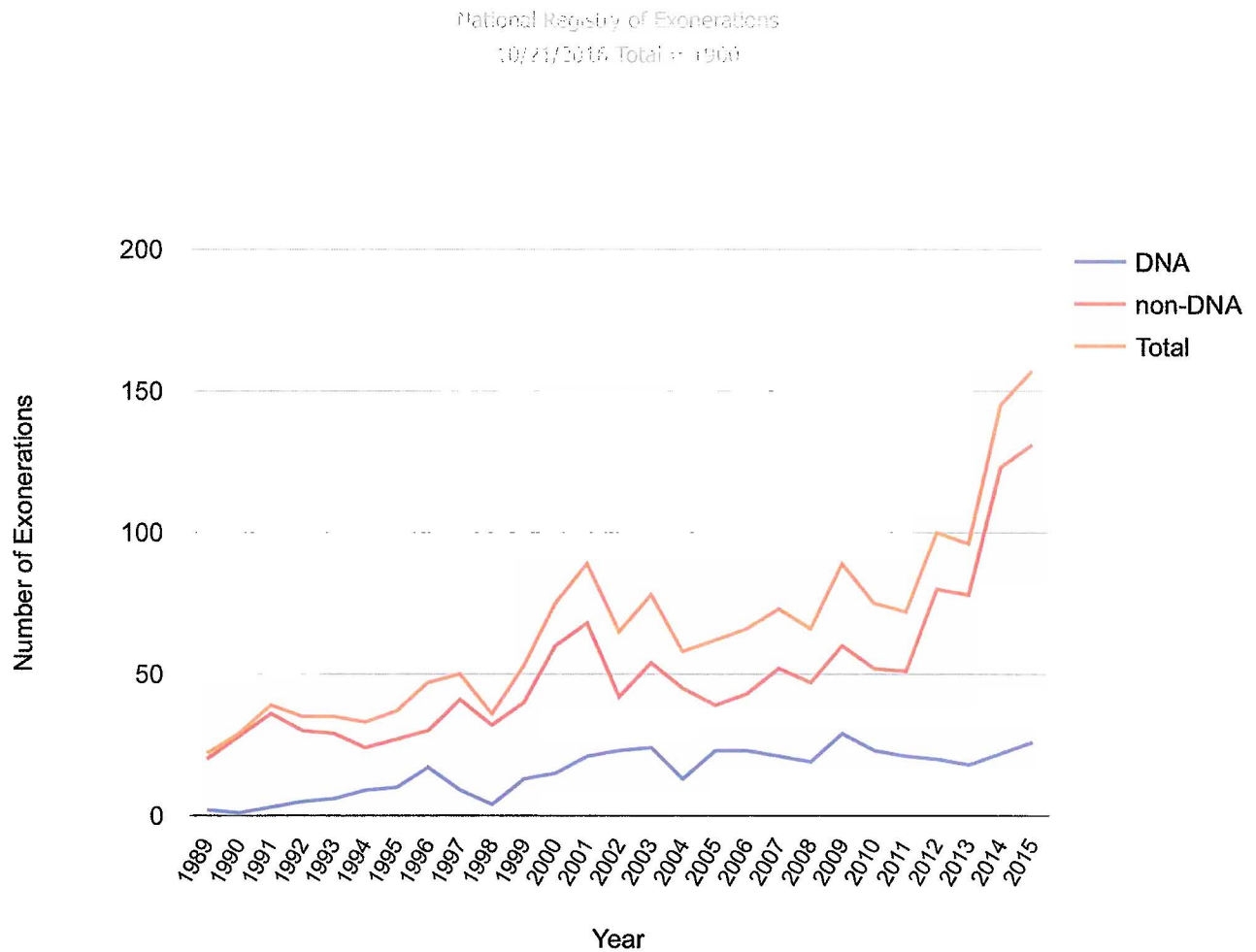
USING THE REGISTRY

RESOURCES

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EXONERATIONS BY YEAR: DNA AND NON-DNA



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 |

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The National Registry of **EXONERATIONS**

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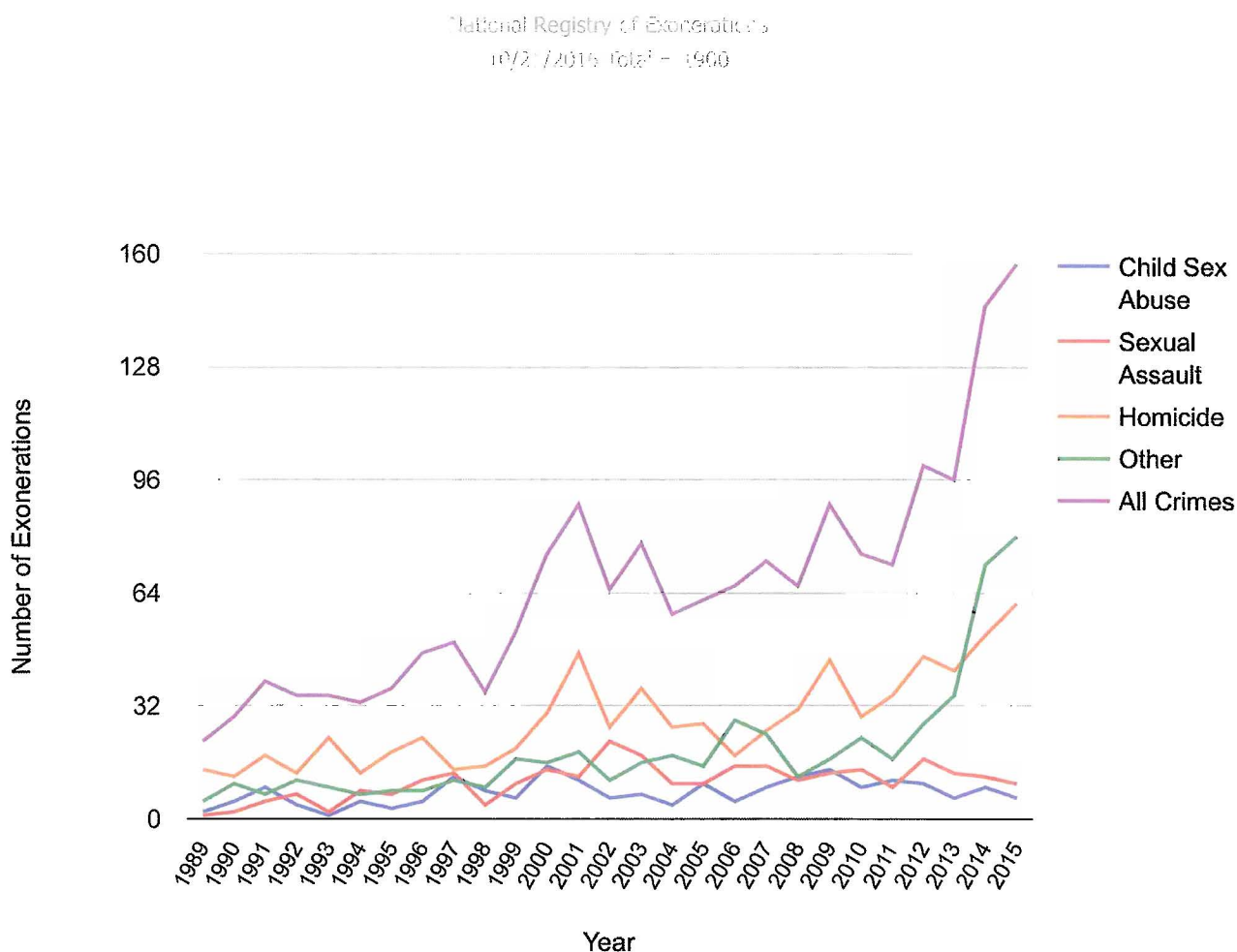
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EXONERATIONS BY YEAR AND TYPE OF CRIME



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 |

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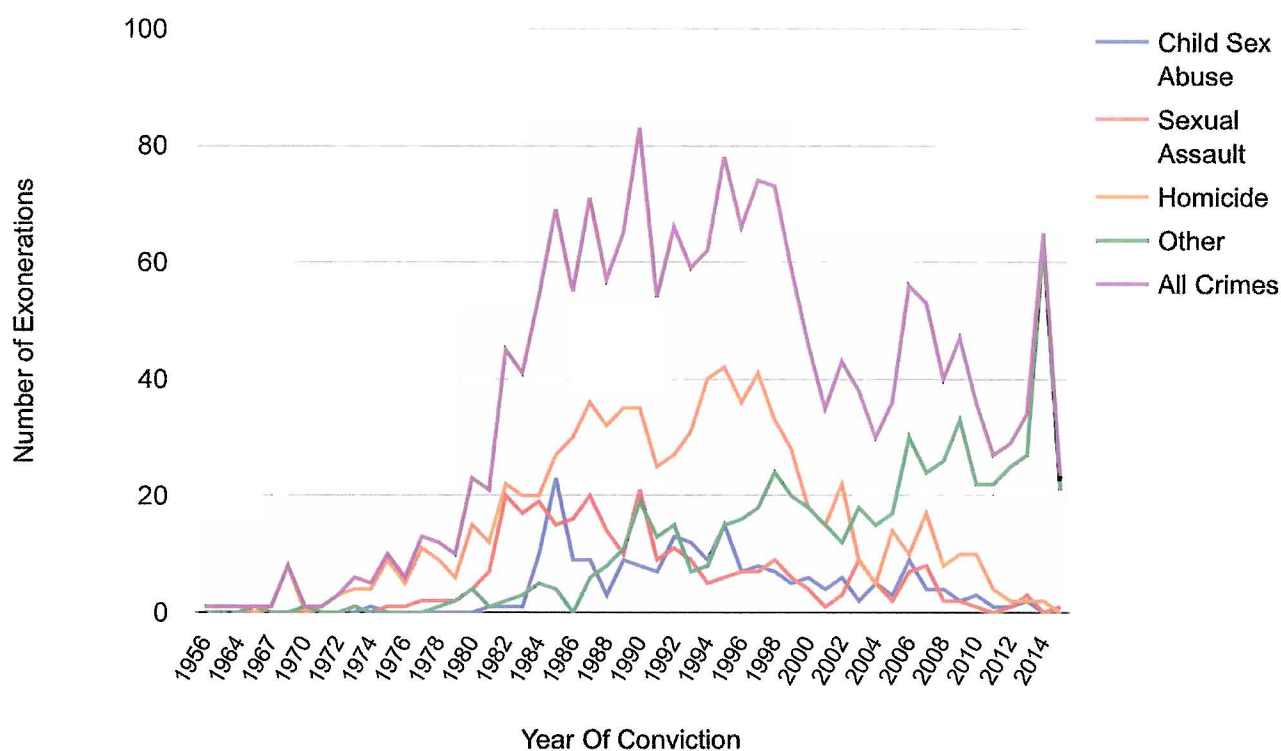
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EXONERATIONS BY YEAR OF CONVICTION AND TYPE OF CRIME

National Registry of Exonerations
10/21/2016 total = 1900



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 |

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CURRENTLY 1,900 EXONERATIONS

USING THE REGISTRY

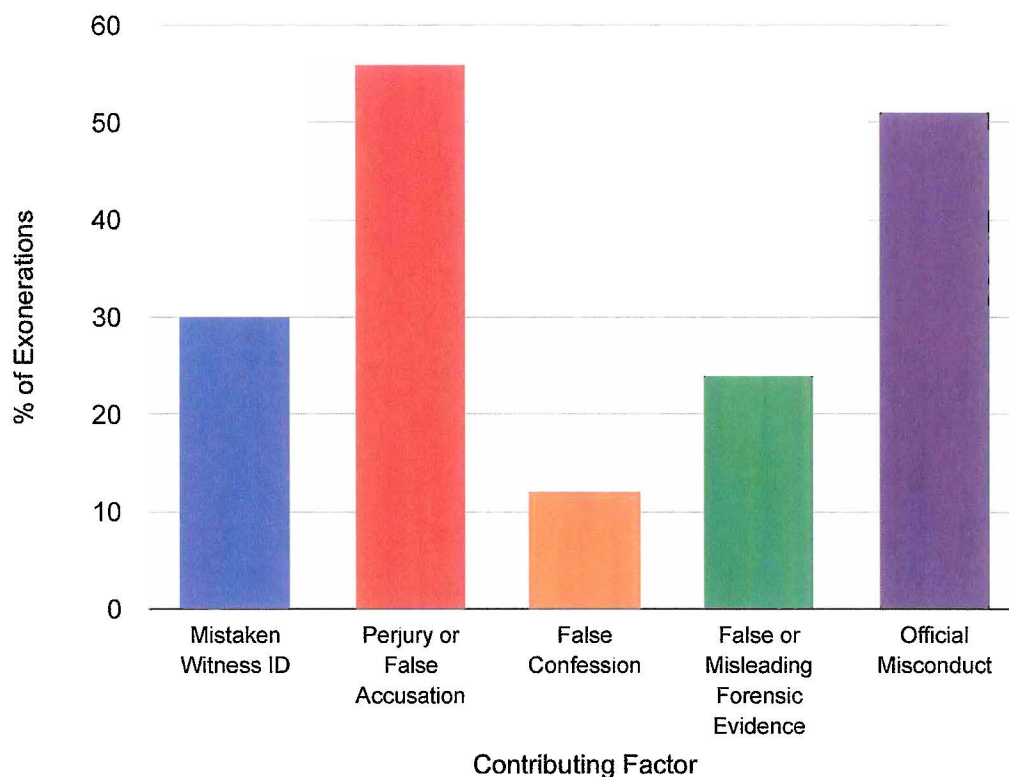
RESOURCES

ABOUT US

MAKE A GIFT

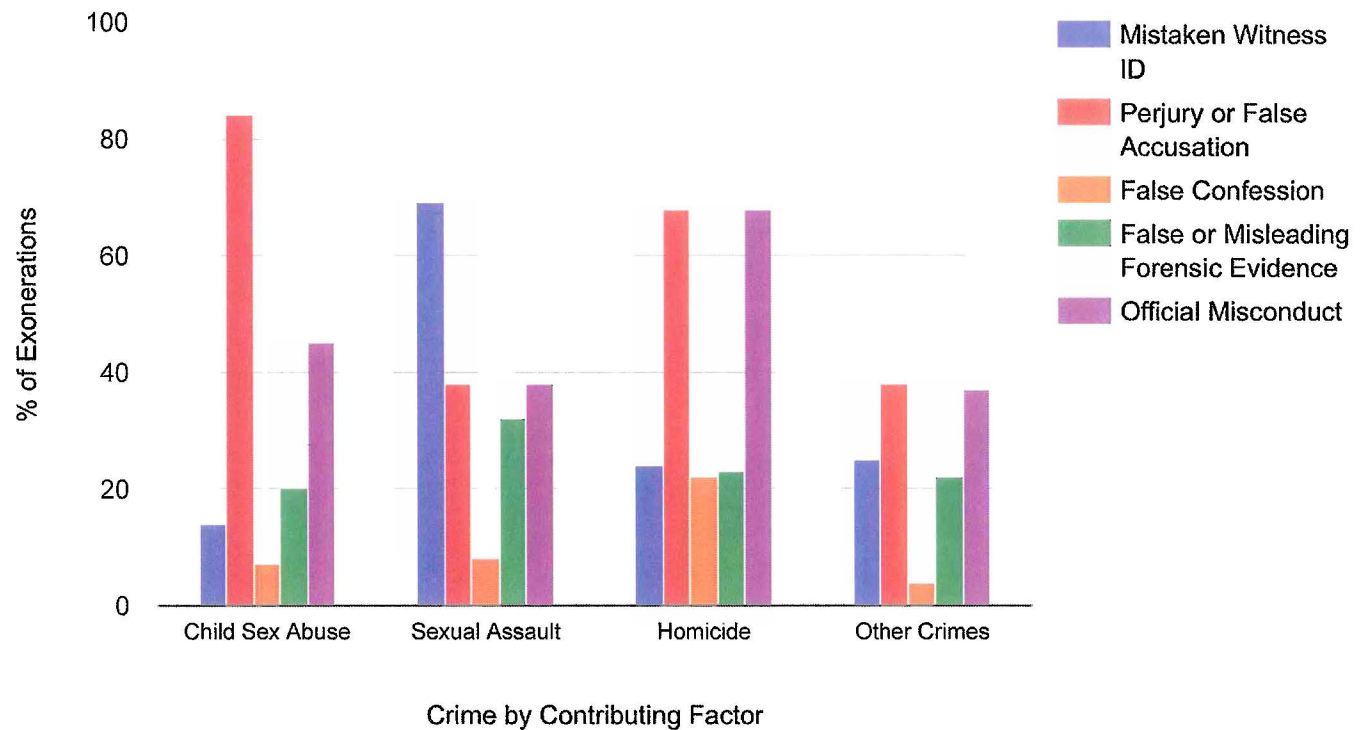
% EXONERATIONS BY CONTRIBUTING FACTOR

National Registry of Exonerations
10/21/2016 Total = 1900



% EXONERATIONS BY CONTRIBUTING FACTOR AND TYPE OF CRIME

National Registry of Exonerations
10/21/2016 Total = 1900



100%.

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 |