NEW SCIENCE WRITS UNDER ART. 11.073, TEX. CODE CRIM. PROC.

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CHANGING SCIENTIFIC EVIDENCE

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

The Atlantic

U.S.

In Texas, a New Law Lets Defendants Fight Bad Science

Scientific evidence can be the most convincing element of a criminal trial. But sometimes it's wrong—and for the first time, a state's justice system has recognized that and adjusted accordingly.

By Linda Rodriguez McRobbie

Texas Innocence Network

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EX PARTE ROBBINS, 360 S.W.3d 446 (2011)

Capital Murder of 17 month old child

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

ROBBINS I MAJORITY

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

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

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

EX PARTE HENDERSON

- **Henderson submits evidence that recent advances in biomechanics suggest that it is possible that child's head injuries could have been caused by an accidental short-distance fall. Additionally, Medical Examiner submitted an affidavit which recanted his testimony.**

EX PARTE HENDERSON

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

2009 BILL REGARDING NEW SCIENCE

By 2009, the Texas Legislature, at the urging of the Innocence Project of Texas, began reacting to the problems of prior convictions based on bad scientific evidence. Senator John Whitmire sponsored Senate Bill 1976, a bill (after amendments) that is remarkably similar to the current Art. 11.073 statute. Although the bill was left pending in the House at the end of the session, the bill analysis stated that Article 11.073 "would authorize courts to grant relief on writs of habeas corpus that, subject to criteria in the bill, raised relevant scientific evidence that was not available at the time of a trial or that discredited scientific evidence relied on by the prosecution at a trial."

Ex Parte Robbins

TEXAS STATUTE CONCERNING WRITS BASED ON NEW SCIENTIFIC EVIDENCE

Art. 11.073. Procedure Related to Certain Scientific Evidence.

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

(1) was not available to be offered by a convicted person at the convicted person's trial; or

(2) contradicts scientific evidence relied on by the state at trial:

ART. 11.073

(b) A court may grant relief if . . . :

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

ART. 11.073

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

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

ART. 11.073

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

ART. 11.073

(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 . . .

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

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

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

SAN ANTONIO FOUR

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

***Ex parte Mayhugh*,**
512 S.W.3d 285 (2016)

- **Found actually innocent by Court of Criminal Appeals on November 23, 2016**
- **Found new science under Art. 11.073**

SAN ANTONIO FOUR

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

SAN ANTONIO FOUR

- New scientific studies within the field of pediatrics showed that hymens that healed from injury did not leave scars in pubertal and prepubertal girls, those studies contradicted the medical testimony presented at trial, physician who testified at trial retracted her testimony as to physical indicators of past trauma, and physician later agreed with the defense that there were no definitive signs of sexual abuse.

SAN ANTONIO FOUR

Dr. Nancy Kellogg, State's Witness at Trial:

"If the new scientific information (presented in Dr. McCann's study) had been available to me in 1997 or in 1998, I would not have testified that the finding was indicative of trauma to the hymen."

EX PARTE STEVEN MARK CHANEY, 563 S.W.3d 239 (2018)

- **Actual Innocence Found**
- **Relief granted under 11.073 on murder case based on change in body of scientific knowledge in field of bitemark comparisons**
- **Experts opinions that human bitemarks were unique and an individual could be identified as source of bitemark discredited by new science.**

EX PARTE STEVEN MARK CHANEY, 563 S.W.3d 239 (2018)

Dr. Jim Hales, State's Witness at Trial:

"Under today's scientific standards, I would not, and could not, testify to a reasonable medical/dental certainty that Mr. Chaney inflicted the bite mark on John Sweek's forearm at or near the time of death as I testified at the time of trial nor could I testify that there was a 'one to a million' chance that anyone other than Mr. Chaney was the source of the bite mark."

EX PARTE RICHARD BRYAN KUSSMAUL, ET AL, 548 S.W.3d 606 (2018)

- **Relief granted under 11.073 to four defendants, three who pled guilty to sexual assault, and one who was convicted of capital murder**

- **Y-STR DNA testing results were exculpatory to all four defendants and constitute new scientific evidence**

EX PARTE RICHARD BRYAN KUSSMAUL, ET AL

A showing by a mere preponderance of the evidence that an applicant would not have been convicted if exculpatory DNA results are obtained is not sufficient to warrant relief on the basis of actual innocence, but statute governing procedure on new scientific evidence (Art. 11.073) affords an avenue for relief under the preponderance standard.