
Statement of

BARBARA PARKER HERVEY

Judge

Texas Court of Criminal Appeals

P.O. Box 12308, Austin, Texas, 78711

(512) 463-1575

Barbara.Hervey@txcourts.gov

regarding

**Justice for All: Convicting the Guilty and
Exonerating the Innocent**

before the

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

March 21, 2012

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BARBARA PARKER HERVEY
**REGARDING JUSTICE FOR ALL: CONVICTING THE GUILTY AND
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**To the Committee on the Judiciary,
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MR. CHAIRMAN and members of the Committee,

How many times have you heard the question – Is it better to convict an innocent man or to set ten guilty people free? See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (8th ed. 1778). The criminal justice system should strive to eliminate both scenarios. The problems associated with wrongful convictions have been manifested in many ways throughout the criminal justice system. Courts have been called upon to develop jurisprudence, legislatures have enacted statutes, science has continued to improve, and educational programs have been developed. We must restore public confidence in our system of justice.

Texas leads the nation in the number of wrongful convictions. However, if anyone in any of the other 49 states thinks for a minute that they do not have innocent people in prison, they may be mistaken. As a result of these wrongful convictions and other concerns, much of how the criminal justice system works is being questioned, including the effectiveness of counsel, treatment of the mentally ill, reliability of crime laboratories, and the applicability of advances in forensic science. Texas is taking a proactive approach, recognizing what went wrong in the past to prepare for the future. Texas is improving its criminal justice system and has become a leader in addressing these problems. Many of our improvements are due to legislative enactments, while others reflect the multi-faceted approach of the Texas Court of Criminal Appeals to educating the participants in the Texas criminal justice system regarding innocence issues. The Court of Criminal Appeals continues to develop its jurisprudence, serving as a leader in actual innocence case law.

I.

There are two types of actual innocence claims. In the first, a defendant may actually have committed the crime for which he has been accused, but he asserts that he is “actually innocent” of the crime because of some constitutional error that occurred at trial. See *Schlup v. Delo*, 513 U.S. 298 (1995). In other words, it is a procedural claim in

which a defendant's claim of innocence does not provide a basis for relief itself, but is tied to a showing of constitutional error at trial. In the second type of actual innocence claim, a defendant asserts that he is actually, factually innocent of a crime. See *Herrera v. Collins*, 506 U.S. 390 (1993). This claim is a substantive claim in which a defendant asserts a bare claim of innocence based on newly discovered evidence. It is this second type of actual innocence claim that has become the subject of increasing national, as well as local, attention.

In *Herrera*, the United States Supreme Court addressed the issue of whether a (bare) claim of actual innocence entitled a petitioner to federal habeas relief. Herrera urged in his petition that he was "actually innocent" of the murder for which he was convicted and sentenced to death. He argued that, because he is actually innocent, his execution would violate the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment guarantee of substantive due process. *Id.*; see also *State of Texas ex rel. Holmes v. The Hon. Court of Appeals for the Third District*, 860 S.W.2d 873 (Tex. Crim. App. 1993) (Miller, J., concurring). But since the evidence supporting his claim was first produced, not at his trial, but eight years later, the Court concluded that his claim did not entitle him to relief. *Herrera*, 506 U.S. at 411-12. The Supreme Court noted that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. The Court concluded that Herrera's forum for relief was the executive power of clemency under state law. *Id.* at 412.

In *Herrera*, the Supreme Court also discussed the effect on the justice system of entertaining claims of innocence. The Court noted that claims of innocence would have a very disruptive effect on the need for finality in (capital) cases and would place an enormous burden on the State which could be charged with retrying a case on stale evidence. Thus, the Court noted that a high threshold showing of innocence would be required before habeas proceedings on such a claim would even be appropriate. *Id.*

Just a year after the Supreme Court handed down *Herrera*, the Texas Court of Criminal Appeals decided the case of *State of Texas ex rel. Holmes v. The Hon. Court of Appeals for the Third District*, 885 S.W.2d 389 (Tex. Crim. App. 1994). In *Holmes*, we adopted the "extraordinarily high" threshold showing of innocence set forth in *Herrera*. The Court also expressly held that habeas corpus was the appropriate vehicle in Texas in which to assert these actual innocence claims, and it overruled previous case law that conflicted with this holding. The *Holmes* case, and the changes that the Texas Legislature made to the habeas corpus statutes around the same time, opened the door for bare claims of actual innocence in Texas. Shortly after the *Holmes* decision, the Texas Court of Criminal Appeals made it clear that these bare innocence claims could be raised in both death penalty and non-death penalty cases because the incarceration of an

innocent person is as much a violation of due process as is the execution of an innocent person. *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

Over the next several years, the Texas Court of Criminal Appeals, which receives thousands of habeas applications every year, saw quite a number of applications in which the petitioners had raised actual innocence claims based on newly discovered evidence. But with the heavy burden placed on a petitioner who attacks his conviction on a bare claim of actual innocence, many found it difficult to prevail. However, even when denying a claim, the Court attempted to help future litigants understand not only the heavy burden they faced, but to decide how they might go about meeting that burden. For instance, in *Ex parte Franklin*, 72 S.W.3d 671, 677 (Tex. Crim. App. 2002), the Court took the opportunity to explain that the type of evidence required to succeed on a *Herrera*-type actual innocence claim was evidence that goes toward affirmatively proving an applicant's innocence. And in other cases, whether relief was granted or denied, the Court continued to try to provide guidance and a thorough recitation of its analysis to help the bench and bar in presenting and understanding these claims. *See Ex parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002) (determining that the Court will not preclude actual innocence claims because the conviction was the result of a guilty plea); *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005) (affirming the habeas court's ruling after reviewing the entire record and finding that the habeas court's were findings supported by the record); *Ex parte Spencer*, 337 S.W.3d 869 (Tex. Crim. App. 2011) (explaining that "[w]e will consider advances in science and technology when determining whether evidence is newly discovered or newly available, but only if the evidence being tested is the same as it was at the time of the offense"); *Ex parte Miles*, Nos. AP-76,488 & AP-76,489, __ S.W.3d __ (Tex. Crim. App. Feb. 15, 2012) (holding that the *Herrera* standard was met where multiple pieces of newly discovered evidence, including *Brady* evidence, amounted to affirmative evidence that unquestionably established the applicant's innocence).

II.

In June 2008, the Court of Criminal Appeals established the Texas Criminal Justice Integrity Unit due to concerns over the growing number of wrongful convictions throughout Texas. The goal in creating the Unit was to review the strengths and weaknesses in the criminal justice system in the hope that meaningful reform through education, training, and legislative proposals would increase the fairness and accuracy of our system. The Texas Criminal Justice Integrity Unit aims to make proactive changes at the front-end of the system – before an innocent person ever receives an erroneous conviction.

The Unit is an ad hoc, nonpartisan group composed of 14 members selected from various segments of the criminal justice system. These members were chosen for their

interest and work on criminal justice issues. The current members of the Unit include, in addition to myself, Senator Rodney Ellis, Representative Pete Gallego, Representative Jerry Madden, Mary Anne Wiley (Deputy General Counsel to Governor Rick Perry), Judge Sid Harle (District Judge), Bill Allison (Clinical Professor of Law and Director at the University of Texas's Criminal Defense Clinic), Pat Johnson (Director of the Texas Department of Public Safety Crime Lab), James McLaughlin (Executive Director of the Texas Police Chiefs Association), Craig Watkins (District Attorney of Dallas), Jaime Esparza (District Attorney of El Paso), Gary Udashen (criminal defense attorney), Jim Bethke (Director of the Texas Indigent Defense Commission), and Edwin Colfax (Project Manager of the Texas Indigent Defense Commission).

Since its establishment, the Unit has contributed much toward eliminating the causes of wrongful convictions. Initially, the Unit sought to improve the quality of defense counsel available for indigent defendants, implement procedures to improve eyewitness identification, make recommendations to eliminate improper interrogations and to protect against false confessions, make recommendations regarding discovery practices, create reform for the standards in the collection, preservation, and storage of evidence, improve crime lab reliability, improve attorney practices and accountability, address adequate compensation for the wrongfully convicted, implement writ training, and establish local, "home rule" protocol for the prevention of wrongful convictions.

Erroneous eyewitness identification is the leading cause of wrongful convictions. Reports indicate that eyewitness misidentifications have contributed to 80 percent of the DNA exonerations in Texas and nearly 75 percent of wrongful convictions nationwide. From its inception, the Unit has urged eyewitness identification reform. In 2009, the Unit worked with the Texas Commission on Law Enforcement Office Standards and Education (TCLEOSE) to add eyewitness evidence training to the Basic Peace Officer Course curriculum, and it assisted TCLEOSE in developing a training course on eyewitness identification procedures modeled after the National Institute of Justice's Eyewitness Evidence Guide.

The Unit worked collaboratively with other criminal justice entities, such as the Texas Indigent Defense Commission and the Timothy Cole Advisory Panel on Wrongful Convictions, to recommend legislation that addressed this issue statewide. The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law. The Advisory Panel was named after Timothy Cole, the first Texan to be posthumously exonerated of a crime through DNA testing, and it was directed to advise the Indigent Defense Commission in the preparation of a study regarding the causes of wrongful convictions and make recommendations to prevent future wrongful convictions. The Advisory Panel made 11 specific recommendations for reform, which were presented to

the Governor, Lieutenant Governor, Speaker of the House, and standing committees with members on the Advisory Panel.

In the 82nd Texas legislative session, a bill was passed that requires police departments to adopt and implement written policies for the administration of photograph and live lineup identification procedures that follow best practices. *See* TEX. CODE CRIM. PROC. art. 38.20 (enacted by Acts 82nd Leg., ch. 219 (H.B. 215), § 1, effective September 1, 2011). All law enforcement agencies are required to have their policies in place by September 1, 2012. The Bill Blackwood Law Enforcement Management Institute of Texas (LEMITE) was charged with the development and dissemination of a model policy and procedure. Those law enforcement departments that have chosen not to adopt the LEMITE model policy are nonetheless charged with drafting their own, which must adhere to the minimum requirements of the statute. All law enforcement groups will be trained on the new eyewitness identification requirements.

A series of Texas legislative enactments governing DNA and its impact in the courtroom have enabled the State to make tremendous advancements in applying science to the law. *See, e.g.*, TEX. CODE CRIM. PROC. ch. 64. However, DNA is only one of the many areas of forensic science increasingly important in criminal matters. It has been, and still remains, an area requiring continuing legal education.

The need for forensic training was heightened with the release of the National Academy of Sciences' (NAS) report entitled, "Strengthening Forensic Science in the United States: A Path Forward." The Unit, with the assistance of other entities such as the Texas Department of Public Safety, the New York Innocence Project, members of the NAS, law professors, and forensic scientists, planned a major forensic science seminar in October 2010. The seminar brought together judges, scientists, criminal defense attorneys, prosecutors, legislators, and others to discuss science in the courtroom. We educated over 400 individuals on various disciplines including fingerprints, ballistics, DNA, arson, lab protocols and standards, and we displayed a virtual tour of the Texas Department of Public Safety crime lab. The conference supplied 12.5 hours of continuing legal education credit for participants for under \$10,000.

As a result of that forensic science conference, and inquiries from interested groups about how the criminal justice system will respond to the NAS report, the Unit conducted a survey of all criminal law judges in Texas about their knowledge, opinions, and reactions to the NAS report. Survey results indicated that judges were not receiving enough training in forensic science and the standards for the admissibility of such evidence. The survey results also revealed that almost half of the responding judges received zero hours of forensic science training over the previous year, and many judges requested additional training on the standards for reliability of scientific evidence. The Unit aims to use the information gleaned from the survey to develop and recommend

forensic science training for judges. In fact, the Unit, in conjunction with the Texas Forensic Science Commission, will put on a seminar this June to further educate criminal justice system participants and address continuing developments in forensic science. Among other topics, the seminar will include a discussion of the recommendations coming out of the Willingham and Willis investigation. The Texas Forensic Science Commission was formed in 2005 by the Texas Legislature and investigates complaints of forensic negligence or misconduct in Texas criminal cases. Following its investigation of the Willingham and Willis cases, the Commission issued a report and made 17 recommendations regarding initiatives designed to improve arson investigation in Texas. Several of the recommendations emphasized increased education about fire science and investigations.

Yet another area of interest for the Unit has been the collection, preservation, and storage of evidence. With the help of former Unit member State Representative Jim McReynolds, a bill was passed, effective September 2009, that established a system whereby less-populated counties (those with populations of less than 100,000) may store some biological evidence with the Texas Department of Public Safety, and it will be bar coded. This program helps communities with fewer resources comply with state requirements while protecting the integrity of biological evidence. Biological evidence, such as DNA, must be stored in climate-controlled buildings – not in unequipped courthouses or in the homes of court clerks. The DPS storage facility has been built and is currently online. Additionally, the DPS has added seven new crime labs to address the scientific needs of Texas. Assisted by a DPS forensic scientist, the Unit has continued to train clerks, judges, defense attorneys, and prosecutors on the proper preservation and storage of biological evidence.

Further, the Unit has also proposed legislation to improve crime lab reliability, including the concept of a traveling DNA lab. The traveling lab would act as an unannounced check on criminal labs throughout the state. Similar to a health department's method of operation, the traveling DNA lab would arrive at a Texas crime lab without notice to review lab operations. This recommendation has been favorably considered by past legislative sessions, and the Unit will continue to push this concept.

The Unit will continue to seek meaningful reform through education, training, and legislative recommendations. As part of that effort, the Unit's Mental Health and Substance Abuse Seminar will take place this week. The seminar is a two day conference that aims to create awareness by highlighting such issues as drug abuse and addiction, the role of support groups in addiction recovery, competency, post-traumatic stress disorder, and the ethical issues associated with representing the mentally ill. Continuing legal education credit will be available, and participants will include judges, criminal defense attorneys, prosecutors, legislators, mental health practitioners, and law enforcement as well as interested members of the public. A *Brady* seminar focusing on discovery issues

is also planned for the future. Among other issues, we will continue to look at issues regarding discovery, videotaped confessions, the writ process, developments from the NAS, the preservation, collection, and storage of evidence, and quality representation by all Texas attorneys.

III.

The Texas legislature has specifically provided funding to the Court of Criminal Appeals for the purpose of providing continuing legal education for its judges, prosecutors, and criminal defense attorneys who regularly represent indigent defendants in criminal matters. Additional funding is to be provided to statewide associations that provide innocence training for law enforcement officers, law students, and other participants. TEX. GOV'T CODE § 56.003. The current funding allocated is approximately \$18 million per biennium.

Texas has an unusual court structure. There are two supreme courts with equal power, one for civil matters and one for criminal cases. The Court of Criminal Appeals, as the court of last resort for criminal cases, handles approximately nine to ten thousand matters a year and is the busiest appellate court in the nation. This volume of work puts the Court in the unique position to perceive areas in need of serious review within our system. Thus, the Court can work with (presently eleven) different entities to provide the necessary education to criminal justice stakeholders.

The Court is charged, as part of its oversight of the training, with the responsibility of monitoring both the financial and program performance of entities awarded funds by the Court. Timely and in depth applications are required to be submitted yearly by any entity requesting grant funds. All grant funding is processed through the Office of the Texas Comptroller. The Court monitors the Comptroller's processing of the funds to ensure all receipts and disbursements are accounted for from the inception of the grant through close out.

For federal grants, federal guidelines are strictly followed, and staff is trained in both program and financial compliance. The current program administrator is a Texas attorney with five years of federal grant experience. The financial administrator is a Texas certified public accountant and a certified internal auditor with 24 years of experience in federal and state grants. The Court of Criminal Appeals monitors sub-grantee recipients of federal grants on a continual basis. Sub-grantee receipts and disbursements of grant funds are audited and reconciled to bank statements at a rate of 100 percent. Supporting documentation for disbursements is reviewed in detail for completeness, validity, and compliance with federal grant guidelines.

For grants other than federal grants, the Court of Criminal Appeals creates its own rules for the operation and monitoring of grants as authorized by statutory law. Sub-grantee recipients of federal funds are required to follow both federal guidelines and rules created by the Court insofar as its rules do not conflict with federal guidelines. Compliance with the federal guidelines and the Court's rules is strictly enforced and grantees are held accountable for their program and financial results. Non-compliance results in various sanctions including payback of unallowable expenditures and cancellation of grants.

IV.

Finally, Texas has enacted the most generous compensation bill in the nation. TEX. CIV. PRAC. & REM. CODE § 103.001. A wrongfully convicted person is entitled to \$80,000 per year of wrongful incarceration, an annuity, as well as \$25,000 per year spent on parole or as a registered sex offender. The wrongfully convicted person is also entitled to compensation for child support payments, tuition for up to 120 hours at a career center or public institution of higher learning, reentry and reintegration services, and the opportunity to buy into the Texas State Employee Health Plan.