The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 6 | Number 1 Article 1

2003

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Recommended Citation

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 THE SCHOLAR 121 (2003).
Available at: https://commons.stmarytx.edu/thescholar/vol6/iss1/1

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COMMENTS

BY ANY MEANS NECESSARY: EVALUATING THE EFFECTIVENESS OF TEXAS' DNA TESTING LAW IN THE AJUDICATION OF FREE-STANDING CLAIMS OF ACTUAL INNOCENCE

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I. INTRODUCTION

"It shall be the primary duty of all prosecuting attorneys. . . not to convict, but to see that justice is done."[1] The quotation from Article 2.01 of the Texas Code of Criminal Procedure is the logical manifestation of the legal maxim "it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned."[2] It is the law of the land; it is an ideal of our criminal justice system. However, several Texas citizens may argue that the criminal justice system effectively denies the individual pursuit of justice in favor of a conviction's finality and the perception of justice,[3] despite the fact that an increasing number of those convicted have been proven innocent. The criminal justice process is facilitated by the legislature's failure to empower the individual defendants with all of the resources necessary to prove their innocence. Furthermore, the judiciary is reluctant to interpret the law more liberally in favor of the individual. The cases of Anthony Robinson, Christopher Ochoa, Kevin Byrd, and Roy Wayne Criner demonstrate the individual costs of that failure.

Anthony Robinson is a 41-year old Army veteran and a non-traditional student at the Thurgood Marshall School of Law in Houston, Texas.[4] He served 10 years in prison for a rape he did not commit, receiving a pardon from then-Governor George W. Bush in 2000.[5]

Christopher Ochoa confessed to the 1988 murder of Nancy DePriest and was sentenced to life in prison. He served 12 years, but was exonerated through the efforts of the Wisconsin Innocence Project.[6] Mr. Ochoa wrote the Wisconsin Innocence Project a letter requesting their help, and

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1. TEX. CRIM. PROC. CODE ANN. § 2.01 (VERNON 2003).

2. Arleen Anderson, *Responding To the Challenge of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489, 491 (1998), *quoting* Schlup v. Delo, 513 U.S. 298 (1995) (discussing the realization and affect that the conviction of innocent people has on the criminal justice system).

3. *See* 1 DONALD E. WILKES JR., STATE POST-CONVICTION REMEDIES AND RELIEF § 3-2, at 194 (2001 ed.) (describing the counterrevolution of the Burger-Rehnquist Supreme Court where criminal procedure protections are given little concern and misconduct in law enforcement is tacitly accepted).

4. Erica Lehrer Goldman, *Back To Life*, TEXAS LAWYER, May 13, 2002, *available at* WL 5/13/2002 Tex. Law. 1.

5. *Id.*

6. *Lessons from Ochoa's Case*, AUSTIN AMERICAN-STATESMAN, Jan. 17, 2001, at A10.

became the first person they helped absolve. Ochoa was released from prison in January 2001.[7]

Kevin Byrd served 12 years of a life sentence for a rape he did not commit. The victim initially signed a statement identifying her attacker as white, but later recanted at trial and identified Mr. Byrd as the assailant. Mr. Byrd is black. He was convicted despite the contradictory statements and a lack of physical evidence linking him to the crime. He gained his freedom as a result of a friend's persistence and pure luck. Kevin Byrd was pardoned in 1997 by then-Governor George W. Bush.[8]

In 1990 Roy Wayne Criner was sentenced to 99 years in prison for the aggravated rape and murder of 16-year old girl.[9] The direct evidence against Mr. Criner was weak, yet he was convicted on the basis of conflicting testimonial evidence about statements he allegedly made on the day of the crime.[10] Mr. Criner eventually won his freedom, and he too was pardoned in 2000 by then-Governor George W. Bush.

Although the facts of these cases are distinguishable, common ground can be found in the fact that neither was found guilty of a capital crime and each made a post-conviction claim of actual innocence using Deoxyribonucleic acid (DNA) typing analysis.[11] They represent an alarmingly increasing number of cases nationwide, over the past decade, where convicted defendants have successfully asserted their innocence and won their release from prison.[12] A great majority of these convictions have been overturned by the judicial system's acceptance and reliance on DNA evidence.[13]

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7. *Id.*

8. John Maekig, *After 12 Years, DNA Clears Inmate In Rape Case*, HOUSTON CHRON., July 29, 1997, *available at* 1997 WL 6570373.

9. *See Frontline: The Case for Innocence*, http:www.pbs.org/wgbh/pages/frontline/shows/case/cases/ (a television documentary based on four cases examining "where DNA evidence has been ignored, discounted, or kept secret." This despite the fact that the "science of DNA testing can now establish with near certainty who did or didn't commit a crime.") (last visited Jan. 12, 2004).

10. *See id.*

11. *Compare* Goldman *supra* note 4, *with* Mary Alice Robbins, *Trial Judge Lacked Jurisdiction to Order DNA Testing: Death-Row Inmate Who Wanted to Pay for Test Didn't Meet Law's Conditions*, TEXAS LAWYER, Sep. 16, 2002, *available at* WL 9/16/2002 Tex. Law. 9.

12. Anderson, *supra* note 2.

13. EDWARD CONNORS ET AL, NATIONAL INSTITUTE OF JUSTICE., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 78 (1996).

Every state now requires a DNA analysis of evidence for specified offenses.[14] However, only a handful of states have passed legislation providing a process for convicted persons to request DNA testing of evidence for their trial.[15] Texas is one of them. The 77th Session of the Texas Legislature passed Senate Bill 3 ("SB 3") on April 5th, 2001, and Governor Rick Perry signed it immediately on April 5th.[16] Senate Bill 3 amended chapters 38 and 64 of the Texas Code of Criminal Procedure and mandated the preservation of biological evidence for post-conviction DNA testing.[17]

The irony is that Robinson, Ochoa, Byrd and Criner were all exonerated, pardoned or released as a result of DNA typing analysis performed *prior* to the passage of SB 3. Interestingly, the law has been used to restrict a convicted petitioner's effort to prove innocence using DNA testing.[18] While such a narrow interpretation is troubling enough in a non-capital case, it is more troubling when a life is at stake.

In *Kutzner v. State*,[19] a death-row inmate relied on the statute and requested DNA testing of the evidence that was used to convict him. The trial court denied the motion and defendant appealed.[20] The Texas Court of Criminal Appeals affirmed the trial court's ruling and held, *inter alia*, that the defendant had failed to show that "the convicted person must show a reasonable probability that exculpatory DNA tests will prove that person's innocence.[21] The state released the evidence for testing soon after the defendant was executed.[22] In *State v. Patrick*,[23] death-row inmate Jesse Joe Patrick filed a motion for DNA testing claiming that he had no memory of the crime and offered to pay for the DNA test himself.[24] The trial court ordered the test but again the Court of Criminal

14. Holly Schaffter, *Post-conviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 695 (2002) (discussing the utility of DNA testing procedures in state courts).

15. *Id.*

16. Act of April 5, 2001, 77th Leg., R.S., ch. 2 2001 Tex Gen. Laws 1-5.

17. *Id.*

18. Robbins, *supra* note 11.

19. 75 S.W.3d 427 (Tex. Crim. App. 2002).

20. *Id.* at 427.

21. *Id.*

22. Barry Scheck, *Some Prosecutors Still Are Resisting DNA Testing Law*, DALLAS MORNING NEWS, Sep. 27, 2002, *available at* http://www.dallasnews.com/opinion/viewpoints/stories/092702dnedischeck.14137.html (last visited Jan. 18. 2004).

23. 86 S.W.3d 592 (Tex. Crim. App. 2002).

24. *Id.* at 593.

Appeals overturned the decision ruling that the defendant failed to meet his statutory burden.[25]

Given the documented numbers of wrongful convictions and universal judicial acceptance of DNA testing, why do Texas courts appear reluctant to exercise discretion in favor of the defendant? Why do they interpret the law so restrictively?[26] Does a defendant who raises a claim of factual innocence have a right to DNA testing so he can prove it? Given that the law was proposed as a legislative response to public outcry over wrongful convictions in Texas, and its passage an emergency priority at the request of the Governor,[27] is the court's narrow interpretation of the law truly an accurate reflection of the legislature's intent? If it is accurate, is it justice?

This comment addresses those questions by tracing the development of Texas's post-conviction remedies from their origins in the Texas state constitution; to their refinement of the writ of habeas corpus; and to the enactment of SB 3 of the Code of Criminal Procedure. Moreover, this paper evaluates the law's effectiveness in attaining "justice" and offers recommendations intended to bring the judiciary closer to the directive of Article 2.01 of the Code of Criminal Procedure – ". . .to see that justice is done."[28]

II. HISTORY

A. *Origin of Post-Conviction Remedies and Relief*

The Texas Constitution is derived from a collaboration of the United States of America's Declaration of Independence and the Constitution of the Free and Independent Republic of Texas.[29] The result is that the Bill of Rights in the Texas Constitution contains "greater protection of . . . rights than what had been written into the United States Constitution and

25. *Compare* Mary Alice Robbins, *Defense Lawyers Worried DNA Bill Doesn't Go Far Enough*, TEXAS LAWYER, Feb. 26, 2001, *available at* WL 2/26/2001 Tex. Law. 5, *with* SAN ANTONIO EXPRESS-NEWS, *New DNA Law Spurs Dozens of Test Requests*, Aug. 20, 2001, at 8B, *and* John Moritz, THE FORT WORTH STAR-TELEGRAM, *DNA Testing Debated For Man on Death Row*, Sept. 4, 2002, *available at* 2002 WL 24696437.

26. Moritz, *supra* note 25.

27. *See Perry Declares DNA Bill on Capitol Fast Track*, HOUSTON CHRON., Feb. 9, 2001, *available at* 2001 WL 2998417 (discussing the proposed DNA testing legislation); *see also,* Robbins, *supra* note 25 (discussing the anticipated effects of the proposed DNA testing bill).

28. TEX. CRIM. PROC. CODE ANN. §. 2.01 (VERNON SUPP. 2003).

29. Arvel Ponton III, *Sources of Liberty In The Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 94 (1988).

its Bill of Rights,"[30] and "positive guarantees of certain rights to the citizens."[31] Article I, section 10 guarantees rights for the accused in criminal prosecutions[32] explicitly stating that: "In all criminal prosecutions the accused shall have . . . the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor. . ."[33] The phrase providing a "compulsory process. . ." suggests the existence of an affirmative right for the individual to promote his defense, and Texas courts have interpreted it to mean an expansion of individual rights and liberties for a defendant facing conviction.[34]

Once convicted, a person's legal options for relief consist of either judicial remedies that are available in a court of law,[35] or non-judicial remedies provided by either the executive or legislative branches of government.[36] Non-judicial executive remedies include parole, pardons, and commutation of sentence or clemency.[37] Non-judicial legislative remedies provide a process for a convicted person to seek compensation or other relief in accordance with applicable statutes, provided the convicted person has sufficient grounds for relief.[38]

B. *General Grounds for Post-Conviction Relief*

Appropriate grounds to support a defendant's claim for post-conviction relief must include an alleged error, which if proven, would constitute "a sufficient legal basis for granting the relief sought by the movant."[39] The alleged error can question the conviction itself, the sentence received, or the quality of the custody or punishment.[40] An alleged error that generally warrants consideration for post-conviction relief in state courts may be founded on either a jurisdictional or constitutional claim, as well as fundamental error, egregious error, or newly discovered evidence of actual innocence.[41]

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30. *See id.* at 97 (assessing the unique combination of individual liberties in the Texas Bill of Rights).

31. *Id.* at 99.

32. TEX. CONST. art. I, § 10; Ponton III, *supra* note 29, at 109 (explaining the individual rights established by article I, section 10 of the Texas constitution).

33. Ponton III, *supra* note 29, at 109.

34. *See id.* at 109-110 (stating that "Texas courts continue to interpret the state constitution so as to protect the framers expansive view of individual rights.").

35. 1 WILKES, *supra* note 3, § 1-4, at 14.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

A movant stating a claim of jurisdictional error usually alleges that the convicting court did not have jurisdiction over: 1) his or her person; or 2) the subject at issue during trial.[42] A movant's claim of sentencing error is premised on a violation of the applicable sentencing statute.[43] Post-conviction relief based on jurisdictional error is available under the Uniform Post-conviction Procedure Act.[44]

A post-conviction claim for relief based on state or federal constitutional errors is the most frequently litigated issue in state post-conviction remedy proceedings.[45] All federal and state jurisdictions provide a process to grant relief from a state conviction when the movant is able to prove that the applicable "statute defining the offense or prescribing punishment is unconstitutional,"[46] or the presiding courts' application of the statute denied the movant's constitutional right resulting in conviction or continued incarceration.[47]

The third basis of error considered sufficient to merit consideration for post-conviction relief in state courts is that the movant has newly discovered evidence of their actual innocence. Historically, claims of actual innocence based on newly discovered evidence were not considered worthy of relief; the claims were not considered to be jurisdictional or constitutional error,[48] thus the movant had to single-handedly combat the police, the prosecution, and the judiciary for the right to argue his innocence.[49] Nonetheless, the majority of states accept newly discovered evidence as sufficient grounds for relief in accordance with their specific post-conviction remedy.[50] Moreover, the judicial system also recognizes numerous cases where an innocent person was granted relief based on constitutional grounds.[51] The judicial system also recognizes that there are an alarming number of cases where a defendant's rights may have been fully protected, yet a conviction was entered because the defendant could not prove his innocence.

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42. *Id.*

43. 1 WILKES, *supra* note 3, § 1-10, at 39.

44. *Id.* at 40.

45. 1 WILKES, *supra* note 3, § 1-11, at 46.

46. *Id.*

47. *Compare id., with Ex parte* Elizondo, 947 S.W.2d 202, 205 (Tex. Cr. App. 1996).

48. 1 WILKES, *supra* note 3, § 1-12, at 50.

49. *See id.*, § 1-13, at 53 (arguing that the conviction of the innocent is a major problem in our criminal justice system, yet shrouded in mystery and often ignored or even denied).

50. *See id.* at 58 (stating that 38 states permit relief based on newly discovered evidence of innocence).

51. *Id.* at 55.

> A claim by a convicted person which does not assert that any violations of his constitutional rights occurred in the proceedings leading to the conviction, but does assert that there is newly discovered evidence that he is factually not guilty of the crime for which he was convicted, is often referred to as a "free-standing claim of innocence.[52]

The traditional common-law remedy for a free-standing claim of actual innocence was a direct appeal to the convicting court by way of a motion for a new trial, subject to the applicable statute of limitations.[53] However, when newly discovered evidence was obtained after the statutory limit had run, the convicted person's only recourse was to rely on the narrower field of post-conviction remedies.[54] Thus, the majority of actions for relief based on the movant's claim of actual innocence resulting from the presentation of newly discovered evidence were adjudicated in accordance with the state's post-conviction remedies.[55]

Under 19th century jurisprudence, free-standing claims of innocence based solely on newly discovered evidence were not favored in most jurisdictions.[56] This was true for several reasons. For one, there was a reluctance to allow the movant to use a collateral attack in an attempt to relitigate trial issues. Second, there was a concern that material witnesses would recant their previous testimony. Finally, courts were concerned with upholding the judicial principle of finality.[57] The principle of finality was summarized by Judge Henry J. Friendly his 1970 article "Is Innocence Irrelevant?"[58] Judge Friendly described the components of finality as follows: 1) the criminal law's interest in swift but just punishment for its deterrent value, and the recognition that continued collateral attacks mitigates against the convicted person's acceptance of it; 2) collateral attacks are generally delayed too long, and thus subject to deterioration of witness memory and evidence; 3) the collective drain that collateral attacks place on judicial resources; 4) the fact that the vast majority of state court convictions are sound as illustrated in "Justice Jackson's never refuted observation that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones;" and 5) societal

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52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 56.
57. *Compare id.* at 56-57, *with* Withrow v. Williams, 507 U.S. 680, 697 (1993) (Justice O'Connor concurring in part and dissenting in part stating "the principles that inform our habeas jurisprudence are finality, federalism, and fairness.").
58. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149 (1970).

conviction that at some point the appeal process must come to an end.[59] Thus, the doctrine of finality appears to be a reasoned approach to balance a multifaceted problem and ultimately achieve a degree of predictability.

Conversely, when the principle of finality is applied to free-standing claims of actual innocence, the result has been described as "willful ignorance."[60] There is an equally compelling rationale to continue to question the validity of a conviction, for we can never have complete confidence that our criminal justice system has convicted the right person.[61] Each release and exoneration of convicted persons confirms a fear that the apparatus of the criminal justice system itself is fundamentally unjust. As a result, each exoneration makes society unwilling to accept the idea that an end has finally come in a particular case.[62] As Justice Brennan stated in *Sanders v. United States*, "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[63]

Therein lays the inherent conflict for both courts and prosecutors in their effort to achieve justice: obtaining balance between the competing interests wherein "guilt shall not escape nor innocence suffer."[64] Justice must be achieved in a manner that encourages public belief and confidence in the criminal justice system and its administration. Regardless of how fervent and zealously the prosecution may believe the accused to be guilty, it cannot pursue "guilt" at the cost of pursuing truth then shrug off the mistaken convictions of those who are truly innocent in the war on crime.[65] If "our criminal justice system is best described as a search for

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59. *Id.* at 146; *see* Sanders v. United States, 373 U.S. 1, 24-25 (1963) (arguing for the significance of the principle of finality despite the provisions for collateral appeals of a criminal conviction).

60. JIM DWYER, ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 247 (2000).

61. *The Innocence Project, Case Profiles,* http://www.innocenceproject.org (website of non-profit legal clinic out of the Benjamin N. Cardozo School of Law. "The Project handles cases where DNA testing of evidence can yield conclusive proof of innocence. As of January 12, 2004, 140 convicted persons nationwide have been exonerated through DNA testing) (last visited Jan. 12, 2004).

62. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV 441, 443 (1963).

63. *Id.*

64. Anderson, *supra* note 3, at 491.

65. *See* Anderson, *supra* note 2, at 491, *citing* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?* 49 RUTGERS L. REV. 1317, 1334-1335 (1997) (suggesting that those who are wrongfully or mistakenly convicted of crimes but are actually innocent are victims of the war on crime).

truth"[66] then we must continue to revise and modify both our technical abilities to find the truth and the analytical processes by which we evaluate those findings.

Justice Friendly's arguments for substantive justice as the standard for habeas corpus claims have been instrumental in the development of the principles of finality and the judiciary's adherence to it.[67] This standard imposed a narrow and strict burden of proof until the introduction and DNA profiling evidence in the mid-1980s. From that point forward, both the prosecution and the defense were able to objectively consider a defendant's argument of constitutional error based on the introduction of newly discovered evidence.

C. *The Role and Use of Habeas Corpus in Texas Criminal Law*

The writ of habeas corpus is guaranteed by the Texas Constitution.[68] It is the principal post-conviction remedy in Texas,[69] and was enacted in its current form by the Texas Habeas Corpus Act of 1995[70] ("the Act"), which required the habeas corpus process to run concurrent with the direct appeals process.[71]

The Act brought about a complete revision of Article 11.07 which streamlined the appellate process and made the writ applicable only to non-death penalty cases after a final judgment.[72] The Act did not establish a statute of limitations for non-death penalty cases as it did for capital cases, leaving some commentators to speculate that the Act was the legislatures' blood-thirsty and cynical expression of support for the principle

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66. NATIONAL INSTITUTE OF JUSTICE., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL iii (1996).

67. *See* Michael J. Muskat, *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins*: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Post-Conviction Remedies*, 75 TEX. L. REV. 131, 134 (1996) (analyzing the proper scope of federal habeas corpus remedies).

68. TEX. CONST. art. I, § 12.

69. Jack Driskill, *Texas Code of Criminal Procedure, Article 11.07: The Exclusive Post-conviction Remedy in Texas*, 2 TEX. TECH L. REV. 45, 45 (1970) (discussing how the writ of habeas corpus was the exclusive post-conviction remedy in Texas, but inadequate to address the variety of actions brought, which led to the enactment of Article 11.07 by the Texas legislature in 1970).

70. Acts of 1995, 74th Leg., ch. 319, 1995 Tex. Gen. Laws (amended TEX. CRIM. PROC. CODE ANN. § 11.07 and added TEX. CRIM. PROC. CODE ANN. § 11.071).

71. James C. Harrington and Anne More Burnham, *Texas's New Habeas Corpus Procedure For Death Row Inmates: Kafkaesque – And Probably Unconstitutional*, 27 ST. MARY'S L. J. 69, 73 (1995).

72. TEX. CRIM. PROC. CODE ANN. art. 11.07, § 1 (Vernon Supp. 2004); 2 DONALD E. WILKES, STATE POST-CONVICTION REMEDIES AND RELIEF app. A at 640 (2001 ed.).

of finality in capital cases, the goal being to "execute people as quickly as possible."[73]

The Act also provided some significant privileges that are not present in other state habeas corpus legislation. Specifically, the Act provides for the right to counsel for all indigent death-row inmates and a right to compensation for expenses pursuant to the investigation supporting the habeas corpus action.[74] Commentators have acknowledged that the Act did not significantly narrow nor restrict the grounds available for a grant of post-conviction relief. Twenty-five distinct sources of error are available to a convicted person including a claim for "denial of due process of law" and a claim of "newly discovered evidence of innocence."[75]

The writ of habeas corpus is a collateral attack on a conviction which was traditionally limited to void judgments; it was unavailable to a convicted person making a free-standing claim of innocence based on the availability of new evidence.[76] The Act did not express the shortcoming because it was not intended to provide a comprehensive post-conviction

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73. Harrington and Burnham, *supra* note 71, at 71.

74. 2 WILKES, *supra* note 72.

75. 2 WILKES, *supra* note 72, at 648-655 (stating that the grounds for post-conviction habeas corpus relief, whether under Art. 11.071 or Art 11.07 include the following: 1) Jurisdictional defect in the conviction, 2) Unconstitutional statute defining the offense, 3) Denial of counsel in the convicting court, 4) Ineffective assistance of counsel at trial, 5) Ineffective assistance of counsel when pleading guilty, 6) Violation of right to conflict-free counsel, 7) Incompetence to stand trial, 8) Involuntary guilty plea, 9) Breach of plea bargain, 10) Double jeopardy violation, 11) Fundamentally defective indictment, 12) Ex post facto violations, 13) Denials of due process of law, 14) Newly discovered evidence of innocence, 15) Sentence in excess of statutory maximum, 16) Unconstitutional sentence, 17) Illegal or unconstitutional condition of probation, 18) Illegal or unconstitutional revocation of probation, 19) Ineffective assistance of counsel on direct appeal or denial of counsel on direct appeal, 20) Unconstitutional actions by parole officials, 21) Unlawful denial of credit against the sentence of time spent in pre-conviction custody, 22) Miscalculation of parole eligibility by prison or parole officials, 23) Unlawful denial of jail time credit for time spent on conditional work furlough until convicted person was released on parole, 24) Illegal denial of good time credit, flat time credit or other time credit against the sentence, 25) The convicted person under death sentence is mentally incompetent to be executed.

76. *See* Driskill, *supra* note 69, at 54 ("A judgment is void only if the trial court lacked jurisdiction over the person or subject matter, or subsequently lost jurisdiction because the constitutional requirements of due process were not met. Thus, any judgment which is not void but merely voidable is not subject to collateral attack by habeas corpus. Anything which goes to the guilt or innocence of the accused cannot be considered by habeas corpus. The case in *Shaver v. Ellis,* 255 F.2d 509 (5th Cir. 1958) is a vivid example of the problem. Shaver was convicted of murder and sentenced to death. On the eve of his execution another inmate confessed to the crime. Shaver immediately filed for a write of habeas corpus, which was flatly denied because the confession merely went to the guilt of the accused and did not render the conviction void but only voidable.")

remedy.[77] Thus, the state post-conviction remedy was narrowly drawn and of limited utility to a movant with a free-standing claim of innocence. The Act was affirmed by the Texas Court of Criminal Appeals in *Ex parte Binder*[78] wherein it held that newly discovered evidence is not grounds for relief under Art. 11.07.[79] At that time, a convicted person with a credible claim of actual innocence had no recourse in state courts and no alternative other than to file a federal writ of habeas corpus in accordance with the Supreme Court's decision in *Townsend v. Sain*.[80] In *Townsend*, the Supreme Court stated that a federal court should grant an evidentiary hearing when a habeas corpus applicant demonstrates a substantial allegation of newly discovered evidence.[81]

As a result, a majority of those convicted chose to bypass the convicting court and submit their writ of habeas corpus directly to the Texas Court of Criminal Appeals for the express purpose of exhausting their state claims and expeditiously move on to federal courts.[82] The strategy diminished when the Supreme Court began to close the door with its decision in *Brown v. Allen*,[83] which denied the federal habeas corpus writ if the movant failed to exhaust all state remedies. *Brown's* holding was ultimately bolstered in *Herrera v. Collins*, where Chief Justice Rehnquist stated that executive clemency by the governor was the appropriate remedy for meritorious claims of actual innocence, not a federal writ of habeas corpus.[84]

D. *Writ of Habeas Corpus after Herrera*

In *Herrera* the movant had been convicted of capital murder and sentenced to death for the 1982 murder of a police officer.[85] Herrera challenged the conviction directly and collaterally with writs of habeas corpus in both Texas state and federal courts,[86] and was denied at every turn. Ten years later he submitted a second federal writ of habeas corpus in

77. *Compare* Driskill, *supra* note 69, at 54-55, *with* 2 WILKES, *supra* note 72, at 659 (describing Texas' limited habeas corpus relief).

78. 660 S.W.2d 103 (Tex. 1983).

79. *Id.*

80. 372 U.S. 293, 313 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

81. *Id.*; Driskill, *supra* note 69, at 47.

82. Driskill, *supra* note 69, at 47.

83. 344 U.S. 443, 486 (1953) (stating that a failure to use a state's available remedy in the absence of some interference or incapacity bars federal habeas corpus).

84. 506 U.S. 390, 416 (1993) (Chief Justice Rehnquist asserting that executive clemency is the proper remedy for claims of innocence because such claims may be abused and disrupt the finality of court decisions).

85. *Id.* (holding that a claim of actual innocence based on newly discovered evidence is not grounds for federal habeas corpus relief).

86. *Id.*

which he made a free- standing claim of his actual innocence based on the discovery of new evidence.[87] He argued that his pending death sentence was a violation of both "the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law" because he was, in fact, innocent.[88]

The federal district court granted a stay of the execution based on fairness and due process concerns.[89] The Court of Appeals for the Fifth Circuit vacated the stay and found Herrera's effort to support his claim of innocence to be disingenuous. The Fifth Circuit held that a free-standing claim of actual innocence based "merely on newly discovered evidence" was not cognizable under the *Townsend* decision.[90] The Supreme Court of the United States ("the Court") granted certiorari and affirmed Herrera's conviction and capital sentence.[91] In issuing its opinion, the Court analyzed the submission of new evidence that had not been available at trial under Article 11.07 of the Texas Code of Criminal Procedure. Further, the Court identified the particular problem and decided that this type of claim could not be judicially determined under Texas law at the time.[92] Nonetheless, the Court assumed that a death-row inmate could warrant relief under a federal writ of habeas corpus so long as the inmate could raise a "truly persuasive post-conviction showing of actual innocence, such that the execution would be unconstitutional, and that no state procedures were available to review the claim.[93] The Court also recognized that although a petitioner could make such a demonstration, the court's interest in comity, finality of the verdict in capital cases, and the corresponding burden on the state to respond to such a showing would combine to render the threshold for the movant's "assumed right" extraordinarily high.[94]

The Court was, in effect, sending a message to the states. For one, the state trial was the primary venue to determine issues of guilt or innocence. Second, adherence to principles of comity and finality meant that federal habeas relief was not an available remedy to address a death-row inmates' free-standing claim of innocence based on newly discovered evidence unless the state courts did not posses a process to do so. Finally, in

87. *Id.*
88. *Id.*
89. *Id.* at 397.
90. *Id.* at 397-398.
91. *Id.* at 398.
92. *Id.* at 400.
93. *Id.* at 417.
94. *Id.*

the rare instance that federal habeas relief was a viable alternative, the threshold to reach it would be extremely difficult.[95]

III. Evolution of Post-conviction Remedies After Herrera

A. *Federal Law*

The Court's decision in *Herrera* begat a string of decisions which further defined its principles. However, none of these decisions expressly recognized an absolute right to federal habeas relief in a post-conviction claim of actual innocence. In *Schlup v. Delo*,[96] Justice Stevens distinguished Herrera's free-standing claim of actual innocence from a less robust claim of innocence resulting from a constitutional error. When attached to a constitutional error, the convicted person's claim of innocence served as a gateway through which a petitioner had to pass so that an otherwise barred constitutional claim could be considered on its merits.[97] In distinguishing the two claims, the Court articulated two standards of review. An *Herrera* claim of actual innocence results from a constitutionally error-free trial where the execution of a factually innocent person would violate the Eighth Amendment. The petitioner's demonstration of evidence in their habeas writ would have to be so strong so as to render an execution constitutionally intolerable even if the conviction was the product of a fair trial.[98] The standard of review for a *Schlup* claim was not as harrowing. Here, the petitioner only had to present evidence to establish sufficient doubt about his guilt and show that the constitutional error probably resulted in the conviction of one who was actually innocent.[99] Thus, *Schlup* established the precedent for a lower standard of review when the petitioner can show that newly discovered evidence was not available at trial.

B. *Texas Criminal Law*

Following *Schlup* the Texas Court of Criminal Appeals decided *State of Texas ex rel. Holmes.*[100] In its decision, the court expressly considered the question of a petitioner's fundamental right to demonstrate his actual innocence as introduced by the Supreme Court in *Herrera*, and held that

95. *See* Anderson, *supra* note 2, at 496 (commenting Chief Justice Rehnquist' holding that the state trial is the main event for determining guilt and that finality is one of the touchstone principles defining habeas jurisprudence).

96. 513 U.S. 298 (1995).

97. *Id.* at 313-314 (differentiating between claims of actual innocence).

98. *Id.* (explaining that executing an actually innocent individual would run afoul of the Eighth Amendment).

99. *Id.* at 299.

100. 885 S.W.2d 389 (Tex. Crim. App. 1994).

the new evidence must create "a doubt as to the efficacy of the verdict sufficient to undermine confidence in the verdict and that it is probable that the verdict would be different [had the new evidence been presented at trial]."[101] Once the court was convinced that the petitioner's motion had met this threshold, he then had to meet an equally high burden of proof to obtain relief by showing that "no rational trier of fact [considering the newly discovered evidence within the context of the entire trial record], could find proof of guilt beyond a reasonable doubt."[102]

Effectively, the Texas Court of Criminal Appeals expanded the scope of the writ of habeas corpus for death-row inmates in response to the *Herrera* decision. Perhaps most significant is the fact that the Texas Court of Criminal Appeals in its reasoning adopted a constitutional due process analysis and applied it to state habeas corpus jurisprudence thereby expanding the scope of all future appeals.[103]

The court also performed due process analysis in *Ex parte Elizondo*.[104] The *Elizondo* court held that beyond execution of an innocent person, the due process clause forbids the incarceration of an innocent person, thereby making the *Holmes* expansion of the writ of habeas corpus applicable to non-death-row inmates making claims of actual innocence.[105] The court further refined the standard of review upon which the applicant must meet to prevail; that is, the newly discovered evidence must "unquestionably establish the petitioner's innocence."[106] Seemingly, the court appeared to have taken notice of the number of wrongful convictions being overturned both within the state and around the nation. The court had to be aware of the role that DNA evidence played in those cases and especially the national controversy surrounding the admissibility of DNA evidence.[107] The court declared their predisposition to affirm the conviction, perhaps in anticipation of similar controversy about appeals in Texas. The opinion plainly stated that the review is not an opportunity for the petitioner to re-argue the evidence presented at the trial; instead, they must present new evidence or evidence that was not presented due to constitutional error:

> We view the evidence in a manner favorable to the verdict of guilty. In practice, this means we assume that the jury weighed lightly the exculpatory evidence and disbelieved entirely the exculpatory wit-

101. *Id.* at 398.
102. *Id.* at 399.
103. *Id.* at 400.
104. 947 S.W.2d 202 (Tex. Crim. App. 1996) (en banc).
105. *Id.* at 205.
106. *Id.*
107. CONNORS ET AL., *supra*, note 13.

> nesses. We make this assumption no matter how powerful the exculpatory evidence may seem to us or how credible the defense witnesses may appear. If the inculpatory evidence standing alone is enough for rational people to believe in the guilt of the defendant we simply do not care how much credible evidence is on the other side.[108]

The court affirmed and clarified its ruling in *Ex Parte Franklin*.[109] The court held that *Elizondo* was intended to "act as a mechanism for freeing the innocent, not as a vehicle for out-of-time motions for new trial."[110]

C. *Federal Impact on State Decisions*

It has taken less than ten years for the post-conviction remedy of habeas corpus to be revised so as to apply to free-standing claims of actual innocence based on newly discovered evidence or evidence that had been un-constitutionally barred at trial. The change was premised on the constitutional violation that would occur if an actually innocent person were executed or incarcerated. Although its scope had been widened, habeas corpus jurisprudence was still not comprehensive enough. When *Elizondo* was decided in 1996, Texas did not have a statutory process to evaluate a post-conviction claim of actual innocence or to compel relief when a petitioner was able to meet their burden of proof. The shortcoming was exposed continuously throughout the period between 1987 and 1996 due to the introduction of DNA profiling evidence in the courtroom. DNA profiling evidence enabled the applicant to objectively meet the high burden of proof as set out by the Court of Criminal Appeals in *Holmes*, and affirmed in both *Elizondo* and *Franklin*. Nevertheless, there lacked a statutory process to permit the inmate to gain access to the physical evidence, or as was often the case in capital appeals, the inmate may have exhausted all of his appeals years earlier at a time when DNA profiling was either not available, or not as capable, or the inmate may have been barred by statutory limitation. Absent a truly persuasive showing that the guilty verdict should be questioned, the applicant could not get into the courtroom to prove that "no rational trier of fact would have found him guilty beyond a reasonable doubt."[111]

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108. 947 S.W.2d at 205.
109. 72 S.W.3d 671 (Tex. Crim. App. 2002) (en banc).
110. *Id.* at 677.
111. *See Herrera*, 506 U.S. at 400.

IV. DNA Testing As a Tool of Forensic Evidence

"The thing is you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of crime, then he is not a suspect."[112]

— Edwin Meese, United States Attorney General

"The criminal justice system is not infallible."[113]

— Janet Reno, United States Attorney General

A. *Role of Forensic Science*

The distinction in the above-quoted statements reflects more than just their ideological differences. Rather, it is testimony to the comprehensive effects that DNA profiling and other technological advance in forensic science have had on the criminal justice system. Forensic science is generally defined as "the application of the natural and physical sciences to the resolution of conflicts with a legal context."[114] If the highest aim of the criminal justice system is a search for the truth, then forensic science is an indispensable tool in the conduct of that search.[115] Thus, it has a symbiotic relationship with the criminal justice system. The relationship, however, is ripe with inherent conflict because the goal of science is to produce the truth, whereas the goal of our legal system is the achievement of justice.[116] Arriving at a legal truth, as a result of vigorous argument of the available facts, is the goal of the legal system's adversarial nature and not just the product of rigid application and adherence to the scientific method.[117]

> The role of physical evidence in the administration of justice may reasonably be described as follows: Science offers a window through which the law may view the technological advances of our age. Science spreads out a smorgasbord of (hopefully) valid facts and, having proudly displayed its wares, stands back. The law now picks out those morsels that appear most attractive to it, applying selection criteria that may or may not have anything to do with science. These

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112. Dwyer et al., *supra* note 60, at xi.

113. Connors et al, *supra* note 13, at iii.

114. John I. Thornton & Joseph L. Peterson, *The General Assumptions and Rational of Forensic Identification*, *in* 3 David L. Faigman & David H. Kaye et al., Modern Scientific Evidence: The Law and Science of Expert Testimony, § 24 at 148 (2002).

115. *See* Connors et al., *supra* note 13, at 78.

116. Thornton & Peterson, *supra* note 114, at 149.

117. *Compare* Connors et al., *supra* note 13, at 78 *with* Thornton & Peterson, *supra* note 114, at 149.

selection criteria may appear sensible, even obligatory to the law, but may appear illogical or even whimsical to science.[118]

Accordingly, the law has to explain and interpret the results of science to make them relevant to the pursuit of justice.

B. *The Development of DNA Profiling*

The classic description of forensic science is the "analysis, identification, and interpretation of physical evidence."[119] Once forensic science techniques have produced results from analysis of the physical evidence, the emphasis shifts to admissibility of the results by a court so they can be considered to assist the resolution of a legal conflict.[120]

DNA typing technology was initially developed in England by Alec Jeffreys in the 1970's, and used to assist in criminal investigations in the United Kingdom in 1985. Forensic science was then adopted by the U.S. Federal Bureau of Investigation in 1988.[121] Its admissibility in the courtroom grew exponentially over the next decade, consistent with the emergence of DNA typing as a means of discriminating between and identifying individuals. It replaced ABO blood typing as the primary method of individualizing physical evidence and DNA typing became "widely viewed as one of the two most important advances in forensic science of the twentieth century."[122] Judicial acceptance of DNA typing occurred in five distinct phases, as reflected in the court decisions from various jurisdictions.[123]

During the first phase, courts generally received the new science without challenge.[124] The first use of DNA technology in an American criminal trial occurred in *Andrews v. State*[125] wherein the Court of Appeals for the Fifth District in Florida affirmed the trial court's decision to admit "genetic fingerprint" evidence.[126] During the trial the technician who performed the test was able to link the defendant to the biological evidence taken from the crime scene by testifying that "the chance that the DNA strands found in appellant's blood would be duplicated in some

118. Thornton & Peterson, *supra* note 114, at 149.
119. *Id.* at 152.
120. *Id.* at 148.
121. *See generally* NATIONAL RESEARCH COUNCIL, COMMITTEE ON DNA TECHNOLOGY IN FORENSIC SCIENCE, BOARD ON BIOLOGY, COMMISSION ON LIFE SCIENCES, DNA TECHNOLOGY IN FORENSIC SCIENCE 1 (1992).
122. Thornton & Peterson, *supra* note 114, at 175.
123. *Id.* at 211.
124. *Id.*
125. 533 So.2d 841, 851 (Fla. Dist. Ct. App. 1989), *rev. denied by*, 542 So.2d 1332 (Fla. 1989).
126. *Id.* at 850.

other person's cells was 1 in 839,914,540."[127] The court noted that while this type of evidence was new to criminal cases, it was deemed admissible principally because of its proven reliability and close relationship with established scientific methodology.[128] Also noteworthy is the fact that the defense did not challenge the admissibility of the evidence; they only challenged the procedures followed by the laboratory conducting the test.[129]

In contrast, the second phase was marked by defense efforts to challenge the admissibility of DNA typing evidence on two fronts: 1) laboratory control of the conditions for the analysis, and 2) interpretation of the results of the analysis.[130] During this period the New York Court of Criminal Appeals conducted the first comprehensive review of the law governing admissibility of DNA identification evidence in *People v. Castro*.[131] After a twelve week hearing, the court concluded that the evidence was admissible to exclude the defendant, but inadmissible to incriminate as a matter of law due to lax handling procedures in the testing laboratory.[132] The *Castro* ruling was significant in two respects. First, it established the premise that DNA identification evidence was presumptively more admissible to exclude a suspect than to include one.[133] Secondly, *Castro* introduced an additional step to the standards which governed admissibility of scientific evidence at the time. Not only did the proponent have to show that the underlying science was generally accepted, but also that the method had been applied appropriately.[134]

Castro and its progeny begat the third phase wherein courts found DNA profiling evidence inadmissible due to controversy over the required probability projections.[135] During this phase the tone and tenor of the debate between the prosecution and defense advocates were likened

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127. *See id.* at 843-850 (addressing the admissibility of DNA identification evidence).

128. *Id.*

129. *Id.*

130. 3 DAVID L. FAIGMAN & DAVID H. KAYE ET AL., MODERN SCIENTIFIC EVIDENCE THE LAW AND SCIENCE OF EXPERT TESTIMONY, § 25-1.2.1, at 212 (2002) (discussing the historical development of DNA testing).

131. *See* CONNORS ET AL., *supra* note 13, at 78; People v. Castro, 545 N.Y.S.2d 985 (1989).

132. *Castro*, 545 N.Y.S.2d at 999 (discussing the conclusions and findings of the court in relation to the issues presented at trial with respect to the reliability of DNA testing and its admissibility).

133. *Id.* at 990; *see also,* EDWARD CONNORS ET AL., *supra* note 13, at 78.

134. *See Castro*, 545 N.Y.S.2d at 998; 3 FAIGMAN & KAYE, *supra* note 130, at 212.

135. David H. Kaye, *DNA Evidence: Probability, Population Genetics, and the Courts*, 7 HARV. J.L. & TECH. 101, 104 (1993).

to "a war",[136] the intensity of which contributed to two National Academy of Science studies which resolved the conflict.[137] The fourth phase began when the forensic science community developed scientifically reliable estimates in sub-population genetics which led to judicial acceptance of the methodology.[138]

We are in the midst of the fifth phase, wherein polymerase chain reaction-based (PCR) DNA profiling analysis is universally accepted by prosecution and defenses alike due to its increased accuracy over earlier techniques.[139] The remaining unresolved issue is the nature of the petitioner's entitlement to the test and the interpretation of the results. Essentially, "DNA evidence is only as reliable as the people testing and analyzing it."[140]

C. *Admissibility of DNA Profiling Evidence in Federal Courts*

In 1993 the Supreme Court refined the criteria for the admissibility of scientific evidence in accordance with rule 702 of the Federal Rules of Evidence.[141] In *Daubert v. Merrell Dow Pharmaceuticals*, Inc.,[142] the Court held that general acceptance is not "a necessary precondition to the admissibility of scientific evidence" and that the rules assign to the trial judge the responsibility to ensure that the expert testimony is both reliable and "relevant to the task at hand."[143] The Court also provided criteria for lower courts to follow when determining if proposed evidence was both reliable and relevant: 1) whether the theory can be and has been tested; 2) whether the theory or technique has withstood peer review and publication; and 3) the expected error rate inherent in the technique and the prevalence of controls for it.[144] The decision also recognized that

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136. William C. Thompson, *Evaluating The Admissibility of New Genetic Identification Tests: Lessons From the "DNA War"*, 84 J. Crim. L. & Criminology 22, 23 (1993) (describing controversies surrounding the admissibility of DNA testing results).

137. *See generally,* David H. Kaye, *The Forensic Debut of the National Research Council's DNA Report: Population Structure, Ceiling Frequencies and the Need for Numbers*, 34 JURIMETRICS J. 369 (1994) (analyzing studies conducted for DNA testing accuracy).

138. *See* 3 FAIGMAN & KAYE, *supra* note 130, at 214 (responding to DNA evidence critics).

139. *See id.* at 215.

140. *Study Shows DNA Results Often Contradict ID By Victim*, SAN ANTONIO EXPRESS NEWS, Sept. 28, 1997, at 5B, *available at* 1997 WL 13206992.

141. *See* Thornton & Peterson, *supra* note 114, at 173 (discussing the criteria established to admit scientific evidence by the U.S. Supreme Court); FED. R. EVID. 702.

142. 509 U.S. 579 (1993).

143. *Id.* at 579-580.

144. *Id.*

general acceptance was a valid factor in a court's decision to admit DNA evidence.[145]

The *Daubert* decision is significant in that it fixes the responsibility to assess the validity of scientific evidence with the trial court. In theory, it should mean that courts will have the flexibility and discretion to admit the proceeds of continued improvements in DNA technology. The advent of DNA databanks means that the amount of DNA evidence admitted in a typical trial will increase over time with a proportionate increase in its probative weight. However, this scenario will not become a reality without some risks. *Daubert* is presumed to be a more liberal standard to admit scientific evidence. In fact, it simply redirects the standard away from the number of experts who agree and focuses on the validity of the proposed evidence and the likelihood that the underlying techniques will produce a false positive.[146] The testing is primarily performed by state laboratories that also maintain the databanks, and have a vested interest in the outcome of a trial or an appeal. Although admissibility of DNA evidence is largely a perfunctory issue and rarely contested, we would be wise to remember that *Daubert* ultimately charges the court to act as the gatekeeper to ensure that the scales of justice remain in balance.

D. *Admissibility of DNA Profiling Evidence in Texas Courts*

In 1992, the Texas Court of Criminal Appeals held that DNA profiling evidence was admissible within the state of Texas in *Kelly v. State*.[147] In *Kelly* the movant, Barry Dean Kelly, petitioned the Court of Criminal Appeals to exercise discretionary review of his 1992 murder conviction resulting in a life sentence. The issue for the Court to determine was whether the lower court of appeals had committed reversible error by finding that the trial court had not abused it's discretion in admitting DNA fingerprint evidence at trial over the appellant's objection.[148] In affirming the judgment, the Court of Criminal Appeals specifically found by clear and convincing evidence that: 1) the Restriction Fragment Length Polymorpshism ("RFLP") technique (which identifies an unknown sample of DNA by comparing it with a known sample) was valid; 2) RFLP itself was a valid process; 3) the RFLP process was applied correctly; and 4) the related population studies necessary to support the recognition of DNA evidence were valid and reliable.[149] The court used the

145. John I. Thornton & Joseph L. Peterson, *supra* note 114, at 173.

146. Barry C. Scheck, *DNA and Daubert*, 15 CARDOZO L. REV. 1959, 1997 (1994).

147. 824 S.W.2d 568, 574 (Tex. Crim. App. 1992) (holding that the trial court by clear and convincing evidence, had sufficient grounds to find DNA evidence valid and relevant to the case and therefore concluding that its admission was not an abuse of discretion).

148. *Id.* at 569.

149. *Id.* at 574.

"clear and convincing" language of *Elizondo* to expressly reject the general acceptance test of *Frye*, and embraced a *Daubert*-type analysis to determine the admissibility of scientific evidence. The court reasoned that the evidence was admissible if two conditions were met: 1) if the expert testimony proved to be reliable; and 2) if the court felt it would help the jury understand a fact in issue. Finally, in accordance with the rules of evidence the court had to determine whether the probative value was outweighed.[150] Although *Kelly* was not the first criminal decision to consider the admissibility of DNA profiling evidence[151] its declarative holding has precedental value. Hereafter, DNA evidence became admissible in all criminal courts in Texas to inculpate a defendant.[152] At the time however, there was no clearly defined process available for a defendant at trial or an inmate on appeal to request DNA testing to exculpate himself. Even if a party successfully petitioned to use DNA to prove their innocence, the state was not required to maintain the biological evidence taken from the crime scene. Thus, defendants were disadvantaged by an inability to acquire biological evidence, or combat the incriminating use of biological evidence by the prosecution. A convicted person suffered an even greater disadvantage because they no longer had the benefit of the presumption of innocence. To prevail, a convicted petitioner had to meet a higher burden than a defendant at trial.[153] DNA profiling evidence made it possible for an appellant to meet their required burden if they could get the test and produce the evidence. The problem was that without a clearly defined process to request the test, the petitioner stood little chance of ever obtaining the evidence.

Since *Kelly,* criminal courts in Texas have defined and expanded the duties and entitlements of every party involved in the use of DNA testing evidence. In *Roberson v. State*[154] the Court of Appeals in Austin ruled that DNA evidence alone was legally and factually sufficient to prove guilt or innocence.[155] The opinion acknowledged that inculpatory eyewitness testimony was not always reliable and could not stand in the face of contradictory DNA evidence.[156] The court concluded further that incul-

150. *Id.* at 572.

151. *See* Roberson v. State, 16 S.W.3d 156, 165. (Tex. App.- Austin 2000, pet. ref'd).

152. *See* Fuller v. State, 827 S.W.2d 919, 930 (Tex. Crim. App. 1992), *citing Kelly* (referring to the standard of admissibility for DNA testing evidence, the proponent of such evidence must prove to the trial court, by clear and convincing evidence and outside the presence of the jury, that the proffered evidence is relevant; whereupon such is admissible before the jury unless the trial court determines that the probative value of the evidence is outweighed per Rule 403.); *see also, Roberson*, 16 S.W.3d at 165.

153. *Herrera*, 506 U.S. at 417.

154. 16 S.W.3d 156 (Tex. App. – Austin 2000, pet. ref'd).

155. *See Roberson,* 16 S.W.3d at 167-172.

156. *Id.* at 170.

patory DNA evidence was preferred over exculpatory eyewitness identification.[157] Thus, the court effectively ruled that DNA evidence was legally superior to eyewitness testimony,[158] and adopted a civil factual sufficiency formulation for use in criminal trials, which further tilted the scales of justice. The court's holding means that an appellant with DNA evidence may argue that their evidence "greatly outweighs contradictory eyewitness or circumstantial evidence to such a degree that any contrary finding is clearly wrong and manifestly unjust" and therefore must be overturned.[159]

Kelly was issued one year before *Daubert*, when courts were only beginning to accept DNA technology and its legal significance. Criminal courts in particular had not been presented with DNA profiling as a means to exculpate an accused party, nor was it a relevant factor in post-conviction jurisprudence. Accordingly, it is understandable, albeit unfortunate, that the prevailing statutory and case law was ill-equipped to consider cases such as those previously discussed - Anthony Robinson and Kevin Byrd, where the movant had maintained his innocence but did not have the means to prove it. At the other extreme lay cases like Christopher Ochoa which consisted of a facially valid conviction but resulted from a false confession that could not stand-up to objective analysis prompted by DNA profiling evidence. Lying somewhere between these two extremes are cases like Roy Criner's. Mr. Criner, the accused, did not confess and maintained his innocence; yet he was convicted. But the coalition of politics, policy, finality, and inadequate law kept him in prison an additional three years after his initial DNA evidence exculpated him.[160]

Some commentators rationalize the outcomes of Robinson, Byrd, Ochoa, Criner and others because DNA evidence wasn't used at the time they were convicted and they were ultimately released and pardoned. In reality, Roy Criner's case calls the criminal justice system's willingness to credibly and impartially investigate a suspects' innocence, and compares it with the prosecution's focus to incriminate and convict. Every refusal to conduct a test or perform a check that could lead to the exoneration and release of an innocent person validates the proposition that our criminal justice system operates carelessly to convict the underprivileged and the uninformed.[161]

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157. *Id.*

158. *See id.* (arguing that the perils of eyewitness identification testimony far exceed those presented by DNA expert testimony.).

159. *Id.* at 172.

160. *See Frontline: The Case for Innocence*, *supra* note 9.

161. Bator, *supra* 62, at 442.

V. TEXAS' DNA PRESERVATION LAW

"The State's obligation is not to convict, but to see that, so far as possible, truth emerges."[162]

— Justice Abe Fortas, United States Supreme Court

"After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent."[163]

— Justice Powell, United States Supreme Court

A. *Senate Bill 3*

Senate Bill 3 was introduced into the Texas Senate in response to what Governor Perry declared an "emergency."[164] SB 3 passed unanimously in both houses of the Texas legislature,[165] and became effective on April 5th, 2001.[166] Upon signing, Governor Perry lauded the technology as an important tool which "must be used to shed light on cases where there is cause for doubt and biological evidence is available. . . for testing."[167] Although most commentators and practitioners acknowledged that the bill would increase access to DNA evidence for certain inmates, it was subject to immediate scrutiny by defense counsel.[168] The dispute centered on whether Texas courts would use their discretion to protect convictions of petitioners with free-standing claims of actual innocence, and whether the movant would have a right to the test.[169]

B. *Analysis of Senate Bill 3*

The bill amended the Code of Criminal Procedure by adding Articles 38.39 and 64.01 through 64.05. Article 38.39 requires the state to maintain biological evidence taken from the crime scene (for capital felonies) and preserve it for possible future testing until the convicted person is either released, paroled, dies, or is executed.[170] Articles 64.01 through 64.05 provide the framework for the convicted person to submit a motion for DNA testing to the convicting court provided that the evidence had

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162. Giles v. Maryland, 386 U.S. 66, 98 (1963); *see also,* United States v. Nobles, 422 U.S. 225, 230 (1963), *citing* Berger v. United States, 295 U.S. 78, 88 (1935) ("[t]he dual aim of our criminal justice system is that guilt shall not escape or innocence suffer.").

163. *Herrera*, 506 U.S. at 398.

164. Robbins, *supra* note 25.

165. Act of April 5, 2001, 77th Leg., R.S., ch. 2 § 2, 2001 Tex Gen. Laws 2.

166. R.G. Ratcliffe, *Perry Clears Way for More Prisoner DNA Testing*, HOUSTON CHRON., Apr. 6, 2001, at 33, *available at* 2001 WL 3011520.

167. *Id.*

168. Robbins, *supra* note 25.

169. *Id.*

170. Act of April 5, 2001, 77th Leg., R.S., ch. 2 § 2, 2001 Tex. Gen. Laws 2.

not been tested previously due to the fault of the movant, or which may have been tested previously using an inferior process that provided inconclusive results. Article 64.03 specifies that to prevail in the motion, the movant must show, by a preponderance of the available evidence, a reasonable probability that they would not have been prosecuted or convicted had the exculpatory results of the DNA test been available at trial.[171]

The bill has some advantages over similar legislation in other states.[172] First, Texas provides counsel for indigent inmates. Second, it prohibits the court from denying identity to be in issue solely on the basis of the movant's guilty plea at trial. Further, SB 3 requires the Texas Department of Corrections to provide written notice of the bill and its provisions to all inmates incarcerated on September 1, 2001. Also, SB 3 permits an inmate possessing favorable DNA profiling evidence to submit an additional writ of Habeas Corpus even if previous writs had been denied or dismissed by the court before the bills passage.[173]

In contrast, Senate Bill 3 has received criticism for not going far enough in protecting individual freedom and liberty.[174] First, the bill does not establish a right to DNA testing. It only provides a mechanism for the movant to request testing. Furthermore, it does not allow submission of the test results to be included in a writ of habeas corpus based on newly discovered evidence of actual innocence.[175] Also, the bill does not create a right to relief based on favorable test results, it only provides that a court *may* release the movant on bail pending the conclusion of the court proceeding.[176] Moreover, Article 64.03(a)(2)(A) requires that the movant establish a reasonable probability that they would not have been prosecuted or convicted if DNA testing resulted in exculpatory evidence. Texas courts have consistently interpreted this provision restrictively and have denied motions for testing. Proponents of this strict perspective assert that this interpretation establishes a necessary threshold because the purpose of Senate Bill 3 is "to free innocent people from prison" and "not merely muddy the waters in the case".[177] Conversely, opponents argue that the provision, as construed by the courts, effectively requires defendants to prove their innocence without having the benefit of the test results to establish their defense.[178]

171. *Id.*
172. *See* 1 WILKES, *supra* note 3, § 1-14, at 20 (2001).
173. *Id.*
174. Robbins, *supra* note 25.
175. *Id.*
176. Act of April 5, 2001, 77th Leg., R.S. ch. 2 § 2, 2001 Tex. Gen. Laws 2.
177. *Kutzner,* 75 S.W.3d at 438-439.
178. *Id.*

This restrictive interpretation is contrary to the intent of members of the Texas House of Representatives Committee on Criminal Jurisprudence who voted for the approved bill in contemplation of creating a right to testing.[179] Without a right to DNA testing, the appellant is deprived of exculpatory benefits if: 1) identity was not at issue during their trial; or 2) if they were not able to show that the new evidence would establish a reasonable probability of their innocence. This means that Senate Bill 3 would not have been applicable to wrongly convicted people whom we now know were, in fact, innocent. Anthony Robinson was convicted solely on the basis of eye-witness testimony from a victim that was a "dream witness. . .very attractive, very intelligent, well-spoken [who] never wavered on her identification of Robinson as being the person who committed the crime."[180] Identity was never at issue in Robinson's trial despite the fact that the forensic evidence, his fingerprints, did not match. Christopher Ochoa made a false confession to murder due to police coercion and intimidation and pled guilty. As such, he did not benefit from the adversarial scrutiny inherent in a trial proceeding.[181] Instead, he only received the DNA test after contacting the Wisconsin Project who, in turn, coordinated with the private laboratory in possession of his biological evidence and tested it using current technology. The results proved he did not commit the rape.[182] Had the prosecution refused to support the effort, or the court declined to accept the results, then Ochoa would have been left with had no recourse under the law.

The law does not provide any recourse to a movant with a favorable judgment if a court, in its discretion, does not choose to order their release on bail. For that reason the law would not have benefited Kevin

179. *Hearings on HB 1474 Before the House Comm. on Criminal Jurisprudence*, 77th Leg., R.S. (Feb. 13, 2001) (A statement by Rep. Hochberg declaring the intent of his bill was to make the procedure to obtain a DNA test "as much of a perfunctory administrative proceeding as possible."; statement by Rep. Hochberg that the adopted language of "reasonable probability" in the approved bill was intentionally a lower burden for the movant to meet then earlier language that the DNA test would show the appellant to be innocent in reference to the case of Christopher Ochoa who gave a coerced confession.; statement by Rep. Garcia declaring it his intention that the bill provide the appellant the right to a DNA test regardless of his plea at trial or judicial response to the motion, further that he sought to have such assurance in the statement of legislative intent); Mary Alice Robbins, *supra* note 161 (quoting a statement by House Criminal Justice Committee Chairman Juan Hinojosa, declaring the intent to make DNA testing a matter of right for a convicted person)(tape recorded copy on file with *The Scholar*).

180. Goldman, *supra* note 4.

181. *Hearings on HB 1474 Before the House Comm. on Criminal Jurisprudence*, 77th Leg., R.S. (Feb. 13, 2001) (statement by Bill Allison attorney for Christopher Ochoa declaring that the bill would not be applicable to a case like Ochoa's) (tape recorded copy on file with *The Scholar*).

182. *The Innocence Project, Case Profiles*, *supra* note 61.

Byrd, who sat in jail for an additional two and a half months while waiting for every conceivable legal challenge to run its course.[183] Roy Criner obtained not one but two favorable tests, yet remained in jail for more than three years while the prosecution and the Court of Criminal Appeals advanced new theories that were not argued at trial, in an effort to preserve the guilty verdict.[184] Identity was not at issue in his trial because the prosecution introduced evidence that he bragged about committing a rape the day of the crime. He was only exonerated after a third DNA test conclusively matched the DNA sample from a cigarette butt found at the crime scene with the DNA extracted from semen taken from the victim, both samples excluded Criner as a suspect.[185] The cases involving Byrd and Criner are testaments to the imperfections within the criminal justice system, and the role that raw luck plays in exposing them. The essential biological evidence in Byrd's case had miraculously avoided destruction simply because an unknown prosecutor inexplicably crossed it off of a list of samples scheduled for destruction.[186] Criner's case was even more extraordinary in that it took a "confluence" of disparate elements to combine to prove he was not guilty.[187] Until then the court system had demanded that he prove himself actually innocent.[188] Criner's attorney Michael Charlton testified before the House Committee on Criminal Jurisprudence that "if the proof of materiality standard had been in place [at the time], then Roy Criner would not have benefited. Materiality

183. *See* Claudia Kolker, *Something To Smile About/Bush To Pardon Houston Man/ DNA Clears Kevin Byrd After 12 Years in Prison*, HOUSTON CHRON., Oct. 9, 1997, *available at* 1997 WL 13070386; John Makeig, *After 12 Years, DNA Clears Inmate In Rape Case*, HOUSTON CHRON., July 29, 1997, *available at* 1997 WL 6570373; *Bush Declines Pardon For Man In Rape Case Despite DNA Evidence Governor Rejects Advice, Prefers Judicial Course*, DALLAS MORNING NEWS, Sept. 14, 1997, *available at* 1997 WL 11520353.

184. *See* Frontline, *The Case for Innocence-Four Cases*, *supra* note 9.

185. Bob Burtman, *Innocent at Last: After Ten Years, Prosecutors Finally Concede That Roy Criner Is Not Guilty And Should Be Free,* HOUSTON PRESS, Aug. 3, 2000, *available at* http://www.houstonpress.com/issues/2000-08-03/news.html.

186. Claudia Kolker, *DNA Tests Can Free Wrongly Convicted If Evidence Survives/ Sample That Helped Kevin Byrd Almost Thrown Out of Warehouse*, HOUSTON CHRON. Oct. 13, 1997, *available at* 1997 WL 13075234.

187. Bob Burtman, *Innocent at Last: After Ten Years, Prosecutors Finally Concede That Roy Criner Is Not Guilty And Should Be Free,* Houston Press, Aug. 3, 2000, *available at* http://www.houstonpress.com/issues/2000-08-03/news.html.

188. *Compare id., with Frontline: The Case for Innocence: Interview with Judge Sharon Keller*, http://www.pbs.org/wgbh/pages/frontline/shows/cse/interviews/keller.html (This is an interview with Judge Sharon Keller of the Texas Court of Appeals. Judge Keller wrote the majority opinion in the Roy Criner Case.) (last visited Jan. 13. 2004).

would have been extremely difficult if not impossible to establish as a means to get the test."[189]

The Texas courts of appeals have had several opportunities to consider the materiality standard as it has been frequently raised as a point of error in appeals to trial court denials of motions for testing.[190] In *Kutzner*,[191] for example, the Court of Criminal Appeals examined the language of Article 64.03(a)(2)(A) and ruled it susceptible to differing meanings and "therefore ambiguous." The court researched extratextual sources to conclude that the legislative intent of the article was to require that the movant show a *reasonable probability* that exculpatory DNA tests would prove their innocence, as opposed to a requirement that the movant prove innocence before the court would approve their motion for the test.[192] In *Dinkins v. State*,[193] the court continued to refine Article 64.03, holding that the "plain language" directs the convicting court to order the test *only* when the movant makes a showing of reasonable probability.[194] Finally, in *State v. Patrick*,[195] the Court of Criminal Appeals held that, absent the required statutory showing by the movant, the convicting court lacked jurisdiction to order the test.[196] Collectively, these decisions represent the court's exercise of discretion as a sieve to filter all motions for post-conviction DNA testing. Conservative interpretation of Senate Bill 3, and Article 64.03(a)(2)(A) in particular, permits

189. *Hearings on HB 1474 Before the House Comm. on Criminal Jurisprudence*, 77th Leg., R.S. (Feb. 13, 2001) (statement by Michael Charlton, attorney for Roy Criner: ". . . Had the proof of materiality standard been in place, Criner would not have benefited. Two negative tests were considered insufficient by the court, they denied his habeas motion. It took a third test which was a long shot; materiality would have been difficult to establish in this case. It arose from the finding of a cigarette butt found by a reporter in the examination of photographs held by the Montgomery County Sheriff's office) (tape recorded copy on file with *The Scholar*).

190. *See In re* McBride, 82 S.W.3d 395, 395-97 (Tex. App.-Austin 2002, no pet.) (holding that the state's failure to respond to the appellants motion for DNA testing was harmless error if the appellant failed to meet his burden); *see also, In re* Fain, 83 S.W.3d 885, 889 (Tex.App.-Austin 2002, no pet.) (ruling that the trial court did not abuse its discretion by denying a motion for DNA testing when the inmate failed to establish by a preponderance of the evidence that a reasonable probability existed that he would not have been prosecuted or convicted had DNA evidence been obtained); *see also*, Watson v. State, 96 S.W.3d 497, 499 (Tex.App.-Amarillo 2002, no pet.) (holding that denial of post-conviction testing does not constitute abuse of discretion in light of defendants failure to make any showing that a reasonable probability existed that exculpatory DNA evidence would prove their innocence).

191. *Kutzer,* 75 S.W.3d at 437.

192. *Id.* at 437-438.

193. 84 S.W.3d 639 (Tex. Crim. App. 2002).

194. *Id.* at 643.

195. 86 S.W.3d 592, 554-595 (Tex. Crim. App. 2002).

196. *Id.*

the court to sift through all motions for testing, approve the rare exception where the confluence of luck, diligence, and perseverance combine, and still maintain finality in the majority of verdicts.[197] Although the decisions clearly lie within the discretion of the Texas Court of Criminal Appeals, they present a picture of a court that is oblivious to the public's concern over false convictions, as well as the legislature's desire to lower the required threshold and increase access to post-conviction testing. Contrary to the high-minded admonitions of Justice Powell[198] or Chief Justice Rehnquist,[199] the Texas Court of Criminal Appeals' decisions appear to dismiss the lessons of cases like Roy Criner,[200] where proof of innocence is often unavailable until after testing is done.

C. *The Basis of the Right to DNA Testing*

In *Herrera*, Chief Justice Rehnquist referred to a capital defendant's "assumed right" to make a showing of his actual innocence as a basis to support a federal writ of habeas corpus.[201] The Court theorized that if such a right existed, the petitioner would have to satisfy an exceptionally high threshold to demonstrate his innocence due to the chaotic effect a permissive standard would have on states' interests in preserving the finality of convictions.[202] The Court's adherence to finality was based on its belief that state courts are the appropriate forum to decide factual questions of guilt or innocence.[203] In that context, finality was not a denial of the merits of an inmate's post-conviction claim of actual innocence; rather, it was an admonition that the issue must be decided in state court for the first time. The emergence of DNA evidence as a post-conviction tool useful to prove an appellant's actual innocence meant that the Supreme Court of the United States' "theoretical" discussion become

197. *Hearings on HB 1474 Before the House Comm. on Criminal Jurisprudence*, 77th Leg., R.S. (Feb. 13, 2001) (statement by Rep. Hochberg, that the reason behind his proposed legislation [based on the concerns of his constituents], was to make it easier for a convicted person to the get the (DNA) test).

198. United States v. Nobles, 422 U.S. 225, 230 (1963) *citing* Berger v. United States, 295 U.S. 78, 88 (1935) ("The dual aim of our criminal justice system is "that guilt shall not escape or innocence suffer").

199. *Herrera,* 506 U.S. at 398.

200. DWYER, *supra,* note 60, at 246.

201. *Herrera*, 506 U.S. at 417.

202. *Id.*

203. *See id.* at 402 (stating that "[t]he guilt or innocence determination in state criminal trials is a decisive and portentous event."); NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., POST-CONVICTION DNA TESTING: RECOMMENDATION FOR HANDLING REQUESTS 9 (1999) (stating that federal habeas jurisprudence. . .views the states as responsible for correcting faulty adjudications unaccompanied by a constitutional violation) *at* http://www.ncjrs.org/txtfiles1/nij/177626.txt.

a realistic possibility,[204] but it had to be accessed through a state's own judicial or legislative process, not the federal courts. The Court provided a framework for the states to develop their processes with several key decisions. In *Brady v. Maryland*,[205] the Court held that the suppression of evidence favorable to an accused, upon request, violates due process where the evidence is shown to be material as to either guilt or punishment.[206] In *Arizona v. Youngblood*,[207] the Court held that a law enforcement agency's failure to preserve evidence is not a denial of due process unless the person can show that the evidence was destroyed in bad faith.[208] In *Ake v. Oklahoma*,[209] the Court held due process requires that states provide an indigent defendant access to a psychiatrist.[210] And, in *Little v. Streater*,[211] the Court held that a state's denial of blood grouping tests violates due process of indigent defendants.[212]

Brady, Ake, and *Streater* present a foundation for supporting a petitioner's right to DNA testing. In *Streater*, a putative father appealed a Connecticut Superior Court judgment identifying him as the father of an illegitimate child and denying his motion for state funding of a blood grouping test which he argued would exclude him as a parent. In reversing the judgment and remanding the case, Chief Justice Burger's decision recognized that the petitioner's due process claim was premised on the "unique quality of blood grouping tests as a source of exculpatory evidence, [and] the state's prominent role in the litigation. . . ."[213] The Court held that denial of the test solely due to the state's refusal to pay for it resulted in considerable risk that an indigent defendant would be erroneously judged the father since the test had a recognized capacity to exclude falsely accused fathers and acted as a procedural safeguard necessary to overcome Connecticut's "onerous" evidentiary rule that "a reputed father's testimony alone was insufficient to overcome the mother's prima facie case."[214] Further, the Court ruled that the state was "inextricably involved in the paternity litigation" and responsible for the imbalance between the litigants by "creating the adverse presumption regarding the

204. NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., POST-CONVICTION DNA TESTING: RECOMMENDATION FOR HANDLING REQUESTS 19 (1999) *at* http://www.ncjrs.org/txtfiles1/nij/177626.txt.
205. 373 U.S. 83 (1963).
206. *Id.* at 85.
207. 488 U.S. 51 (1983).
208. *Id.* at 58.
209. 470 U.S. 68 (1985).
210. *Id.* at 83.
211. 452 U.S. 1 (1981).
212. *Id.* at 2.
213. *Id.*
214. *Id.*

putative father's testimony by elevating the weight of the mother's imputation of him."[215] The Court concluded that it was a violation of the due process clause for the state to deny "a conclusive means for an indigent defendant to surmount that disparity and exonerate himself."[216]

It is clear that the Court's affirmation of an indigent petitioner's right to state funded exculpatory evidence is not the legal equivalent to an appellant's request for post-conviction DNA testing in a criminal case.[217] Nonetheless, the heightened burden which the movant must meet to prevail, and the probative and conclusive nature of the test results to either exculpate of inculpate the applicant are directly analogous. The issues confronting the courts when considering a motion for post-conviction DNA testing are: whether the conclusive nature of DNA testing evidence is certain enough, to overcome state interest in preserving its conviction, and if so, whether denial of the requested test violates the appellant's due process rights. It is settled that courts now hold forensic DNA testing admissible.[218] What remains unanswered is judicial willingness to level the playing field by correcting the imbalance between the movant and the state by recognizing the movant's right to DNA testing and the attendant basis for trial court jurisdiction and discretion to order the test in the interests of justice. This issue was raised as a question of first impression by Judge Cochran in the dissent to *Patrick*.[219] The Jurist noted that courts have "inherent and implied powers that provide a broad foundation on which they act,"[220] and that the legislative intent behind SB 3 was to free the innocent by "increasing the trial court's post-conviction jurisdiction and judicial authority to order DNA testing."[221] Thus Judge Cochran concluded that the trial court's order of DNA testing despite the movant's failure to meet the statutory burden was not clearly outside the intent of the law and did merit future debate.[222] Although the issue may

215. *Id.*
216. *Id.* at 12.
217. NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 204.
218. *Compare Streater*, 452. U.S. at 7 (discussing the admissibility of human blood grouping tests to determine paternity; "[T]here is now practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity.") *with Kelly*, 824 S.W.2d at 571(". . .DNA identification evidence has been held admissible by virtually every appellate court that has considered the question."); *Roberson*, 16 S.W.3d at 165, *quoting* Paul C. Giannelli, *The DNA Story: An Alternative View*, 88 J. CRIM. L. & CRIMINOLOGY 380, 380-382 ("DNA identification is generally admissible in most American jurisdictions. No other scientific technique has gained such widespread acceptance so quickly and no other technique has been as potentially valuable to the criminal justice system.").
219. *Patrick*, 86 S.W.3d at 598.
220. *Id.* at 600.
221. *Id.* at 602.
222. *Id.*

not yet be ripe for direct consideration, cases such as *Robinson*, *Byrd*, *Ochoa*, *Criner* and those that follow will shorten the wait. They are continual reminders that "a wrongly accused person's best insurance against the possibility of being falsely incriminated is the opportunity to have the testing repeated."[223]

Jurisdictions across the nation have applied the principles of *Brady*, *Ake*, *Streater* and their progeny to buttress the argument supporting a movant's right to DNA testing. In *Dabbs v. Vergari*,[224] a New York appeallate court granted a petitioner's motion for DNA testing notwithstanding the absence of a statutory post-conviction discovery process. The court referenced *Brady* and declared that the petitioner had a constitutional right to "be informed of exculpatory evidence known to the state."[225] In *State v. Thomas*,[226] the Superior Court of New Jersey held that a lower court was in error in denying the defendant's motion for DNA testing of a rape kit until sentencing.[227] The lower court denied the motion solely because the petitioner breached a procedural limitation.[228] The appellate court ruled that the prosecution's identification evidence was inconsistent and conflicted, and therefore not sufficient to sustain a procedural bar to the defendant's motion. The court stated as follows:

> Under these circumstances, consideration of fundamental fairness demands that the [DNA] testing of this now 7-year old rape kit material be done now. . . . Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed. That failure is even more tragic when an innocent person is sentenced to a prison term. . . . We regard it as important to rectify that failure. . . . There is a possibility, if not a probability, that DNA testing can put to rest the question of defendant's guilt. . . . We would rather [permit the testing] than sit by while a [possibly] innocent man. . . "languishes in prison while the true offender stalks his next victim.[229]

Thus, the court affirmed a belief in substantive fairness and the relevance of DNA testing to resolve questions of guilt or innocence in non-

223. *Roberson*, 16 S.W.3d at 163.

224. 570 N.Y.S.2d 765 (1990).

225. *Id.* at 767; *see also*, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 204, at 12.

226. 586 A.2d 250 (1991).

227. *Id.* at 253.

228. *Id.*; *see also*, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 204, at 12.

229. *Thomas*, 586 A.2d at 253; *see also*, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 204, at 12.

capital cases. In *Sewell v. State*,[230] an Indiana court of appeals granted an inmate's motion for testing of a rape kit ten years after his conviction.[231] The decision is instructive because it applies the Supreme Court's reasoning in *Streater* to recognize that advances in technology can render previously immaterial biological evidence relevant and probative at a future date.

The most promising decision advocating an appellant's right to DNA testing is *Cherrix v. Braxton*.[232] In granting the petitioner injunctive relief, the court held that the federal statute empowering a district court to provide reasonably necessary investigative and other services to an indigent defendant in support of their habeas petition also applies to DNA testing when the appellant makes the required showing.[233] The court took judicial notice of Virginia's recent experience with other falsely convicted inmates, gave deliberate reflection to *Cherrix's* persuasive showing of reasonable necessity and the state refusal to test, and denied the state motion for a writ of mandamus prohibiting the test thereby ordering the Assistant Attorney General to take steps to preserve the evidence and transfer it to a laboratory for testing because it was reasonably necessary to support the writ of habeas corpus.[234] Thus, a federal district court has established the precedent that an appellant has a right to DNA testing to support a claim of actual innocence.

VI. RECOMMENDATIONS

> "O God, our Father,. . .Strengthen and increase our admiration for honest dealing and clean thinking, and suffer not our hatred of hypocrisy and pretence ever to diminish. Encourage us in our endeavor to live above the common level of life. Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won."[235]
>
> — Cadet Prayer, United States Military Academy at West Point

> "You should never be ashamed of the truth."[236]
>
> — Travis Bishop, Constable Montgomery County Texas

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230. 592 N.E.2d 705 (1992).

231. *Id.* at 707-708; *see also*, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 204, at 12.

232. 131 F.Supp.2d 756 (E.D. Va. 2000).

233. *Id.* at 762.

234. *Id.* at 773-786.

235. UNITED STATES MILITARY ACADEMY, BUGLE NOTES, 20 (1977).

236. *See* Bob Burtman, *Innocent at Last: After Ten Years, Prosecutors Finally Concede That Roy Criner Is Not Guilty And Should Be Free*, HOUSTON PRESS, Aug. 3, 2000, *available at* http://www.houstonpress.com/issues/2000-08-03/news.html.

To prevent the continued miscarriage of justice reflected in the cases of *Robinson*, *Byrd*, *Ochoa* and *Criner*, chapter 64 of the Texas Code of Criminal Procedure requires revision. First, the legislature should adopt and incorporate the five classification categories promulgated by the National Commission on the Future of DNA Evidence for evaluation of cases where a motion for post-conviction DNA testing is submitted.[237] Further, the legislature should create a statutory right to DNA testing for convicted persons in categories one and two. Moreover, the convicting courts should be empowered to order DNA testing at their discretion in furtherance of the interests of justice. Also, chapter 64 should be amended to mandate that a convicted person who makes a favorable showing of his innocence using newly discovered DNA evidence be released on bail within thirty days of the convicting courts finding.

A. *Statutory Right to DNA Testing.*

Article 64.01 should be amended to incorporate the five classification categories described by National Commission on the Future of DNA Evidence; further, the legislature should establish statutory rights to DNA testing on behalf of those convicted inmates whose cases fall into categories one and two. Cases in category one, where both the defense and prosecution agree to the need for DNA testing, should be exempt from the requirement to show a reasonable probability that they would not have been prosecuted or convicted. Therefore, the court order for testing would be perfunctory. For those cases falling into category two, the movant should still have a right to the test, and the exculpatory results should then be submitted to the court for consideration in light of all of the evidence.

This amendment would have directly affected the cases of Anthony Robinson and James Byrd where eyewitness testimony was the only evidence linking them to the crime.[238] Christopher Ochoa's case is perhaps the prime example for recognition of a claimant's right to exculpatory procedures as a counter to improper or illegal police or prosecutorial misconduct that results in a wrongful conviction. Without recognition of a right to exculpatory DNA testing on behalf of the movant, then the justice system essentially concedes the pursuit of justice to the presence of outside actors such as the Wisconsin Project or the Innocence Project.

237. NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, *supra* note 204, at 3.

238. *Compare* Goldman, *supra* note 4 *with* Kolker, *supra* note 183.

B. *Judicial Discretion*

Article 64.03 should be amended to empower the convicting court to order DNA testing at its discretion in the pursuit of justice. Further Article 64.03(a)(2) should be revised to include language that the movant's showing of reasonable probability be judicially construed to ensure that justice is done.[239] This amendment, coupled with the movant's statutory right to testing discussed above, would be the best ways to ensure that courts are not constrained by rigid adherence to principles of finality to the detriment of justice.

The amendment would also empower the court to recognize, at its discretion, that the tools used to demonstrate innocence will facilitate justice and will continue to evolve.[240] Thus, courts need the flexibility to take advantage of those tools at their discretion.

Another factor supporting a right to DNA testing is the recognition that the prosecutorial uses of DNA testing evidence will continue to grow. Within Texas, legislation is being proposed to grant civilian authorities the right to access military personnel's DNA samples.[241] Nationally, Virginia has convicted and executed an inmate based solely on a "cold-hit" match between his sample contained in the state's DNA database and biological evidence from a previously unsolved crime.[242] Similarly, an intermediate court of appeals has ruled that DNA evidence alone is sufficient to sustain a finding of guilt in a criminal trial.[243] Commentators have even begun to advocate compulsory DNA testing for unsolved rape cases as an exception to the Fifth Amendment prohibition against self-incrimination.[244] No one advocating justice can argue against the widest

239. *Hearings on HB 1474 Before the House Comm. on Criminal Jurisprudence*, 77th Leg., R.S. (Feb. 13, 2001) (testimony from former Court of Criminal Appeals Justice Charlie Baird that the proposed DNA preservation bill should include language that the legislation is intended to see that "justice is done") (tape recorded copy on file with *The Scholar*).

240. *See Herrera*, 506 U.S. at 431.

241. Jonathan Osborne, *DNA Sampling of Sex-Crime Suspects Is Off to Slow Start, Travis County Set to Begin*, AUSTIN AMERICAN-STATESMAN, March 29, 2002, *available at* 2002 WL 48118515; Melody Mcdonald, *Grant to Help Crime Labs Handle DNA Tests*, THE FORT WORTH STAR-TELEGRAM, Oct. 22, 2002, *available at* 2002 WL 101969313; John W. Gonzalez, *Victim Assails Army for not Matching DNA Sooner*, HOUSTON CHRON., May 5, 2002, available at 2002 WL 3260989.

242. Bill Baskerville, *Cold Hit Execution Set in Virginia, DNA Database Found Match*, SAN ANTONIO EXPRESS-NEWS, March 11, 2002, *available at* 2002 WL 13906686.

243. *See Roberson* 16 S.W.3d at 170 (arguing that the perils of eyewitness identification testimony far exceed those presented by DNA expert testimony).

244. *See generally,* Stephanie A. Parks, Note, *Compelled DNA Testing in Rape Cases: Illustrating the Necessity of an Exception to the Self-Incrimination Clause*, 7 WM.& MARY J. WOMEN & L. 499 (2001) (discussing how in the last 15 years, DNA fingerprinting has assisted in the incrimination and exoneration of those accused of rape).

possible use of DNA technology to resolve open crimes, not even the perpetrators.[245] Although it is disappointing, and somewhat hypocritical, that prosecutors are reluctant to expand the exculpatory use of DNA testing simply to preserve the integrity of a conviction,[246] it is also understandable because they are advocates in the criminal justice system. What is detestable is judicial complicity in their refusal. Fundamental fairness demands that in order to deny a person's liberty, the prosecution be certain enough of the conviction to allow DNA testing whenever biological evidence is available.[247] Justice demands that DNA evidence be used to exclude to the same degree that it is used to incriminate and convict; only then will the scales of justice regain their desired balance.

C. *Compulsory Relief*

Article 64.01 should also be amended to mandate that once the convicting court finds that the DNA testing results are favorable to the convicted person, that court shall order release on bail within 30 days. This amendment is necessary to prevent any possible recurrence of a case such as Roy Criner. In its current form, chapter 64 only provides a statutory process for the petitioner to move for the DNA test, it does not compel the court to grant relief. Justice dictates that the law consider favorable DNA results sufficient impetus to mitigate the presumption of guilt imposed on a convicted person. Judicial reasoning traditionally views the introduction of newly discovered post-conviction evidence with skepticism. Nevertheless, DNA evidence provides an objective means of rebuttal. DNA testing evidence is more than negative evidence[248] that would not guarantee a "more accurate determination of guilt or innocence"[249] at a future proceeding. To the contrary, its probative value is such that "[t]he question is not whether a second trial would be more reliable than the first but whether, in light of new evidence, the result of the first trial is sufficiently reliable for the State to carry out. . . [its] sentence."[250]

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245. *See* Baskerville, *supra* note 243.

246. Diane Jennings, *Clarity Urged On DNA Law*, DALLAS MORNING NEWS Sep. 4, 2002.

247. *Hearings on H.B. 1474 Before the House Comm. on Criminal Jurisprudence,* 77th Leg., R.S. (Feb. 13, 2001) (statement by Michael Barnard, Deputy District Attorney, Bexar County, Texas, indicating that his office would agree to DNA testing because the confidence in their convictions) (tape recorded copy on file with *The Scholar*).

248. *Frontline: The Case for Innocence, Interview Judge Sharon Keller*, *supra* note 188.

249. *Herrera*, 506 U.S. at 403.

250. *Id.* at 435 (dissenting opinion of Justice Blackmun).

VII. CONCLUSION

> "So justice is far from us. . . . We look for light, but all is darkness, for brightness but we walk in shadows, like the blind we grope along the wall, feeling our way like men without eyes. . . . We look for justice, but find none."[251]
>
> — Judge Michael K. Mayes, Montgomery County, Texas

On August 15th, 1987, Judge Michael K. Mayes ordered the release of Roy Criner on bond pending the signing of his pardon by Governor George W. Bush. In his order of release and recommendation for a pardon that he signed July 28th,[252] Judge Mayes addressed both Mr. Criner and his family, urging him not to be vengeful. He stated that justice was not a static entity, but a living process that would not ignore conclusive evidence which the state could not dispel beyond a reasonable doubt, and which ultimately acted to free him.[253] His words were eloquent, and cannot be ignored. Justice must continue to adapt and evolve, and it cannot be denied. The development of DNA testing, both to exclude and incriminate, is simply just another step in its continuing evolution.

251. *Ex parte Criner*, No. 87-09-00591-CR-(1) (410th Dist. Ct., Harris County, Tex. Aug. 15, 1987).
252. *Id.*
253. *Id.*