

SUBJECT: Creating an innocence commission to investigate wrongful convictions

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Gallego, Hodge, Kent, Miklos, Moody, Pierson, Vaught, Vo
3 nays — Christian, Fletcher, Riddle

WITNESSES: For — Edwin Colfax, The Justice Project; Scott Henson, Innocence Project of Texas; Andrew Rivas, Texas Catholic Conference; Ana Yanez-Correa, Texas Criminal Justice Coalition; Cory Session, for Timothy Cole; (*Registered, but did not testify*: Khalia Gibson, ACLU; David Gonzalez, Texas Criminal Defense Lawyers Association; Kristin Houle, Robert Van Steenburg, Texas Coalition to Abolish the Death Penalty; Amanda Marzullo, Texas Fair Defense Project)

Against — Ed Heimlich, Informed Citizens of Texas; (*Registered, but did not testify*: John Rolater, for John Roach, Collin County Criminal District Attorney)

DIGEST: CSHB 498 would create the Timothy Cole Innocence Commission. The commission would be required to investigate thoroughly all post-conviction exonerations, including convictions vacated based on a plea to time served to:

- ascertain errors and defects in the criminal procedure used to prosecute the case;
- identify errors and defects in the criminal justice process in Texas;
- develop solutions and methods to correct the identified errors and defects; and
- identify procedures and programs to prevent future wrongful convictions.

The commission would be composed of nine members:

- two appointed by the governor, with one required to be a law school dean and one a law enforcement officer;
- one appointed by the attorney general, who would have to be a prosecutor who handles felonies;

- one appointed by the chair of the Senate Criminal Justice Committee, who could be a member of the Legislature;
- one appointed by the chair of the House Criminal Jurisprudence Committee, who could be a member of the Legislature;
- one appointed by the chief justice of the Texas Supreme Court, who must be a member of the judiciary;
- two appointed by the chancellor of the University of Texas System, one of whom must be a law professor and one of whom must work in the forensic science field; and
- one appointed by the Texas Criminal Defense Lawyers Association, who must be a criminal defense lawyer.

Members would serve two-year terms, and the governor would designate the chair. Members of the commission would not be entitled to compensation but would be entitled to reimbursement for travel expenses.

The commission would be authorized to administer oaths and issue subpoenas to compel the production of documents and the attendance of witnesses as necessary to conduct a thorough investigation. The commission would be able to enter into contracts for research services to complete the investigation of a case, including forensic testing and autopsies.

The commission would be required to compile a detailed annual report of its findings and recommendations, including proposed legislation to implement procedures and programs to prevent future wrongful convictions. The report would have to be submitted to the governor, the lieutenant governor, and the speaker of the House by December 1 of even-numbered years. Upon request, it would have to be made available to the public. Within 60 days of receiving the report, the governor, the lieutenant governor, and the speaker would have to issue a formal written response to the findings and recommendations. The response could be issued singly or jointly.

The findings and recommendations in the report would be admissible in a subsequent civil or criminal proceeding only if the presiding judge determined that the issue the person was seeking to establish by offering the findings and recommendations was not sufficiently corroborated by other admissible evidence.

The Legislative Council, the Legislative Budget Board, and the University of Texas at Austin would be required to assist the commission. It would not be subject to Government Code provisions governing state agency advisory committees.

The bill would take effect September 1, 2009.

**SUPPORTERS
SAY:**

CSHB 498 is necessary to address the state's problem of wrongful criminal convictions. The wrongful conviction and imprisonment of any innocent person is a miscarriage of justice that carries with it a moral obligation to prevent additional miscarriages of justice. CSHB 498 would help the state address this issue. The bill would be named in honor of Timothy Cole, a Texas Tech student who was wrongfully convicted of rape and died in prison after serving 13 years of a 25-year sentence.

In Texas, at least 38 men have been exonerated after wrongful convictions, according to The Innocence Project. Many of these inmates served decades in prison before being exonerated through DNA evidence or on other grounds. Similar cases abound in other states.

An innocence commission could investigate cases in which people were wrongfully convicted, help identify what went wrong and why, examine the criminal justice system as a whole, and recommend changes to prevent wrongful convictions in the future. An innocence commission would not erode the authority of the courts because it would examine a case only after an exoneration.

The need for an innocence commission is not eliminated just because certain facets of the criminal justice system, such as indigent defense and post-conviction DNA testing procedures, have been reformed in recent years, or because the Legislature is considering additional changes to front-end procedures, such as interrogations. An innocence commission would identify additional needed changes and examine the system as a whole.

The Legislature needs to create a state entity to examine exonerations and recommend systemic changes because now there is no adequate mechanism for doing so. While other bodies may recommend changes to criminal justice procedures, the innocence commission created by the bill could do so based on findings from actual cases. Even though some individuals are exonerated through the judicial or clemency systems, this

does not necessarily result in the criminal justice system as a whole being examined or changed. Innocence projects, such as those at some Texas law schools, focus on individual cases and should not be depended upon to examine systemic issues. A legislatively created entity would express the will of the Legislature that certain issues be examined, put the authority of the state behind its actions, be directly tied to lawmakers with power to make changes, and make the body more accountable to the public through legislative oversight.

The authority that CSHB 498 would grant the commission would be necessary and appropriate to perform its duty to investigate exonerations. Because the state's clemency system can be slow moving and makes relatively few recommendations for pardons, the bill would not limit the commission's authority to investigating only persons who had been formally pardoned. The commission's powers regarding testing would be limited to what was necessary to complete an investigation in a particular case. Subpoena power would be limited to what was necessary to compel documents and witnesses for a thorough investigation. The bill would allow the findings in the commission's reports to be admissible in a court only if the presiding judge determined that the issue the person was seeking to establish by offering the findings and recommendations was not sufficiently corroborated by other evidence.

Fears that an innocence commission would erode support for the death penalty are unfounded. Under CSHB 498, the commission would include representatives from all parts of the criminal justice system, including a prosecutor, judge, law enforcement officer, and criminal defense lawyer. The Legislature would have oversight of the commission and the power to revise or eliminate it.

An innocence commission could help ensure public safety and confidence in the criminal justice system. A wrongful conviction may mean that a guilty person remained undetected and unpunished and could commit more crimes. An innocence commission could investigate cases similar to the way a national safety board investigates transportation accidents.

The commission's small size, limited mission, and legislative oversight would help ensure that it did not become an unwieldy bureaucracy. Under CSHB 498 the commission would be assisted by the Legislative Council, the LBB, and a university, and the fiscal note estimates no fiscal implication for the state.

OPPONENTS
SAY:

It is unnecessary to create an innocence commission in Texas because the criminal justice and legislative systems in the state have checks and balances that work to achieve justice and to identify and address problems and because other entities in the state can and do review and report on wrongful convictions. The commission that would be created by CSHB 498 would have powers that were too broad and open-ended and that would fall outside the state's traditional jurisprudence system and blur the lines between a state commission and the judiciary.

CSHB 498 would invest an innocence commission with inappropriate authority and quasi-judicial powers. The commission would be authorized to investigate all post-conviction exonerations, something that is not defined. The authority would not be limited to cases involving a pardon or that had other specific criteria. The commission would be allowed to contract for forensic testing and autopsies in individual cases, powers that would be inappropriate for a state entity tasked with studying the criminal justice system. The bill also would give the commission subpoena power, which is normally reserved for the courts and legislative committees. The bill would allow findings and recommendations of the commission to be admissible in civil or criminal proceedings, something that could lead to complications in courts.

It is unfair to use cases that may be decades old to argue for an innocence commission. In the past two-and-a-half decades, the state's criminal justice system has received many substantial improvements, resulting in a just and fair system that protects the public. For example, the state's Fair Defense Act improved the system that provides attorneys for indigent criminal defendants, and the state now has a system of post-conviction DNA testing that allows defendants to get testing that was not available when they were convicted.

The state should continue to let the court and clemency systems handle individual cases of alleged innocence. The state should focus on preventing errors at the front end of the criminal justice system, such as with eyewitness identification or recording interrogations, and bills in these areas currently are pending in the Legislature. These types of reforms would be better than spending resources to examine cases that relied on outdated procedures.

Studying post-conviction exonerations and the criminal justice process in Texas could be accomplished without creating a new governmental entity. An interim study could be conducted by a legislative committee, such as the Criminal Justice Legislative Oversight Committee created in 2007. The governor, the attorney general, or another state official could appoint a special committee to study the issue of convictions. The Texas Criminal Justice Integrity Unit, established in June 2008 by Judge Barbara Hervey of the Court of Criminal Appeals, has been studying the strengths and weakness of the state's criminal justice system. In February 2009, the group issued a report that included recommendations for preventing wrongful convictions on the front end of the system. Innocence projects at the state's law schools already investigate alleged claims of innocence. Other efforts include the one being made by Dallas County District Attorney Craig Watkins, who established a Conviction Integrity Unit to oversee the post-conviction review of about 400 cases involving DNA.

An innocence commission could be used as a back-door way to erode support for the death penalty in Texas. It would emphasize relatively few mistakes – especially those from long ago – in a system for which rigorous standards are enforced and extensive opportunities for review afforded. CSHB 498 would create a bureaucracy biased toward eliminating the death penalty, focused only on negative aspects of criminal cases and lacking the traditional adversarial process central to the criminal justice system. This could institutionalize opposition to the death penalty and allow public funds and the weight of the state to be used to further the political goal of eliminating capital punishment, an objective not shared by most Texans.

Creating an innocence commission would unnecessarily add to state bureaucracy. It could be hard to abolish because governmental entities traditionally are difficult to eliminate and tend to grow in scope to justify their continued existence.

NOTES:

Two other bills, HB 788 by Thompson and SB 115 by Ellis, would create commissions to investigate wrongful convictions. HB 788 is pending in the House Criminal Jurisprudence Committee, and SB 115 has been referred to the Senate Criminal Justice Committee.