

SUBJECT: Exoneration review commission to examine wrongful convictions

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Herrero, Moody, Canales, Shaheen, Simpson

0 nays

2 absent — Hunter, Leach

WITNESSES: For — Cory Session, Innocence Project of Texas; Ana Yanez Correa, Texas Criminal Justice Coalition; Amanda Marzullo, Texas Defender Service; and six individuals; (*Registered, but did not testify*: David Gonzalez, Texas Criminal Defense Lawyers Association; Scott Henson, Texas Criminal Justice Coalition; Joshua Houston, Texas Impact; Yannis Banks, Texas NAACP; Jennifer Allmon, The Texas Catholic Conference of Bishops; Emely K. Smith)

Against — (*Registered, but did not testify*: Kelley Shannon, Freedom of Information Foundation of Texas; Justin Wood, Harris County District Attorney's Office)

On — John Beauchamp, Texas Commission on Law Enforcement; Jim Bethke, Texas Indigent Defense Commission; David Slayton, Texas Office of Court Administration, Texas Judicial Council; (*Registered, but did not testify*: Seana Willing, State Commission on Judicial Conduct)

DIGEST: CSHB 48 would create the Timothy Cole Exoneration Review Commission. The bill would establish the composition of the commission and its duties and authority and would outline its operations.

**Commission composition.** The commission would be composed of the following nine members or, in some cases, their designee:

- the presiding judge of the Texas Court of Criminal Appeals;
- the chief justice of the Texas Supreme Court;

- a district judge appointed by the presiding judge of the Court of Criminal Appeals;
- the presiding officer of the Texas Commission on Law Enforcement;
- the presiding officer of the Texas Indigent Defense Commission;
- the presiding officer of the Texas Forensic Science Commission;
- the chair of the Senate Committee on Criminal Justice;
- the chair of the House Committee on Criminal Jurisprudence; and
- the president of the State Bar of Texas.

The commission could act only upon concurrence of at least five members. It would elect its presiding officer and could hire a staff.

**Duties.** The commission would be required to thoroughly review and examine all cases in which an innocent person was convicted and exonerated, including convictions vacated based on a plea to time served to:

- identify the causes of wrongful convictions and suggest ways to prevent future wrongful convictions and improve the reliability and fairness of the criminal justice system;
- determine errors and defects in the laws, evidence, and procedures applied or omitted in a case;
- identify errors and defects in the Texas criminal justice system in general;
- consider suggestions to correct the errors and defects through legislation or procedural changes;
- identify procedures, programs, and education or training opportunities to eliminate or minimize the causes of wrongful convictions; and
- collect and evaluate information from an actual innocence exoneration reported to the commission by a state-funded innocence project.

The commission also would be required to review and examine each case

in which the Court of Criminal Appeals had made a final ruling on a writ of habeas corpus (a type of appeal typically claiming a violation of constitutional rights) granted for actual innocence on or after January 1, 1994, and each case in which a commutation or pardon was granted before January 1, 1994, based on a claim of actual innocence. These reviews would:

- identify apparent breaches of professional responsibility or misconduct by attorneys, judges, or criminal justice system personnel that is revealed in any habeas review process existing in the case;
- refer any apparent breach of professional responsibility or misconduct to the State Commission on Judicial Conduct, the State Bar, the Texas Commission on Law Enforcement, the Office of the Attorney General, or other appropriate offices;
- identify patterns in apparent breaches of professional responsibility or misconduct by attorneys, judges, or others, or errors or defects in the criminal justice system that impact the pretrial, trial, appellate, or habeas review process; and
- consider and suggest legislative, training, or procedural changes to correct patterns, errors, and defects identified by the commission.

The commission would have to consider potential implementation plans, costs, savings, and the impact on the criminal justice system for each potential solution it identifies.

In its first biennium in operation, the commission would have to give particular attention to reviewing and updating the work of the Timothy Cole Advisory Panel on Wrongful Convictions established by the 81st Legislature. After that, in each biennium the commission would be required to monitor the progress and implementation of the recommendations made in the first biennium. The commission would have to determine future items for study by identifying up to 10 prominent criminal justice issues to consider. The chief justice of the Texas Supreme Court and the presiding judge of the Court of Criminal Appeals would then choose up to six issues to be studied by the commission.

The commission would be authorized to assist in training and education for those involved in the criminal justice matters of investigation, prosecution, defense, trial, or appeal.

**Reports.** The commission would be required to compile and issue an annual report of its findings and recommendations and could compile interim reports. These reports could be issued only with the concurrence of at least six members.

Reports would have to be submitted to the governor, the Legislature, and the Texas Judicial Council by December 1 of even-numbered years or within 60 days of issuance, whichever came first.

Official reports would have to be made public on request. The working papers and records of the commission and its members and staff would be exempt from the public disclosure requirements in Government Code, ch. 552.

Law school legal clinics or programs that receive financial support from the Texas Indigent Defense Commission would be required to submit a report to the commission on their annual work, including information about innocence claims they handled.

**Commission operations.** The commission would exist under the Texas Judicial Council but be independent of the council. It would be administratively attached to the Office of Court Administration, which would be required to provide administrative assistance to the commission, subject to available funding.

At least annually, the commission would have to conduct a public hearing that included a review of its work. The commission would have to meet in Austin at least once a year, but could meet other times and places.

The commission would be able to enter into contracts for necessary or appropriate research, analysis, and professional services to facilitate its

work or to complete the review and examination of a case with a commutation, pardon, or final ruling of actual innocence on a writ of habeas corpus.

The commission would be authorized to request that state entities or political subdivisions provide information to the commission, and the entities would be required to comply unless the disclosure was prohibited. Any confidential information that the commission received would remain confidential and not subject to public disclosure requirements.

Subject to available funding, the commission could request assistance from the Legislative Budget Board and any state-supported university. The commission also could request the assistance of other state agencies and officers, which would be required to assist the commission.

The bill would establish operating requirements for the commission, including member qualifications, conflicts of interest, grounds for removal, commission member training and policies on gifts, grants, and donations. Commission members would not be compensated but could be reimbursed for expenses, subject to available funds.

**Advisory panel.** The commission would be authorized to receive advice and guidance from an advisory panel named by the bill. The panel would have three members, including the president of the Texas Criminal Defense Lawyers Association and the chair of the board of the Texas District and County Attorneys Association or their designees. It also would have either the director of the Innocence Project of Texas or a representative of one of the innocence projects at the University of Texas Law School, the University of Houston Law Center, or the Thurgood Marshall School of Law. The representative from the innocence groups would serve on a rotating basis.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2015.

SUPPORTERS  
SAY:

CSHB 48 is necessary to help prevent the wrongful convictions of innocent people. 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. The bill would be the next step after the Timothy Cole Advisory Panel on Wrongful Convictions, created by the 81st Legislature to advise the state's Task Force on Indigent Defense in studying wrongful convictions, which finished its assignment in 2010. The Legislature has enacted many of the recommendations of the panel, but more needs to be done.

In Texas, there have been at least 200 exonerations after wrongful convictions, according to the National Registry of Exonerations. Many of these inmates served decades in prison before being exonerated through DNA evidence or on other grounds. Those wrongfully convicted lose their freedom along with family, jobs, and parental rights. The tragedy of wrongful convictions can affect individuals' dignity and can extend beyond those who are irreparably harmed to society as a whole. A wrongful conviction may mean that a guilty person remains unpunished and possibly free in society, endangering the public and eroding confidence in the criminal justice system.

The bill would address the issue of wrongful convictions by establishing a body to examine certain cases and identify the root causes of wrongful convictions and suggest ways to prevent future cases. A commission would look at the criminal justice system as a whole to identify errors and defects and patterns leading to wrongful convictions. By identifying ways to address any issues, the commission would help the state learn from its past mistakes and make changes to prevent future ones. An exoneration commission could examine cases similarly to the way a safety board reviews transportation accidents.

Commission members would represent all facets of the criminal justice system from pretrial through appeal to ensure a knowledgeable, thorough examination of issues. The commission would be unbiased and together be able to take a broad view of the criminal justice system.

The need for an exoneration commission is not eliminated because certain facets of the criminal justice system, such as indigent defense, have been reformed in recent years or because the Legislature is considering additional changes this session. These efforts can be piecemeal or reactions to one case and do not necessarily identify systemic failures remaining in the criminal justice system.

The Legislature needs to create a state entity dedicated to examining exonerations and recommending systemic changes because currently there is no adequate mechanism or effort to do so. Existing state entities do not have the manpower, resources, or mandate to examine past exonerations. The exoneration of individuals through the judicial or clemency systems does not focus on the criminal justice system as a whole. Innocence projects, such as those at some Texas law schools, focus on individual cases seeking exoneration and not on past cases or systemic issues. With this diffusion of efforts, no entity is responsible or accountable for looking at wrongful convictions as a whole. The commission created by the bill would have the authority of the state behind it, be directly tied to lawmakers with the power to make changes, and be accountable to the public through legislative oversight.

Fears about the commission overreaching its authority are unfounded because the bill clearly outlines the commission's limited powers and duties. The commission would not seek exonerations, re-open cases, or exercise any appellate authority but would only review certain cases that had reached their conclusion. It would not conduct investigations or make rulings. The commission's reviews involving writs of habeas corpus would apply only to ones with final rulings granted for actual innocence and cases with a commutation or pardon based on actual innocence. The examination of the writs would involve numerous things, including only identifying apparent breaches of responsibility or misconduct, not taking any actions. The commission would have no enforcement powers or disciplinary authority but would refer any apparent breaches of responsibility or misconduct to other entities responsible for such matters.

The commission's authority to enter into contracts would be limited to

research, analysis, and professional services, not other things such as testing or autopsies. This authorization would be necessary so that it could adequately examine cases.

Fears that an innocence commission would erode support for the death penalty are unfounded. The death penalty itself is not a cause of wrongful convictions, which is what the commission would be charged with examining. The commission would have no authority to advocate for any position related to the death penalty. The Legislature would have oversight of the commission and the power to revise, change, or eliminate it if its work strayed from legislative mandates.

The commission's limited mission and legislative oversight would help ensure that it did not become an unwieldy bureaucracy. In addition to having general oversight as it does with other entities, the Legislature would control appropriations to the commission to prevent it from growing beyond what the Legislature desired.

The cost of the bill is small compared to the costs of wrongful convictions. The state has paid about \$68.9 million in compensation for wrongful convictions in addition to funds used on the prosecution and incarceration of innocent people. The bill would leverage state resources by having the commission administratively attached to the Office of Court Administration and allowing the commission to request assistance from other state entities.

The public would be informed about the work of the commission because official reports would be public. To protect confidentiality in the documents that the commission would be working with, working papers and records would be confidential and information from other entities that was confidential would remain so.

**OPPONENTS  
SAY:**

It is unnecessary to create a commission to review wrongful convictions in Texas because the state's criminal justice and legislative systems have checks and balances that work to achieve justice and to identify address and problems.

It is unfair to use cases that may be decades old to argue for an exoneration commission. In the past few decades, the state's criminal justice system has improved substantially, resulting in a just and fair system with rigorous standards and extensive opportunities for review. For example, the state's Fair Defense Act improved the system that provides attorneys for indigent criminal defendants, and the state established a system of post-conviction DNA testing allowing defendants to get testing that was not available when they were convicted. In addition, the state has adopted almost all of the recommendations made in the 2010 Timothy Cole Advisory Panel on Wrongful Convictions.

Post-convictions exonerations and the state criminal justice process could be studied without creating a new government entity. Instead, a focused, limited-time review could be done by existing entities. An interim study could be conducted by a legislative committee or an existing agency could be given the task. The governor or other state official could appoint a special committee. The Texas Criminal Justice Integrity Unit, established in 2008 by Judge Barbara Hervey, studies the strengths and weaknesses of the criminal justice system and has made recommendations for improvements relating to wrongful convictions. Innocence projects at the state's law schools already investigate alleged claims of innocence and receive some state funding. There also are efforts on the local level.

The bill would invest an innocence commission with inappropriate, broad authority. With authority to ascertain errors in evidence and procedures, to contract for research and analysis, and to identify breaches of responsibility or misconduct, the commission could become an entity working to prove an exoneration, rather than just studying those that have occurred. Other state agencies could have difficulties meeting the commission's requirements for assistance.

An exoneration commission could be used as a backdoor way to erode support for the death penalty in Texas by focusing on certain cases without the benefit of the adversarial process central to the criminal justice system. This process could institutionalize opposition to the death penalty

and allow the use of public funds and the weight of the state to further the political goal of eliminating capital punishment, an objective not shared by most Texans.

Creating an exoneration commission would unnecessarily add to state bureaucracy. It would cost the state almost \$400,000 per biennium, according to the bill's fiscal note. It could be difficult to abolish a commission because governmental entities tend to grow in scope to justify their continued existence. The bill would establish a process that would institutionalize the commission by requiring it to identify 10 issues and to choose six to study each biennium.

OTHER  
OPPONENTS  
SAY:

CSHB 48 should include an exoneree or exoneree's family member on the commission to ensure that their unique perspective was represented.

Working papers, records, and other information of the commission should not be made confidential. This would run counter to the state's policy of allowing the public access to government records.

NOTES:

The Legislative Budget Board estimates that CSHB 48 would have a negative impact of about \$395,000 to general revenue through fiscal 2016-17.