

SUBJECT: Creating an innocence commission to investigate wrongful convictions

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Gallego, Hartnett, Aliseda, Burkett, Carter, Y. Davis, Rodriguez
1 nay — Zedler
1 absent — Christian

WITNESSES: For — Joshua Houston, Texas Impact; Ana Yanez-Correa, Texas Criminal Justice Coalition; (*Registered, but did not testify:* Anthony Graves, Texas Defender Service; Maria Huemmer, Texas Catholic Conference - Roman Catholic Dioceses of Texas)

Against — None

On — Scott Henson, Innocence Project of Texas; (*Registered, but did not testify:* Jim Bethke, Task Force on Indigent Defense)

BACKGROUND: The 81st Legislature in 2009 enacted HB 498 by McClendon, which required the state's Task Force on Indigent Defense to study the causes and means of the prevention of wrongful criminal convictions and created an advisory panel to assist the task force in the study. The panel, named the Timothy Cole Advisory Panel on Wrongful Convictions, was composed of 10 members designated in the bill, including legislators and representatives of the criminal justice system, law schools, and the governor. In August 2010, the panel released its report, which included recommendations for changes in the state's criminal justice system. Under HB 498, the authority for the panel expired on January 1, 2011.

DIGEST: CSHB 115 would create the Texas Innocence Commission. The commission would be required to thoroughly review or investigate each case 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;
- determine errors and defects in the laws, rules, proof, and procedures used to prosecute cases or implicated by cases of wrongful convictions;
- identify errors and defects in the Texas criminal justice process;
- consider and develop solutions to correct the errors and defects; and
- identify procedures, programs, and educational or training opportunities demonstrated to eliminate or minimize the causes of wrongful convictions and to prevent wrongful convictions and the resulting executions.

The commission would be composed of nine members appointed by the governor who would serve staggered six-year terms and would elect their presiding officer.

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

At least annually the commission would have to conduct a public hearing that would have to include a review of its work. The commission would have to meet in Austin at least once a year, but could meet at other times and places. Proceedings would be conducted by majority vote of those present.

The University of Texas at Austin, the Legislative Council, and the Legislative Budget Board (LBB) would be required to assist the commission. The commission could request assistance from other state agencies and officers, who would have to assist the commission if requested. The commission also could inspect the records, documents, and files of any state agency.

The commission would be able to enter into contracts for necessary and appropriate research and services to facilitate its work or to investigate a post-exoneration case, including forensic testing and autopsies.

The commission would have to compile an annual report of its findings and recommendations and could compile interim reports. The findings and recommendations in official commission reports could be used as evidence in any subsequent civil or criminal proceeding, according to the procedural and evidentiary rules that applied for that proceeding. The commission's reports would have to be submitted to the governor, the lieutenant

governor, the speaker, and the Legislature by deadlines set in the bill. Commission reports would have to be available to the public on request. The commission's working papers would be exempt from public disclosure requirements.

The commission would be able to accept gifts, grants, and donations, but would have to do so in an open meeting and report each item in its public records. From the grants it accepted, the commission could disburse subgrants for appropriate programs, services, and activities.

Commission members would not be compensated for service but could be reimbursed for expenses, if appropriated funds were available. CSHB 15 would establish operating requirements for the commission, including for member qualifications, grounds for removal from the commission, and commission member training. Neither state employees nor registered lobbyists could serve on the commission.

The commission would not be subject to Government Code provisions governing state agency advisory committees, but would be subject to the Texas Sunset Act, and would be abolished September 1, 2023, unless continued by the Legislature.

The 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, 2011. Commission members would have to be appointed within 60 days of CSHB 115's effective date.

**SUPPORTERS
SAY:**

CSHB 115 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 115 would help the state address this issue. The bill would continue the work done by the Timothy Cole Advisory Panel, created by the 81st Legislature to advise the state's Task Force on Indigent Defense in studying wrongful convictions, which finished its assignment in August 2010.

In Texas, at least 42 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. The innocence commission created by CSHB 115 could investigate such cases, help identify what went wrong and why, examine

the criminal justice system as a whole, and recommend changes to prevent future wrongful convictions. This could help ensure public safety and confidence in the criminal justice system, since a wrongful conviction may mean that a guilty person remains unpunished. An innocence commission could investigate cases similarly to the way the national safety board investigates transportation accidents.

The commission would not blur the lines between state entities and the courts because the bill clearly states that the commission would examine cases only after an exoneration. Since the state's clemency system can be slow, the bill would not limit the commission's authority to investigating only persons who had been formally pardoned. The commission would not work to achieve exonerations, only to investigate those that had occurred.

The need for an innocence commission is not eliminated 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, examine the system as a whole, and determine which procedures were followed and which failed in individual cases.

The Legislature needs to create a state entity to examine exonerations and recommend systemic changes because currently there is no adequate mechanism for doing so. While other bodies may recommend changes to criminal justice procedures, the innocence commission could do so based on findings from actual cases. The exoneration of some individuals through the judicial or clemency systems does not necessarily force the examination or change of the criminal justice system as a whole. 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. Having the governor appoint the members would allow them to be independent.

The authority and powers that CSHB 115 would grant the commission would be necessary and appropriate to perform its duty to investigate

exonerations. The commission's authorization to contract for services is necessary so that it could adequately investigate cases. The bill would allow the findings in the commission's reports to be admissible in a court, according to procedural and evidentiary rules, to ensure that any use of the commission's findings was appropriate. The ability to have other agencies assist the commission is important to make the best use of state resources. Fears about the commission overreaching its authority or abusing its powers are unfounded because it would be clearly tasked with examining the causes of exonerations, not proving exonerations.

Fears that an innocence commission would erode support for the death penalty are unfounded. The death penalty itself not a cause of wrongful convictions, which is what the commission would be charged with examining. Under CSHB 115, the commission would consist of gubernatorial appointees who could be held accountable for their reports and actions. The Legislature would have oversight of the commission and the power to revise or eliminate it if its work strayed from legislative mandates.

The commission's appointed members, limited mission, and legislative oversight would help ensure that it did not become an unwieldy bureaucracy. The fiscal note estimates no fiscal implications for the state, and any appropriations for the commission would have to be approved by the Legislature. The bill would allow the commission to accept grants and gifts that could be used to fund its work. In addition, the commission would be assisted by the Legislative Council, the LBB, UT-Austin, and, as needed, other state agencies.

**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. Other entities in the state can and do review and report on wrongful convictions. The commission that would be created by CSHB 115 would have powers that were too broad and open-ended and that would fall outside the state's traditional jurisprudence system.

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 improved substantially, 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.

Post-conviction exonerations and the Texas criminal justice process could be studied without creating a new governmental entity. An interim study could be conducted by a legislative committee. The governor, the attorney general, or another state official could appoint a special committee to study the issue of wrongful convictions. The Texas Criminal Justice Integrity Unit, established in June 2008 by Judge Barbara Hervey of the Court of Criminal Appeals, has studied the state's criminal justice system and 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 and receive some state funding. Other efforts include those on the local level, including in Dallas and Harris counties.

CSHB 115 would invest an innocence commission with inappropriate authority and quasi-judicial powers. The commission would have to investigate post-conviction exonerations, which are undefined. 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 convictions that already have been identified as wrongful. With these powers, the commission could become an entity working to prove an exoneration, rather than one studying those that already have occurred. The bill would require other state agencies to assist the commission, something that could be difficult or inappropriate, and would allow findings and recommendations of the commission to be admissible in civil or criminal proceedings, which could lead to complications in the courts.

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

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 115 would create a commission that could reflect a bias 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 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 innocence commission would unnecessarily add to state bureaucracy and to demands for state funding. It is unclear how such a commission would obtain funds to reimburse members for expenses and to operate. 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.

OTHER
OPPONENTS
SAY:

It might be better to create a commission composed of elected officials or representatives of the criminal justice system than one consisting of gubernatorial appointees who could be politically motivated.

NOTES:

The committee substitute made several changes to the original bill, including changing the terms of the members of the Innocence Commission from four years to six years, adding a specific date for the commission to be abolished under the Sunset Act, and eliminating a section regarding legislative findings.

The Legislative Budget Board's fiscal note anticipates that the bill would not have a significant fiscal implication for the state. It assumes that the bill would not require a significant increase in the workload or demand for resources or services of the agencies required to provide assistance to the commission.

A similar bill, SB 1835 by Ellis, has been referred to the Senate Criminal Justice Committee.