

**SUBJECT:** Creating an exoneration commission to investigate wrongful convictions

**COMMITTEE:** Criminal Jurisprudence — favorable, as amended

**VOTE:** 7 ayes — Herrero, Burnam, Canales, Leach, Moody, Schaefer, Toth  
1 nay — Carter  
1 absent — Hughes

**WITNESSES:** For — Alison Dieter, Texas Moratorium Network; Joshua Houston, Texas Impact; Kathryn Kase, Texas Defender Service; Travis Leete, Texas Criminal Justice Coalition; Johnnie Lindsey and Christopher Scott, House of Renewed Hope; Jaimie Page, Texas Exoneree Project; Cory Session, Tim Cole's brother, Innocence Project of Texas; Charles Chatman; Entre Karage; Johnny Pinchback; Sandra Pinchback; Billy Smith  
  
*(Registered, but did not testify: Jennifer Allmon, The Texas Catholic Conference, the Roman Catholic Bishops of Texas; Allen Place, Texas Criminal Defense Lawyers Association; Leah Cohen; Claude Simmons, Jr.)*  
  
Against — *(Registered, but did not testify: Justin Wood, Harris County District Attorney's Office)*  
  
On — Jim Bethke, Texas Indigent Defense Commission; Shannon Edmonds, Texas District and County Attorneys Association

**DIGEST:** HB 166, as amended, would create the Timothy Cole Exoneration Review Commission. The bill would establish the commission's duties and authority and outline its operations. The commission would be subject to the Texas Sunset Act and would be abolished September 1, 2025, unless continued by the Legislature.  
  
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, 2013.

**Commission composition.** The governor would appoint the commission's nine members, who would serve staggered, six-year terms. The commission would elect its own presiding officer. Appointments to the commission would have to be made within 60 days of HB 166's effective date.

**Duties.** The commission would be required to thoroughly review or investigate each case in which an innocent person was convicted and exonerated, including convictions 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 a case or implicated by each cause of a wrongful conviction;
- identify errors and defects in the criminal justice process;
- consider and develop solutions to correct errors and defects; and
- identify procedures, programs, and educational or training opportunities to eliminate or minimize the causes of wrongful convictions and to prevent wrongful convictions and resulting executions.

The commission also would be required to review thoroughly each application for a writ of habeas corpus made to the Texas Court of Criminal Appeals if the court had issued a final ruling. (Habeas corpus is a writ ordering a person in custody to be brought before a court and places the burden of proof on those detaining the person to justify the detention.) The review would be to:

- identify ethical violations or misconduct by attorneys or judges revealed during the habeas review;
- refer ethical violations and misconduct to the State Commission on Judicial Conduct, the State Bar of Texas, the Office of the Attorney General, or other appropriate offices;
- identify patterns of ethical violations or misconduct by attorneys or judges or errors or defects in the criminal justice system that impact the habeas review process;
- consider and develop ways to correct the patterns, errors, and defects; and
- identify procedures, programs, and educational or training opportunities to eliminate or minimize the patterns, errors, and defects.

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.

The commission would have to compile an annual report of its findings and recommendations and could compile interim reports. Commission reports would have to be available to the public upon request. Reports would have to be submitted to the governor and the Legislature by December of even-numbered years or within 60 days of issuance, whichever occurred first.

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 at other times and places.

The working papers and records of the commission and its staff would be exempt from public disclosure requirements.

The findings and recommendations in official reports could be used as evidence in subsequent civil or criminal proceedings, according to the procedural and evidentiary rules that applied to that proceeding.

**Commission operations.** The University of Texas at Austin and the Legislative Budget Board would be required to assist the commission. The commission could request assistance of other state agencies and officers, which would have to assist the commission if requested. The commission could inspect the records, documents, and files of state agencies.

The commission would be able to enter into contracts for necessary and appropriate research and services to facilitate its work or to investigate a case in which there had been an exoneration or final adjudication of a habeas corpus, including forensic testing and autopsies.

The commission could 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 programs, services, and activities related to the commission's purpose and activities.

HB 166 would establish operating requirements for the commission,

including member qualifications, conflicts of interest, grounds for removal, and commission member training. Commission members could not hold any other public office or be state employees or registered lobbyists. Commission members would not be compensated, but could be reimbursed for expenses.

The commission would not be subject to Government Code provisions governing state agency advisory committees.

**SUPPORTERS  
SAY:**

HB 166 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. The bill would be the next step after 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, there have been at least 119 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. The tragedy of wrongful convictions extends beyond those who are irreparably harmed to society as a whole. A wrongful conviction may mean that a guilty person remains unpunished, endangering the public and eroding confidence in the criminal justice system.

Wrongful convictions also are costly to the state, not only in the approximately \$60 million that the state has paid out in compensation to the innocent but also for the public funds wasted on the prosecution and incarceration of innocent people.

HB 166 would address the issue of wrongful convictions by establishing a body to investigate wrongful convictions, identify what went wrong and why, examine the criminal justice system as a whole, and recommend changes. An exoneration commission could investigate cases similarly to the way the national safety board investigates transportation accidents.

The commission would not work to obtain exonerations but would examine only cases which had already reached their final outcome. It would review exonerations and cases with final rulings involving writs of habeas corpus sent to the court of criminal appeals. The commission's

work would include reviewing the writs, which are a type of appeals typically centered on constitutional rights, for patterns that may identify the causes of wrongful convictions because there is no current policy or procedure that requires any overall review or action based on issues raised in these writs. 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 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. These efforts are piece-meal 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 for doing so. 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, and no other state agencies focus directly on the issue. 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 innocence commission 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 the power to make changes, and make the body more accountable to the public through legislative oversight. Having the governor appoint the members would be in keeping with other state commissions and would allow the members to be independent.

Fears about the commission overreaching its authority are unfounded because HB 166 clearly outlines the commission's powers and duties and limits them to those needed to investigate exonerations. The commission's authorization to contract for research and professional services, including forensic testing and autopsies, would be necessary so that it could adequately investigate cases. The bill would specifically limit these contracts to cases in which there had been exonerations or final adjudications of habeas corpus, ensuring that they would not be used for ongoing cases. The commission would have no enforcement powers.

Other commission authority also would be appropriately limited. For example, its charge relating to examining writs of habeas corpus would allow only for referrals to entities such as the state bar or the State Commission on Judicial Conduct, not for actions by the commission itself. Findings in the commission's reports would be admissible in a court, only according to procedural and evidentiary rules, to ensure that any use of the commission's findings was proper. Assistance from other state agencies would have to be consistent with the commission's duties.

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. Under HB 166, 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. HB 166 contains a sunset date of 2025 when the commission would be eliminated unless continued by the Legislature, which also would have authority to review, change, or eliminate the commission at any time.

The commission would not cost the taxpayers. The fiscal note estimates no fiscal implications for the state. The bill would allow the commission to accept grants and gifts that could be used to fund its work and would be assisted by the Legislative Budget Board, UT-Austin, and, as needed, other state agencies.

The ability to have other agencies assist the commission would allow state resources to be efficiently leveraged. Other groups also could aid the commission as needed. Any state appropriations for the commission would have to be approved by the Legislature.

**OPPONENTS  
SAY:**

It is unnecessary to create an exoneration 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.

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. In 2011, the Legislature revised the laws dealing with witness identification procedures, a source of numerous exonerations.

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 or an existing agency could be given the task. 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 County.

HB 166 would invest an innocence commission with inappropriate, overly broad authority. 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. Examining the approximately 4,300 writs of habeas corpus finalized by the court of criminal appeals in fiscal 2012 could be especially challenging for a commission with no staff. Other state agencies could have difficulties meeting the commission's requirements for assistance.

The bill also appears to give the commission quasi-judicial powers that could fall outside the traditional jurisprudence system. For example, it 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. In addition, the bill would allow findings and recommendations of the commission to be admissible in civil or criminal proceedings, which could lead to complications in the courts if the

findings or recommendations were not relevant to whatever case is being tried.

The state should continue to let the court and clemency systems handle individual cases of alleged innocence that could be politicized by an exoneration commission. The Legislature should focus on preventing errors at the front end of the criminal justice system, such as through rules governing interrogations or evidence. 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. HB 166 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.

**NOTES:**

The committee amended the bill to specify that the commission can enter into contracts for help in completing its review or investigation of a case only in cases in which there had been an exoneration or final adjudication of a habeas corpus.