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An Unfulfilled Promise: Assessing the Efficacy of Article 11.073

A CRITICAL EXAMINATION OF TEXAS'S "JUNK SCIENCE" LAW

TEXAS DEFENDER SERVICE

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EXECUTIVE SUMMARY

No one should be forced to serve a prison sentence—or face the death penalty and be executed—because they were convicted based on unreliable forensic evidence. But the reality is that scores of innocent people are serving prison terms, or even facing execution, simply because their juries trusted forensic evidence—from DNA to fingerprints to ballistics—that was later found to be untrustworthy. Yet for years, in both Texas and across the country, people who were convicted based on flawed forensic evidence had no legal recourse in the courts to be relieved of their convictions.

Then, just over a decade ago, the Texas Legislature took a revolutionary step forward for people who were wrongfully convicted based on flawed forensics: it passed Texas Code of Criminal Procedure Article 11.073 (hereinafter 11.073). The first statute of its kind in the United States, 11.073 created a pathway for people whose convictions were based on false forensic evidence to show those faults and ultimately secure their freedom.

Is Article 11.073 fulfilling its powerful initial vision: to grant relief to innocent people who are incarcerated on the basis of flawed scientific evidence?

The answer is no.

Texas Defender Service systematically examined the more than 70 cases raised under 11.073 between September 2013 and December 2023. We found that 11.073 is not working to provide relief to innocent people convicted based on false or unreliable forensic evidence. Due both to the Texas Court of Criminal Appeals's (CCA) interpretation of the statute and lack of guidance in the statute itself, 11.073 is not operating as the Texas Legislature intended:

#1—The Statute Does Not Go Far Enough to Protect Innocent People Who Were Convicted Based on Junk Science: At the heart of 11.073 is the Texas Legislature's recognition that an innocent person convicted based on flawed forensic evidence should be able to overturn their conviction if they can show (1) that the evidence was flawed and (2) that without this flawed evidence, the jury would have found them "not guilty." This is the standard written in the statute itself, and it is designed to provide a pathway for innocent people who are serving sentences based on unreliable forensic evidence. But in practice, the CCA does not apply this standard. Instead, it usually only grants relief if a person can show evidence strong enough to eliminate any rational basis for their conviction, such as exonerating DNA evidence or an alternate perpetrator. This is the legal "actual innocence" standard, and it is higher than the standard written in the 11.073 statute. The legal "actual innocence" standard also places an impossibly high burden on innocent people convicted based on flawed forensic evidence. For the vast majority of people who are actually innocent, meeting the high evidentiary burden of the legal "actual innocence" standard years—or decades—after their conviction is out of the question.

Innocent incarcerated people are almost never in a position to do the intensive police work required to reconstruct a crime scene, uncover previously unknown eyewitnesses, or track down an alternate perpetrator. Moreover, original evidence may have gone stale, and eyewitnesses can be missing, deceased, or are no longer able to recall specific details.

#2—The CCA Largely Restricts Relief to Cases Involving New DNA Evidence, Even Though Most Wrongful Convictions Are Based on Other Types of Flawed Forensic Evidence: The CCA primarily grants relief in cases involving DNA evidence, ignoring many other cases involving false forensic evidence. This is concerning because nationwide data shows that false DNA evidence is only involved in a relatively small number of wrongful convictions.

#3—The CCA is Not Granting Relief to Death-Sentenced People Under 11.073: The CCA has never granted 11.073 relief to a person sentenced to death, as compared to granting relief to 31% of people who seek relief and are serving non-death sentences. Given the historically high rates of exonerations in capital cases, the total failure of the CCA to grant 11.073 claims for death-sentenced people—compared to nearly a third of all other people—is especially concerning.

#4—People Without Counsel are Functionally Barred from Meaningfully Seeking Relief Under 11.073: People who represent themselves in their 11.073 applications are effectively denied access to relief under 11.073 due to their lack of legal counsel. Of the 74 applications filed and adjudicated between September 2013 and December 2023, 19 were filed by people without lawyers. Of those 19 people without lawyers, only one has ever been granted relief, a stark drop-off from the 25% of people with counsel who receive relief.

#5—Procedural Bars Prevent Large Numbers of 11.073 Applications from Being Considered on the Merits: Despite having valid claims, many people who seek relief under 11.073 never receive consideration of their claims on the merits because of procedural issues. These barriers especially impact people sentenced to death and people without lawyers.

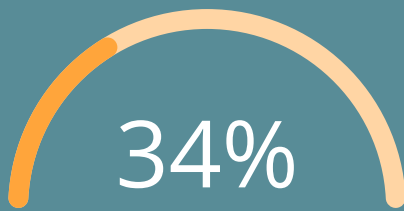
Texas took an extraordinary step in enacting 11.073, but more must be done to ensure that the statute operates as the Texas Legislature intended. In this report, we recommend steps the Texas Legislature can take to ensure that 11.073 serves its intended function: creating a pathway to relief for innocent people who were convicted on the basis of false or unreliable forensic evidence.

11.073 BY THE NUMBERS

74 applications have been filed and ruled on by the CCA under 11.073 since the inception of the statute.

20%

15 PEOPLE, OR 20% OF THOSE WHO APPLIED, HAVE RECEIVED RELIEF.

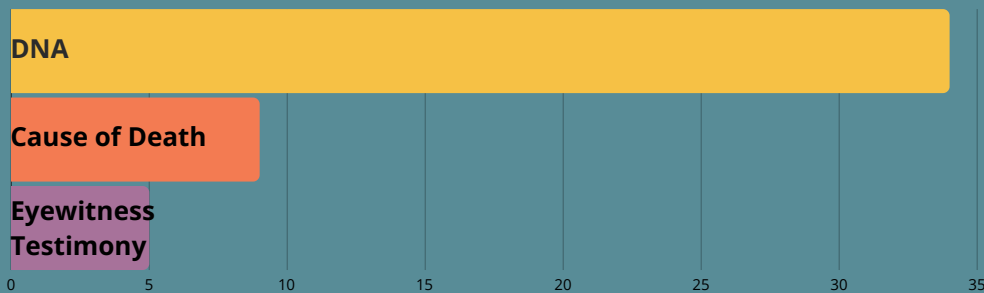


People facing the death penalty have filed 25 applications, constituting 34% of all applications filed.

THE RATE OF RELIEF FOR PEOPLE FACING THE DEATH PENALTY IS

0%

Most Common 11.073 Claims



- The most commonly raised claims are errors related to DNA, appearing in 34 of the 74 applications filed. The second-most common error raised is cause of death determination (9 applications), followed by eyewitness testimony (5 applications).
- DNA claims are significantly overrepresented in successful applications. Of people granted relief under 11.073, nearly three-quarters—73%—were successful on DNA-based claims, even though DNA claims appeared in only 46% of applications.

73%

of the cases where the CCA has granted relief under 11.073 involved individuals who not only proved they were wrongfully convicted but also affirmatively demonstrated their actual innocence.

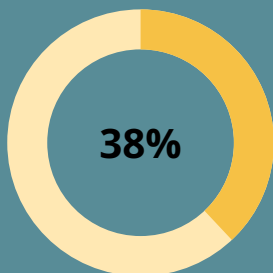
Legal Representation

Of the 74 applications filed and adjudicated, 19, or 26%, were filed by people without lawyers, and 55 were filed by people who had lawyers.

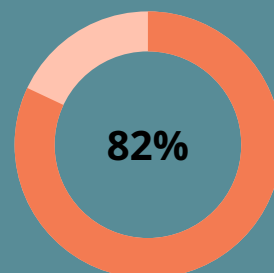


Only one person who filed without a lawyer has ever received relief under the statute, and he was out on parole. **People without lawyers received relief at a rate of 5%, compared with 25% of people with lawyers.** The CCA dismissed or denied 16 of 19, or 84%, of applications from people without counsel without a written order, compared to 16% of people who had legal representation.

Procedural Bars



At least 28 of the 74 11,073 applications filed since 2013, or **38%, have been barred on procedural grounds.** This means that the CCA decided that the claims were procedurally barred, which then leaves the merits unaddressed.



This pattern disproportionately affects people sentenced to death and people without lawyers, two particularly vulnerable groups, who combined make up 23 of 28 of procedurally barred applications, or 82%.

INTRODUCTION

The persuasive power of scientific evidence in the courtroom cannot be understated. Criminal defendants are often convicted based on testimony and evidence provided by experts in forensic science. Therefore, ensuring the reliability of scientific evidence is critically important.

However, science is continually evolving. As new facts and methods become part of scientific knowledge, conclusions can and do change.

In the 2000s, Texans began to recognize that the State needed a mechanism through which innocent people convicted by virtue of problematic forensic evidence could obtain relief from their wrongful convictions. Several scandals, exposés, and exonerations¹ revealed that many innocent people had been convicted based on flawed forensic science, from false DNA and fingerprint evidence to problematic arson assessments. In addition, court decisions showed that courts lacked clear guidelines for dealing with new forensic evidence in post-conviction cases, i.e., when evaluating new forensic evidence after an initial conviction.² Historically, post-conviction relief was only available if someone could prove a legal claim of actual innocence or show a violation of their federal constitutional rights, both of which required a high, and almost always impossible-to-meet, evidentiary burden. There was no mechanism to address situations where scientific advancements and evolving expert opinions challenged the evidence used to support a conviction.³

These high standards failed to protect people who were innocent and had been convicted based on false forensic evidence. For a person who is innocent, establishing actual innocence is, in the words of the CCA, a “Herculean task.”⁴ That task is often impossible years or decades after a conviction, as original evidence may have gone stale, and eyewitnesses can be missing, deceased, or are no longer able to recall specific details. Incarcerated people are not well-suited to doing the work of proving a legal actual innocence claim, which often requires identifying an alternate perpetrator, reconstructing the crime scene, unearthing previously unknown eyewitnesses, or finding entirely new evidence—work better suited to a police department than a criminal defendant. As a practical matter, then, before 11.073, innocent people who had been convicted because of problematic forensic evidence had no legal means to overturn their convictions.

After a series of failed bills, the Texas Legislature passed Senate Bill 344, later codified as Texas Code of Criminal Procedure Article 11.073 in 2013 and amended in 2015.⁵ Colloquially known as the “junk science” law, 11.073 created a statutory, non-constitutional pathway for post-conviction relief for people who could present scientific evidence that was not available to be offered at their trial or contradicted scientific evidence relied on by the state at trial.⁶ 11.073 was the first law of its kind in the nation and served as a response to “the changing landscape in the forensic sciences.”⁷

In order to obtain relief under 11.073, a person must show that new, relevant scientific evidence is currently available and was not available at the time of their trial, the new science would be admissible under the Texas Rules of Evidence, and that they likely would not have been convicted if this new scientific evidence had been presented at their trial.⁸ People seeking relief under 11.073 must also comply with specific procedural requirements codified in Texas Code of Criminal Procedure Article 11.07 Section 4 and Article 11.071 Section 5.

More than a decade has passed since the Texas Legislature enacted Article 11.073. This report looks at how effective this law has been since September 2013. When it enacted 11.073, the Texas Legislature advanced both a cutting-edge understanding of the fallibility of forensics and a new vision for post-conviction relief. The Legislature intended the statute to be a novel avenue for people whose convictions rested on science now deemed to be outdated or unreliable.⁹ After reviewing the 11.073 applications that have been adjudicated by the CCA, this report finds that 11.073 is failing to live up to its promise.

This report recommends changes to improve the efficacy of 11.073 as a pathway to relief, to ensure the accuracy of convictions, and to uphold the integrity of the criminal legal system.

Summary of Recommendations

#1—Revise the Standard for Granting Relief to Consider the Overall Impact of Flawed Scientific Evidence: The law should be amended to focus on the reliability and significance of the scientific evidence presented and clarify that innocent people are not required to affirmatively show there is no possibility of their guilt, as this standard is almost always impossible for innocent people to meet.

#2—Amend 11.073 to Include Penalty Phase Relief: Allowing relief in cases where unreliable scientific evidence was used in the penalty phase can help ensure that defendants are not unfairly disadvantaged at any stage of the trial. This is especially important in cases with severe punishments, like the death penalty.

#3—Expand Access to Legal Representation: The law should ensure that indigent people can receive relief under 11.073 by guaranteeing they have access to legal counsel early in the process. This would help them navigate the complex legal system and potentially avoid dismissals for procedural defects.

#4—Implement Discretionary Review by the CCA: Shifting to discretionary appellate review would encourage rigorous fact-finding in trial courts, promote efficiency, and make relief more accessible.

#5—Require Reasoned Explanations from the CCA: Article 11.073 should require the CCA to provide reasoned explanations when it makes decisions on Article 11.073 claims. This would improve transparency and help people who seek relief under 11.073 understand the reasons for the court's decisions.

THE SCIENTIFIC AND LEGAL LANDSCAPE LEADING UP TO THE CREATION OF ARTICLE 11.073

The enactment of 11.073 was a significant development in Texas's approach to post-conviction relief and the evolving role of scientific evidence in the legal system. In fact, with the passage of 11.073, Texas became the first state in the U.S. to have a specific legal pathway for people to overturn their convictions based on false forensic science. This development was preceded by several key events that give context to the motivations behind 11.073 and its anticipated impact on the legal system.

2001

The Texas Legislature enacted Article 38.39, establishing procedures for preserving any biological evidence secured in relation to the offense, and Chapter 64 of the Code of Criminal Procedure, creating a mechanism for convicted individuals to request DNA testing that could establish, by a preponderance of the evidence, that they would not have been convicted if exculpatory results had been available.

2002

In November, the Houston Police Department Crime Lab faced scrutiny after a state audit revealed troubling findings, including under-trained staff, mistake-ridden work, and contaminated evidence, leading to the closure of the lab's DNA and Serology Section.

2004

Cameron Todd Willingham was executed in February for allegedly setting a fire that killed his three young daughters. He maintained his innocence. After his execution, more questions about the arson investigation and the purportedly scientific evidence used in his conviction emerged, suggesting that the fire was not the result of arson.

2005

The Texas Legislature established the Texas Forensic Science Commission to investigate allegations of error and misconduct by forensic scientists that affect the integrity of forensic analysis results.

Congress authorized the National Academy of Sciences, which advises the federal government on scientific and technical matters, to conduct an independent study on forensic science.

2009

The National Academy of Sciences released *Strengthening Forensic Science in the United States: A Path Forward*, recommending the creation of an independent scientific oversight entity for forensic science, investment in research and standards setting, addressing cognitive bias, and educating judges and legal practitioners.¹⁰

Texas State Senator John Whitmire filed Senate Bill 1976, which would have enacted Article 11.073, aiming to allow wrongfully-convicted individuals to present new scientific evidence. The bill passed the Senate but did not prevail in the 81st Legislature.

2011

The CCA denied relief in *Ex parte Robbins*. Neal Hampton Robbins had filed a post-conviction application after the Harris County Medical Examiner's Office reconsidered its prior autopsy findings for the victim and ultimately amended the autopsy report to change the initial cause of death to "undetermined." The CCA held that despite the change, Robbins failed to prove that the State's medical examiner's testimony at his original trial was false.¹¹ Three judges dissented, noting that the change in the cause of death determination "raises an extremely serious concern about the accuracy of the original jury verdict."¹² The dissent held that Robbins should be granted a new trial and that the legal system needed a mechanism to deal with claims involving changed science.¹³

Senator Whitmire filed Senate Bill 317, which would have enacted Article 11.073, but it failed again.

2013

The Texas Legislature amended Article 39.14 of the Code of Criminal Procedure, mandating an open discovery process. The legislation, named the Michael Morton Act, honored Michael Morton, who was wrongfully convicted in Texas in 1987 and exonerated by DNA evidence in 2011 after it was discovered that prosecutors had withheld exculpatory evidence.

Senator Whitmire's Senate Bill 344 successfully passed through the Legislature, finally enacting Article 11.073. It went into effect on September 1, 2013.

2014

Days after the enactment of 11.073, Neal Hampton Robbins filed a new post-conviction application, raising no new facts but relying on 11.073 as a new legal basis for bringing a second application. The CCA granted Robbins a new trial, acknowledging 11.073 as a new legal basis, though concurring and dissenting opinions revealed uncertainty about whether a change in a testifying expert's opinion is sufficient to grant relief.

2015

Following the CCA's decision in Robbins's second case, 11.073(d) was amended to clarify that changes in scientific knowledge also apply to a change in the opinion of an expert who previously testified for the State.

TEXT OF ARTICLE 11.073

(a) This article applies to relevant scientific evidence that:

- (1) was not available to be offered by a convicted person at the convicted person's trial; or
- (2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07 (Procedure After Conviction Without Death Penalty), 11.071 (Procedure in Death Penalty Case), or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) For purposes of Section 4(a)(1), Article 11.07 (Procedure After Conviction Without Death Penalty), Section 5(a)(1), Article 11.071 (Procedure in Death Penalty Case), and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

FINDINGS

11.073 was meant to expand access to justice in post-conviction proceedings for people wrongfully convicted on the basis of false or unreliable forensic evidence. In reality, the Texas Court of Criminal Appeals's (CCA) implementation of the statute has shown inconsistency in application, a disregard for discredited scientific methods, a heavy investigative burden for people seeking relief (especially people without counsel), and a striking absence of relief in capital cases—meaning that potentially innocent people will be executed. Individually and cumulatively, these have detrimental effects on justice and mean that the statute is not fulfilling its intended purpose: providing relief to innocent people convicted based on flawed forensic evidence.

The following findings were developed by examining all 74 applications with 11.073 claims filed in Texas that received a CCA decision as of December 2023. They do not include data pertaining to pending 11.073 applications or data relating to four successful, expunged 11.073 applications. Records were obtained from the Texas Court of Criminal Appeals. Several people have filed more than one application with an 11.073 claim, and these were considered separate applications.

Finding #1

The statute does not go far enough to protect innocent people who were convicted based on flawed forensic evidence.

Under 11.073, a court may grant relief when it finds that “had the scientific evidence been presented at trial, on the preponderance of the evidence, the person would not have been convicted.” On its face, the CCA typically uses 11.073’s statutory language, but in application, the court appears to require the evidence to be strong enough to eliminate any rational basis for a conviction, which is the legal actual innocence standard. This places much too high a burden on the people it was designed to help. Innocent people often cannot definitively prove that there is no rational basis for their conviction years or decades after it occurred. Often, much of the original evidence has gone stale, been destroyed, or been lost.

In 73% of the cases where the CCA has granted relief under 11.073, the person seeking relief did not just prove they were wrongfully convicted—they also affirmatively proved their actual innocence.¹⁴ Of the fifteen people granted relief under 11.073 since September 2013, 10 were either simultaneously granted relief on an actual innocence claim or presented evidence indicative of actual innocence.

The CCA's focus on whether a legal claim of actual innocence has been established can be seen across its opinions. In the following cases where the court granted relief, it emphasized exculpatory evidence rather than merely scientifically faulty inculpatory evidence.

Darryl Demitri Adams's aggravated sexual assault conviction was overturned under 11.073 after DNA testing not available at the time of his 1992 trial excluded him as a contributor to the DNA detected on vaginal swabs. The trial court had signed proposed findings drafted jointly by Adams and the State, which admitted that Adams had been misidentified.

In overturning the convictions of **Richard Bryan Kussmaul**, **James Edward Long**, **James Wayne Pitts Jr.**, and **Michael DeWayne Shelton**, the CCA emphasized in an extensive discussion that DNA testing had excluded all four co-defendants as contributors to the DNA evidence and had, in fact, identified an alternative perpetrator.

Tyrone Day's sexual assault conviction was overturned after DNA testing excluded Day as a contributor to the DNA evidence and identified two other men as contributors.

Ernest Lee Sonnier's aggravated kidnapping conviction was overturned after DNA testing excluded Sonnier as a contributor and identified two other men as contributors. These two alternate perpetrators were known associates, both with felony convictions.

These examples demonstrate that, in practice, people seeking relief under 11.073 might need to go beyond proving the State's reliance on flawed science—they might need to provide evidence affirmatively showing innocence. For most innocent people who were convicted based on problematic forensic evidence, this standard is impossible to meet. As a result of the CCA's interpretation, 11.073 does not do enough to consistently protect all people who have been convicted on false and discredited scientific evidence.

Texas already has actual innocence as an independent pathway for post-conviction relief. To hold people seeking 11.073 relief to the same standard renders 11.073 moot and denies relief to many innocent people who will never be able to meet the actual innocence legal standard but can nonetheless show that their convictions were based on flawed forensics.



Finding #2

Contrary to the language of 11.073 itself, the CCA does not grant relief for all kinds of new science; instead, it largely restricts relief to new DNA evidence.

The text of 11.073 allows for relief based on any false scientific evidence. The statute recognizes that many scientific disciplines, at one time regularly used to secure convictions, have been found to be riddled with errors.¹⁵ Those disciplines include fields as varied as blood spatter evidence, forensic pathology, fire debris investigation, shoeprints, bitemark evidence, firearms identification, gunshot residue, and DNA, to name a few. But new DNA evidence is the only consistently reliable type of evidence upon which the CCA grants relief. Eleven of 15 successful applications raised DNA-based claims. This is by far the most commonly raised type of claim, with 32 total DNA claims raised of the 74 applications examined by TDS; the second most commonly raised claims are those concerning the determination of the cause of death, with nine such claims having been raised. Still, DNA claims are significantly overrepresented in successful applications, constituting 73% of successful claims but only 43% of claims raised.

This is problematic because DNA evidence is only a tiny subset of potentially false forensic evidence, and in fact, most wrongful convictions are not based on DNA.¹⁶ Of the 3,479 exonerations in the U.S. since 1989,¹⁷ only 594 involved DNA evidence. In a study of 458 wrongful convictions involving false or misleading forensic evidence, a researcher found that while many cases involved issues with DNA, exonerations based on DNA have become less likely; now, it is more likely that other forensic flaws contributed to the conviction.¹⁸

While DNA evidence represents only a small subset of potentially flawed forensic evidence, it is the most commonly presented claim. This contradiction makes sense because DNA evidence uniquely has the power to definitively establish innocence or guilt, making it possible to overturn wrongful convictions based solely on its re-evaluation. Few other types of scientific evidence possess this same conclusive power, even though they can still significantly influence trial outcomes. This underscores the harm of prioritizing the concept of innocence over evaluating the reliability of the verdict in light of the evidence.

In creating 11.073, legislators acknowledged that a mechanism for relief pursuant to DNA issues had been recognized through the establishment of Chapter 64 of the Code of Criminal Procedure.¹⁹ Instead of creating a provision for every type of discredited science, 11.073 “would establish a single standard” to address developments in “various fields.”²⁰

Although the Texas Legislature intended for 11.073 to encompass the full scope of scientific evidence that can affect a trial,²¹ the CCA’s interpretation narrows in on only a small subset of false forensic evidence. This excludes vast swathes of defendants whose convictions are based on false forensic techniques but whose cases involved no DNA.²²

Evidence at Issue in 11.073 Claims ²³

Type of Evidence at Issue	Number of Claims Raised	Number of Claims Succeeded	Success Rate
DNA ²⁴	32	11	34%
Cause of Death Determination	9	1	11%
Eyewitness Testimony	5	0	0%
Biomechanics	4	0	0%
Pediatric Head Trauma	4	0	0%
Scarring of the Hymen	3	0	0%
Bite Mark Comparison	3	1	33%
Time of Death Determination	3	0	0%
Hypnosis	2	0	0%
Ballistics	2	1	50%
Shaken Baby Syndrome	3	0	0%
Blood Pattern Analysis	1	0	0%
Herpes Test	1	0	0%
Cell Tower Evidence	1	1	100%
Trace Evidence	1	0	0%
Bruise Dating	1	0	0%
Hair Comparison	1	0	0%
Fingerprint	2	1	50%
Handwriting Analysis	1	0	0%
Effects of Opioids	1	0	0%
Blood Alcohol Content	1	0	0%
Physical Match Comparison	1	0	0%
Burn Patterns	1	0	0%
Collision Reconstruction	1	0	0%
Psychiatric Testimony	1	0	0%
Persistence of Spermatozoa	1	0	0%

Finding #3

The CCA is not granting relief to death-sentenced people under 11.073.

The CCA has decided 25 11.073 applications filed by people facing the death penalty since September 2013, which constitutes 34% of all applications filed. In that time, the CCA has not granted relief to a single death-sentenced person under the statute.²⁵ People who are not death-sentenced have received relief in 15 of 49 cases, or a rate of 31%. Of the 25 applications filed by people sentenced to death, 18 were dismissed or denied by the CCA without review of the underlying claim because the court determined they were procedurally barred. Of the 25 applications filed by people sentenced to death, most—64%—were dismissed or denied by an order no longer than a page and with no substantive discussion.

The deadly consequences of this pattern are clear: People may be executed following convictions that rest on faulty science because they are unable to obtain relief under 11.073. This is especially concerning because the rate of wrongful convictions of death-sentenced people is quite high. Since 1973, 200 people have been exonerated from U.S. death rows; 18 of these people were from Texas.²⁶ For every eight people executed, one person on death row has been exonerated. A 2014 study estimated that the rate of wrongful conviction is 4% in capital cases; the actual number may be far higher than that.²⁷

Only seven applications filed by death-sentenced applicants were ever reviewed on the merits. One of the cases where the CCA subsequently denied relief is profiled below:

Areli Escobar: Mr. Escobar was convicted of capital murder and sentenced to death for the sexual assault and fatal stabbing of a 17-year-old girl who lived in the same apartment complex.

After his conviction, a 2016 audit by the Texas Forensic Science Commission revealed that lab technicians had used flawed science to calculate the odds of DNA results and had used expired materials during testing. Due to these findings, the Austin Police Department's lab was shut down.²⁸

Mr. Escobar filed claims under Article 11.073, challenging the validity of the DNA and fingerprint evidence that purportedly linked him to the crime scene. This evidence was crucial because Mr. Escobar did not know the victim and had no connection to her. The CCA authorized these claims and sent the case back to the trial court. After an evidentiary hearing, the trial court issued over 80 pages of findings, concluding that it would be "shocking to the conscience" to uphold the conviction given the "fundamentally unfair" trial.

Following the trial court's findings, the Travis County District Attorney's office admitted error and agreed that Mr. Escobar's federal due process rights were violated by the use of faulty DNA evidence during his trial.

Despite the agreement between Mr. Escobar, the district attorney's office, and the trial court on the unreliability of the DNA evidence—and despite the CCA's typical practice of adopting trial court findings—the CCA did not adopt the trial court's findings in Mr. Escobar's case. Instead, the CCA ruled that Mr. Escobar had not shown that the DNA evidence was likely to have affected the jury's verdict.

Mr. Escobar took his case to the United States Supreme Court, which in January 2023 remanded the case and ordered the CCA to consider the district attorney's concession. In September 2023, the CCA again denied Mr. Escobar relief, and he has now taken his case to the Supreme Court once more.

Finding #4

People without counsel are functionally barred from meaningfully seeking relief under 11.073.

While all people seeking 11.073 relief struggle to obtain review, people without lawyers—pro se applicants—uniformly fare much worse than people with lawyers across almost every metric. Of the 74 applications filed and adjudicated between September 2013 and December 2023, 19 were filed by people without lawyers. Of those 19 people without lawyers, only one has ever been granted relief, a stark drop off from the 25% of people with counsel who receive relief. The CCA dismissed or denied 16 of 19 pro se applications without a written order—84% compared to 16% of people who had legal representation. Of the few cases in which the CCA has denied relief without a written order and with no statutory citation to give insight into the basis of the denial, most were filed pro se. People without lawyers receive significantly less rigorous trial court and CCA written decisions and are much more likely to be deemed procedurally barred.

While a statutory basis for appointing counsel for indigent people already exists, access to such counsel is only warranted “if the court concludes that the interests of justice require representation.”²⁹ Further, as former CCA Judge Elsa Alcala pointed out in a dissent, “that statutory basis is seldom used by [the CCA] in order to mandate the appointment of counsel in these situations.”³⁰ Additionally, trial courts must make a determination of indigency and appoint counsel if the trial court calls for an evidentiary hearing.³¹ People without counsel who are seeking 11.073 relief often fail at the initial application stage and would not reach the point at which the CCA might call for the appointment of counsel.

Particularly in light of the high standard of review the CCA applies to 11.073 claims, people without lawyers are so disproportionately burdened by the requirements of 11.073 that they are functionally barred from relief. The investigative demands of putting together an 11.073 claim cannot be and have never been met by an incarcerated person working without the assistance of an attorney; the one successful person who did this without counsel was out on parole at the time of his application. While 11.073 provides a legal pathway for relief, this pathway cannot be successfully utilized by indigent people who lack the resources to meet the CCA's high demands. These people are penalized for their inability to hire counsel.

Some applications make it clear how many incarcerated people believe 11.073 may apply to their cases but do not know how to investigate such a claim. For example, Sergio Reyes Castillo submitted an 11.073 application stating that he simply wanted to have DNA testing done on evidence from his case after hearing about 11.073. The trial court responded by incorrectly stating that Mr. Castillo was not eligible for 11.073 because he had made a plea. The court stated further, “Applicant does not point out what scientific evidence is available or how this evidence would prove he would not have been convicted had he presented said evidence at trial.” It is clear from the application that Mr. Castillo did not know how to go about getting DNA testing done and was asking for help in the only way he could think of—by writing to the court.

GROUND TWO: DNA testing (Art.11.073.
Procedure related to certain scientific evidence)

FACTS SUPPORTING GROUND TWO:
Art.11.073 was not available at the
time of my case, I would like to
have testing done.

An excerpt of Mr. Castillo's 11.073 Application

Bartholomew Antonio Guzman's case is another example of how the system fails people without counsel. Mr. Guzman filed a subsequent post-conviction application arguing that the State's claim of shaken baby syndrome was not supported by the evidence.

The trial court sent Mr. Guzman's application to the CCA, and the CCA agreed that there was a valid basis for relief and instructed the trial court to make specific findings of fact and conclusions of law. The CCA also suggested that Mr. Guzman should be appointed a lawyer if a hearing was necessary. The trial court adopted the State's version of the findings, which were incomplete and did not address the CCA's instructions. The State's version recommended dismissing the case due to a procedural issue, even though the CCA had already ruled that this issue had been resolved.

The trial court sent the findings to the CCA, which remanded the case again for findings of fact and conclusions of law. The trial court signed poorly written findings that barely addressed Mr. Guzman's issues. Appended to the findings was an article about the validity of the diagnosis of shaken baby syndrome, which, though topical, did not address Mr. Guzman's specific claims. The trial court ignored his multiple requests for a lawyer until the day after sending the findings to the CCA, rendering the appointment almost meaningless.

The trial court did not give Mr. Guzman a copy of these findings or allow him to submit his own version before sending them to the CCA. Ultimately, the CCA denied Mr. Guzman's application.

The problems outlined throughout this report are heightened for people without lawyers, who do not have the guidance of an attorney in navigating the complex, demanding 11.073 application process. People without counsel could also be penalized in the future for even filing a pro se application. If they later acquire counsel and attempt to submit a successive 11.073 claim, they may be found procedurally barred and bound to the decision made on their earlier, and inevitably weaker, application. Incarcerated people without counsel and without funding do not have the means to develop 11.073 claims as the statute stands now.

Finding #5

Procedural bars prevent large numbers of 11.073 applications from being considered on the merits.

A procedural bar is a rule that precludes a court from fully considering a claim either because it was brought before the court incorrectly or because insufficient facts were presented. At least 28 of the 74 applications filed since 2013 have been barred on procedural grounds. In other words, the CCA dismissed these applications without considering the claim on the merits, instead determining that the claims could not be addressed. In addition to this, half of the claims found to be procedurally barred were dismissed or denied without a written order.

This pattern disproportionately affects people sentenced to death and people without lawyers, two particularly vulnerable groups, who combined account for 23 of the 28 procedurally barred applicants, or 82%. This is because people who are sentenced to death have often already filed a prior habeas application under 11.071, which oftentimes failed to raise any forensic science issues. But even if they never raised an 11.073 claim in their prior application, people must still overcome the procedural bar set out in 11.071 Section 5 before their claim can be assessed on its merits.³² Many death-sentenced people who are wrongfully convicted can simply never overcome this bar, and their claims are never heard by a court, instead simply dismissed on procedural grounds. People without lawyers are likely to be procedurally barred for a different reason: without counsel, they are not well-versed enough in the statute to comply with all of its requirements.³³

Article 11.073 was designed to give those convicted of crimes using faulty evidence a chance to present new scientific evidence. When procedural bars prevent any court from reaching the merits of an application, people who received an unfair trial are left incarcerated. Many of them are on death row and face execution despite serious questions about their guilt that have never been addressed by any court.

Of the 28 applications barred on procedural grounds, 13 were dismissed without a written order at all, and the remaining 15 were dismissed by orders that never provided more than a page of discussion and frequently used form language, seen below:

We have reviewed the subsequent application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the claims' merits.

Several capital applicants, profiled below, presented compelling claims that their convictions rested in part on junk science, but their 11.073 applications were nonetheless determined to be barred under 11.071 Section 5. These applicants continue to face execution by the State of Texas despite the possibility that their convictions rest on outdated or false science. The execution of a person who was convicted due to faulty forensics, simply because they were not able to overcome a procedural bar, raises serious concerns about the legitimacy and accuracy of the criminal justice system.

DeMontrell Miller: Mr. Miller was convicted of capital murder for the death of his two-and-a-half-year-old stepson. The State had no physical evidence or eyewitness testimony supporting its theory that Mr. Miller physically harmed the child. The State's entire case rested on the testimony of a forensic pathologist, who testified that the time of the injury that ultimately resulted in the child's death, a torn mesentery, could be pinpointed to a time during which the child was in Mr. Miller's care.

In his 11.073 application, he pointed out that the State's witness had changed his opinion. At trial, the State's witness testified that the child's mesentery was torn one to four hours before his death, when he was in Mr. Miller's care. After learning additional facts, the medical examiner now believes his original testimony to be incorrect and that the injury could have been caused earlier while the child was in the care of his mother.

The CCA dismissed the 11.073 claim without reviewing its merits, simply stating that the application was procedurally barred.

Rodney Reed: Mr. Reed was convicted of capital murder. The State's theory was that Mr. Reed abducted and raped the victim and then disposed of her body between 3:00 am and 5:23 am. The only evidence used to argue that there was a sexual assault was that Mr. Reed's sperm had been found inside the victim's body. However, Mr. Reed insisted that he was innocent, and he had had an ongoing consensual sexual relationship with the victim. In Mr. Reed's first 11.073 claim, his lawyers asserted that the jury disbelieved Mr. Reed because he was a Black man living in rural Texas and his victim was white; he was ultimately convicted by an all-white jury. In a declaration made 18 years after the trial, the State's expert changed his testimony, stating that the forensic evidence pointed not to rape but instead to a consensual sexual encounter—which is consistent with Mr. Reed's account. The expert's recantation was further supported by conclusions proffered by three of the nation's leading forensic pathologists.

Nonetheless, the CCA dismissed Mr. Reed's application without reviewing the merits, simply stating that the applications were procedurally barred.

While procedural bars commonly block the review of meritorious claims, such bars are particularly problematic for 11.073 claims because there is no further avenue for review in any other court, state or federal. Unlike some people seeking relief under 11.07 and 11.071, those with junk science claims do not have a clear pathway to bring their claims to federal court. While procedurally defaulted claims are generally ineligible for review by a federal court, a person with a Constitution-based claim found procedurally defaulted in state court can petition a federal court for review under the cause and prejudice standard. However, a person with a procedurally defaulted 11.073 claim has no such pathway because, as a function of 11.073, the claims fall outside of the Constitution.³⁴

ROBERT ROBERSON

EVIDENCE OF CHANGED SCIENCE AND ACTUAL INNOCENCE—STILL NOT ENOUGH?

Robert Roberson, a special education student, dropped out of school after the 9th grade because of undiagnosed autism spectrum disorder. Coming from a very poor family, he joined the military and struggled to find stability. When he learned about his daughter Nikki, born to a young woman with a drug addiction, he was eager to take on the responsibility of fatherhood.

After gaining custody soon after Nikki turned two, Mr. Roberson worked multiple paper routes to support her. Nikki, who had been chronically ill since birth, suffered from a high fever and undiagnosed pneumonia during the week before her final collapse on January 31, 2002. First, she fell from bed, and Robert awoke upon hearing a strange cry, saw nothing wrong, comforted her, and then they both went back to sleep.



Robert Roberson and his daughter, Nikki

Later that morning, Mr. Roberson found her unresponsive with blue lips from oxygen deprivation. The State claimed that Nikki's collapse was caused by "shaken baby syndrome," now known as "abusive head trauma," suggesting that a combination of violent shaking and blunt head impact caused her condition. This hypothesis is now widely questioned. Mr. Roberson's legal team maintains that he is an innocent father who has spent over 20 years on death row for a crime that never occurred.

In 2016, a week before Mr. Roberson's scheduled execution, the CCA granted a stay and remanded his claims to the trial court, including an actual innocence claim and a challenge to the shaken baby hypothesis under Article 11.073. During his 2003 trial, State medical experts testified that violent shaking or blunt force were the only explanations for Nikki's death, dismissing the relevance of her recent high fever and illness. Mr. Roberson had taken Nikki to the ER and her pediatrician in the days before her collapse, but each time she was sent home with prescriptions no longer deemed suitable for children her age and condition. On the morning of her collapse, when Mr. Roberson sought medical help, he was met with suspicion.

Nikki's body showed virtually no external signs of injury, but a CAT scan revealed bleeding under the dura membrane, brain swelling, and retinal hemorrhages. In 2002, the medical consensus was that these symptoms could be used to “diagnose” abuse, dismissing the possibility that this triad could be caused by illness or accidental short falls with head impact. Whoever was with the child when he or she collapsed would be presumed guilty, especially if they denied doing anything to harm the child, as Mr. Roberson did. The jury saw disturbing autopsy photos showing blood under Nikki’s scalp, and despite the absence of neck injuries, skull fractures, or broken bones, the internal conditions were attributed to shaking. Mr. Roberson's own lawyer conceded to the shaken baby diagnosis, arguing only that Mr. Roberson lacked intent due to his mental impairments, despite the fact he consistently denied harming Nikki and refused plea deals.



The Palestine, Texas, Courthouse where Robert Roberson was convicted

The jury heard testimony misinterpreting Mr. Roberson's autistic traits as a lack of appropriate emotion. Misleading testimony from a nurse suggested sexual abuse, although no other evidence supported this claim. The State dropped this allegation right before deliberations, but only after prejudicing the jury irreparably. The trial, focused on the shaken baby syndrome diagnosis and bolstered by the abuse pediatrician's and medical examiner's testimonies, portrayed Mr. Roberson as a monster.

Years later, new counsel for Mr. Roberson identified significant changes in the scientific understanding of the shaken baby hypothesis, used Article 11.073 to obtain a stay of execution, and then fought for an evidentiary hearing, which was eventually granted. His counsel presented evidence showing Nikki's condition could be explained entirely by her illness and the dangerous medications she had been prescribed rather than abuse. Long-lost CAT scans found in the courthouse basement during the evidentiary hearing showed a single minor head impact, aligning with Mr. Roberson's account of the fall from bed, not multiple impact sites. Expert analysis indicated Nikki's undiagnosed pneumonia, respiratory-suppressing medications, and the accidental fall could explain her condition, not any inflicted trauma.

Despite the evidence amassed during the 11.073 proceedings, in February 2022, the trial court recommended denying relief to Mr. Roberson. In doing so, the court simply adopted, virtually verbatim, a 17-page document drafted by the local prosecutors, typographical errors included. Mr. Roberson's 302-page proposed findings of fact and conclusions of law, which comprehensively summarized the new evidence from six expert witnesses from a range of disciplines, was ignored. The CCA's 2023 decision, which denied Mr. Roberson's claims, provided no explanation but merely adopted the trial court's findings, which did not mention any of the voluminous new evidence and instead invoked the outdated trial cause-of-death theory that had been challenged under Article 11.073. Neither the trial court nor the CCA acknowledge the significant scientific advancements and the exculpatory evidence presented.

According to the National Registry of Exonerations, since 1992, over 30 parents and caregivers in 18 states have been exonerated after being wrongfully convicted under the shaken baby hypothesis.³⁵ Yet Mr. Roberson, using Article 11.073 and much of the same changed science relied on in cases in other jurisdictions, was unable to obtain relief from the Texas courts. Unless his case is revisited before it is too late, he would be the first person in the U.S. executed based on the debunked shaken baby hypothesis.



Recent photo of Robert Roberson

RECOMMENDATIONS

Based on our analysis of the Article 11.073 cases filed and adjudicated by the Texas Court of Criminal Appeals (CCA) since the law's enactment, we have identified opportunities for the Texas Legislature to strengthen the framework of review and address some of the ambiguities in the law's application. These recommendations have been crafted to promote the efficacy and fairness of post-conviction review where a person is convicted based on unreliable scientific evidence.

Recommendation #1

Revise the Standard for Granting Relief to Consider the Overall Impact of Flawed Scientific Evidence.

The CCA has itself admitted that proving actual innocence is a “Herculean task.”³⁶ But the vast majority of the decidedly few successful claims under Article 11.073 have placed significant emphasis on the legal “actual innocence” standard which requires eliminating any possibility of guilt, even though proof of this is not required under the statute. As explained throughout this report, most innocent people cannot meet the “actual innocence” legal standard. 11.073 could be more effective in protecting innocent people convicted based on flawed forensic evidence if courts could consider claims of false and discredited science as it does due process claims: granting relief if the evidence was more likely than not to contribute to a conviction. While typically discrete types of evidence are not treated this way, scientific evidence deserves due process treatment because of its weighty influence on juries.³⁷ If the statute permitted relief when it is more likely than not that the flawed scientific evidence relied on by the State contributed to the conviction, the focus would be on the reliability and significance of the scientific evidence presented rather than requiring an innocent person to meet the impossible burden of affirmatively disproving any possibility of their own guilt.

Recommendation #2

Amend 11.073 to Include Penalty Phase Relief.

Once a person facing a capital sentence is found guilty, they proceed to the “penalty phase” of their trial, where the jury decides whether they deserve a life or death sentence. The jury makes this decision based on the presence of mitigating circumstances and aggravating circumstances, as well as based on whether the person presents a future danger to society. The introduction of unreliable or discredited scientific evidence during the penalty phase can skew the sentencing process by influencing the severity of a sentence. The prosecution can use scientific evidence to suggest a person's involvement in another offense, support an aggravating circumstance, or advance a theory of future dangerousness.



The CCA has interpreted the plain language of Article 11.073 to exclude penalty-phase relief.³⁸ However, permitting penalty-phase relief could help ensure that people are not unfairly disadvantaged by problematic scientific evidence at any stage of the trial. In capital cases where the death penalty is a possible outcome, discredited and unreliable scientific evidence can lead to wrongful executions, which is an irreversible miscarriage of justice.

Expanding Article 11.073's reach to the penalty phase would be a significant step toward more accurate and fair sentencing decisions. It would help address the impact of unreliable scientific evidence, uphold legislative intent, and promote public trust in the legal system, even in the most severe cases.³⁹

Recommendation #3

Expand Access to Counsel for Indigent People Seeking Relief from their Wrongful Convictions.

The legislature should add a statutory provision for the limited appointment of counsel for indigent people with potentially viable claims under Article 11.073. The provision should instruct courts to appoint such counsel before deciding whether to authorize the claims or grant merits review. Although a court can appoint an attorney to an indigent applicant "if the court concludes that the interests of justice require representation,"⁴⁰ courts rarely utilize this provision uniformly.⁴¹ Currently, pro se applicants are typically appointed counsel only after their application is remanded for additional fact-finding. Furthermore, when the CCA directs trial courts to appoint counsel, it is usually in the event the trial court elects to hold an evidentiary hearing. This is insufficient, as it is often too late for applicants with claims that have substantive merit but fail because they lack technical procedural compliance.

Without legal representation, pro se applicants are significantly disadvantaged in the complex process of resolving issues that may require affidavits, depositions, interrogatories, or additional forensic testing. Therefore, early appointment of counsel is essential to ensure fair and effective access to justice for these applicants. Under Chapter 64, "[a] convicted person is entitled to counsel."⁴² Once a person tells the trial court they want to file a motion under Chapter 64, the court must find reasonable grounds for the motion and determine that the person cannot afford a lawyer in order to appoint one.⁴³ Article 11.073 would benefit from a similar addition, ensuring people have access to the courts.



Recommendation #4

Implement Discretionary Review by the CCA.

To enhance the effectiveness of the post-conviction review process where junk science is at issue, 11.073 should be amended to give trial courts the power to enter final judgments and allow for discretionary review by the CCA. Under the current procedure, the CCA is required to review every post-conviction application submitted under Article 11.073, irrespective of the case's merits or the trial court's findings of fact and conclusions of law.

By shifting to a discretionary appellate review system, the CCA would have the authority to select which cases merit its attention based on the need to address legal or factual issues or the presence of novel questions of law.

This amendment would streamline the review process and provide trial courts with greater responsibility in evaluating claims under 11.073. Such a shift would encourage thorough and rigorous fact-finding and produce better trial court-level record-making. Furthermore, in cases where the applicant, State, and the trial court agree that relief should be granted, the judgment could be left undisturbed. This approach better aligns with the goal of granting relief to people convicted based on false and unreliable scientific evidence while promoting judicial efficiency and preserving the CCA's capacity to address the most pressing legal questions.

Recommendation #5

Mandate the CCA to Explain Why It Has Denied or Dismissed an 11.073 Claim.

The legislature should amend Article 11.073 to require the CCA to explain its reasoning in a written opinion any time it dismisses or denies relief under the statute. This amendment would enhance transparency in the decision-making process, offering valuable insight to legislators on the effectiveness and application of 11.073 and providing clear guidance to future litigants. This requirement is crucial because the current practice shows that the CCA either applies an overly stringent standard for authorization or relies on trial courts for substantive fact-finding and decision-making. Oftentimes, trial courts simply adopt the State's arguments with minimal scrutiny or explanation, resulting in applicants receiving little to no rationale for the rejection of their claims. By insisting on reasoned orders, the legislature could identify how 11.073 is being applied and address any shortcomings in its implementation.

CONCLUSION

In summary, the implementation and application of Article 11.073 have highlighted several areas where improvements are necessary to ensure justice for innocent people convicted based on flawed forensic evidence. The recommendations provided would address these issues by clarifying procedural requirements, mandating reasoned opinions from the CCA, ensuring that the onerous showing of actual innocence is not a prerequisite for relief, and improving access to legal representation for indigent and pro se people. By making these changes, the legislature could enhance the fairness, reliability, and effectiveness of the post-conviction review process and ensure that wrongful convictions based on junk science are more readily addressed and rectified.

ENDNOTES

¹ *Ex parte Robbins (Robbins II)*, 478 S.W.3d 678, 695-700 (Tex. Crim. App. 2014) (Cochran, J., concurring). See also *DNA Testing Suspended as More Problems Emerge at Houston Crime Lab*, Innocence Project (Feb. 1, 2008), <https://innocenceproject.org/dna-testing-suspended-as-more-problems-emerge-at-houston-crime-lab/>; Houston Police Department Crime Laboratory Technical Review Panel, Report (May 31, 2005), <http://www.hpdlabinvestigation.org/reports/050531report.pdf>.

² *Ex parte Robbins (Robbins I)*, 360 S.W.3d 446, 454 (Tex. Crim. App. 2011); *Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012).

³ *Id.*

⁴ See *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

⁵ Tex. Code Crim. Proc. Ann. art. 11.073.

⁶ *Id.*

⁷ Trevor Rosson, *A New Remedy for Junk Science: Article 11.073 and Texas's Response to the Changing Landscape in the Forensic Sciences.*, 48 St. Mary's L.J. 465, 467 (2017), <https://commons.stmarytx.edu/thestmaryslawjournal/vol48/iss3/2>.

⁸ Tex. Code Crim. Proc. Ann. art. 11.073(a), (b).

⁹ House Research Organization, Bill Analysis, Texas House of Representatives, 83rd Legislature, Regular Session, at 2 (May 15, 2013), <https://hro.house.texas.gov/pdf/ba83R/SB0344.PDF>.

¹⁰ *Ten Years Later: The Lasting Impact of the 2009 NAS Report*, Innocence Project (Feb. 19, 2019), <https://innocenceproject.org/lasting-impact-of-2009-nas-report/>.

¹¹ *Robbins I*, 360 S.W.3d at 459.

¹² *Id.* at 469 (Cochran, J., dissenting).

¹³ *Id.* at 471, 476 (Cochran, J., dissenting).

¹⁴ See *Ex parte Fournier*, 473 S.W.3d 789, 793 (Tex. Crim. App. 2015) (“An actual innocence claim must be accompanied by new “affirmative evidence of the applicant's innocence.”).

¹⁵ See House Research Organization, Bill Analysis, Texas House of Representatives, 83rd Legislature, Regular Session, at 2 (May 15, 2013), <https://hro.house.texas.gov/pdf/ba83R/SB0344.PDF>.

¹⁶ As of June 28, 2024.

¹⁷ Exonerations by Year, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited Jun. 28, 2024).

¹⁸ John Morgan, *Forensic Testimony Archaeology: Analysis of Exoneration Cases and Its Implications for Forensic Science Testimony and Communications*, National Institute of Justice, Document No. 306259, at 31, 35 (March 2023), <https://www.ojp.gov/pdffiles1/nij/grants/306259.pdf>.

¹⁹ House Research Organization, Bill Analysis, Texas House of Representatives, 83rd Legislature, Regular Session, at 2 (May 15, 2013), <https://hro.house.texas.gov/pdf/ba83R/SB0344.PDF>.

²⁰ *Id.*

²¹ Senate Research Center, Bill Analysis, S.B. 344, 83rd Leg., R.S., at 1 (Feb. 28, 2013), <https://capitol.texas.gov/tlodocs/83R/analysis/pdf/SB00344I.pdf#navpanes=0>. (“The bill specifies that evidence to discredit scientific evidence presented at trial is among the types of claims or issues that can affect court consideration of an application for a writ of habeas corpus.”).

²² See Texas Code of Criminal Procedure chapter 64 for the procedure to file a Motion for Forensic DNA Testing. This is a motion that convicted people can submit to their convicting court requesting the court order the forensic DNA testing of evidence reasonably likely to contain biological material. While the procedures are different from Article 11.073, with some assumptions, it is arguable that all successful 11.073 claims based on DNA could have been granted relief through the gateway provided by Chapter 64. Tex. Code Crim. Proc. art. 64.01(a-1).

²³ Many applicants raised multiple claims based on different types of evidence. This chart catalogs all the claims raised. A claim is marked as successful only if the CCA granted relief in light of the type of evidence at issue. For example, one applicant raised claims based on ballistics and cell-tower evidence, but the applicant was only granted relief on the cell-tower evidence claim. The chart identifies this applicant as having raised a ballistics claim and a cell-tower evidence claim and as having succeeded on the cell-tower evidence claim.

²⁴ Four applicants granted relief based on DNA evidence claims were co-defendants.

²⁵ Furthermore, access to relief for death-sentenced people is limited by the CCA’s refusal to provide a remedy when a person alleges innocence of the death penalty. An example of this is

“evidence that would show that the defendant was, in fact, a non-triggerman who did not have the culpability necessary to allow the imposition of the death penalty.” *See Ex parte White*, 506 S.W.3d 39, 47 (Tex. Crim. App. 2016). In *Ex parte White*, the CCA contemplated whether to interpret the word conviction in 11.073 to encompass guilt and punishment, in 11.07 and 11.071, or like in Chapter 64. The CCA decided that it would run afoul of its principles of statutory construction to provide a remedy for punishment claims. *See Id.* at 52 (“Because applicant’s proffered scientific evidence relates solely to punishment, his evidence cannot meet that requirement.”).

²⁶ Death Penalty Information Center, Innocence Database, Texas, <https://deathpenaltyinfo.org/database/innocence?state=Texas> (last visited Jun. 28, 2024).

²⁷ Samuel R. Gross, Barbara O’Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proc. Nat’l Acad. Sci. 7230, 7230-35 (2014), <https://www.pnas.org/doi/epdf/10.1073/pnas.1306417111>.

²⁸ Jolene Almendarez, *More Questions for Austin Police Department Crime Lab*, *Texas Tribune* (Jul. 30, 2016), <https://www.texastribune.org/2016/07/30/more-questions-austin-police-department-lab/>.

²⁹ Tex. Code Crim. Proc. Ann. art. 1.051(d)(3).

³⁰ *Ex parte Resendez*, No. WR-39,308-11, 2018 WL 849460, at *2 (Tex. Crim. App. Feb. 14, 2018) (Alcala, J., dissenting).

³¹ *See, e.g., Ex parte Gandy*, No. WR-22,074-10, 2018 WL 1516394, at *1 (Tex. Crim. App. Mar. 28, 2018) (remanding to the trial court and ordering that the trial court make a determination of indigence and appoint counsel if it elects to hold an evidentiary hearing).

³² People who are not death-sentenced may face a similar procedural bar under 11.07 Section 4, but it is less common that they have filed an application in the past and the trial court may choose to engage in fact finding before the CCA determines whether the claims are barred.

³³ If a person raises an 11.073 claim in a subsequent application for a writ of habeas corpus, they must not only meet the requirements of 11.073. They must also comply with the procedures set out in 11.07 Section 4 if they are not sentenced to death, or 11.071 Section 5 if they are sentenced to death. Failure to meet these statutory requirements will result in their being procedurally barred from obtaining relief. 11.07 Section 4(a) provides:

If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed

under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

11.071 Section 5(a)(1) is functionally identical to 11.07 Section 4(a), providing:

If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

11.073(c) clarifies the scope of 11.07 Section 4(a)(1) and 11.071 Section 5(a)(1) for the purpose of 11.073 claims:

For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

³⁴ Federal statutes allow federal courts to grant habeas relief to state prisoners to challenge convictions or sentences that violate a defendant's constitutional rights. *See* 28 U.S.C. § 2254(d)(2). 11.073 applicants may attempt to take their claims to federal court, but a court will likely find the claim to be outside of the scope of federal habeas review.

³⁵ National Registry of Exonerations, Exoneration Detail List, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Jul. 1, 2024) (filter for cases tagged “SBS”).

³⁶ *See Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

³⁷ *See* Ellory R. Dabbs, *Understanding the Impact of Scientific Testimony on Potential Jury Members: Independent and Interactive Effects of Expert Characteristics and Jury Member's Social Location*, 1-2 (2023) (unpublished Ph.D. dissertation, West Virginia University), <https://researchrepository.wvu.edu/etd/12244>. (“Although most criminal cases crimes end with a plea deal (Smith and MacQueen 2017; Gramlich 2023), where the defendant will plead guilty to the offense without ever asserting their innocence in front of a jury, those cases that do result in a criminal trial are increasingly relying on forensic evidence linking someone to a crime (Murphy 2015; Barbaro 2019; Bali et al. 2020; Ling, Kaplan, and Berryessa 2021). Over the last twenty years, the collection of forensic evidence has been increasingly important for those accused of a

violent crime. Forensic scientific evidence, such as DNA, blood spatter patterns, fingerprints, or bite marks, has been found to be crucial in criminal cases that go to trial.”).

³⁸ *Ex parte White*, 506 S.W.3d 39, 52 (Tex. Crim. App. 2016).

³⁹ In the past three regular legislative sessions, the Texas House has passed bills aimed at addressing the CCA's ruling in *Ex parte White*; those bills have passed with near-unanimous, bipartisan support. Most recently, in 2023, the Texas House passed House Bill 205 by a vote of 144 yeas, one nay, and two present not voting. *See* H.B. 205, 88th Leg., R.S. (Tex. 2023), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB205> (last visited Jul. 1, 2024). The bill was not considered in the Senate. This same legislation also passed in 2021 with the same vote count; it did not pass in the Senate Criminal Justice Committee that year. *See* H.B. 275, 87th Leg., R.S. (Tex. 2021), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB275> (last visited Jul. 1, 2024). Similarly, in 2019, House Bill 464 passed the House by a vote of 130 yeas, one nay, and one present not voting. *See* H.B. 464, 86th Leg., R.S. (Tex. 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB464> (last visited Jul. 1, 2024).

⁴⁰ Tex. Code Crim. Proc. art. 1.051(d)(3).

⁴¹ *Ex parte Resendez*, No. WR-39,308-11, 2018 WL 849460, at *2 (Tex. Crim. App. Feb. 14, 2018) (Alcala, J., dissenting). (“[T]he statutory basis for appointing counsel to an indigent *pro se* habeas applicant in the interests of justice already exists in Texas, but that statutory basis is seldom used by this Court in order to mandate the appointment of counsel in these situations.”).

⁴² Tex. Code Crim. Proc. art. 64.01(c).

⁴³ *Id.*



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