



THE TEXAS JUNK SCIENCE WRIT

A look six years in.

BY KIRK COOPER

In 2013, Texas became the first state in the country¹ to provide a specific legal avenue allowing prisoners to challenge potential wrongful convictions by showing that changes in the field of forensic science either seriously undermined the integrity of the criminal trials resulting in their convictions or else exonerated the prisoner completely. In the six years since the Texas Legislature passed Article 11.073 of the Texas Code of Criminal Procedure—known by many as the so-called Junk Science Writ—several applicants have used the procedure to receive new trials and, in a recent case, to obtain an acquittal on actual innocence grounds.

How the Junk Science Writ Works

The Legislature's passage of Article 11.073 served two purposes. First, the statute clarified that judges could consider changes in the scientific value of already-available evidence as a basis for granting post-conviction habeas relief once all direct appeals are exhausted. Generally, habeas corpus proceedings allow a convicted person to present *new* evidence that did not make its way into trial record; challenges related to the probative value of evidence admitted at trial are matters dealt with on direct appeal that cannot be raised in a habeas challenge.²

Second, Article 11.073 has also allowed some convicted persons to bypass a common procedural barrier in the post-conviction review process: the subsequent application bar,³ which bars a convicted person from filing more than one habeas corpus application unless a subsequent application contains sufficient specific facts establishing that 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 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.⁴

Article 11.073 solved both the new-versus-old evidence questions and the subsequent application questions that can arise in habeas proceedings involving changes to the weight and value of trial evidence years or decades later by allowing judges to evaluate “old” evidence with fresh eyes, through the lens of greater scientific knowledge and understanding.⁵ Now, convicted persons have the opportunity to file a specific habeas application showing, by a preponderance of the evidence, that they would not have been convicted at trial based on the existence of currently available, relevant scientific evidence that was “not ascertainable through the exercise of reasonable diligence by the convicted person before the date or during” the original trial.⁶ The applicant must show that the new scientific evidence would have made a difference at the guilt/innocence phase of trial and not simply during punishment.⁷

When Is the Junk Science Writ Available?

In assessing whether a defendant used “reasonable diligence” in ascertaining scientific evidence, courts take into account 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 [the applicant’s trial.]” A Westlaw search shows that while Article 11.073 new-science grounds have been invoked in appellate courts in at least 63 writ cases, particularly those filed by pro se litigants, caselaw interpreting the contours of the statute remains relatively sparse, even when relief is granted.⁸ However, the

Texas Court of Criminal Appeals has specifically held that this writ is available:

- When a scientific field has evolved or been discredited in the years since the conviction;⁹
- When individual experts who, based on further study and changes in the understanding of scientific knowledge at large, would have given a different opinion at trial under today's scientific standards; and¹⁰
- When new forensic testing techniques emerge that were not available at the time of trial.¹¹

Chaney and Bite Mark Testimony

The Texas Court of Criminal Appeals' most recent high-profile Article 11.073 case involved the 2018 exoneration of Steven Mark Chaney, who was accused of murdering John Sweek.¹² This case involved the use of Article 11.073 to challenge bite mark evidence based largely on a scientific sea-change in the field of forensic odontology.

In 1987, John and Sally Sweek were found dead in their apartment with multiple stab wounds and slashed throats. John had what appeared to be a human bite mark on the left forearm. During the initial investigation, police determined that the Sweeks had been dealing drugs. An anonymous telephone tip and a ledger-book led investigators to learn that Chaney had been buying cocaine from the Sweeks and owed them money.¹³ Although Chaney maintained he had an alibi, the state ultimately tried Chaney for the capital murder of John Sweek only.¹⁴

The Texas Court of Criminal Appeals characterized the state's case against Chaney as being largely circumstantial, based on Chaney's debt, a partial fingerprint at the crime scene, and the fact that Chaney had shoes similar to those that left bloody footprints at the scene.¹⁵ The state's only evidence directly linking Chaney to Sweek's murder during expert testimony was from two forensic odontologists, including Dr. James Hales. Hales testified that the bite mark on John's arm was inflicted at the time of the murder and that it was a "perfect match" to Chaney with "no discrepancies" and "no inconsistencies." He also testified that the chance the bite mark came from someone other than Chaney was "one to a million."¹⁶ The bite mark evidence served as the linchpin of the state's case, and the prosecutor relied heavily on the bite mark evidence during closing arguments.¹⁷ Chaney was convicted of capital murder.

In Chaney's post-conviction habeas proceedings brought years later, Chaney, the state, and the trial court all agreed that Chaney had shown that he was entitled to an acquittal based on actual innocence grounds, and in 2018, the Texas Court of Criminal Appeals affirmed the trial court's findings and ordered an acquittal.¹⁸

The Chaney court found that the science behind forensic odontology had evolved considerably since the 1987 trial. Although forensic odontologists at the time believed that human bite marks were as unique as fingerprints and that human skin was an adequate medium for preserving bite mark evidence for forensic analysis, neither of those premises stood up conclusively to intervening scientific scrutiny. Multiple studies cited by the court did not establish the uniqueness of human

dentition, the ability of dentition to transfer a unique pattern to human skin, or the ability of skin to maintain that unique pattern. The court also noted that while forensic odontology guidelines in 1987 allowed experts to testify using the one-in-a-million statistic and words like "match" and "biter," then-current American Board of Forensic Odontology standards only allowed experts to make three conclusions in comparing a suspect to a bite mark: (1) excluded as having made the bite mark, (2) not excluded as having made the bite mark, and (3) inconclusive.¹⁹

The Texas Court of Criminal Appeals held that Dr. Hales' bite mark testimony would not have been admissible as evidence had Chaney been tried in 2018.²⁰ Based on the flawed bite mark testimony and several other factors, the court overturned Chaney's conviction and granted an acquittal.

Conclusion

As scientific knowledge advances further and new theories and evidentiary testing techniques emerge, prosecutors and defense attorneys should be aware that Article 11.073 will allow judges to re-scrutinize the scientific integrity of the evidence underpinning final convictions if the forensic principles (or the scientists who advanced them) should no longer fall within the mainstream of scientific consensus. **TBJ**

Notes

1. Maurice Chamamah, *Old Convictions, New Science*, The Marshall Project (Feb. 2, 2016, 6 p.m.), <https://www.themarshallproject.org/2015/05/28/old-convictions-new-science>.
2. See *Ex parte Cruzata*, 220 S.W.3d 518, 520 (Tex. Crim. App. 2007) (issues that could have been raised on direct appeal cannot be raised in habeas).
3. See Tex. Code Crim. Pro. art. 11.07 § 4(a) (non-death penalty cases); 11.071 § 5(b) (death penalty cases).
4. Tex. Code Crim. Pro. art. 11.07 § 4(a) (non-death penalty cases); 11.071 § 5(b) (death penalty cases).
5. See *Ex parte Kussmaul*, 548 S.W.3d 606, 632-33 (Tex. Crim. App. 2018) (subsequent habeas application not barred because Y-STR DNA testing technology in rape case was not available in 1994, when DQ testing was used).
6. Tex. Code Crim. Pro. art. 11.073.
7. *Ex parte White*, 506 S.W.3d 39, 41 (Tex. Crim. App. 2016) (the existence of a study showing that regular cocaine use can lead to psychotic symptoms was punishment mitigation evidence and not guilt/innocence evidence; subsequent application barred).
8. See, e.g., *Ex parte Adams*, No. WR-29,889-04, 2016 WL 1161091 (Tex. Crim. App. Mar. 23, 2016) (not designated for publication) (granting habeas relief from aggravated sexual assault conviction where newly available DNA evidence showed applicant was excluded as both the major and minor donor to the profiles detected).
9. *Ex parte Chaney*, 563 S.W.3d, 239, 255 (Tex. Crim. App. 2018).
10. *Ex parte Robbins*, 478 S.W.3d 678, 691 (Tex. Crim. App. 2014); see also Act of May 25, 2015, 84th Leg. R.S., ch. 1263, § 1, 2015 Tex. Gen. Law 4273, 4273 (amending Tex. Code Crim. Pro. art. 11.073(d)).
11. *Ex parte Kussmaul*, 548 S.W.3d 606, 632-33 (Tex. Crim. App. 2018).
12. *Ex parte Chaney*, 563 S.W.3d, 239, 255 (Tex. Crim. App. 2018).
13. *Id.* at 246-47.
14. *Id.* at 247.
15. *Id.* at 245-47.
16. *Id.* at 250.
17. *Id.* at 251.
18. *Id.* at 254.
19. *Id.* at 258-61.
20. *Id.* at 260-61.



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