

BEYOND THE BENCH: THE TEXAS COURT OF CRIMINAL APPEALS' WORK TO IMPROVE THE CRIMINAL JUSTICE SYSTEM OUTSIDE THE BOX

BY JUDGE BARBARA PARKER HERVEY AND D. KAYLYN BETTS

Texas is truly unique in many ways. One major difference between Texas and other states is our court structure; we are one of only two states in this country that has two supreme courts.¹ Our state is well served by this system, considering the numerous and diverse activities both courts engage in beyond their mandated judicial functions.

The Supreme Court of Texas is widely recognized for the many noble deeds its justices accomplish for our state, and we applaud all of their good work. On the other hand, the Court of Criminal Appeals is often overlooked and misunderstood. Only a handful of Texas citizens know of its existence and even less know of its purpose. Who are those people in the black robes across the hall from the Supreme Court of Texas and what do they really do?

The Texas Court of Criminal Appeals is the court of last resort for criminal cases in Texas. It handled more than 10,000 cases last year.² With that much work, the judges and staff at the Court keep pretty busy. But occasionally, we do break out of our regular judicial roles in the criminal justice system to step back and make improvements to the system that we serve every day.

Almost two years ago, the Court established the Texas Criminal Justice Integrity Unit because of concerns over a growing number of wrongful convictions being uncovered throughout Texas.³ Texas leads the nation in the number of wrongful convictions.⁴ Since 1994, 39 people and counting have been exonerated in Texas.⁵ These exonerees have collectively served more than 500 years for crimes they did not commit.⁶ While these innocent people were behind bars, the real perpetrators were free to continue committing crimes, posing a major public safety threat. As a result of these wrongful convictions and other concerns, much of the criminal justice system was being questioned, including the effectiveness of counsel, treatment of the mentally ill, and reliability of crime laboratories and forensic science.

Author Hervey's goal in creating the Unit was to review the strengths and weaknesses in the criminal justice system in hopes of bringing about meaningful reform through education, training, and legislative recommendations that would increase the fairness and accuracy of our system. The Unit is a nonpartisan group composed of 13 members representing the legislature, judiciary, governor's office, academia, criminal defense bar, district attorneys' offices, and crime laboratories. With regard to wrongful convictions, the Unit's plan is to make proactive changes at the front-end of the system — before an innocent person ever receives an erroneous sentence. For example, some of the issues initially addressed include: Improving the quality of defense counsel available for indigent defendants, implementing procedures to improve eyewitness identification, making recommendations to eliminate improper interrogations and to protect against false confessions, reforming the stan-

dards for collection, preservation, and storage of evidence, improving crime lab reliability, and improving attorney practices and accountability.

Since its establishment, the Unit has made significant improvements toward eliminating the causes of wrongful convictions. The Unit recognizes that erroneous eyewitness identification is the leading cause of wrongful convictions. Erroneous eyewitness identifications have contributed to 85 percent of the wrongful convictions exposed by DNA evidence in Texas and 75 percent of wrongful convictions nationwide.⁷ A recent survey revealed that only 12 percent of law enforcement agencies in Texas have written policies on conducting eyewitness identification procedures.⁸ Last year, the Unit worked with the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) to add eyewitness evidence training to their Basic Peace Officer Course curriculum. Since then, approximately 4,000 new officers have been trained on basic eyewitness identification procedures. The Unit also worked with TCLEOSE to develop a 16-hour training course modeled after the National Institute of Justice's Eyewitness Evidence Guide. The training course is now available upon request to all law enforcement agencies. The Unit is currently collaborating with other criminal justice entities, such as the Task Force on Indigent Defense⁹ and the Timothy Cole Advisory Panel on Wrongful Convictions,¹⁰ to recommend legislation that will address this issue statewide.¹¹

The Unit has also made some progress to improve the preservation of biological evidence. With the help of Unit member State Rep. Jim McReynolds, a bill was passed last session that established a system whereby less-populated counties may store some biological evidence at the Texas Department of Public Safety (DPS). This program helps communities with fewer resources comply with state requirements while protecting the integrity of biological evidence. Biological evidence, such as DNA, must be stored in climate-controlled building — not in unequipped courthouses or in the homes of court clerks. Assisted by a DPS forensic scientist, the Unit trained clerks, judges, defense attorneys, and prosecutors on the proper preservation and storage of biological evidence. The Unit proposed the concept of a traveling DNA lab last year. The traveling lab would act as an unannounced check on criminal labs throughout the state. Similar to a health department's method of operation, the traveling DNA lab will arrive at a Texas crime lab without notice to review lab operations. Committees in both the House and Senate reported favorably last session on proposed legislation, and the Unit is currently working with legislators to prepare a similar bill for next session, which we hope will also consider proficiency testing.

In an effort to improve the reliability of forensic science, the Unit conducted a survey of the judiciary this year on the National Academy of Sciences report entitled, "Strengthening

Forensic Science in the United States: A Path Forward.”¹² We found that judges felt that they were not receiving enough training on forensic science and the standards for the admissibility of such evidence. Because the Unit strives to include all of the “players” in the criminal justice system and because there is a serious need for forensic science education, the Unit, with the assistance of other entities, is planning a forensic science seminar. The seminar will bring judges, scientists, criminal defense attorneys, prosecutors, legislators, and others together to discuss science in the courtroom. The seminar will make Texas a national leader in forensic science education by offering education on various disciplines including fingerprints, ballistics, DNA, arson, lab protocols, and standards intertwined with a virtual tour of crime laboratories.

Author Hervey is also the chair of the Court’s Grants Committee. The Court administers approximately \$20 million per biennium of grants for continuing legal education.¹³ The Court not only monitors the financial aspects of the grants, but it also provides guidance on programming to the grant constituents: Judges, prosecutors, and defense attorneys. At the Court’s specific request, separate funding was awarded to provide training programs to law enforcement officers, law students, and other participants on defendants’ claims of actual innocence.

The Court is fortunate enough to have a judge with a background in science who is also dedicated to increasing the scientific training that judges receive. Judge Cheryl Johnson has a Bachelor of Science in Chemistry and Masters of Science in Inorganic Crystallography. She has completed two years of the Advanced Science and Technology Adjudicative Resources (ASTAR) program to become an ASTAR Fellow, and she serves as the chair of the Texas ASTAR Steering Committee. ASTAR is a program for judicial education that is funded by the U.S. Department of Justice. ASTAR provides seminars led by top scientists on a variety of subjects that are of interest to both the civil and criminal bar. All participants attend a “boot camp” to become acquainted with the language of science and then may attend other conferences that may be helpful to them in *Daubert/Kelly*¹⁴ hearings. The purpose is not to make scientists or experts out of judges, but to equip judges to evaluate the credentials and proposed testimony of experts so that they may ably perform the duties of a gatekeeper and also to make them available to other judges as a resource. Together with other ASTAR Fellows, Judge Johnson has recruited 33 more judges from 20 cities across the state to begin the ASTAR program this year.

Presiding Judge Sharon Keller is improving the quality of representation for indigent defendants as chair of the Texas Task Force on Indigent Defense and the Texas Mental Health Task Force. Under Judge Keller’s leadership over the past nine years, the Task Force on Indigent Defense has helped fund dozens of innovative programs such as the award-winning West Texas Capital Defender’s Office and the nation’s first stand-alone mental health public defender office. It has also commissioned studies on matters like the verification of indigency and established policies and standards for defense attor-

neys. In 2007, Judge Keller created the Texas Mental Health Task Force to address problems related to the mentally ill in the criminal justice system.¹⁵ The goal of the Task Force is the front-end diversion of people with mental illnesses from the criminal justice system in appropriate cases. Toward this end, the Task Force recommended legislation that merged the Mental Health and Mental Retardation database with the DPS’ Texas Law Enforcement Telecommunication System, thus allowing jail staff immediate access to information relevant to continuity of care for an inmate with a mental illness.

Judge Keller is also a member, and immediate past chair, of the executive board of the Counsel of State Governments Justice Center. The Justice Center is a national nonprofit organization whose major projects include its Criminal Justice and Mental Health Consensus Project, the Reentry Policy Counsel, and the Justice Reinvestment Initiative.¹⁶ Examples of its work in Texas include a study in 2007 that offered alternatives to increased prison construction. Adoption of Justice Center’s recommendations has saved Texas hundreds of millions of dollars, while maintaining public safety.

Many of the judges on the Court are involved in improving the system through education. The judges often teach at various state, national, and local seminars and events. For example, Judge Michael Keasler has served on the National Judicial Col-



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lege Faculty for 19 years, where he has taught judicial ethics, constitutional criminal law, trial management, and statutory construction. Judge Keasler is also currently serving on a committee planning a model national curriculum to assist state appellate judges in handling capital cases. For more than 25 years, Judge Paul Womack has been an adjunct professor at the University of Texas School of Law, where he teaches a course on Texas Criminal Procedure. Judge Hervey is also an adjunct professor at St. Mary's University School of Law, and Judge Charles Holcomb has spoken to the Christian Legal Society on practicing before the Court.

Other judges are working with the State Bar of Texas to improve the system. Judge Larry Meyers is the liaison between the Court and the State Bar, and he is on the board of directors for Board Certification in Criminal Law. Judge Cathy Cochran is a member of the State Bar Administration of the Rules of Evidence Committee and the State Bar College. She also formed a Governor's Ad Hoc Advisory Committee to Revise Code of Criminal Procedure, and Judge Hervey served as a member of that committee. Along with Judge Johnson, Judge Cochran monitors the attorney-appointment list for writs of habeas corpus.¹⁷

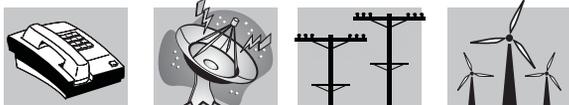
We are proud of the work that the Criminal Justice Integrity Unit has accomplished in such a short period of time and the

efforts other judges on the Court make to improve the imperfections in our system. Although the Court of Criminal Appeals remains invisible to many Texas citizens,¹⁸ it continuously ventures out, beyond the bench, to increase the fairness and reliability of the criminal justice system.

NOTES

1. See Gregory L. Acquavia and John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 Seton Hall L. Rev. 1203, 1260 n.7 (2009).
2. Office of Court Administration, *Annual Report for the Texas Judiciary*, 28 (Office of Court Administration 2009).
3. Court of Criminal Appeals, Texas Criminal Justice Integrity Unit, <http://www.cca.courts.state.tx.us/tcju/tcjuhome.asp> (last visited May 11, 2010).
4. The Innocence Project, Exonerations by State, <http://www.innocenceproject.org/news/StateView.php> (last visited May 11, 2010).
5. The Justice Project, *Convicting the Innocent: Texas Justice Derailed: Stories of Injustice and the Reforms that Can Prevent Them*, 2 (The Justice Project 2009).
6. *Id.*
7. The Justice Project, *Eyewitness Identification Procedures in Texas*, 1 (The Justice Project 2008).
8. *Id.*
9. Office of Court Administration, Task Force on Indigent Defense, <http://www.courts.state.tx.us/tfid/tfidhome.asp> (last visited on May 13, 2010).
10. Task Force on Indigent Defense, Timothy Cole Panel on Wrongful Convictions, <http://www.courts.state.tx.us/tfid/tcap.asp> (last visited on May 10, 2010).
11. Judge Hervey is also a member of the Timothy Cole Advisory Panel on Wrongful Convictions.
12. National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press 2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.
13. Court of Criminal Appeals, Judicial and Court Personnel Training Fund, <http://www.cca.courts.state.tx.us/jcptfund/jcptfundhome.asp> (last visited on May 12, 2010).
14. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).
15. Sharon Keller, Mental Health Leadership Initiative, <http://www.courts.state.tx.us/tfid/mentalhealth.asp> (last visited on May 12, 2010).
16. The Council of State Governments, Justice Center, <http://justicecenter.csg.org/> (last visited on May 12, 2010).
17. See Tex. Code. Crim. Proc. art. 11.071, §2(d) (Vernon 2006).
18. See Judge Cathy Cochran, *The Court of Criminal Appeals of Texas*, 69 Tex. B.J. 218, 219 (March 2006).

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JUDGE BARBARA PARKER HERVEY

was elected to the Texas Court of Criminal Appeals in 2000. Prior to her election, she was an assistant criminal district attorney in the Bexar County District Attorney's Office, Appellate Section, for 16 years. She was also in private practice for five years with the Law Office of M.M. Pena, Jr., of San Antonio, directly after graduating from St. Mary's University School of Law.

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