

Contemplating Innocence

By: Judge Barbara Hervey
Judge, Texas Court of Criminal Appeals

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Judge Barbara Hervey

Judge Barbara Parker Hervey was elected to the Texas Court of Criminal Appeals in November 2000. Prior to her election, she was an Assistant District Attorney in the Appellate Section of the Bexar County District Attorney's Office for 16 years. She is a native of New Jersey and earned her Bachelor of Arts Degree in 1975 from The University of North Carolina at Greensboro and her Juris Doctor in 1979 from St. Mary's University School of Law.

Judge Hervey has been an author and speaker for over 250 lectures & legal seminars; served on the Governor's Ad Hoc Committee to Rewrite the Texas Code of Criminal Procedure; supervised Continuing Legal Education training for judges, attorneys and their staff of attorneys; served as a Faculty Member of the National College of District Attorneys; and co-authored *The Appellate Prosecutor: "Professional Responsibility on Appeal."* In addition, she is a Commissioner on the National Commission on Forensic Science appointed by the United States Attorney General and is an Advisory Member of the American Association for the Advancement of Science's Committee "Forensic Science Assessments: A Quality and Gap Analysis."

Judge Hervey is a member of the State Bar of Texas, the American Law Institute, and the Texas Bar Foundation. She is also the Chair of the Court's ad-hoc Grants Committee and the Texas Criminal Justice Integrity Unit. Judge Hervey is also a member of the Rules Committee, and she served as a member of the Governor's Criminal Justice Advisory Council and the Tim Cole Advisory Panel. She has received the Appellate Advocacy Award from Region VI, Association of Government Attorneys in Capital Litigation. She has also received a Certificate of Appreciation from the San Antonio Police Officers Association, in recognition of work on *Johnathan Moore v. State of Texas*, tried for the Capital Murder of S.A.P.D. Officer Fabian Dominguez.

Judge Hervey and her husband Richard Langlois reside in San Antonio, Texas. They have three children, Edward, Christopher, and Melissa.

Introduction

NO ONE wants to incarcerate an innocent person, but we also do not want the guilty to run free. The most recent count of exonerations nationally as provided by the National Registry is 1,594,¹ and the most common causes of wrongful conviction include:

- Erroneous eyewitness identifications
- False confessions
- Informants
- Ineffective assistance of counsel
- Prosecutorial misconduct
- Flawed (forensic) science

However, one term that has not received adequate attention is: What do we really mean by “actually innocent?” I was only the get-away driver? I’m only guilty of a lesser-included offense? The witnesses just hate me? Or do we mean I DID NOT DO IT?² The Court of Criminal Appeals has indicated that, as a matter of state law, “actually innocent” does mean that “I didn’t do it,” although many Courts have always toed the line.

The need to address Innocence and to recognize the call for change in our criminal justice system has been at the forefront of many new approaches to achieving just results. But we have a long way to go. Now a little food for thought, or matters to consider when “contemplating innocence.”

- Stakeholders—judges, prosecutors, defense attorneys, defendants, scientists, law enforcement, legislators, and the general public.

¹ NAT’L REGISTRY OF EXONERATIONS, [https:// www.law.umich.edu/special/exoneration/Pages/browse.aspx](https://www.law.umich.edu/special/exoneration/Pages/browse.aspx) (last visited May, 8, 2015).

² The Court of Criminal Appeals has held as much. See *State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010) (“We hold that the term “actual innocence” shall apply, in Texas state cases, only in circumstances in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses.”); see also *Ex parte Mable*, 443 S.W.3d 129 (Tex. Crim. App. 2014). In *Mable*, the Court granted the applicant relief from his conviction after he pled guilty to possession of a controlled substance because subsequent testing revealed no illicit substances were present in the seized evidence. However, the Court did not grant relief on the basis of actual innocence. Instead, the Court reiterated its position taken in *Wilson* and held that the applicant was not “actually innocent” because he may have “attempted to possess a controlled substance (which is a lesser included offense of possession).” *Id.* at 130–31.

- National Academy of Sciences Report: “Where are we now?”—a call for validation of forensic science.
- Intersection of science and the law

SCIENCE DISCIPLINES

- | | |
|---------------------------|--|
| ➤ Biology/DNA | ➤ Medical examiners/coroners |
| ➤ Trace evidence | ➤ Fingerprints |
| ➤ Drugs | ➤ Human factors |
| ➤ Toxicology | ➤ Bias |
| ➤ Gunshot residue | ➤ Property rooms and collection/preservation of evidence |
| ➤ Fire and explosives | ➤ Ethics |
| ➤ Geology | ➤ Reports and testimony |
| ➤ Odontology | ➤ Protocols |
| ➤ Dogs | ➤ Standards |
| ➤ Digital media evidence | ➤ Validation |
| ➤ Documents | ➤ Interpretation vs. opinion |
| ➤ Pattern evidence | ➤ Statistics |
| ➤ Bloodstains | ➤ Probabilistics |
| ➤ Footwear and tires | ➤ Certification |
| ➤ Firearms and tool marks | ➤ Accreditation |
| | ➤ Terminology |

THE LAW

- | | |
|-------------------------------------|-----------------------|
| ➤ Discovery | ➤ Innocence Projects |
| ➤ <i>Brady</i> | ➤ <i>Daubert/Frye</i> |
| ➤ Field notes/offense reports/video | ➤ Caselaw |
| ➤ Eyewitness identifications | ➤ Mental health |
| ➤ Informants | ➤ Confessions |
| ➤ Bids | ➤ Effective counsel |
| | ➤ Testimony |

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