

## Commentary: Verdict is still out on innocence as defense

By LISA FALKENBERG Copyright 2009 Houston Chronicle

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Does innocence matter?

When I posed that question in a column last week on death row inmate Larry Swearingen's innocence claim in federal court, I was unaware of the state of Texas' long-held official answer.

The next day, attorney Gerry Birnberg sent me the link to the transcript of the 1992 oral arguments before the U.S. Supreme Court in the landmark case *Herrera v. Collins*.

I was appalled by what I read.

The State of Texas argued before the nation's highest court that it was OK to execute an innocent person, as long as he got a fair trial.

The most chilling exchange came when a justice asked the assistant attorney general arguing for Texas, Margaret Griffey, whether the state would maintain that same position if video evidence conclusively proved the person didn't commit the crime. The justice wanted to know: Is there a violation of that person's constitutional rights if he were executed anyway because no court would hear the video evidence?

"No, Your Honor, there is not," Griffey replied.

The justices continued to probe, as if needing clarification of what they were hearing.

If everyone agrees that the evidence establishes innocence, another justice inquired, but the jury just made a mistake, "is there a constitutional right under the Eighth Amendment (which bars cruel and unusual punishment) not to be executed when you're innocent? That's the issue. And you're saying no, there's no such right."

"That is what I'm saying, Your Honor," said Griffey.

Several criminal defense attorneys told me this is still Texas' official stance. But I decided to ask Attorney General Greg Abbott's office.

AG spokesman Jerry Strickland provided an unexpected response. Texas, it seems, has changed its mind.

"No," he wrote in an e-mail. "It would not be permissible for the state to execute a person whom the state knew to be innocent." In a later e-mail, he said such an execution "would constitute a miscarriage of justice."

I asked what led to the change of position, and he wouldn't elaborate. But he pointed out that even under the old thinking, AG's attorneys had worked to clear inmates they felt were wrongfully convicted.

The new philosophy was news to the criminal defense bar.

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"It's a breath of fresh air coming from the AG's office, a fabulous development," said James Rytting, who represents Swearingen. "To take the position that you can kill people who are innocent is morally repugnant to anyone's system of justice."

Rytting said the AG's new stance could help his client, who got a stay of execution from a federal appeals court last week based on newfound forensic evidence. The evidence suggests Swearingen was in jail on an unrelated charge in 1998 when the body of 19-year-old victim Melissa Trotter was dumped in the woods.

But several other criminal defense attorneys expressed skepticism that the AG's lawyers, who represent the state in late criminal appeals in federal court, will practice what their office is now preaching.

The AG's office, defense attorneys say, still throw up every roadblock at their disposal, such as procedural errors and strict adherence to deadlines, to derail even credible claims of innocence.

"It's a refreshing attitude," said attorney Patrick McCann, but, "until they start actually waiving appeal and confessing error ... they're just blowing smoke."

"It's a significant change in position," said attorney Dick Burr. "We in the capital defense bar hope they will likewise have a more open-minded approach to the facts showing innocence."

"They're charged to defend the state's convictions," said attorney Stan Schneider. "I don't see them changing. They're going to continue fighting cases."

### Still more roadblocks

The question remained: was Strickland articulating a true shift in Texas' approach to innocence claims, that actual innocence actually matters, or just feeding a line to a newspaper columnist?

The proof, I guess, is in the pleadings.

As recently as last month, the AG's lawyers answered Swearingen's compelling claim of actual innocence with the same procedural roadblocks it's employed for years.

Among the reasons the AG's office argued that the 5th Circuit shouldn't consider the merits of Swearingen's claim: It was past deadline.

And, this late in the game, in federal court, being truly innocent isn't a good enough reason to ask not to be executed.

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