16-Year-Old Railroaded After Baby's Accidental Death – The Denise Lockett Story

By John Cole Vodicka

In September 1997, 16-year-old Denise Lockett gave birth to a baby boy while sitting on the toilet in her mother's Baconton, Georgia apartment. The baby was either born dead or died within minutes of falling into the toilet bowl. Denise, who has an IQ of 61, was charged with murder, encouraged to plead guilty to manslaughter by her court appointed lawyer, and sentenced to serve 20 years in prison. Her plea and sentencing hearing lasted no more than 15 minutes. Denise never had a chance.

Denise hid her pregnancy from everyone. She was a sophomore in the Mitchell-Baker high school in Camilla, Georgia. No one — not her special ed teachers, her mother, her siblings — knew that Denise was with child. She did not seek prenatal care.

Then on September 21, 1997, Denise woke up in the middle of the night and went to the bathroom in her mother's housing project apartment. As Denise later told a police investigator, she thought she had to "make a booboo." Instead of a bowel movement though, a full-term baby boy was born, falling into the toilet. Denise, probably in shock, returned to her bedroom and passed out. Her 10-year-old sister called 911. Police arrived and Denise was charged with felony murder. She was placed in a sheriffs car and brought not to a hospital, but to a Mitchell County jail cell.

A lawyer was appointed to represent Denise on the murder charge. Over the span of three months, this attorney spent less than one hour with his mentally retarded client. The last few minutes the lawyer spent with Denise were in Judge Wallace Cato's chambers in the Mitchell County jail courtroom, when he persuaded the youngster to waive her rights to a jury trial and plead guilty to manslaughter. Denise says the lawyer promised her the judge would not keep her locked up if she admitted her guilt. Denise initialed the waiver form and signed the document just as the lawyer had hoped she would. Judge Cato held a short hearing — the transcript is 19 pages long! — which consisted mostly of a local detective's testimony. Denise did not testify, nor did her attorney introduce the autopsy report that stated the baby's cause of death "could not be determined." Judge Cato ordered that Denise spend the next 20 years behind bars.

I first learned about Denise's ordeal a few months after she was sent off to prison. Rosa Ward, who was then a school nurse, called me late one night at home to tell me what happened to Denise and pleaded with me to help. The Prison & Jail Project (P&JP), of which I am the director, got immediately involved. We met with Denise's mother in Baconton, with her special education teachers in Camilla, and with members of a Baconton church that had been reaching out to the Lockett family since the death of Denise's baby. I took statements from a dozen different people who knew Denise through her childhood, knew her limitations. I was able to gather together Denise's school records, the baby boy's autopsy report and other information that would have been essential to any lawyer worth his or her salt. I also secured a copy of the plea transcript. And I began visiting Denise in prison.

We were then able to convince our lawyer friend and P&JP board member, Clyde Royals, to file a habeas corpus petition on Denise's behalf in an attempt to get her case back into court. We also brought in a psychologist to interview Denise in prison and confirm that her retardation limited her ability to understand the legal process or to assist her lawyer. Later, Jim Bonner, another lawyer friend, filed an appeal with the Georgia Supreme Court. Despite all this, our efforts to win a new trial for Denise were unsuccessful: three years ago (2002) the State Supreme Court let her conviction stand.

Since that time we've attempted to secure a parole hearing for Denise. It's been difficult, because until recently in Georgia, if someone was convicted of a crime of violence (and manslaughter is a violent offense) the parole board required that person to serve at least 90% of their sentence before it would even entertain parole. This meant that Denise would have to serve 18 years of her 20 year-sentence before even being eligible for parole. Last December, however, we received the hopeful news that the parole board has decided to consider granting Denise parole in 2010. The P&JP now plans to petition the parole board further in an effort to convince the board that it serves absolutely no purpose to keep this young African-American woman in prison any longer. Denise did not kill her baby boy. She had no intentions of harming her child. She is not – and has never been — a threat to anyone.

Denise is now twenty-four years-old. She's spent eight years in confinement since that September night in 1997 when she birthed her baby boy and the infant died. Denise is presently caged in the women's penitentiary in Hawkinsville (Pulaski County), Georgia. If she serves all 20 years of her sentence she'll be 37-years-old when she finally leaves her prison cell.

"I'm ready to get out of these folks' prison," Denise told me recently during a visit at the prison. "I'm about to lose my mind here. Tell everybody to keep praying for me that I'll be home soon."

Denise can be written at,
Denise Lockett 955807
Pulaski State Prison
P.O. Box 839
Hawkinsville, GA 31036

Reprinted with permission. Originally published in *FreedomWays*, Issue 76, March/April 2005. John Cole Vodicka is director of the Prison & Jail Project in Americus, GA. The P&JP limits its activity to monitoring jail and prison conditions, and courtroom and law enforcement behavior in a 33-county region of southwest Georgia. They have a 33 page booklet - *Rule of Law: Citizens' Rights in a Georgia Court of Law* that is available at no charge for Georgia prisoners ONLY. All others please enclose at least a $1 donation (stamps OK). Write: Rule of Law, P&JP, PO Box 6749, Americus, GA 31709.

Sutton's Pardon Not Enough For Compensation

By C.C. Simmons, JD Correspondent

In October 1998, Josiah Sutton, then 16. was arrested and charged with the rape of a Houston woman. The victim had been taken from her apartment at gunpoint and left in a field by her attacker.

In January 1999 a Houston Police Department (HPD) Crime Lab analyst testified Sutton's DNA "definitely" matched the perpetrator's DNA recovered from the victim. Sutton was convicted and sentenced to 25 years in prison.

Four years later in March 2003, the HPD Crime Lab retested a sample of the evidence used to convict Sutton. The DNA profiles of two men were found in that sample. However neither matched Sutton.

The 2003 retesting of the evidence used to convict Sutton was an example of the faulty conclusions HPD Crime Lab analysts were testifying to in Houston area cases at the time of his trial. The police lab was later shut down after auditors found unsound techniques and contamination of evidence. Sutton's case was

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ton somehow to murder her family, clean herself of any and all blood traces and gunshot residue, and drive to her cousin's house – all in less than 30 minutes. And since her 1988 conviction, the question of a second gun has haunted Newton's case. The ballistics evidence was increasingly suspect in any case because of the recent history of the Houston PD crime lab, which has been repeatedly charged with incompetent, shoddy work, resulting in a number of exonerations and the wholesale discrediting of the lab, which remains under investigation. The lab's clouded reputation was one factor that prompted Gov. Perry to accept the BPP's recommendation to grant Newton a reprieve last winter.

Although subsequent testing supposedly confirmed the ballistics match, the search for the second gun continued. And in June, Dow argued in Newton's clemency petition, the truth finally began to leak out, and from the most unlikely place: the Harris Co. District Attorney's Office. During a brief videotaped interview with a Dutch reporter, Assistant DA Roe Wilson inadvertently confirmed the existence of a second gun. "Police recovered a gun from the apartment that belonged to the husband," Wilson acknowledged. "[It] had not been fired, it had not been involved in the offense, " she continued. "It was simply a gun [Adrian] had there; so there is no second-gun theory."

Wilson and her boss, DA Chuck Rosenthal, quickly retracted her admission. Wilson told the *Houston Chronicle* that she'd simply "misspoken," and Rosenthal accused Dow of fabricating the idea of a second gun "out of whole cloth." "I'm very clear," Rosenthal told *The New York Times*. "One gun was recovered in the case." On Aug. 24, the Court of Criminal Appeals agreed, dismissing Newton's most recent appeal. "The evidence in this case was more than sufficient to establish [Newton's] guilt," Judge Cathy Cochran wrote. "The various details that [Newton] suggests her trial counsel should have investigated in greater detail do not detract ... from the single crucial piece of evidence that concerns her: she disposed of the murder weapon immediately after the killing."

Dow and his University of Houston law students persisted, and late last month may have succeeded. In August, Harris Co. investigators provided testimony that police may have recovered at least two identical .25-caliber Raven Arms pistols. In separate affidavits, two police investigators recall tracing firearms recovered in connection with the murders. Officer Frank Pratt told one of Dow's students that he was assigned a gun found in the abandoned house, which he traced to a purchase by Newton's boyfriend's cousin at a local Montgomery Ward. He also discovered, he told student Frances Zeon, that the purchaser had also bought a "second, identical gun"; but he didn't follow up on the second gun, because "he felt there was no need to do so." Pratt said he'd written up a report on the gun – a report Newton's attorneys have never seen.

However, Newton's attorneys do have a police report written by Detective M. Parinello, who reported he had traced yet another firearm recovered in connection with the case to a purchase from Rebel Distributors in Humble, Texas, which he said also ended up with Newton's boyfriend. "The question arises: what recovered firearm was ... Pratt investigating?" asks the clemency petition. "Counsel does not have access to the Harris Co. Sheriff's Department's records in this case. A request made directly to that institution for all records in connection to its investigation of this offense was rejected."

From all this conflicting yet incomplete gun evidence, it seems reasonable to surmise that there is no way to know which gun was in fact the murder weapon, or which gun was delivered for ballistics tests in 1987 or this year. Since the prosecution relied so heavily on a weapon that Newton herself had delivered to them, the new evidence discovered by her attorneys completely undermines her conviction.

At press time, Harris Co. Sheriff's Office spokesman Lt. John Martin was not able to reach Parinello or Pratt for comment but said that a captain who worked the Newton case had said there was only one gun recovered during the investigation. Harris Co. DA Chuck Rosenthal reiterated that, "as far as I know" there was only one gun recovered in the case. However, he said that even if investigators had recovered multiple firearms, and even if each were the same brand and caliber, the fact remains that the weapon investigators recovered from the abandoned house, which was immediately "tagged" and "tested," matched the bullets recovered from the victims. "Let's say, for conjecture's sake, that you ran down 50 or 100 guns, all associated with the case," he said. "The fact [is] that only one fired the bullets and that we know where that gun came from."

Lack of Effective Criminal Defense

As in many Texas capital cases, a large part of the problem with Newton's appeals is that her court-appointed trial attorney, Ron Mock, never actually investigated her case. If he had, perhaps he would've followed up the drug dealer lead or Freeze's reported comments about a second gun. Newton and her parents implored the trial judge to allow her to change attorneys, and Mock admitted to the judge that he hadn't talked to any prosecution witnesses, nor had he subpoenaed any defense witness. The judge granted the motion to remove Mock but he declined a continuance, leaving Newton little choice but to go to trial with Mock. "It was stunning," she told me. "[Mock gets on the stand and] says, 'I don't know anything,' and for the judge to just dismiss it ... it was stunning." Mock has since been brought before the State Bar's disciplinary board at least five times on various charges of professional misconduct, for which he has been fined and sometimes suspended; he is currently suspended from practicing law until late 2007.

The Harris Co. prosecutors' defense of the conviction has also worn thin, especially given Roe Wilson's supposed "misstatement" about the second gun. To Newton's mother, Jewel Nelms, Wilson's admission is no mistake. "I've known all the time that there was a second gun," she told Houston's KPFT radio last month. "So I want to say again, to Roe Wilson, I thank you ... very much for letting us know, indeed, that there's somebody down there that knows about the second gun and was willing to talk about it – even though I know it wasn't her intention to do it."

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but one of hundreds of convictions to came under scrutiny because of doubts about the methods and quality of handling crime scene evidence by the Houston PD.

"The HPD Crime Lab has produced evidence instrumental in convicting thousands of people," explained Bob Wicoff, Sutton's attorney. For some, the lab's shoddy work may have helped prosecutors send innocent people to prison or to death row. "Josiah has served 4-1/2 years in prison for nothing," said Wicoff.

In mid-2003, Sutton was released from prison after the retesting of the DNA positively excluded him as a suspect in the assault. The Texas Board of Pardons and Paroles then pondered Sutton's case for 11 months before finally recommending a pardon. In May 2004, Texas Governor Rick Ferry granted Sutton a pardon on the basis of his innocence. His story does not end there. Although he is now free, Sutton is a convicted rapist with a governor's pardon in his pocket. Under Texas law, a pardon does not erase a conviction from a person's record; only a new trial and a verdict of acquittal can

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mugshot and thought he looked similar to the gunman. The three other eyewitnesses — all restaurant workers — then identified McKinney when shown his photo. Police had a file on the 20-year-old McKinney because he had been in trouble with the law as a juvenile — most seriously when he was sent to the California Youth Authority for attempted robbery.

During his trial, the prosecution relied on the testimony of the four eyewitnesses identification of him as the killer. The prosecutor — Orange County Asst. DA Tony Rackauckas — said about the eyewitness testimony, "About the only way to bring in better evidence is if we had a movie of it."

In convicting McKinney, the jury rejected his defense that at the time of the robbery he was home in Ontario, 30 miles from the Burger King. McKinney's alibi was supported by several people who testified they were with him. The jury also rejected the fact that McKinney is several inches shorter than the shooter as described by eyewitnesses, and at the time of the crime he was using crutches to walk because of a leg injury — while the shooter walked without a limp or artificial aid.

McKinney was sentenced to life in prison without parole after the jury deadlocked on the death sentence sought by Rackauckas.

As the years passed, McKinney earned his high school equivalency degree, became religious, read avidly, and on the dark side — he was stabbed on two occasions, contracted tuberculosis, and attempted suicide.

Then, in 1997, a prison inmate wrote a letter to the Orange County public defender. He explained that he knew who had been involved in the Burger King robbery and murder, and that McKinney had nothing to do with it. The letter named the two men involved in the crime — the getaway car driver and the shooter.

The public defenders office began an investigation that lasted more than two years. They reconstructed the crime and re-interviewed all surviving witnesses. In addition to the new evidence of the getaway drivers' admissions, two of the eyewitnesses recanted their identification of McKinney as the killer.

Based on the new evidence that McKinney didn't receive a fair trial, but that he was innocent, in September 1999 the public defenders' office filed a motion for a new trial. After Orange County DA Rackauckas — who as an assistant DA had been McKinney's trial prosecutor and sought his execution — conducted his own investigation, he owned up to his error and agreed not to oppose the motion. In January 2000 McKinney's conviction was vacated and the charges dismissed.

McKinney was released from the state prison in Lancaster on January 28, 2000. From the time of his arrest he had been incarcerated for more than 19 years. He was forty years old, and he didn't have a Social Security number, a change of clothes, or even a toothbrush.

After his release, McKinney filed a lawsuit against the City of Orange and the detective who constructed the case against him. The suit was settled in the summer of 2002 for $1.7 million. He received a check for about $1 million after deductions for attorneys fees and expenses.

Having heard horror stories of how money was squandered by lottery winners and other people who suddenly came into wealth, McKinney put the money in the bank as he scouted around for a place to invest it.

McKinney always had a head for business, he said recently, "I was working and selling since I was a kid. Selling papers. Washing dishes. Bagging groceries. Selling candy. Cut people's grass. Everything I wanted, I worked and saved for all my life."

DeWayne McKinney at one of his ATM machines in Hawaii.

His first investment was when he bought half-a-dozen condominiums in La Mirada - a Los Angeles suburb.

He then learned that it was possible for an individual to buy and operate automated teller machines (ATM). The ATM's owner would be paid a commission on each transaction. After meeting a man whose company sold and installed ATMs, McKinney recruited two acquaintances to work on commission to find locations. His first machine was installed at a Unocal station in Santa Ana. Within a few months McKinney had 20 ATMs around Southern California.

However he felt uncomfortable in So Cal. He said recently, "In California, it was a nervous feeling. LA to me is almost like being in prison. The nervous energy, it never ceased."

When McKinney and his wife went to Hawaii after their wedding, he found he liked the pace of life there. So in 2003 he sold his ATMs in So Cal and bought a beachfront five-unit fixer upper apartment near Oahu's North Shore. They lived in one unit and rented the rest.

McKinney dug right in finding good locations for an ATM. He paid a generous finders fee to anyone who gave him a tip on a location where he was able to install a machine, and he soon had ATMs all over Oahu.
In 2004 McKinney and his wife divorced. They split the ATMs in the family business. Within a year McKinney built his business back up to the 20 machines he had before the divorce.

After the divorce McKinney sold for $2.7 million, the five-unit apartment he bought for $740,000 in 2003. He used the money to buy real estate on Oahu, including a beachfront home in Honolulu.

Although he didn't go to college and had no job skills when he was released from prison, McKinney credits much of his success to a skill that he honed in prison - making the most of his connections. In prison you need to know the right person, and treat that person right to obtain a hard to get item or to get something done. That is called networking in the business world, and McKinney has proven since his release it is a skill he has in spades.

Less than six years after his release from 19 years of wrongful imprisonment, McKinney is a multi-millionaire living a life that most people only dream about. In July 2005 he told a Los Angeles Times reporter, "I finally found my place. I enjoy being able to breathe the fresh air, feel the wind on my face and know I'm free. I enjoy watching the sun set and the sun rise. I lay in my house with the doors open, feeling the breeze."

Source: From Prison to a Paradise for ATMs, Stuart Pfeifer, *Los Angeles Times*, July 19, 2005.

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do that. Once pardoned, however, a person loses "standing" to petition the state for a new trial. Thus, a pardon permanently closes the principal avenue to clearing a wrongly convicted person's record.

"I continue to be surprised at how much easier it is to convict someone who is innocent than to correct a wrongful conviction," said David Dow of the Houston Innocence Network. "It should be simple to correct these things. It shouldn't be a bureaucratic nightmare."

In 2001, the Texas legislature enacted a law that allows exonerated prisoners to

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> "To be considered truthful Mr. Fonseca's overall score would have to equal or exceed 6 points. His score for the test was 13. It is my professional opinion that Mr. Fonseca was telling the truth when he stated that he did not shoot Arthur Mayer."

Dr. Rovner, who has a Ph.D in Psychology, claims that when a polygraph examination is conducted properly by a highly trained and skilled examiner using state of the art computerized instruments, the results are accurate 96% of the time. He thinks that with today's sophisticated equipment, virtually no one can "beat" a test.

Fonseca is considering his options in light of the new evidence of Dr. Rovner's finding. Fonseca was assisted in arranging Dr. Rovner's exam by INNOCENT!, a Michigan-based non-profit organization that works with families and friends of the wrongly convicted. Meanwhile, Fonseca remains behind bars. Contact INNOCENT! at,

INNOCENT!
20 W. Muskegon Avenue
Muskegon, MI 49440
Or email, thedouger@chartermi.net

Dr. Rovner's email address is: rovner@polygraph-west.com. His website is, http://polygraph-west.com

JD Note: Contrary to popular mythology fueled by television programs and movies, there is not a blanket exclusion of polygraph results as evidence in state and federal courts. The U.S. Supreme Court has never directly ruled on the admissibility of polygraph test results, and their admissibility in federal circuits varies. Many states allow the introduction of polygraph examination results under different circumstances. In California, where Timothy Fonseca is located, polygraph results are admissible in a pretrial, trial or post-conviction proceeding if both parties stipulate to its admissibility. Cal. Evidence Code § 351.1. (a) states:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and *post conviction motions and hearings*, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court*, unless all parties stipulate to the admission of such results*.

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Almost a decade ago, AEDPA severely cut back on habeas protections that decisions by the Supreme Court over the previous 20 years had already trimmed substantially. Among other things, AEDPA imposed a novel statute of limitations (ordinarily, one year from final judgment); abolished "same-claim" successive petitions; greatly restricted successors containing claims omitted from an earlier application (usually requiring that the underlying facts strongly demonstrate actual innocence); and barred relief for any claim adjudicated on the merits in state court unless such adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court ... or ... was based on an unreasonable determination of the facts." Moreover, chapter 154 of AEDPA gave the benefit of even more favorable provisions in capital habeas cases to states that opted to put in place mechanisms for appointing and paying competent counsel to represent death-sentenced defendants in state post-conviction proceedings.

Impossible standards for review

The SPA goes even further toward rendering illusory federal protection of defendants' rights. Overruling a long line of Supreme Court precedent, it removes jurisdiction from habeas courts to consider claims that a state court refused to hear on the ground of some procedural error committed by the prisoner or his lawyer-even if the lawyer's inadequate assistance caused the default or the state court's action was unreasonable. To overcome this global barrier to review, a petitioner would generally have to show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and ... the facts underlying the claim ... would be sufficient to establish ... that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." The proverbial camel could have navigated the needle's eye more easily than a prisoner will be able to satisfy this provision.

Other sections direct dismissal with prejudice of claims not exhausted in state court, where many defendants lack the aid of counsel in collaterally attacking their judgments, and severely restrict the right to amend habeas petitions. Again, the only escape hatch is the "mission impossible" innocence exception. Additional provisions would alter current tolling provisions, so as to trap unwary litigants into breaching the one-year statute of limitations, and impose rigid timetables on the processing of habeas appeals.

Finally, the House bill zeroes in on capital cases in further jurisdiction-stripping sections. It bars federal courts from hearing almost all claims of sentencing error that a state court has found to be harmless, and-subject to the innocence "out"-all claims by death row inmates, if the U.S. attorney general certifies that a state's system for furnishing counsel in post-conviction proceedings fulfills statutory standards. Significantly, existing law leaves the certification decision to the judiciary, not to a potentially biased executive official, and does not wholly deny the applicant a hearing in "opt-in" states.

Fueled by baseless hostility toward prisoners and federal judges, the SPA threatens to put habeas courts out of the business of safeguarding constitutional rights. It would reverse the results of decisions granting relief for such violations as ineffective assistance of counsel and racial bias in jury selection and place innocent lives at risk. Ironically, too, it would not lessen delays: The courts will have to interpret and review challenges to its provisions. The bill deserves capital punishment and quick burial.

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Vivian Berger is a professor emerita at Columbia Law School.

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receive compensation. The law provides that people who were wrongly convicted can collect $25,000 per year of incarceration up to a maximum of $500,000 if they: (a) Served all or part. of their sentence; (b) Received a pardon based on their innocence or relief from a court based on their innocence; and (c) Can document the amount of time served. Under the law Sutton is eligible for over $100,000.

However, when Sutton applied for compensation, his claim was denied. Unbeknown to the law's original author, State Senator Rodney Ellis (D-Houston), someone changed the law he introduced prior to its enactment by the legislator in 2003. The added provision requires that people claiming compensation for wrongful imprisonment must first obtain a letter from the district attorney whose office prosecuted them. The letter must certify the claimant's "actual innocence."

Ellis said he was never consulted about the change to the law. "Someone has slipped

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he told colleagues on May 19. "These delays burden the courts and deny justice to defendants with meritorious claims. They are also deeply unfair to victims of serious, violent crime." Although the AEDPA (passed by a Republican-controlled Congress) itself curtailed federal judicial oversight in order to speed the process along, its restrictions are apparently not enough for Kyl, his co-sponsors (first among them Texas Sen. John Cornyn), and his House colleague Rep. Dan Lungren, R-Calif. [who introduced the SPA in the House in June], who have seemingly decided the remedy to this sort of delayed justice is to eliminate the judicial process altogether.

Under the SPA, the only criminal cases that would earn any federal habeas review are those in which a defendant can show three things: one, that there are "new facts" in the case that were never brought to light through the "due diligence" of attorneys; two, that those facts establish the defendant's innocence by "clear and convincing evidence"; and, three, that "but for a constitutional violation, the defendant wouldn't have been convicted," Marcus says. "You should really think of it as three bells that all have to be rung." The problem, say Marcus and others, is it is nearly impossible to ring all three bells without first successfully ringing an underlying chord – such as a claim that the reason the new information was unidentified was the result of a prosecutor hiding evidence from the defense (as was the case with Texas death row inmate Delma Banks, whose case was ultimately remanded to state district court), or because the defendant's attorney was ineffective. Under the SPA, those claims would need vetting in state court – in Texas that means the CCA, a court whose record on such issues is abominable. It was the CCA that infamously opined in Calvin Burdine's death case that Burdine's lawyer sleeping intermittently through his trial did not necessarily mean his counsel was ineffective. (During a Senate Judiciary Committee meeting late last month, Cornyn told members that he believes the law "provides for a lawyer who is awake and fully functioning," and said the fact that Burdine's case was reversed shows "that the system can and does work." But if those kinds of claims aren't raised during state appeals or in a direct appeal to federal courts, Cornyn argues, a defendant should not be able to raise a claim for the first time, years later, during federal habeas appeals.)

'We Don't Really Care'

Neither Marcus nor fellow TDS attorney Greg Wiercioch can recall a single case won on the basis of "actual innocence" during a habeas appeal that was not predicated upon one of those apparently lesser claims. "If the state system is shoddy," says Wiercioch, under the SPA "you're never going to get an opportunity in federal court to get better counsel, or to investigate what may be a claim of actual innocence. Unless you can meet the really high standard ... They're screwed." The legislation's message, say the TDS attorneys, "is that if [the defendant is not 100%] innocent, we don't really care," Wiercioch said. Even defendants who have been exonerated by DNA would likely not get a federal review. Take the case of an inmate convicted before the advent of modern DNA technology. Although the defendant may be able to pass through the SPA's first two hurdles – new evidence, clear and convincing evidence of innocence – any attorney would be hard-pressed to find a constitutional claim that hinges on the right to access modern technology. As such, the defendant would likely be barred from proving "actual innocence" in court.

According to Cornyn, all the hype over the possibility of denying justice to criminal defendants is, apparently, just hysteria. "What we are talking about here is not denying people access to reasonable review of their case, but we're talking about abuse of the habeas process in federal court," he told the committee on July 28. The "fact is" that habeas review "has become rife with gamesmanship" and is used to delay the imposition of a fair sentence. "In my state, from the time ... the most hardened criminals are convicted of the most heinous crimes ... their case is reviewed by not only a jury of 12 of their peers but up to 23 different judges ... perhaps even more."

Just because a number of people have reviewed the case, however, doesn't mean it has been justly resolved, points out SPA opponent John Whitehead, president of the conservative civil liberties organization the Rutherford Institute. "State court judges – who are often elected – are susceptible to pressures that life-tenure federal judges may find less compelling," he wrote in a July 27 memo to the committee. The SPA is "radical legislation" that would "likely result in the execution of citizens who have been wrongly convicted and sentenced to death." Whitehead isn't the only conservative critic of the legislation. The ranks of opposition are swollen with critics of all political stripes – including former Rep. Bob Barr, R-Georgia, the National Association of Criminal Defense Lawyers, former FBI director William Sessions, and the American Bar Association. This widespread criticism has apparently halted the SPA's progress. Sen. Arlen Specter, R-Penn., chair of the judiciary committee, recently tabled the measure until some time next month. If it passes, the measure will likely be challenged in court – at least in part on questions of whether Congress actually has the power to encroach on the jurisdiction of the judicial branch. "It is a constitutional issue, taking so much power away from the courts," Wiercioch says.

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into state law in the dark of night a provision that says - even if you have a pardon - you have to have a letter from the district attorney saying you are actually innocent," Ellis said. "It's ridiculous. This is a fundamental change to the law that makes it harder far people to get what is owed to them. I want to see it changed."

Harris County (Houston) District Attorney Chuck Rosenthal said he will not send the necessary letter, "If I knew be was innocent, I would. But I don't know that now." Rosenthal discounted the pardon received by Sutton in May 2004, "If you give me some good reason to believe [the victim] was mistaken, I will probably send the letter."

"Even if he secures all the paperwork, which is unlikely, it might be 18 months before [Sutton] gets the money," said David Dow whose network continues to represent Sutton.

Ellis said he plans to introduce amendments to the compensation law in the 2005 legislative session. He wants the law changed to eliminate the "actual. innocence" letter requirement. He also wants to increase the amount of money exonerated people can receive to $40,000 per year of imprisonment. He said, "It takes $40,000 a year to incarcerate someone. We should be giving them at least that."

Source: *The Houston Chronicle*