
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 243 **Hearing Date:** March 16, 2021
Author: Wiener
Version: March 9, 2021
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Trial testimony: expert witnesses: writ of habeas corpus*

HISTORY

Source: California Innocence Project
Loyola Project for the Innocent
Northern California Innocence Project

Prior Legislation: SB 938 (Wiener, 2020) not heard COVID
SB 1134 (Leno, 2016) Chapter 785, Stats. 2016
SB 694 (Leno) held in Assembly Appropriations 2015
SB 1058 (Leno) Chapter 623, Stats. 2014
SB 618 (Leno) Chapter 800, Stats. 2013
AB 1593(Ma) Chapter 809, Stats. 2012

Support: American Civil Liberties Union; California Attorneys for Criminal Justice;
California Civil Liberties Advocacy; California Coalition for Women Prisoners;
California Public Defenders Association (CPDA); Ella Baker Center for Human
Rights; Initiate Justice; San Mateo County Participatory Defense

Opposition: None known

PURPOSE

The purpose of this bill to set a standard for which expert testimony is entered in a criminal proceeding and to expand the definition of “false evidence” for the purpose of a habeas corpus petition to including expert testimony that has been undermined by research, technological advances, or reasonable disputes as to the validity of the scientific theory upon which and expert opinion was based.

Existing law provides that every person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint. (Penal Code § 1473(a).)

Existing law states that a writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

- a) False evidence that is substantially material or probative on the issue of guilt, or punishment was introduced against a person at any hearing or trial relating to his incarceration;

- b) False physical evidence believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty and which was a material factor directly related to the plea of guilty by the person.
- c) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome of the trial. "New evidence" is evidence that was discovered after trial that could not have been discovered before trial and is admissible. (Penal Code § 1473 (b))

Existing law provides that any allegation that the prosecution knew or should have known of the false nature of the evidence is immaterial to the prosecution of a writ of habeas corpus. (Penal Code § 1473(c).)

Existing law states that nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies. (Penal Code § 1473(d).)

Existing law provides that "false evidence" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or have been undermined by later scientific research or technological advances. (Penal Code § 1473(e)(1).)

Existing law proves that this section does not create additional liabilities, beyond these already recognized, for an expert who repudiates the original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research. (Penal Code § 1473(e)(2).)

This bill expands the definition of "false evidence" as including opinions of experts that have been repudiated by the expert who originally provided the opinion at a hearing or trial or have been undermined by scientific research, including scientific research that existed at the time the expert's testimony was given, technological advances, or the emergence of a reasonable dispute with the expert's relevant scientific community as to the validity of the methods or theories upon which the expert based their opinion.

Existing law provides that a person is qualified to testify as an expert if they have special knowledge, skill, experience, training, or education sufficient to qualify them as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. (Evidence Code § 720(a))

Existing law provides that a witness' special knowledge, skill, experience, training, or education may be shown by any other wise admissible evidence, including his own testimony. (Evidence Code § 720(b))

Existing law provides that if a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law including but not limited to an opinion that is:

- a) Rationally based on the perception of the witness; and
- b) Helpful clear understanding of his testimony. (Evidence Code § 800)

Existing law provides that if a witness is testifying as an expert, their testimony in the form of an opinion is limited to such an opinion as is:

- a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. (Evidence Code § 801)

Existing law provides a witness testifying in the form of an opinion may state on direct examination the reasons for this opinion and the matter (including in the case of an expert, his special knowledge, skill, experience, training and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based. (Evidence Code § 802)

This bill provides that in any criminal proceeding, a court considering whether expert testimony is based on matter that is of a type that reasonably may be relied upon by an expert in forming an opinion pursuant to this section, shall determine whether the expert's opinion, and supporting literature, studies, research, or other bases on which the expert relies in forming that opinion are based on a reliable foundation, properly tested methodology, and sound logic.

This bill provides that whatever the underlying basis for the expert's opinion, a court shall inquire into, not only the type of material on which the expert relies, but also whether the material provides a reasonable basis for the expert's opinion or whether there is too great an analytical gap between the data and the opinion proffered for the testimony to be reliable and admissible.

This bill provides that if the opinion or supporting literature, studies, research, or other bases lack a reliable foundation, properly tested methodology, and sound logic, they are not matter that may be reasonably relied upon.

This bill also provides that the court may also limit the expert's testimony if it extends beyond the underlying support.

COMMENTS

1. Need for This Bill

According to the author:

Senate Bill 243 strengthens standards for acceptable expert witness testimony to help prevent wrongful convictions in criminal cases. This legislation further articulates the definition of false testimony to ensure that anyone wrongfully convicted of a crime due to faulty and/or unreliable scientific evidence may seek post-conviction relief. SB 243 also seeks to prevent wrongful convictions based on faulty and/or unreliable expert opinion testimony by ensuring this testimony is based on valid methodology, theory, research, studies, and/or evidence.

2. Standard for expert testimony

Expert opinions can often be very persuasive in a criminal case, but they are not always based on the sound logic and research one would assume. Bad scientific conclusions have been the basis of many of the wrongful conviction cases over the years. “The evidence used to win convictions has often been based on bad science. In about half of the cases in which D.N.A. evidence led to exoneration, invalid or improper forensic science contributed to the wrongful conviction.”

(Gertner, Nancy, “Judges Need to Set Higher Standard for Forensic Evidence” *New York Times*, February 4, 2016.)

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the US Supreme Court determined the standard for admitting expert testimony in federal court. The *Daubert* Court held that the enactment of the Federal Rules of Court implicitly overturned the previously held *Frye* standard. “Under the *Daubert* standard the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.” (Cornell Law School, Legal Information Institute; *Daubert* Standard, https://www.law.cornell.edu/wex/daubert_standard)

Consistent with the *Daubert* standard, this bill strengthens the standards for expert testimony in a criminal case. It will give the Judge the tools to keep faulty or questionable forensic science out of the courtroom by providing that a court shall determine whether the opinion and the research they used are based on a reliable foundation, properly tested methodology, and sound logic and shall inquire into, not only the type of material on which the expert relies, but also whether the material provides a reasonable basis for the expert’s opinion or whether there is too great an analytical gap between the data and the opinion proffered for the testimony to be reliable.

3. False Evidence

Under existing law a person can bring a habeas corpus based on false evidence at trial. False evidence is defined including opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or have been undermined by later scientific research or technological advances

This bill also expands that definition of false evidence instead of having been undermined by later scientific research or technological advances to more clearly state that it has been undermined by “scientific research that existed at the time the expert’s testimony was given, technological advances, or the emergence of a reasonable dispute with the expert’s relevant scientific community as to the validity of the methods or theories upon which the expert based their opinion.” This change in definition would allow evidence of opinions that were based on flawed scientific research or outdated technology that were flawed, and thus, were an unreliable basis from which the expert opinion was originally provided; and scientific areas where a reasonable dispute has emerged within the expert’s relevant scientific community as to the validity of methods or theories upon which the expert based their opinions. The author asserts that this expanded definition of false evidence better captures what unreliable forensic science is and therefore provides innocent people the opportunity to seek justice. It is not a blanket exclusion of any specific forensic science. Instead, it simply responds to the reality that forensic science is ever changing and improving

4. Argument in Support

The sponsors of the bill, the Innocence Project states:

Problematic forensic science remains a leading cause of wrongful convictions, occurring in nearly half (45%) of DNA exoneration cases and one-quarter (24%) of all exonerations in the United States. Research shows that experts whose opinions led to wrongful convictions either used forensic science that was flawed or scientific methods that are widely questioned within the scientific community. The National Academy of Science (NAS) states that a large part of this issue is due to the “CSI effect” where jurors have “unrealistic and preconceived notions about the availability and precision of forensic evidence in criminal trials” because of what they have seen portrayed on television. For example, the NAS report also found that “for many long-used types of forensic science, including fingerprint identification....experts’ conclusions were simply not supported by their methodology or training.”

Retired US District Court Judge Nancy Gertner put a spotlight on the issues SB 243 aims to address. She recently emphasized that criminal courts have become less rigorous in their scrutiny of forensic evidence: “The pacing of criminal prosecutions, the pressures, the unequal and limited resources make it particularly difficult to raise forensic challenges.” She continued, “[t]he best cross-examiner, with the best skills in the usual driving-under-the-influence case, may not be up to par when complex forensic evidence is involved.”

Additionally, expert opinions in general, not just those related to forensics, can be very persuasive and influential in the outcome of a trial, and their conclusions are often assumed to be data- and research-driven. However, experts sometimes offer opinions that lack sound logic, or rely on literature, research, or evidence that lack sound logic, valid methodology or theories.

This type of evidence is patently problematic for a jury. Jurors often rely on the opinions of experts because they lack the experience, skill, and education to make a certain determination, which is exactly why experts are permitted to testify as to their opinion in a particular area. However, our system should reconsider placing on jurors the pressure of deciphering whether an expert opinion is based on sound logic or more importantly, whether the articles, research, studies or other evidence their opinions rely upon are grounded in sound logic and proper methodology. Therefore, expert testimony should be vetted by a judge, serving as a gatekeeper, who should explicitly articulate the basis for exclusion of an expert opinion.

Science in the courtroom brings great complexity in the criminal legal system and has caused wrongful convictions. These good sense clarifications are a step forward for California in addressing concerns set forth — by the scientific community itself — to ensure that scientific evidence and expert testimony is reliable and when it is not, that there are avenues for justice to be served.

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