



# TEXAS JUDICIAL COUNCIL

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HON. SHARON KELLER  
Presiding Judge, Court of Criminal Appeals

## TIMOTHY COLE EXONERATION REVIEW COMMISSION

### AGENDA

October 29, 2015

2:00-4:00 P.M.

Supreme Court of Texas  
201 W. 14<sup>th</sup> Street  
Austin, Texas 78701

#### Action and Discussion Items:

**I. Commencement of Meeting**

**II. Attendance of Members – Wesley Shackelford**

**III. Remarks from Bill Authors – Representative Ruth Jones McClendon & Senator Rodney Ellis**

**IV. Introductions of Commission and Advisory Members**

**V. Staff Introductions**

**VI. Election of the Commission's Presiding Officer**

**VII. Reports and Discussion Items**

- a. Presentation of exoneration story - *Richard Miles*
- b. Review charge to Commission/HB 48 – *Wesley Shackelford*
- c. Discuss interests and goals - *Commission and Advisory Members*
- d. Discuss scope of work – *Presiding Officer*
- e. Report on implementation of recommendations from Timothy Cole Advisory Panel on Wrongful Convictions (2010) – *Wesley Shackelford*
- f. Report on Texas Forensic Science Commission's notifications task force related to DNA mixture interpretation - *Dr. Vincent Di Maio*

**VIII. Public Comment**

**IX. Other Business**

**X. Next Meeting**

**XI. Adjournment**

## Timothy Cole Exoneration Review Commission

### Members

**Senator Joan Huffman**, District 17, Houston

**Senator John Whitmire**, District 14, Houston

**Representative John T. Smithee**, District 86, Amarillo

**Representative Abel Herrero**, District 34, Corpus Christi

**Sam Bassett**, President, Texas Criminal Defense Lawyers Association

**John Beauchamp**, General Counsel, Texas Commission on Law Enforcement

**Dr. Vincent Di Maio**, Presiding Officer, Texas Forensic Science Commission

**The Honorable Sharon Keller**, Chair, Texas Indigent Defense Commission

**Rene M. Péna**, Chairman, Texas District and County Attorneys Association

**Carol Vance**, Retired, Houston

### Advisory Members

**Tiffany J. Dowling**, Director, Texas Center for Actual Innocence at The University of Texas School of Law

**Cassandra Jeu**, Director, Texas Innocence Network, University of Houston Law Center

**Anthony S. Haughton**, Executive Director, Innocence Project at The Thurgood Marshall School of Law at Texas Southern University

**Scott Henson**, Executive Director, The Innocence Project of Texas

### Staff

**Terri Peirce**, Judicial Information Data Analyst, TCERC, Office of Court Administration

**Alejandra Peña**, Research Specialist, TCERC, Office of Court Administration

**Wesley Shackelford**, Deputy Director, Texas Indigent Defense Commission

# Timothy Cole Exoneration Review Commission

## MEMBERS

**Bassett, Sam** is a partner at [Minton, Burton, Bassett & Collins](#) in Austin, Texas. He received his law and undergraduate degrees from the [University of Texas](#). Sam has been board certified in criminal law since 1994.

Sam is currently President of the Texas Criminal Defense Lawyers' Association (2015-16).

He practices criminal defense and family law. He is listed in Best Lawyers in America, is AV Rated by Martindale Hubbel and is a Texas Monthly Super Lawyer. In 2014, Best Lawyers in America named him Lawyer of the Year for criminal defense in Austin, Texas.

Sam served as panel chair on the [District 9A Grievance Committee](#) for the State Bar. He is a frequent speaker on criminal law, family law and ethics.

Sam served as the Presiding Officer of the [Texas Forensic Science Commission](#) from 2007 to 2009. The Dallas Morning News named Sam as a finalist for Texan of the Year for his work on the Commission.

Sam is the proud father of Kathleen and Daniel Bassett. He is a sports fan of U.T., the San Antonio Spurs and the Dallas Cowboys. He spends his spare time responding to his teenagers' requests for money, playing golf, boxing and working at his ranch near Floresville, Texas.

**Beauchamp, John P.** is the General Counsel for the Texas Commission on Law Enforcement. His prior legal experience includes criminal defense work, family law, and six years at the Texas Attorney General's Office.

As an Assistant Attorney General, he was an advocate for open government as head of the agency's open records litigation section. He also represented numerous other state agencies in district and appellate courts.

John grew up in west and central Texas, graduating from Round Rock High School. He served as a Rifleman in the United States Marine Corps, including a tour on the Presidential Security Detail at Camp David, Maryland. While an undergraduate at The University of Texas at Austin, he worked as a farmhand, salesman, and musician. He received his J.D. and M.B.A. degrees from Texas Tech.

When not spending time with his wife and three children, he continues his lifelong pursuit to get *good* at playing the guitar by making music with his band, Them Duquaines.

**Di Maio, Vincent J.M., MD**, obtained his Medical Degree from the State University of New York, Downstate Medical Center, in 1965. He did a year internship in Pathology at Duke University Hospital, Durham, N.C., followed by three years of residency in Pathology at the Downstate-Kings County Medical Center in Brooklyn, New York. This was followed by a one year fellowship in Forensic Pathology at the Maryland Medical Examiner's Office. He was then Board Certified in Anatomical, Clinical and Forensic Pathology. From July 1, 1970 - June 30, 1972, he was a Major in the Army Medical Corps assigned to the Armed Forces Institute of Pathology in Washington, D.C. where he was Chief of the Legal Medicine Section and Chief of the Wound Ballistic Section.

Dr. Di Maio was a Medical Examiner in Dallas, TX, from July 1, 1972 - February 28, 1981. He served as Chief Medical Examiner in Bexar County, Texas, (San Antonio), from March 1, 1981, until his retirement on December 31, 2006. He was Director of Bexar County Criminal Investigation Laboratory from March 1, 1981 - April 15, 1997. He was a Professor in the Department of Pathology, University of Texas Health Science Center at San Antonio, from February 1, 1987, to December 31, 2006.

Dr. Di Maio is Presiding Officer of the Texas Forensic Science Commission and is Editor-in-Chief of the American Journal of Forensic Medicine and Pathology. He is a Commissioner on the National Commission on Forensic Science.

He is the author/co-author of four texts: [Excited Delirium Syndrome](#); [Forensic Pathology](#); [Gunshot Wounds and Handbook of Forensic Pathology](#). In addition, he is the author/co-author of 91 scientific articles, 15 scientific letters and 15 book chapters.

Dr. Di Maio is married to Theresa G. Di Maio, BSN who is the senior author of the text [Excited Delirium](#). They have two children, Dominick J.M. Di Maio, M.D., a dermatopathologist and Samantha Di Maio, a prosecutor in the District Attorney's Office in San Antonio, Texas

**Heatly, Staley** received his bachelor's degree from Baylor University and his law degree from Tulane University. After law school he worked for the international law firm Bryan Cave in Washington, D.C. In 2003, he and his wife joined the Peace Corps and lived for two years in Ecuador.

Staley has served as the District Attorney for the 46th Judicial District in Texas since 2006. He currently serves as president of the board of directors of the Texas District and

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County Attorneys Association and is a member of the public policy committee of the Texas Council on Family Violence. Staley is a passionate advocate for victims of family violence and works hard to raise awareness about the issue.

In 2013, he founded a non-profit battering intervention and prevention program in his rural community. In 2014, at the invitation of the US Embassy in Quito, Staley traveled through Ecuador for two weeks to raise awareness about family violence. During his trip he spoke to civic organizations and university students, and trained police officers on investigative techniques they can use in family violence cases. Staley is a frequent speaker at conferences throughout the country on the investigation and prosecution of family violence cases.

Staley has written several articles for The Prosecutor Magazine including articles on the effect of trauma on victims of sexual assault and family violence, sequential versus simultaneous photo lineups, and the efficacy of police body worn cameras.

**Herrero, Abel** First elected in 2004, State Representative Abel Herrero is now serving in his fifth term proudly representing the people of District 34. During his time in the Texas House of Representatives, Herrero has served on several committees: Appropriations, Human Services, Defense Affairs and now serves as Chairman of the Criminal Jurisprudence Committee and as a member of the Energy Resources Committee.

Before his election to the Texas Legislature, Rep. Herrero served as a city council member from 1999-2003 for Robstown, Texas. He received a bachelor's degree in political science from Texas A&M University in College Station and earned a Doctor of Jurisprudence from the University of Texas School of Law. Rep. Herrero is a partner with Herrero & Loftin PLLC in Corpus Christi, Texas.

District 34 covers western Nueces County including Robstown, Bishop, Driscoll, Banquete, Agua Dulce, Petronila, parts of Corpus Christi and Sandia.

**Huffman, Joan** started her career as a public servant in 1981. Upon earning her undergraduate degree from Louisiana State University, she became a secretary for the Harris County District Attorney's office. It was there that she became inspired by the work of prosecutors and decided to attend law school. She took night classes at South Texas College of Law while working full time.

Upon earning her law degree, Joan was hired as a prosecutor and advanced from misdemeanor court to Chief Felony Prosecutor, Special Crimes Gang Prosecutor, and Legal Counsel to the Organized Crime Narcotics Task Force. She served as lead prosecutor in over 100 jury trials, including murders, sexual assaults, aggravated robberies, and sexual assaults of children. Huffman earned a

reputation as a fair and tough enforcer of the law both as a prosecutor and a twice elected Judge to the 183rd Criminal District Court.

Senator Huffman was first elected to the Texas Senate in 2008 after winning a special election to fill the vacated office of Senate District 17 and has been twice re-elected. Her background and knowledge on various topics has allowed for her to serve on several key committees which impact the overall operation and efficiency of state government. She currently serves as Chairwoman of the Senate Committee on State Affairs, Vice Chairwoman of the Senate Committee on Criminal Justice, and is a member of the Senate Committee on Finance.

Senator Huffman's common sense approach to solving issues has allowed for her to build strong relationships with members of both parties, which enables her to represent the needs of her district and her constituents efficiently and effectively. Her leadership has been acknowledged by numerous advocacy groups. She was named a "Champion for Free Enterprise" by the Texas Association of Business, a "Taxpayer Champion" by Texans for Fiscal Responsibility and a "Big Voice for Little Texans" by Court Appointed Special Advocates for her work to protect children. She was also named a "Patient Care Champion" by the Harris County Medical Society and is the only repeat recipient of the Texas District and County Attorneys Association's "Law and Order Award" since its inception, for her efforts to improve victims' protections and the criminal justice system.

Senator Huffman lives with her family in Houston and proudly represents a diverse district which includes portions of Brazoria, Fort Bend and Harris counties.

**Keller, Sharon** First elected to the Texas Court of Criminal Appeals in 1994. Elected Presiding Judge in 2000; reelected Presiding Judge in 2006 and in 2012. Chair, Texas Indigent Defense Commission. Vice-chair, Texas Judicial Council. Board of Directors, Council of State Governments Justice Center. Member, Judicial Advisory Council to the Community Justice Assistance Division of the Texas Department of Criminal Justice. Member, Texas Re-Entry Task Force. Life Fellow, Texas Bar Foundation. Distinguished Alumni Award for Judicial Service, SMU Dedman School of Law, 2003. Bachelor of Arts (philosophy), Rice University, 1975. Juris Doctor, Southern Methodist School of Law, 1978. Born August 1, 1953. One child.

**Péna, Rene M.** is a lifelong resident of Floresville, Wilson County, Texas. Rene received an Associate of Applied Science in Public Administration from San Antonio College and a Bachelor of Arts in Business Administration from Our Lady of the Lake University in San Antonio, Texas. He received his Doctorate of Jurisprudence from Thurgood Marshall School of Law in Houston, Texas.

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Rene established a law practice in his hometown immediately after receiving his degree, representing clients in a wide range of legal issues including business transactions, wills and probate, family law and criminal defense. Rene served as County Attorney for Wilson County before being elected as the 81st Judicial District Attorney in 2004. The 81st Judicial District is comprised of Atascosa, Frio, Karnes, La Salle, and Wilson Counties. Rene is now serving in his third term as district attorney.

In addition, Rene currently serves as the Chairman of the Texas District and County Attorney's Association and as an Executive Board Member of the Special Prosecution Unit which oversees prosecution within the 111 prisons in the State of Texas. In 2011, Rene was appointed by Governor Rick Perry to the Texas Violent Gang Task Force and presently serves as its Chairman. In August 2015, Rene was appointed to serve on the Texas Attorney General's Human Trafficking Prevention Task Force.

Rene is the founder and former Chairman of the Texas Border Prosecution Unit, which consists of the seventeen judicial districts located along and contiguous to the Texas border. He also served on numerous other boards and is actively involved in the community.

Rene is married to Rachel Pena and they have one son.

**Smithee, John** Graduate of Amarillo College, graduate of West Texas State University with Business Degree, graduate of Texas Tech School of Law with J.D. Degree.

Licensed to practice law in Texas since 1976. Licensed to practice before the United States District Court, Northern District of Texas; 5th Circuit Court of Appeals; United States Court of Claims; and the United States Supreme Court. Member, State Bar of Texas, Amarillo Bar Association. Named partner with firm of Templeton, Smithee, Hayes, Heinrich & Russell. Engaged in a general civil litigation practice. Board certified in Civil Trial Law and Civil Appellate Law, Texas Board of Legal Specialization, since 1987.

Elected State Representative, 86th District, in November 1984 election. District is comprised of Dallam, Deaf Smith, Hartley, Oldham, Parmer and Randall Counties. Elected as a Republican. Currently serves as Chair of the House Judiciary & Civil Jurisprudence as well as a member of the House State Affairs Committee. Previously served as Chairman of the House Insurance Committee from 1993 to 2015. Has also served on the following committees: Ways & Means, Natural Resources, Economic Development, Energy Resources, Business & Commerce, Government Organization, Higher Education, Judicial Affairs, and Regulated Industries committees. Member of the American Legislative Exchange Council and Texas Conservative Coalition.

Married to Becky Smithee. Three children: Jennifer Rush; Rebecca Smithee, and John Smithee, Jr. Three grandchildren.

**Vance, Carol** attended Texas A&M his freshman year and then the University of Texas where he received his BBA and Law Degree.

Mr. Vance received his commission as a 2d Lt. in the U.S. Army and served on active duty at Ft. Gordon, Georgia. Vance continued serve in the Army Reserves for ten years and was a Captain in the Judge Advocate's General Corp.

After law school he became an Assistant District Attorney for Harris County from 1958 to 1966. As District Attorney Carol started the Special Crimes Bureau, The Organized Crime Division, the Major Fraud and Consumer Fraud Divisions, the Victim Witness Section, the Career Criminal Division, the Pollution Prosecution Section and the Intake Division.

While District Attorney, Vance was chosen the Outstanding Young Man of Houston by the Houston Junior Chamber of Commerce, selected the Outstanding Young Lawyer in Texas by the Texas Young Lawyers Association and the Outstanding District Attorney in the U.S. by the National District Attorney's Association. He served as President of the Texas District Attorneys Association and as President of the National District Attorneys Association. He was one of several founders of the National College of District Attorneys and served as its Chairman. Vance served on the State Bar Committee that wrote the new Texas Penal Code of 1974, which is in effect today. He is a past President of the Houston Young Lawyers Association and past Chairman of the State Bar Criminal Law Section. He was a co-founder of the International Association of Prosecutors. Vance helped develop the National Prosecution Standards for the NDAA and served on the ABA task force that wrote the ABA Criminal Justice Standards. He taught a night class of Criminal Law at the University of Houston Law School as an Adjunct Professor as well as seminars and a trial training course during his tenure as District Attorney.

In 1979 Vance left the District Attorney's office to become a partner with the Bracewell and Patterson Law Firm, now Bracewell and Giuliani. Prior to retirement he was a senior partner. Carol was invited to be a Fellow of the American College of Trial Lawyers.

Vance served as Chairman of the Texas Department of Criminal Justice, which oversees the Texas Prison System 1992 to 1995 and served on the Board eight years.

He is the author of *After the Leap; My Grandfather's House; Boomtown D.A.*, and *Youth and the Law* which had over two million copies printed and was used throughout Texas for school kids.

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Mr. Vance is married to Carolyn Kongabel Vance. They have been married over sixty years. Carol and Carolyn have five children and fourteen grandchildren.

**Whitmire, John** represents the 15th Senatorial District comprised of north Houston and parts of Harris County. He was elected to the Texas Senate in 1982 after serving 10 years in the Texas House of Representatives. With over 30 years of service in the Texas Senate, Senator Whitmire ranks first in seniority and is the "Dean of the Texas Senate."

Senator Whitmire serves as Chair of the Senate Criminal Justice Committee and works to bring about needed changes to the adult and juvenile criminal justice systems. He is also a member of the Senate Business and Commerce Committee and the Senate Select Committee on Government Facilities. In addition, he serves as a member of the Senate Finance Committee where he is committed to finding appropriate solutions for funding the state's many agencies and programs.

Senator Whitmire chairs the School Discipline Consensus Project, a nonpartisan effort led by the Council of State Governments Justice Center, which brings together leaders from across the United States to develop strategies to minimize the over-use of suspension and expulsion in public schools, improve students' academic outcomes, reduce the referral to the juvenile justice system, and promote safe and productive learning environments.

In addition to his leadership in criminal justice and public safety, Senator Whitmire is a passionate advocate for quality public education, affordable higher education, minority and women's rights, and access to quality affordable health care and mental health services, and sound business and economic development.

Originally from Hillsboro, Texas, Senator Whitmire moved to Houston where he graduated from Waltrip High School. He earned a Bachelor of Arts degree from the University of Houston and attended the Bates College of Law. He was admitted to the Texas State Bar in 1981 and is attorney of counsel to the law firm Locke Lord LLP. Senator Whitmire has two daughters and one grandson.

## ADVISORY MEMBERS

**Dowling, Tiffany** began her career as a Deputy Counsel and Program Attorney for the Texas Municipal Courts Education Center, where she provided judicial education and training for Texas municipal court judges. Ms. Dowling then served as an Assistant County Attorney for Travis County, Texas, prosecuting misdemeanors and conducting Grand Jury investigations in conjunction with the Travis County District Attorneys Office. In 2007, she left the Travis County Attorneys Office to join the faculty of The University of Texas School of Law as a Clinical Instructor and Staff Attorney for the Actual Innocence Clinic. In 2010 Ms. Dowling was promoted to Director of the Actual Innocence Clinic. In her current position, Ms. Dowling teaches and supervises law students in the review and investigation of post-conviction innocence claims made by Texas inmates.

**Jeu, Cassandra** received her B.A. from Vassar College and her J.D. from the University of Houston Law Center (UHLC). Prior to attending law school, Cassandra worked for Princess Cruises and the Walt Disney Company. After graduating law school, she practiced white collar criminal law and probate law before joining the Texas Innocence Network in 2005 as its Deputy Director of Operations. Cassandra returned to UHLC in 2011 as a Legal Clinic Supervisor, acting as the Director of the University of Houston Innocence Project (UHIP). Cassandra is also an Adjunct Professor at UHLC, co-teaching Innocence Investigations and Death Penalty Clinic with Professor David R. Dow. As UHIP's Director, Cassandra runs the organization's administrative components and its Non-

Capital Division. She supervises all non-death penalty casework: reviewing, investigating, and litigating inmates' claims of actual innocence. In addition, Cassandra is a Moot Court Coach for UHLC's Blakely Advocacy Institute.

**Haughton, Anthony S.**, is currently Interim Director of the Thurgood Marshall School of Law Legal Clinics, Associate Director, Earl Carl Institute (ECI) Center for Criminal Justice, and Managing Attorney of the Thurgood Marshall School of Law Innocence Project. Mr. Haughton has been with the law school since 2009, starting as an adjunct professor. He joined the ECI in 2011, and became interim Director of the Legal Clinics in 2015. During his 25 plus years as an attorney, Mr. Haughton has worked consistently in the representation of the indigent accused. His experience includes: working as a consulting attorney at the Texas Resource Center (handling post-conviction capital appeals); Six years at the Public Defender Service (PDS) of Washington, D.C., where Mr. Haughton served in many roles, handling both appeals and serious criminal trials, ultimately serving as the Chief of the Trial Division; and in private practice, where he worked primarily on serious felony and capital cases in both state and federal courts. Mr. Haughton is also an ordained minister.

**Henson, Scott** is executive director of the Innocence Project of Texas. He has worked with various organizations promoting criminal justice reform in Texas for 20 years and authors a widely read blog at [gritsforbreakfast.org](http://gritsforbreakfast.org).

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## STAFF

**Peirce, Terri** has joined the Judicial Information section as a Judicial Information Data Analyst. This is a new position that will primarily focus on supporting the newly created Exoneration Commission until the Commission issues its report sometime next year. Terri comes to us from the Department of Information Resources where she served for a short time as their Customer Information Coordinator, her previous state service includes the Department of Motor Vehicles, the Department of Transportation, and the Department of Licensing and Regulation. She has 15 years' experience working for law firms collecting defaulted student loans and court fees and fines. She graduated from St Edwards University with a BA in Management.

**Peña, Alejandra I.** was the Volunteer Retention Manager for CASA of Travis County where she oversaw all agency wide retention efforts, data collection and analysis. Prior to that role she was the Lead Senior Drug Court Specialist CASA representative with the Travis County Family Drug Treatment Court (TCFDTC) in which she served in the TCFDTC Operations Committee. Before her time with CASA of Travis County, Ms. Peña worked for the Consulate General of Mexico in their Legal and Protection Department where she conducted research on criminal cases and provided support for Mexican nationals and case stakeholders.

Ms. Peña received her Master's of Public Administration from Texas State University with a focus in research methodology. She was appointed as the first President for the International City/County Management Association student chapter with TX State University and is a member

of the Pi Alpha Alpha Global Honor Society for Public Affairs and Administration. Ms. Peña is the scholar recipient for the 2013-2014 William P. Hobby scholarship and the first ever CenTex ASPA Dr. George Weinberger Scholarship. She holds a bachelor's degree in Forensic Science from St. Edward's University in Austin, TX. Ms. Peña is a member of the Texas State University Master of Public Administration Advisory Council. She is currently a member of the Director of Volunteers in Austin association.

**Shackelford, Wesley** serves as Deputy Director of the Texas Indigent Defense Commission (Commission). He develops standards and policies for the provision of indigent defense services and acts as team lead on fiscal and policy monitoring programs. He also represents the Commission on substantive indigent defense policy before the Texas Legislature. Wesley also provides legal advice on the issue to judges, counties, and the Commission. He also speaks about indigent defense issues to stakeholders and policy makers. He has been with the Commission since 2002. Wesley previously served as Senior Staff Attorney for the Texas Juvenile Probation Commission (TJPC) from 1995-2002. He was the intergovernmental relations' specialist for TJPC and provided information to legislators and other state agencies. Wesley also responded to inquiries on juvenile justice law from judges, probation officers, and prosecutors. Wesley graduated from the University of Texas at Austin with a B.A. in Government in 1990. He received his Doctor of Jurisprudence in 1994 from the University of Texas School of Law and was licensed to practice law in 1994. He is a member of the Juvenile Law Section of the State Bar of Texas.



## **Richard Miles Bio**

Born April 26, 1975 to Mr. Richard and Thelma Miles, Richard Miles was your average kid doing kid things. At a very early age, his parents divorced and his mother married the now late Bishop William L. Lloyd. In their home, they did not use the word “stepfather”, so to Richard, Bishop Lloyd was unquestionably his Father. With one older sister, Lashawnda, and two younger brothers, William and Emanuel, Richard was raised in the heart of Dallas, Texas. He attended Skyline and Justin F. Kimball High Schools where he maintained a “B” GPA; in 1992 he was able to tour Texas State Technical Institute with great hopes of pursuing a career in the field of “plastic technology”. But in May of 1994, his life would take a dramatic turn after being falsely arrested for the offenses of murder and attempted murder. After spending a total of 15 months in the Dallas County Jail, Richard went to trial and presented by plea of innocence to a judge, prosecutor and a jury of peers. A seven day trial and eight hour deliberation ended with Richard receiving a total of 60 years in prison for a crime that he did not commit. In October of 1995, at the young age of only 20 years old, Richard left Lew Sterrett County Jail in Dallas and headed to the Texas Department of Criminal Justice Institutional Division in Tennessee Colony, TX, where he would spend the next 14 years proclaiming his innocence and fighting for his freedom – all while enduring an environment that was not conducive to change or society. Despite these immeasurable odds, while incarcerated he received an Associate Degree in Applied Science and numerous vocational certificates. He would eventually receive his ordination as a minister by his own father, Bishop Lloyd in September of 2001. After filing and losing a direct appeal and the 11.07 Writ of Habeas Corpus to the Court of Criminal Appeals, Richard began submitting pleas to television shows, colleges, and law firms declaring my innocence. He then met Mr. Benjamin Spencer, innocent and still incarcerated, who advised him to write Centurion Ministries in Princeton, New Jersey. His first letter to Centurion in 1998 would lead to ongoing correspondence over the course of 10 years. It was in 2008, Centurion accepted his case and by October of 2009, Richard Miles left the Texas Department of Criminal Justice Division on his way back home to Dallas. A fifteen year journey seemed to be coming to a close. Walking out of that prison in 2009 a “free” man but not fully exonerated and being the first non-DNA conviction without confession – it would take the Court of Criminal Appeals two and a half years before a full exoneration would be announced. In the interim, Richards transition was very difficult. Reuniting with family and attempting to reconnect with a world he had been disconnected from for so long was more challenging than not. Although grateful for his family’s unwavering support, sadly his father would not be alive to experience the joy of this reunion. On February 15, 2012, standing in front of Dallas County District Judge Andy Chatham – Richard Miles received a heartfelt and long overdue apology. It was that day in that courtroom, he would be officially notified of the Court of Criminal Appeals’ decision to acknowledge Richard’s false imprisonment. And so a new journey would begin... The passage God provided him gave way to the birth of a non-profit organization appropriately named, Miles of Freedom, in June of 2012. The Miles of Freedom mission is to provide assistance for those impacted by incarceration; right or wrong, in or out. Since his release from prison, Richard has been a consistent special guest on numerous platforms in radio, television, and stage – speaking on topics ranging from wrongful incarceration to education to the prison pipeline. He’s traveled the nation with his story of faith and perseverance and has even been memorialized in the book, “Tested”, written by mother and daughter Dorothy and Peyton Budd. Richard has also presented court testimony in trials as a prison Expert Witness; and one of his most memorable moments includes reading his own case,

“ExParte Richard Miles (SW 3rd 359)”, that is now a part of our legal history for all time. Also among his growing accomplishments: Recipient of the Miguel Hildago Award (2013); TDJCID Chaplain Volunteer; DISD Volunteer; and more. But there are no greater accolades to be received that compare to Richard’s most remarkable honors like marrying his beautiful wife, Latoya, on September 15, 2013 and then a year and a half later, holding his firstborn child, Raelyn Grace, on March 6, 2015. Life has truly become Richard’s own extraordinary Miles of Freedom!

## **Richard Miles- Wrongful Conviction/Exoneration Summary**

Credit: The National Registry of Exonerations



Shortly before 3 a.m. on May 16, 1994, Deandre Shay Williams and Robert Ray Johnson, Jr., stopped at a Texaco gas station on Northwest Highway in Dallas, Texas, so that Williams, who was in the passenger seat, could talk to a woman who was walking on the sidewalk.

As they were sitting in the car, a black male wearing dark shorts, a white tank top and a floppy hat walked along the driver’s side, reached in, shot both men with a nine-millimeter pistol and fled to a white Cadillac which drove away. Williams was killed and Johnson was severely injured, but survived.

Marcus Thurman was standing in line to buy gas at the station when he heard six or seven gunshots. He saw a black male running with a gun in his right hand within 20 feet of him. He said he saw the gunman’s face as he went by and saw him go into some bushes near the station. Fifteen to 20 seconds later, a white Cadillac drove up with its lights off and the man emerged from the bushes and got into the car.

Thurman said he got into his car and followed the Cadillac while calling 9-1-1 and a description was broadcast over police radio. Thurman said the car made a u-turn in front of a car dealership and the gunman emerged and walk away. An off-duty police officer working at the car dealership heard the radio broadcast and called in that he saw a man fitting the description walking by the dealership.

Police were dispatched to the area and found 19-year-old Richard Miles standing about a block and a half from the dealership. Miles was wearing a floppy hat, a white tank top and blue “jams,” trousers that reach down between the knees and ankles. They put him into the back of their squad car and drove to the scene of the shooting where Thurman saw him and said Miles was the gunman. Miles was then removed from the car in handcuffs so that a gunshot-residue hand washing could be performed.

Miles was taken to a police station where a photograph was taken and put into a photo-spread—although he was the only member of the photo-spread wearing a white tank top. Thurman again identified him as the gunman.

Later that morning, several more witnesses were shown the photo-spread, but none could identify Miles. Five of the witnesses said the gunman was dark-skinned and more than six feet tall. Johnson, shown the photo-spread in the hospital, also was unable to identify Miles.

Miles, a light-skinned black man standing 5 feet, 9 inches tall, denied being involved in the shooting and provided names and telephone numbers of friends. Police called them and they confirmed Miles's account of his evening.

Miles was charged with murder and attempted murder. In August 1995, he went on trial in Dallas County District Court.

The prosecution relied primarily on Thurman, who identified Miles in the courtroom. Further, Vicki Hall, a trace evidence analyst with the Southwest Institute of Forensic Sciences testified that she found elevated levels of gunshot residue on the palm of Miles's right hand.

A defense witness said he was with Miles watching television until about 2 a.m. and then gave him a ride home, stopping to buy cigarettes along the way. He was dropped off near the car dealership so Miles could walk to the residence where he was staying. Another witness said that Miles called him about 2 a.m. and asked him to unlock his front door so Miles could come in and stay the night.

Miles testified on his own behalf and denied the shooting. He said he was left-handed, never carried a gun and had never shot a gun. He said he handled matches—a source of chemicals that mimic gunshot residue—because he smoked. He said that after he was dropped off, he walked past the car dealership to find a pay telephone to wake the friend at whose residence he was staying to ask him to unlock the door so that he could get in. He said that after he hung up the phone and began to walk to the friend's residence, he was arrested.

During closing argument, the prosecution relied on Thurman's identification and the gunshot residue evidence, and attacked Miles's alibi as concocted. The prosecution told the jury that there were "no other suspects."

Miles was convicted and sentenced to 40 years on the murder count and 20 years on the attempted murder count.

His appeal was denied on July 2, 1997.

In 2007, after Miles enlisted the help of Centurion Ministries, a Princeton, New Jersey-based organization that investigates wrongful convictions, a Freedom of Information Act request was filed with the Dallas Police Department. Among the documents released were two police reports that had never been disclosed to Miles's defense attorney.

One report documented an anonymous telephone call made to police a year after the shooting, but three months prior to Miles's trial. A woman said that her ex-boyfriend, Keith Richard, told her he shot two men near a Texaco gas station using a nine-millimeter pistol and that police had arrested the wrong person.

The other report said that William Garland told police that Williams' brother told him that "a dude by the name of Deuce" had been the gunman.

James McCloskey, founder of Centurion Ministries, interviewed Keith Richard in 2009. Richard, a dark-skinned black man standing approximately 6 feet, 6 inches tall, said he was in the area of the shooting, but departed just before it happened.

McCloskey also prepared a timeline and a map based on Miles's testimony of his activities that night as well as police and witness accounts. The document showed that Miles was about 12 minutes behind the gunman seen leaving from the scene of the shooting.

An expert on gunshot residue retained by Miles's attorney provided an affidavit stating that the prosecution expert at trial overstated the significance of the tests on Miles and that the residue detected was not proof that he had fired a gun.

A petition for a state writ of habeas corpus was filed on Miles's behalf on September 18, 2009. On October 6, 2009, the Dallas County District Attorney's Office agreed that the two police reports had not been turned over to the defense, that they were exculpatory, and the prosecution would not oppose the granting of the petition.

State District Judge Andy Chatham ruled that the petition should be granted and ordered Miles, 34, released from prison on bond on October 12, 2009.

On January 6, 2010, Thurman recanted his in-court identification of Miles, saying that after he told the trial prosecutor he could not identify Miles, the prosecutor showed him where Miles would be seated and he then picked Miles out in front of the jury.

On February 4, 2010, the habeas court adopted findings, agreed to by the defense and by the prosecution, setting aside Miles's conviction.

On July 27, 2010, Vicki Hall, the prosecution's gunshot residue analyst at Miles's trial, provided an affidavit saying she would testify differently than she did at the trial—that the residue level she found would be reported as "negative" for gunshot residue.

On August 29, 2010, Miles took and passed a polygraph examination.

On October 8, 2010, an investigator in the Dallas County District Attorney's office provided an affidavit saying that he had identified the source of a previously unidentified fingerprint found on the victims' car. The print was in a spot on the car that was consistent with someone putting one hand down while shooting into the car with the other hand.

The man who was the source of the fingerprint was interviewed by police and said that he lived near the Texaco station in the 1990's, that he frequented a nightclub next to the Texaco station and that he owned a white Cadillac. That man was given a polygraph test and his answers to questions about the crime were judged deceptive.

On February 15, 2012, the Texas Court of Criminal Appeals upheld the lower court ruling and found Miles "actually innocent."

As of 2012, Miles had received \$1,233,333 in state compensation.

– *Maurice Possley*

<b>State:</b>	Texas
<b>County:</b>	Dallas
<b>Most Serious Crime:</b>	Murder
<b>Additional Convictions:</b>	Attempted Murder
<b>Reported Crime Date:</b>	1994
<b>Convicted:</b>	1995
<b>Exonerated:</b>	2012
<b>Sentence:</b>	60 years
<b>Race:</b>	Black
<b>Sex:</b>	Male
<b>Age at the date of crime:</b>	19
<b>Contributing Factors:</b>	False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct
<b>Did DNA evidence contribute to the exoneration?:</b>	No

# Review Charge to Timothy Cole Exoneration Review Commission & HB 48 Summary

- House Bill 48 was passed by the 84<sup>th</sup> Texas Legislature and became effective on June 1, 2015 upon Governor Abbott's signature.

House Author: Representative Ruth Jones McClendon, et al.

Senate Sponsor: Senator Rodney Ellis, et al.

- HB 48 creates the Timothy Cole Exoneration Review Commission (TCERC) under but independent from the Texas Judicial Council. It is also administratively attached to the Office of Court Administration (OCA).
  - OCA was also provided authority and funding for two positions to support the Commission. Researcher and a data analyst positions are \*\*
- TCERC is a study commission charged with the following:
  1. Review “cases in this state in which an innocent defendant was convicted and then, on or after January 1, 2010, was exonerated”:
    - a. to identify the causes of wrongful convictions and suggest ways to prevent future wrongful convictions and improve the reliability and fairness of the criminal justice system;
    - b. ascertain errors and defects in the laws, evidence, and procedures applied or omitted in the defendant's case;
    - c. consider suggestions to correct the identified errors and defects through legislation or procedural changes;
    - d. identify procedures, programs, and educational or training opportunities designed to eliminate or minimize the identified causes of wrongful convictions;

- e. collect and evaluate data and information from an actual innocence exoneration reported to the commission by a state-funded innocence project, for inclusion in the commission's report;
    - f. identify any patterns in errors or defects in the criminal justice system in this state that impact the pretrial, trial, appellate, or habeas review process; or
    - g. consider and suggest legislative, training, or procedural changes to correct the patterns, errors, and defects in the criminal justice system that are identified through the work of the commission.
  2. Consider potential implementation plans, costs, cost savings, and the impact on the criminal justice system for each potential solution identified through the work of the commission; and
  3. Review and update the research, reports, and recommendations of the Timothy Cole advisory panel established in the 81st Regular Session and shall include in its report the degree to which the panel's recommendations were implemented.
- The findings and recommendations are required to be compiled in a report and submitted to the Governor, Texas Legislature, and Texas Judicial Council by December 1, 2016 and the TCERC is dissolved upon submission of the report.
- TCERC is made up of 11 members including four legislators, a gubernatorial appointee, representatives of various criminal justice government bodies and stakeholder organizations, and an appointment from the chair of the Texas Judicial Council.
  - Advisory board made up of the directors of the innocence projects at The University of Texas School of Law, the University of Houston, the Thurgood Marshall School of Law, and the Innocence Project of Texas.
  - The Innocence Project affiliated with the Cardozo School of Law in New York has also offered its support to the TCERC's efforts.

# H.B. No. 48

## AN ACT

relating to the creation of a commission to review convictions after exoneration and to prevent wrongful convictions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 43, Code of Criminal Procedure, is amended by adding Article 43.27 to read as follows:

Art. 43.27. TIMOTHY COLE EXONERATION REVIEW COMMISSION

Sec. 1. CREATION. The Timothy Cole Exoneration Review Commission is created.

Sec. 2. COMPOSITION. (a) The commission is composed of the following 11 members:

- (1) a member appointed by the governor;
- (2) the chair of the Senate Committee on Criminal

Justice;

- (3) the chair of the Senate Committee on State

Affairs;

- (4) the chair of the House Committee on Criminal

Jurisprudence;

- (5) the chair of the House Committee on Judiciary and

Civil Jurisprudence;

- (6) a member appointed by the chair of the Texas

Judicial Council;

- (7) the presiding officer of the Texas Commission on

Law Enforcement, or a member or employee of the Texas Commission on Law Enforcement appointed by the presiding officer;

- (8) the presiding officer of the Texas Indigent

Defense Commission, or a member or employee of the Texas Indigent Defense Commission appointed by the presiding officer;

- (9) the presiding officer of the Texas Forensic

Science Commission, or a member or employee of the Texas Forensic Science Commission who has significant experience in the field of forensic science appointed by the presiding officer;

- (10) the president of the Texas Criminal Defense

Lawyers Association, or the president's designee; and

- (11) the chairman of the board of the Texas District and County Attorneys Association, or the chairman's designee.

(b) A person appointed under this section may not, while serving on the commission, be an active judge, as that term is defined by Section 74.041, Government Code.

(c) The following persons serve as advisory members to the commission:

- (1) the director of the Texas Center for Actual

Innocence at The University of Texas School of Law;

- (2) the director of the Texas Innocence Network at the

University of Houston Law Center;



(3) the executive director of the Innocence Project of Texas; and

(4) the executive director of the Innocence Project at Thurgood Marshall School of Law.

Sec. 3. TERMS; VACANCIES. (a) A member of the commission serves until the commission is dissolved.

(b) The presiding officer of the commission shall be elected by the members of the commission.

(c) A vacancy on the commission is filled in the same manner as the original appointment.

(d) The presiding officer may appoint committees from the membership of the commission as needed to organize the commission or to perform the duties of the commission.

Sec. 4. ADMINISTRATIVE ATTACHMENT. (a) The commission exists under the Texas Judicial Council created under Chapter 71, Government Code. The commission operates independently of the Texas Judicial Council.

(b) The commission is administratively attached to the Office of Court Administration of the Texas Judicial System.

(c) Notwithstanding any other law, and subject to available funding, the Office of Court Administration of the Texas Judicial System shall:

(1) provide administrative assistance and services to the commission;

(2) accept, deposit, and disburse money made available to the commission; and

(3) provide the commission with adequate computer equipment and support.

Sec. 5. MEETINGS. (a) The commission may hold its hearing and meetings and other proceedings at a time and in a manner determined by the commission, but shall meet in Austin at least annually. The commission shall hold its first meeting on or before October 31, 2015.

(b) The commission shall conduct one public hearing. Advisory members may participate in the public hearing of the commission but do not count toward a quorum and are not entitled to vote on matters before the commission.

(c) Six members of the commission constitute a quorum. The commission may act only on the concurrence of six or more members. The commission may issue a report under Section 9 only on the concurrence of seven members.

(d) Subject to the availability of funds, a member of the commission is entitled only to reimbursement for the member's travel expenses as provided by Chapter 660, Government Code, and the General Appropriations Act.

Sec. 6. QUALIFICATIONS. (a) A member of the commission may not participate in or vote on any matter before the commission if the matter directly concerns an individual related to the member within the second degree by affinity or consanguinity.

(b) An individual may not be a member of the commission if the individual or individual's spouse is required to register as a lobbyist under Chapter 305, Government Code, because of the individual's activities for compensation on behalf of a profession or entity related to the operation of the commission.

Sec. 7. GROUNDS FOR REMOVAL. (a) It is a ground for removal from the commission that a member:

(1) if applicable, does not have at the time of appointment the qualifications required by this article;

(2) does not maintain during service on the commission the qualifications required by this article;

(3) violates a prohibition established by this article;

(4) is ineligible for membership under this article;

(5) cannot, because of illness or disability, discharge the member's duties for a substantial period; or

(6) is absent from more than half of the regularly scheduled meetings that the member is eligible to attend during a calendar year, unless the absence is excused by a majority vote of the commission.

(b) The validity of an action of the commission is not affected by the fact that it is taken when a ground for removal of a commission member exists.

Sec. 8. DUTIES. (a) The commission may review and examine all cases in this state in which an innocent defendant was convicted and then, on or after January 1, 2010, was exonerated to, as applicable:

(1) identify the causes of wrongful convictions and suggest ways to prevent future wrongful convictions and improve the reliability and fairness of the criminal justice system;

(2) ascertain errors and defects in the laws, evidence, and procedures applied or omitted in the defendant's case;

(3) consider suggestions to correct the identified errors and defects through legislation or procedural changes;

(4) identify procedures, programs, and educational or training opportunities designed to eliminate or minimize the identified causes of wrongful convictions;

(5) collect and evaluate data and information from an actual innocence exoneration reported to the commission by a state-funded innocence project, for inclusion in the commission's report under Section 9;

(6) identify any patterns in errors or defects in the criminal justice system in this state that impact the pretrial, trial, appellate, or habeas review process; or

(7) consider and suggest legislative, training, or procedural changes to correct the patterns, errors, and defects in the criminal justice system that are identified through the work of the commission.

(b) The commission shall consider potential implementation plans, costs, cost savings, and the impact on the criminal justice system for each potential solution identified through the work of the commission.

(c) The commission shall review and update the research, reports, and recommendations of the Timothy Cole advisory panel established in the 81st Regular Session and shall include in its report under Section 9 the degree to which the panel's recommendations were implemented.

(d) The commission may solicit input from innocence projects, bar associations, judicial entities, law enforcement agencies, prosecutor associations, public defender or criminal defense associations, public and private universities, and advocacy organizations.

Sec. 9. REPORT AND RECORDS. (a) The commission shall compile and issue a detailed report of its findings and recommendations, including any legislation or policy changes the commission recommends to implement procedures and programs to prevent the causes and occurrence of future wrongful convictions. The report must also describe statutory, procedural, and evidentiary reforms that have already been implemented in this state to prevent the causes and occurrence of future wrongful convictions.

(b) The report may not include any recommendation regarding the use of the death penalty or related procedures.

(c) The official report issued by the commission must be made available to the public on request.

(d) Working papers and records, including all documentary or other information, collected, received, prepared, or maintained by the commission or members of the commission in performing under this article or other law the commission's duties to conduct an evaluation and prepare a report, are confidential and not subject to disclosure under Chapter 552, Government Code.

(e) The commission may request that an entity of state government or of a political subdivision provide information related to the commission's duties under Section 8. On the request of the commission, an entity may provide information to the commission unless otherwise prohibited from disclosing that information.

(f) Information held by an entity of state government or of a political subdivision that is confidential and that the commission receives in connection with the performance of the commission's functions under this article or other law remains confidential and is not subject to disclosure under Chapter 552, Government Code.

(g) In carrying out its duties, the commission may examine the public records of an entity of state government or a political subdivision that are provided under Subsection (e).

Sec. 10. ASSISTANCE OF STATE-SUPPORTED UNIVERSITIES. The

commission may request assistance from any state-supported university in performing the commission's duties.

Sec. 11. SUBMISSION. The commission shall submit the report described by Section 9 to the governor, the lieutenant governor, the speaker of the house of representatives, the legislature, and the Texas Judicial Council not later than December 1, 2016.

Sec. 12. EXPIRATION. (a) This article expires December 1, 2016.

(b) The commission is dissolved on the earlier of:

(1) the date the commission submits its report; or

(2) December 1, 2016.

SECTION 2. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 48 was passed by the House on May 1, 2015, by the following vote: Yeas 134, Nays 6, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 48 on May 28, 2015, by the following vote: Yeas 137, Nays 5, 2 present, not voting.

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Chief Clerk of the House

I certify that H.B. No. 48 was passed by the Senate, with amendments, on May 26, 2015, by the following vote: Yeas 31, Nays 0.

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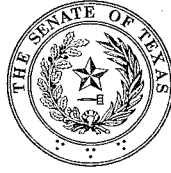
Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor



## SENATE CRIMINAL JUSTICE COMMITTEE

SENATOR JOHN WHITMIRE  
Chairman  
SENATOR JOAN HUFFMAN  
Vice Chairman

MEMBERS:  
SENATOR JUAN "CHUY" HINOJOSA  
SENATOR BRANDON CREIGHTON  
SENATOR CHARLES PERRY  
SENATOR KONNI BURTON  
SENATOR JOSÉ MENÉNDEZ

October 22, 2015

Timothy Cole Exoneration Review Commission  
201 W. 14th Street  
Austin, TX 78711

Dear Members,

Though I regret not being able to attend today, I am honored to serve on this commission. It is a long time coming.

Since 1994 there have been 49 DNA exonerations here in Texas. Nine of these exonerations happened after January 1, 2010 which places them under the purview of this commission. I believe it is important to look closely at these cases to determine the areas where we can improve our criminal justice system to ensure the same mistakes are not continually made.

The damage of falsely imprisoning someone is so widespread we must do all we can to prevent it. False imprisonment ruins an individual's life, the individual's family, and the communities belief in the system.

Serving on this commission provides us the opportunity to review the work done by the Timothy Cole Advisory Panel, and to continue that mission of identifying and correcting the gaps in the current system, whether they be in the investigative, arrest, or the judicial stage. By doing so we save lives and restore some of the public's faith in the Texas criminal justice system.

We have an important, but difficult task ahead of us and I look forward to rolling up our sleeves and working together to come up with solutions to prevent wrongful convictions in the future.

Sincerely,

A handwritten signature in black ink that reads "John Whitmire".

JOHN WHITMIRE



**Timothy Cole Advisory Panel on Wrongful Convictions  
Status of Panel Recommendations as of 2015**

<b>Eyewitness Identification Procedures</b>	
1. Require Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to work with scientific experts in eyewitness memory research and law enforcement agencies to develop, adopt, disseminate to all law enforcement agencies, and annually review a model policy and training materials regarding the administration of photo and live lineups. That model policy should comport with science in the areas of cautionary instructions, filler selection, double-blind administration, documentation of identification procedures, and other procedures or best practices supported by credible research.	<b>Implemented in 2011 via HB 215. Model policy released by LEMIT in December 2011.</b>
2. Require all law enforcement agencies to adopt eyewitness identification procedures that comply with the model policy promulgated by LEMIT.	<b>Implemented in 2011 via HB 215. Departments must comply by September 1, 2012</b>
3. Integrate training on eyewitness identification procedures into the required curricula of the LEMIT and the Texas Commission on Law Enforcement Standards and Education (TCLEOSE).	<b>Implemented via training curricula changes</b>
4. Permit evidence of compliance or noncompliance with the model policy to be admissible in court.	<b>Implemented in 2011 via HB 215</b>
5. Allow law enforcement agencies discretion on the adoption of sequential procedures.	<b>Implemented in 2011 via HB 215. Sequential presentation is recommended in the model policy, but not required in statute.</b>
<b>Recording Custodial Interrogations</b>	
6. Adopt a mandatory electronic recording policy, from delivery of Miranda warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.	<b>Not implemented</b>
<b>Discovery Procedures</b>	
7. Adopt a discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.	<b>Implemented in 2014 via SB 1611, the Michael Morton Act. Requires prosecutors to produce for and permit</b>

	<p>photocopying by the defense of witness statements, offense reports, and other relevant evidence.</p>
<p><b>Post-Conviction Proceedings</b></p>	
<p>8. Amend the Chapter 64 motion for post-conviction DNA testing to allow testing of any previously untested biological evidence, regardless of the reason the evidence was not previously tested, or evidence previously tested using older, less accurate methods.</p>	<p><b>Implemented in 2011 via SB 122 to modify the requirements for granting motions for post-conviction DNA testing by removing certain conditions regarding the reasons why biological evidence was not tested previously, so that testing of any previously untested biological evidence may be granted.</b></p>
<p>9. Amend the Chapter 11 writs of habeas corpus to include a writ based on changing scientific evidence.</p>	<p><b>Implemented in 2013 via SB 344 to permit a convicted individual to file an application for a writ of habeas corpus to challenge a conviction based on scientific evidence that is now outdated or discredited by advances since the trial.</b></p>
<p><b>Innocence Commission</b></p>	
<p>10. Formalize the current work of the innocence projects that receive state funding to provide further detail in the projects' annual reports and distribute those reports to the Governor, Lieutenant Governor, Speaker of the House, and Chairs of the Senate Jurisprudence, House Corrections, House Criminal Jurisprudence and Senate Criminal Justice Committees. Report input should be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations.</p>	<p><b>Implemented in 2011 via HB 1754 Exoneration Report section</b></p>
<p>11. Provide an FTE for the Task Force using the current appropriation or other grant funding to administer these responsibilities, and contracts between the innocence projects and the Task Force on Indigent Defense should be amended to reflect the new administrator and additional responsibilities.</p>	<p><b>Implemented in 2011 via Office of Court Administration/Texas Indigent Defense Commission budget rider</b></p>







TEXAS FORENSIC  
SCIENCE COMMISSION

*Justice Through Science*

1700 North Congress Ave., Suite 445  
Austin, Texas 78701

August 21, 2015

Members of the Texas Criminal Justice Community:

This letter provides notification to the community regarding an issue of potential concern to judges, criminal prosecutors, criminal defense lawyers, victims and defendants in the Texas criminal justice system. The concerns involve the interpretation of DNA results where multiple contributors may be present, commonly referred to as DNA mixture interpretation. The attached document details the origin and scope of the concerns.

While the Commission assesses the issues described in the attached document, we recommend any prosecutor, defendant or defense attorney with a currently pending case involving a DNA mixture in which the results could impact the conviction consider requesting confirmation that Combined Probability of Inclusion/Exclusion (referred to as "CPI" or "CPE") was calculated by the laboratory using current and proper mixture interpretation protocols. If the laboratory is unable to confirm the use of currently accepted protocols for the results provided, counsel should consider requesting a re-calculation of CPI/CPE.

The extent to which any closed criminal cases may require re-analysis will be a subject of Commission review and subsequent notification to the stakeholder community.

If you have any questions regarding these issues, please contact the Commission's general counsel, Lynn Garcia, at 512-936-0649 or [lynn.garcia@fsc.texas.gov](mailto:lynn.garcia@fsc.texas.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Vincent J.M. Di Maio".

Vincent J.M. Di Maio, MD  
Presiding Officer

## **Unintended Catalyst: the Effects of 1999 and 2001 FBI STR Population Data Corrections on an Evaluation of DNA Mixture Interpretation in Texas**

### 1. FBI Data Corrections: What Do They Mean?

In May 2015, the Federal Bureau of Investigation (“FBI”) notified all CODIS laboratories it had identified minor discrepancies in its 1999 and 2001 STR Population Database. Laboratories across the country have used this database since 1999 to calculate DNA match statistics in criminal cases and other types of human identification. The FBI attributed the discrepancies to two main causes: (a) human error, typically due to manual data editing and recording; and (b) technological limitations (*e.g.*, insufficient resolution for distinguishing microvariants using polyacrylamide gel electrophoresis), both of which were known limitations of the technology. The FBI has provided corrected allele frequency data to all CODIS laboratories.

In May and June 2015, Texas laboratories notified stakeholders (including prosecutors, the criminal defense bar and the Texas Forensic Science Commission) that the FBI allele frequency data discrepancies were corrected. The immediate and obvious question for the criminal justice community was whether these discrepancies could have impacted the outcome of any criminal cases. The widely accepted consensus among forensic DNA experts is the database corrections have *no impact* on the threshold question of whether a victim or defendant was *included or excluded* in any result. The next questions were whether and to what extent the probabilities associated with any particular inclusion changed because of the database errors.

The FBI conducted empirical testing to assess the statistical impact of the corrected data. This testing concluded the difference between profile probabilities using the original data and the corrected data is less than a two-fold difference in a full and partial profile. Testing performed by Texas laboratories also supports the conclusion the difference is less than two-fold. For example, in an assessment performed by one Texas laboratory, the maximum factor was determined to be 1.2 fold. In other words, after recalculating cases using the amended data, the case with the *most substantially affected* Combined Probability of Inclusion/Exclusion (“CPI”)<sup>1</sup> statistical calculation (evaluated for a mixed sample) changed from a 1 in 260,900,000 expression of probability to a 1 in 225,300,000 expression of probability.

Amended allele frequency tables are publicly available for anyone to compare the calculations made using the previously published data and the amended allele frequencies, though expert assistance may be required to ensure effective use of the tables.<sup>2</sup>

### 2. The Impact of FBI Database Errors on DNA Mixture Interpretation Using CPI

As part of their ongoing commitment to accuracy, integrity and transparency, many Texas laboratories offered to issue amended reports to any stakeholder requesting a report using the corrected FBI allele frequency data. Some prosecutors have submitted such requests to laboratories, particularly for pending criminal cases. As expected, the FBI corrected data have not had an impact exceeding the

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<sup>1</sup> The Combined Probability of Inclusion/Exclusion is commonly referred to as either “CPI” or “CPE.” They are referred to jointly in this document as “CPI” for ease of reference.

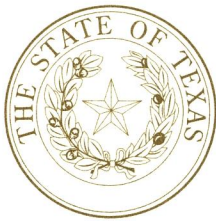
<sup>2</sup> <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/amended-fbi-str-final-6-16-15.pdf>

two-fold difference discussed above. However, because analysts must issue *signed amended reports* with the new corrected data, they may only issue such reports if they believe *the analyses and conclusions in the report comply with laboratory standard operating procedures*. For cases involving DNA mixtures, many laboratories have changed their interpretation protocols and related procedures using CPI. To reiterate, changes in mixture interpretation protocols are unrelated to the FBI allele frequency data corrections discussed above. However, when issuing new reports requested because of the FBI data corrections, the laboratory's use of current mixture protocols may lead to different results if the laboratory had a different protocol in place when the report was originally issued. Changes in mixture interpretation have occurred primarily over the last 5-10 years and were prompted by several factors, including but not limited to mixture interpretation guidance issued in 2010 by the Scientific Working Group on DNA Analysis ("SWGDM").

The forensic DNA community has been aware of substantial variance in mixture interpretation among laboratories since at least 2005 when the National Institute of Standards and Technology ("NIST") first described the issue in an international study called MIX05. Though NIST did not expressly flag which interpretation approaches were considered scientifically acceptable and which were not as a result of the study, it has made significant efforts to improve the integrity and reliability of DNA mixture interpretation through various national training initiatives. These efforts have ultimately worked their way into revised standard operating procedures at laboratories, including laboratories in Texas. Based on the MIX05 study, we know there is variation among laboratories in Texas and nationwide, including differences in standards for calculation of CPI that could be considered scientifically acceptable. However, we also know based on a recent audit of the Department of Forensic Sciences ("DFS") in Washington, DC that some of the "variation" simply does not fall within the range of scientifically acceptable interpretation. This finding does not mean laboratories or individual analysts did anything wrong intentionally or even knew the approaches fell outside the bounds of scientific acceptability, but rather the community has progressed over time in its ability to understand and implement this complex area of DNA interpretation appropriately.

While in many cases the changed protocols may have no effect, it is also possible changes to results may be considered material by the criminal justice system, either in terms of revisions to the population statistics associated with the case or to the determination of inclusion, exclusion or an inconclusive result. The potential range of interpretive issues has yet to be assessed, but the potential impact on criminal cases raises concerns for both scientists and lawyers. We therefore recommend any prosecutor, defendant or defense attorney with a currently pending case involving a DNA mixture in which the results could impact the conviction consider requesting confirmation that CPI was calculated by the laboratory using current and proper mixture interpretation protocols. If the laboratory is unable to confirm the use of currently accepted protocols for the results provided, counsel should consider requesting a re-analysis of CPI.

The Texas Forensic Science Commission is currently in the process of assembling a panel of experts and criminal justice stakeholders to determine what *guidance and support* may be provided to assist Texas laboratories in addressing the challenging area of DNA mixture interpretation. In particular, a distinction must be made between acceptable variance in laboratory interpretation policies and protocols and those approaches that do not meet scientifically acceptable standards. An emphasis on statewide collaboration and stakeholder involvement will be critical if Texas is to continue to lead the nation in tackling challenging forensic problems such as those inherent in DNA mixture interpretation.



## TEXAS HOUSE OF REPRESENTATIVES

# RUTH JONES McCLENDON

State Representative, District 120

### COMMITTEES:

Rules and Resolutions - Chair  
Appropriations  
Transportation

### TEXAS LEGISLATIVE ORGANIZATIONS:

Mexican American Legislative Caucus  
Texas Legislative Sportsman's Caucus  
Texas Tourism Caucus  
Texas Legislative Black Caucus

September 17, 2015

Mr. David Slayton, Executive Director  
Office of Court Administration  
205 W 14th St., #600  
Austin, Texas 78701

Dear Director Slayton,

As the Author of House Bill 48, I would like to thank you for your service thus far in the administration of the Timothy Cole Exoneration Review Commission.

I realize there has been some discussion about the scope of the Commission's work in regard to determining the number and type of cases to be reviewed. It was my intent for the Commission to study all Texas exoneration cases since January 1, 2010, including those that did not result in a judicial declaration of "actual innocence." I see the "actual innocence" issue as being more closely associated with an exoneree's eligibility to receive state reparations than the entire set of exoneration cases. I strongly believe there is a need to study all exoneration cases, not just this subset. The results of that study would help provide empirical evidence in support of the recommendations the Commission will decide to make.

While I acknowledge that the sunset date for the Commission is much sooner than I had hoped, I do not believe that there is a need to narrow the scope of exoneration cases for review before the research process begins. Rather, I encourage you and your staff to review and analyze as many of the exoneration cases as possible over the next twelve months, in preparing to make recommendations for the Commission's report. With funding support for 1.5 FTE's, I am hopeful that your staff can make substantial strides toward that goal, working with sole dedication and focus in researching the underlying causes for the exoneration cases.

After working diligently for a year, you and your staff would still have two months in which to draft a report for consideration and action by the Commission before December 1, 2016. In short, I believe that with your expertise and guidance and the resources of the Office of Court Administration, the Commission can complete a broad review of all exoneration cases in Texas after January 1, 2010, in time to submit a solid and realistic report by Commission. If it should happen that not all the exoneration cases can be fully reviewed, then one of the several recommendations by the Commission to the Legislature would properly be to extend the life of the Commission in order to continue its work.

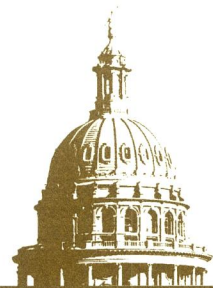
Should you ever feel that the resources available to you are not enough to accomplish this mission, please do not hesitate to call on me; I am ready and willing to lend support. Also, there is latitude to request research assistance from additional outside sources. I remain fully committed to furthering the success of this Commission and its production of a meaningful and helpful report. Please feel free to call on me or my staff for assistance as needed.

Sincerely,

  
Ruth Jones McClendon

cc: Mr. Jim Bethke, Executive Director, TIDC;  
Mr. Wesley Shackelford, Deputy Director/Special Counsel, TIDC

District Office: 403 S. W.W. White, Suite 210 • San Antonio, Texas 78219 • (210) 225-2107 • Fax (210) 333-7700  
Capitol Office: P.O. Box 2910 • Austin, Texas 78768-2910 • (512) 463-0708 • Fax (512) 463-7071  
Email: ruth.mcclendon@house.state.tx.us • 1-800-618-2785



October 26, 2015

Timothy Cole Exoneration Review Commission  
c/o Texas Judicial Council  
205 West 14<sup>th</sup> Street, Suite 600  
Austin TX 78701

Dear Commissioners:

As members of the Timothy Cole Advisory Panel on Wrongful Convictions (TCAP), we write to advise of the Panel's recommendations, the Legislature's responses, and the one remaining recommendation.

The 81<sup>st</sup> Legislature established TCAP in 2009 to study wrongful convictions and propose reforms to prevent future miscarriages of justice. The Panel's report, published in 2010, detailed 11 criminal justice reforms intended to increase the accuracy of the Texas criminal justice system including: changes to eyewitness identification procedures, mandating the recording of custodial interrogations concerning certain felony investigations, requiring open discovery, establishing improved post-conviction procedures, and formalizing the work of Texas' innocence projects.

To date, all of the TCAP recommendations have been adopted by the Legislature with one notable exception: a statewide policy on mandatory electronic recording of interrogations for certain felony crimes. This proposed reform reflected the most common suggestion from legal scholars, social scientists, law enforcement associations and policy organizations to reduce the likelihood of a wrongful conviction stemming from a false confession.

The Advisory Panel found that many Texas jurisdictions voluntarily record interrogations; 380 of 441 departments who participated in a survey "indicated that they either routinely record custodial interrogations, record interrogations for certain classes of felonies, or record interrogations at the discretion of the lead investigator." These jurisdictions reported that the practice of recording custodial interrogations lends a variety of benefits to the officers, the defendant, and the prosecution, and it has not been cost-prohibitive for these departments.

With law enforcement increasingly focused on building public confidence and transparency, it is likely that more agencies have adopted this practice since the TCAP report was released. Absent a uniform statewide policy on recording of interrogations, however, there is no way to guarantee the fair administration of justice in serious felony cases involving confessions. For that reason, we encourage the Timothy Cole Exoneration Review Commission to reexamine the creation and implementation of a statewide policy on recording custodial interrogations. We will gladly provide any information or resources that would assist with this effort.

Thank you for your consideration and service on the Commission. Your work will surely have an impact in improving the fairness and reliability of the criminal justice system in the state of Texas, and we stand ready to help in any way we can.

Very truly yours,

Pete Gallego  
Texas State Representative, 1991-2003  
Chair, House Committee on Criminal  
Jurisprudence, 2009-2013  
U.S. Representative, 23<sup>rd</sup>  
Congressional District, 2013-2015

Kathryn M. Kase  
Executive Director,  
Texas Defender Service

Barry L. Macha  
Wichita County Criminal District  
Attorney, 1985-2010  
President, Texas District & County  
Attorneys Association, 1998; 2009

Sandra Guerra Thompson  
Alumnae College Professor of Law  
and Criminal Justice Institute Director,  
University of Houston Law Center

Jeff Wentworth  
Texas State Senator, 1993-2003





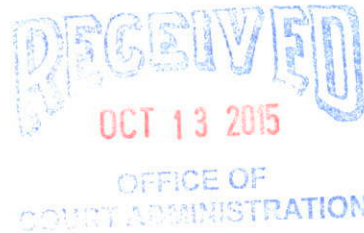
# The TOWN OF NORWOOD

Commonwealth of Massachusetts

**POLICE DEPARTMENT**  
**WILLIAM G. BROOKS III**  
*Chief of Police*

October 9, 2015

Carol Vance  
Chair of Texas Judicial Council  
P.O. Box 12066  
Austin, TX 78711-2066



Dear Chairman Vance,

As Chief of Police at the Norwood, Massachusetts Police Department and a thirty-eight year law enforcement veteran, I have seen firsthand how recording of custodial interrogations has strengthened police work. I wanted to share my experiences with the practice and to encourage the Timothy Cole Exoneration Review Commission to look into ways that it can be implemented throughout the state of Texas.

In Massachusetts, law enforcement agencies were compelled to record interrogations by a 2004 court ruling. I did not like the idea at first. Like a lot of detectives, I had attended training, which at the time taught officers to secure the general admission, and then to record only the confession itself once the suspect had admitted his involvement in the offense. I thought that recording the entire interrogation would expose investigative procedures and techniques and that it might have a chilling effect on suspects.

Once we started recording interrogations from start to finish, however, I became a believer. That is because confession cases go to trial with extremely solid evidence, and because the practice enhances investigations. We tell the suspect being interviewed at the outset that everything said in the room is recorded and we simply begin the interview. If the suspect objects to the recording, we explain why it's in his best interests. If he still objects, then we turn the equipment off, which any policy can permit. The vast majority of our suspects don't react when we tell them that the interview is being recorded.

Recording interrogations has completely eliminated the need for detectives to testify in motions to suppress. No longer does the detective need to get on the stand and try to recall the words and movements of the person being interviewed. Judges begin motions to suppress by simply asking, "Ok, has everybody seen the video? Counsel, what's your point?" Then they swing right into points of law.

Detectives really do interview in a respectful and efficient way, and jurors get to see that. Techniques used by detectives have not leaked on to the streets like we feared they might. We record all interviews now, whether or not the suspect is in custody. It's been over a decade since we began recording interrogations and I would not go back to the days when we did not record.

Recording custodial interrogations has benefited my department and so many others. I hope that the Commission will take up this issue to develop a plan for helping all Texas law enforcement agencies to

Chairman Vance  
October 9, 2015  
Page 2

adopt this best practice. It promises to enable the fair administration of justice, providing not only protections to the innocent but also innumerable benefits to law enforcement.

Sincerely,



William G. Brooks III  
Chief of Police

WGB/cjk

Misc.-Oct915



October 15, 2015

John Beauchamp  
General Counsel  
Texas Commission on Law Enforcement  
Highway 290, STE 200  
Austin, TX 78723

Dear Mr. Beauchamp,

My name is Christopher Ochoa and I served 13 years in a Texas prison after falsely confessing and pleading guilty to a crime that I did not commit. Had my custodial interrogation been recorded, I believe my wrongful conviction could have been prevented and the real perpetrator may have been identified sooner.

It is hard for people to understand why someone would admit to something they did not do. When I was 22 years old, the police picked me up for questioning in the rape and murder of Nancy DePriest at a Pizza Hut in Austin. Having never been in trouble before, I was not prepared for what happened at the police station. There I was interrogated for two 12-hour sessions. My request for a lawyer was denied. The police said that my best friend Richard Danzinger was ready to implicate me. They threatened me with the death penalty unless I confessed. The worst part was that they called my mother, who was sick at the time, and told her that I would die in prison if I didn't cooperate.

Signing a confession and pleading guilty was the most difficult thing I've ever done, but I could not stand to have my mother suffer. As part of the plea bargain, I also agreed to testify against Richard, who persisted in claiming to be innocent. In 1989 we were both convicted and sentenced to life in prison. Finally, we were exonerated in 2002 after Achim Marino confessed to the crime and DNA testing proved that he was the real culprit.

I believe that our wrongful convictions could have been prevented if my interrogation was recorded in its entirety. While some audio recordings of my statements were made, the police kept starting and stopping the tape until I told them what they wanted to hear. An uninterrupted recording would have provided the prosecutor, judge and jury with a complete picture of what occurred in the interrogation room and alerted them that my confession was coerced. Not only could this have protected two innocent people, but it could have helped law enforcement to focus on Achim Marino, who went on to commit additional sexual assaults.

Restarting life was not easy, but I am determined to make something positive out of this tragedy. The experience inspired me to fight for justice, and I graduated from the University of Wisconsin Law School in 2006. Unfortunately, Richard has faced a much more difficult road. He suffered severe brain damage in prison after being beaten by another inmate, and will require care for the rest of his life.

I hope that my story can prevent others from enduring what Richard and I went through. I encourage the Timothy Cole Exoneration Review Panel to develop a plan for every agency in the state to record custodial interrogations in their entirety. This practice would bring accuracy, transparency and accountability to the interrogation process, which can prevent wrongful convictions and help law enforcement focus on real criminals.

Sincerely,

*Christopher Ochoa*

October 15, 2015

John Beauchamp  
General Counsel  
Texas Commission on Law Enforcement  
Highway 290  
STE 200  
Austin Texas 78723

Dear Mr. Beauchamp,

Congratulations on your appointment to the Timothy Cole Exoneration Review Commission. As Timothy's brother I am proud that this commission bears his name and hopeful that its work will prevent others like him from being wrongfully convicted in the state of Texas.

Timothy was a military veteran and student at Texas Tech University when was convicted of a rape he did not commit and sentenced to 25 years in prison. He always maintained his innocence and dreamed of the day that he would be fully vindicated. Tragically, Timothy died in prison before that dream was realized. In 2009, after DNA evidence and a confession by the real perpetrator proved his innocence, he became the first person to be posthumously exonerated in the state of Texas.

While nothing can change what happened to my brother, I know that he would be proud of the policy reforms that have been part of his legacy. In 2009, the Timothy Cole Advisory Panel was created to assist the Task Force on Indigent Defense in the preparation of a study regarding the prevention of wrongful convictions. This temporary panel issued eleven recommendations, and all were enacted except for one: mandatory recording of custodial interrogations. Now that the Timothy Cole Exoneration Review Commission has been created to continue this work on a permanent basis, I encourage you to reexamine this final outstanding proposal that would safeguard against wrongful convictions stemming from false confessions.

False confessions are one of the leading contributing factors to wrongful convictions, playing a role in 28 percent of the nation's 330 DNA exoneration cases, including three in the state of Texas. Recording of custodial interrogations protects the innocent by creating a record of the circumstances surrounding a confession, ensuring that a defendant's rights are protected during the interrogation process, and deterring against improper or coercive techniques. In addition, by offering an irrefutable account of what transpired during closed-door interrogation sessions, the practice enhances investigations and improves public confidence in the system.

Texas has become a national leader in preventing wrongful convictions by enacting reforms related to eyewitness identification, post-conviction DNA testing, and automatic, reciprocal discovery. Implementing a mandatory statewide recording policy would further our state's commitment to protecting the innocent, ensuring public safety and safeguarding individual liberties.

Timothy once wrote "I still believe in the justice system, even if the justice system doesn't believe in me." I look forward to seeing the Timothy Cole Exoneration Review Commission make meaningful changes to the system that my brother believed in, so that other Texans will be protected against wrongful convictions. When this happens Texans can be assured that our criminal justice systems is seeking "Equal Justice Under Law." An injustice to one is an injustice to all.

Sincerely,

A handwritten signature in black ink, appearing to read "Cory Session". The signature is fluid and cursive, with a large initial "C" and "S".

Cory Session



## MAJOR CITIES CHIEFS ASSOCIATION

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October 15, 2015

John Beauchamp  
General Counsel  
Texas Commission on Law Enforcement  
Highway 290  
STE 200  
Austin, Texas 78723

Dear Mr. Beauchamp,

My name is Darrel Stephens and I am the Executive Director of the Major Cities Chiefs Association, a professional organization of police executives representing the largest cities in the United States and Canada. Our organization provides a forum to address the unique public safety and crime problems of urban areas, and our membership includes chiefs from the following cities in Texas: Arlington, Austin, Dallas, EL Paso, Fort Worth, Houston and San Antonio. In addition, I serve on the board of directors at the Innocence Project, a national organization dedicated to exonerating the wrongfully convicted through DNA evidence.

Both organizations recommend recording of custodial interrogations as a best practice by law enforcement. The Major Cities Chiefs Association recently issued a policy statement on improving policing to ensure accuracy in arrests and convictions, which included a recommendation for electronic recording of custodial interrogations. The Innocence Project supports the practice as a key safety valve that can prevent wrongful convictions stemming from false confessions.

Electronically recording custodial interrogations removes serious questions about the circumstances of confessions by preserving the truest account of the interrogation, improving the quality and reliability of the interrogation evidence, and thus reducing the possibility of false arrest and wrongful conviction. By recording the interrogation, disputes about the circumstances of the interrogation and conduct of investigators will be grounded in evidence available to all parties, protecting both the innocent and the investigators.



## MAJOR CITIES CHIEFS ASSOCIATION

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Montreal, Canada  
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Nassau Co.  
New Orleans  
New York City  
Newark  
Oakland  
Oklahoma City  
Omaha  
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Washington  
Winnipeg, Canada

Moreover, investigators will not have to focus upon writing up a meticulous account of the statements provided by the suspect and may instead focus attention on small details, such as subtle changes in the narrative, which might otherwise have been missed. Finally, having a record of good interrogation techniques can also provide a valuable training tool for police departments, particularly as cases with distinctive characteristics come to light.

Mandatory electronic recording of interrogations is now embraced by an estimated 1,000 law enforcement agencies across the country. Twenty-one states and the District of Columbia require recording by law or court action in serious cases, and many others have voluntarily implemented recording as a best practice, including large metropolitan cities such as Austin.

The Innocence Project and I encourage the Timothy Cole Exoneration Review Commission to review statewide implementation of mandatory recording of custodial interrogations in Texas to enhance public safety, protect law enforcement and prevent wrongful convictions. Thank you for your consideration.

Sincerely,

Darrel Stephens  
Executive Director  
Major Cities Chiefs Association

# **MAJOR CITIES CHIEFS**



## **Policy Statement**

### **Improving Policing to Ensure Accuracy in Arrests and Convictions**

#### **Preface**

To date, 329 innocent people in prison have been exonerated by DNA evidence. In almost half of these cases, the DNA evidence that exonerated the innocent also identified 141 true perpetrators, many of whom had gone on to commit additional crimes, including more than 70 rapes and 30 murders, and countless other violent felonies, while someone else served time in prison for their crimes.

Wrongful convictions cause tremendous harm, not just to the innocent and their families, but also to crime victims and the general public, and they have a profound negative impact on public safety, public trust in policing, and police legitimacy. When the wrong person – an innocent person – is convicted and imprisoned, the actual perpetrator remains free and a continued threat to the public. In addition, prosecution and imprisonment of the wrong person wastes precious police and other criminal justice resources and robs citizens of their faith in law enforcement and our criminal justice system. The public needs to believe that law enforcement agencies and individual officers are willing to take whatever steps necessary to ensure public safety and the reliability of arrests and convictions of fellow citizens.

Simple improvements to policing and police investigations can significantly reduce the chance of false arrests and wrongful convictions. As such, the Major Cities Chiefs Association adopts the following policy statements and urges law enforcement agencies to adopt best practices to ensure the accuracy of investigations and prevent wrongful convictions.

#### **Policy Positions**

##### **Improving Eyewitness Identification Evidence:**

Eyewitness identification procedures aim to secure accurate, reliable identification of criminal offenders. In order to ensure the accuracy and reliability of identifications, eyewitness identification procedures must be conducted in a fair, objective, and non-suggestive manner. Otherwise, they may result in an irreparable mistaken identification, which can lead to the arrest and conviction of an innocent person instead of the true offender.

Mistaken eyewitness identification is the single greatest cause of wrongful convictions nationwide, playing a role in approximately 75% of all convictions overturned through DNA testing. Social science research over the past three decades has consistently confirmed the fallibility of eyewitness memory and identifications, as well as the unintentional contamination of witness recall through many traditional eyewitness identification procedures. Over these decades, a large body of peer-reviewed research and practice has shown how simple reforms to the eyewitness identification process can greatly reduce mistaken eyewitness identification.<sup>1</sup>

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<sup>1</sup>*The Causes of Wrongful Conviction: Eyewitness Misidentification*, Innocence Project, <http://innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification> (last visited April 27, 2015).

The National Academy of Sciences (NAS) recently confirmed the importance of these reforms. NAS examined the extant research and “settled the science” so that law enforcement could confidently implement improvements to their existing identification procedures. In October 2014, the NAS affirmatively endorsed, among other things, the use of a blind or blinded identification procedure; the issuance of instructions to the eyewitness; the taking of a confidence statement at the time of the identification procedure; and the recordation of the identification procedure.<sup>2</sup>

The President’s Task Force on 21<sup>st</sup> Century Policing recommended that: 2.4 Law enforcement agencies are encouraged to adopt identification procedures that implement scientifically supported practices that eliminate or minimize presenter bias or influence.

Based on the abundance of scientific research, practitioner experience, and the NAS report, the Major Cities Chiefs Association recommends that all law enforcement agencies implement the following improvements to their eyewitness identification procedures to increase the quality and accuracy of eyewitness evidence:

- Double-blind live lineup and photo array procedures. A lineup administrator can inadvertently convey the suspect’s identity through unintended body gestures, facial expressions, or other nonverbal cues. Using a double-blind procedure, in which neither the witness nor the administrator knows which person in the lineup or photo array is the suspect, and the witness is told that the administrator does not know, can avoid this inadvertent bias.
- Proper composition of the lineup. The optimal composition of a lineup assures more accurate selections. Among the simple reforms: only one suspect should be included in any lineup; suspect photographs should not bring unreasonable attention to the suspect; fillers should be selected based on their resemblance to the description provided by the witness – as opposed to their resemblance to the police suspect. At the same time, the suspect should also not unduly stand out from among the other “fillers.”
- Standardized witness instructions. “Instructions” are a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection as well as prevent the witness from looking to the administrator for feedback during the procedure. Among other things, witnesses should be instructed that the perpetrator may or may not be in the photo array or lineup and that, regardless of whether the witness identifies a suspect, the investigation will continue.
- Documentation of witness confidence judgments. Scientific research indicates that an eyewitness’s level of confidence in his or her identification at the time of trial is not a reliable predictor of their accuracy. The relationship between confidence and accuracy is strongest at the time of initial identification. Law enforcement should elicit and document the witness’s level of confidence verbatim at the time when she or he first identifies a suspect.

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<sup>2</sup> *Identifying the Culprit: Assessing Eyewitness Identification*, National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts, Committee on Science, Technology, and Law; Policy and Global Affairs; Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council (2014), available at <http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

The national Technical Working Group on Biological Evidence Preservation recently issued a handbook with specific guidelines and recommendations for law enforcement agencies.<sup>5</sup> Based on this handbook, the Major Cities Chiefs Association recommends that law enforcement agencies preserve all biological evidence in the following five crime categories, regardless of whether the case involved a plea agreement: homicides, sexual assault offenses, serious assaults, kidnapping/abductions, and robberies. Biological evidence from these cases should be retained, at a minimum, for the period of time that any person remains incarcerated, on probation or parole, involved in civil litigation in connection with the case, or subject to registration as a sex offender.

Adopted by MCCA Members on June 3, 2015

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<sup>5</sup> *The Biological Evidence Preservation Handbook: Best Practices for Evidence Handlers*, National Institute of Standards and Technology Technical Working Group on Biological Evidence Preservation (2013), available at <http://nvlpubs.nist.gov/nistpubs/ir/2013/NIST.IR.7928.pdf>.

October 15, 2015

John Beauchamp  
General Counsel  
Texas Commission on Law Enforcement  
Highway 290  
STE 200  
Austin Texas 78723

Dear Mr. Beauchamp,

My name is Major Mike Smathers and I currently oversee the Lab and Evidence Bureau at the Charlotte-Mecklenburg Police Department in Charlotte, North Carolina. My department has been recording custodial interrogations for the past 16 years, and I encourage the Timothy Cole Exoneration Commission to examine ways that departments in Texas can uniformly adopt this critical practice.

The Charlotte-Mecklenburg Police Department implemented recording of custodial interrogations because we continued to hear from jurors and prosecutors that it would enhance their confidence in the work that we were producing. At first there was apprehension that recording would cause problems and that jurors wouldn't understand the procedures and tactics that detectives were using.

Those fears were quickly dispelled. We were able to explain the techniques and styles that vary from detective to detective. As we polled jurors after trial we heard that the recordings swayed them and encouraged them to feel more comfortable in the work we were doing. Today, all departments in North Carolina are required to record custodial interviews under a 2008 statute.

Recording of custodial interrogations is a foundational investigative effort to provide confidence in the interview process and the evidence that comes from those interviews. Judicial, juror and public confidence is enhanced with these recordings and it simply demystifies the process.

Many citizens cannot fathom the things people confess to since they themselves could not or would not commit such acts. Hearing those incriminating comments firsthand is powerful evidence. Conversely, the interview can show coercion or other inappropriate tactics that hurt the process and the pursuit of justice. Ethical policing today demands recording of custodial interviews.

I hope that you will consider further review of this issue. Recording custodial interrogations has enhanced the work of the Charlotte-Mecklenburg Police Department, and it could do the same for agencies in Texas.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Smathers", written in a cursive style.

Major Mike Smathers  
Charlotte-Mecklenburg Police Department





JOHN JAY COLLEGE  
THE CITY UNIVERSITY OF NEW YORK  
OF CRIMINAL JUSTICE

DISTINGUISHED PROFESSOR  
DEPARTMENT OF PSYCHOLOGY

Saul M. Kassin, PHD

October 15, 2015

John Beauchamp  
General Counsel  
Texas Commission on Law Enforcement  
Highway 290  
STE 200  
Austin, Texas 78723

Dear Mr. Beauchamp,

My name is Saul Kassin and I am a Distinguished Professor of Psychology at John Jay College of Criminal Justice in New York. For more than a quarter of a century, my research has focused on the phenomenon of false confessions in the criminal justice system. Based on this research, I believe that mandatory video recording of interrogations in their entirety is the most pressing reform to reduce both the number of false confessions taken and the wrongful convictions that result from these confessions.

For years, legal scholars have viewed a confession as the gold standard of evidence that adds a degree of certainty to a conviction. However, this notion has been undermined with false confessions playing a role in more than 25 percent of the nation's wrongful convictions proven with DNA evidence—a number that is far higher within the population of wrongful convictions in homicide cases.

It can be difficult to understand why someone would confess to a crime that he or she did not commit. In fact, research shows that it contradicts common sense. Yet juveniles and adults with intellectual limitations and psychological disorders are particularly vulnerable to influence and manipulation and certain interrogation tactics—such as prolonged isolation, acute stress, the presentation of false evidence, and minimization themes that imply leniency—can cause even mentally capable and innocent adults to confess. There are many reasons why people admit to crimes they did not commit through a process of interrogation, but what they tend to have in common is the belief that confession will prove more beneficial than continued denial.

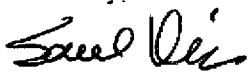
Confessions have a powerful effect on judges and juries, as well as eyewitnesses and forensic examiners who are apprised of such confessions before rendering their own judgments. Research shows that confessions can triumph over other potent forms of evidence. Humans being fallible, there will always be situations in which innocent people confess, which is why a safety net is necessary to allow police, prosecutors, judges, juries, and appeals courts to assess both the voluntariness and accuracy of confessions. Too often these decision makers are presented with only the suspect's final narrative confession—in writing or on tape—without the preceding interrogation in which it was induced. Research indicates that people cannot reliably distinguish between true and false admissions of guilt; viewing the confession alone does not provide the full context of situation that evoked it or insight into the source of the crime details contained within it.

Recording interrogations in their entirety—preferably with both the suspect and detectives on camera—is necessary to help fact finders better assess the voluntariness and reliability of confession evidence. In a mock jury study that I conducted with other researchers in 2003, participants were presented with tapes of confessions from five actual crime suspects who were later proved guilty or innocent. Half the jurors viewed only the final confession; the other half also viewed an edited tape of the preceding interrogation. In that study, participants who saw the interrogation as well as the confession were less likely to convict two of the three innocent false confessors but there was no reduction in their convictions of the two guilty true confessors.

Mandatory recording of interrogations—a measure of reform adopted in the United Kingdom in the 1980's; in more than twenty states as well as the District of Columbia; by the U.S. Department of Justice beginning in 2014; and which is uniformly embraced—as communicated in hundreds of interviews—by all law enforcement agencies that have adopted this practice; is a necessary means of protecting the innocent and enhancing the evidentiary value of confessions.

I encourage the Timothy Cole Exoneration Review Commission to further examine the implementation of this practice in the state of Texas and am happy to provide additional research or information on this topic to assist with your work.

Sincerely,

A handwritten signature in black ink, appearing to read "Saul Kassin". The signature is written in a cursive, flowing style.

Saul Kassin  
Distinguished Professor

# Timothy Cole Exoneration Review Commission: Defining the Scope of Inquiry into Wrongful Convictions in Texas

By Scott Henson, Executive Director, Innocence Project of Texas

*October 2015*

*An exploration of innocence-related issues which the Timothy Cole Exoneration Review Commission should consider studying as part of its legislatively mandated review.*



The Innocence Project of Texas is a non-profit, 501c(3) organization dedicated to freeing the innocent and educating the public about the extent and causes of wrongful convictions. IPOT gratefully acknowledges generous assistance from Rebecca Brown and Michelle Feldman from the national Innocence Project and Texas Fair Defense Project Executive Director Rebecca Bernhardt. Their assistance was immensely appreciated. All content and definitely any errors, however, remain the sole responsibility of the author.

Innocence Project of Texas \* PO Box 6567, Austin, Tx 78762 \* [Ipoftexas.org](http://Ipoftexas.org) \* [info@ipoftexas.org](mailto:info@ipoftexas.org)

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Appendix: Eyewitness ID Statutes and Remedies from Other States

# I. Scope of Work:

## ***Which Cases Should The Commission Review?***

*Proposal: The Commission should examine all exonerations since January 2010 as listed in the National Exonerations Registry.*

As of the end of July, 2015, the National Exoneration Registry listed 113 exonerations in Texas since January 1, 2010,<sup>1</sup> which is the time period from which HB 48 authorizes the Timothy Cole Exoneration Review Commission to analyze wrongful convictions in order to suggest legislative reforms.

Of these 113 cases, 67 are controlled substances prosecutions out of Harris County in which defendants pleaded guilty in order to get out of jail and then, months or years later, crime lab results came back to say there weren't actually any drugs present.<sup>2</sup> The National Exoneration Registry lists those Harris County drug cases as exonerations even though the Texas Court of Criminal Appeals does not recognize most of them as "actual innocence" cases.<sup>3</sup>

There are several additional instances - either on the registry or in which exonerated defendants received state compensation from the Comptroller - where defendants may be considered "exonerated" or declared "innocent" without courts having agreed they're "actually innocent" under Texas case law.

Thus, among the first decisions facing the Timothy Cole Exoneration Review Commission will be to determine what scope of work the group will undertake. Specifically, which cases will be included in the review. To decide that, *one must first look to the language of HB 48* which authorized the Exoneration Review Commission.

## **Duties of the Exoneration Review Commission**

The Legislature gave very specific instructions to the Timothy Cole Exoneration Review Commission regarding what it should do:

HB 48 by McClendon/Ellis directed the Exoneration Review Commission to "identify the causes of wrongful convictions and suggest ways to prevent future wrongful convictions and improve the reliability and fairness of the criminal justice system."

To that end, stated the bill, "The commission may review and examine all cases in this state in which an innocent defendant was convicted and then, on or after January 1, 2010, was exonerated."

There are several additional, concomitant duties enumerated for the group. Specifically:

- ascertain errors and defects in the laws, evidence, and procedures applied or omitted in the defendant's case
- consider suggestions to correct the identified errors and defects through legislation or procedural changes

- identify procedures, programs, and educational or training opportunities designed to eliminate or minimize the identified causes of wrongful convictions
- identify any patterns in errors or defects in the criminal justice system in this state that impact the pretrial, trial, appellate, or habeas review process
- consider and suggest legislative, training, or procedural changes to correct the patterns, errors, and defects in the criminal justice system that are identified through the work of the commission

Moreover, separately from the broader review of cases, HB 48 directs the Commission to “review and update the research, reports, and recommendations of the Timothy Cole advisory panel established in the 81st Regular Session and shall include in its report under Section 9 the degree to which the panel's recommendations were implemented.”

The Commission was also told to consider the economics of their recommendations: “The commission shall consider potential implementation plans, costs, cost savings, and the impact on the criminal justice system for each potential solution identified through the work of the commission.”

Finally, and critically to this debate, the Commission’s last enumerated “duty,” as articulated in section 8a(5) of HB 48, directs it to “collect and evaluate data and information from an actual innocence exoneration reported to the commission by a state-funded innocence project, for inclusion in the commission's report.”

That’s the only use of the phrase “actual innocence” in HB 48 and its inclusion has implications for interpreting the bill authors’ intent.

## **‘Exonerations’ or ‘Actual Innocence’?**

Which cases the Commission reviews depends on decisions made about how to interpret the language in HB 48. The legislature used the words “exoneration” and “wrongful conviction” to describe the main areas of research and restricts the requirement that a case result in “actual innocence” only to one specific topic – a case study chosen from university innocence project cases.

HB 48 uses four different terms which refer to similar and related but fundamentally different ideas: “wrongful conviction,” “exoneration,” “innocent,” and “actual innocence exoneration.”

The primary duty of the group is numbered a(1): “identify the causes of wrongful convictions and suggest ways to prevent future wrongful convictions and improve the reliability and fairness of the criminal justice system.”

To that end, the Commission “may review and examine all cases in this state in which an innocent defendant was convicted and then, on or after January 1, 2010, was exonerated.”

One notices the bill authors did not speak here of “actually innocent” defendants, but cases involving an “innocent defendant” who “was exonerated.” However, we know from elsewhere in the bill that the authors are aware of the term “actual innocence exoneration,” since they required that the Commission include one case study specifically from that sub-category of cases in its final report. So, the bill authors could have said “actual innocence” if that’s what they meant. Instead, they spoke in section 8a(1) only

of “wrongful convictions” and the need to “improve the reliability and fairness of the criminal justice system.”

The most common definition of “exoneration” comes from the National Exoneration Registry, a project of the University of Michigan Law School that collects and analyzes information about exonerations of innocent defendants in the United States, defines exoneration as “when a person who has been convicted of a crime is officially cleared based on new evidence of innocence.”

Under this definition,<sup>4</sup> a person becomes “exonerated” if he or she was convicted of a crime and later a government official or agency with the authority to make that declaration either: (1) declared them to be factually innocent; or (2) relieved them of all the consequences of the criminal conviction. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered. However, evidence of innocence need not be an explicit basis for the official action that exonerated the person.

By contrast, the legal definition of ‘actual innocence’ in Texas was established by *Ex Parte Elizondo*, in which the Texas Court of Criminal Appeals (CCA) held that newly discovered evidence which supports a claim of actual innocence can itself provide the basis for relief from a conviction under Texas law. To be entitled to relief, an applicant must show “by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.” In *Ex parte Brown*, 205.S.W. 3d 538 (Tex.Crim.App.2006), the court observed that establishing a bare claim of actual innocence under this standard is a “Herculean” task.

Until 2013, under federal case law there was no “actual innocence” finding available. And under the new standard,<sup>5</sup> the standard for granting post-conviction relief based on innocence “is so demanding that only a handful of prisoners will be able to satisfy it,”<sup>6</sup> Instead, some innocent defendants find relief based on other grounds, such as due process. Texas’ actual innocence case law, like the new, federal standard, establishes criteria which many innocent people still can’t meet. Both federal courts and the Court of Criminal Appeals have more frequently granted relief on other grounds, often simply without ruling on inmates’ actual innocence claim.

While proving “actual innocence” may be a “Herculean” task, according to the courts, this Commission has the clear authority to examine a broader array of cases than just “actual innocence” if it chooses to do so.

Other states have authorized “innocence commissions” in the past. Texas authorized an “exoneration commission” named after a deceased man for whom the Texas Court of Criminal Appeals never issued an “actual innocence” finding. The legislature intended this distinction to mean something.

**Broader review best fits legislative intent, is the right thing to do.**

The Exoneration Commission must decide whether it will focus its inquiry on the full panoply of Texas exonerations in the registry, only those in which Texas courts declared “actual innocence,” or some other set of cases based on some different definition or criteria. The Innocence Project of Texas urges the commission to adopt the broadest possible interpretation of its authority and include the full list of Texas cases in the National Exoneration Registry since 2010 as its baseline array of cases to research.

From the title of the commission to the text of its duties, it’s clear the bill authors did not intend to restrict its investigation to only “actual innocence” cases. A broader interpretation most closely matches the plain meaning of the bill text and, just as importantly, enables the Commission to confront the full array of wrongful-conviction causes witnessed in Texas over the last five years.

Choosing not to address known problems makes little sense. We have an exoneration commission, we have staff and enthusiastic commissioners: Why not address these issues now?



## II. Innocence, Pretrial Detention, and the Strange Case of Texas' 'Unknown Exonerees'

The nature of exonerations in Texas has changed over the last five years, according to the National Exoneration Registry, in significant part because of the rise of a curious brand of cases out of Harris County in which crime labs determine that defendants possessed no drugs after they'd already pled guilty to the crime.

Nearly 70 such cases are listed in the registry but there are many more on the horizon. Between July and September 2014, the Harris County DA sent out notification letters to "hundreds of defendants who took plea deals for misdemeanor and felony drug possession charges [and] were later cleared when evidence tested by an HPD crime lab analyst came up negative for a controlled substance."<sup>7</sup>

And, it should be noted, some of these defendants weren't entirely innocent, even if they were convicted based on false evidence. According to the Austin American-Statesman, "Court records and interviews show many of the defendants were habitual offenders with established records of lawbreaking. Some almost certainly intended to possess illegal drugs when they were arrested."<sup>8</sup>

If the Timothy Cole Exoneration Review Commission chooses to examine these cases, it will open up an array of important issues which its predecessor panel did not consider, particularly related to pretrial detention and the pressure it places on innocent defendants to plea guilty.

The Statesman called these defendants "Texas' unknown exonerees,"<sup>9</sup> and for good reason. Compared to higher profile crimes, these cases remain largely invisible. It's easy to understand why. When an innocent person is convicted of a violent crime, often a guilty person goes free. In these drug cases, though, there is no victim except the wrongly convicted defendant and no alternative perpetrator. The harm is measured in lost liberty and earning power for the individual and wasted resources on jail, prosecution and supervision for the government.

In some cases, those harms to individuals have been compensated by the state.<sup>10</sup> In others, defendants may be eligible for compensation but may never be notified, or may become ineligible due to subsequent convictions.<sup>11</sup>

An examination of this cohort of cases will give the Commission a window into pressures on those who are actually innocent that lead them to plea anyway. Common sense tells us that defendants plead guilty because, if they cannot make bond, doing so is the only way they can secure release from jail. However, those who secure release pretrial without a plea not only are incarcerated less but enjoy better outcomes in their cases. According to data from the Wichita County Public Defender,<sup>12</sup> defendants able to make bail experience:

- 86% fewer pretrial jail days
- 333% better chance of getting deferred adjudication
- 30% better chance of having all charges dismissed
- 24% less chance of being found guilty, and
- 54% fewer jail days sentence

In Harris County, comparing those who make bail to those who could not, "In drug possession cases, 55 percent of those who remained in jail got deferred prosecution or had cases dismissed compared to 83 percent of those who posted bond." <sup>13</sup>

By law and tradition, the purpose of bail is to ensure defendants appear in court. As a practical matter, though, locking up people pretrial creates tremendous pressure on innocent defendants to enter into plea bargains, waiving their right to a trial and other important rights. Most people lose the will to fight charges after spending time in jail. Often innocent people plead guilty to avoid losing their jobs and homes and in order to be able to get back to taking care of their children, particularly if the offer on the table is time served.

A lot of lower-level, less serious innocence cases - where a defendant is actually innocent but pleads guilty because of the rotten cost-benefit analysis associated with going to trial – could be prevented if Texas were to change the incentives around jail, bail, and plea bargains. Right now, defendants who can't make bail face an overwhelming incentive to accept a plea, whether they're guilty or not.

The Timothy Cole Exoneration Review Commission should examine these Harris County drug cases with a particular emphasis on cataloging pressures on innocent defendants to plead guilty and suggesting reforms to reduce both pretrial detention and pressure on innocent (and presumed innocent) defendants to waive their rights.

### **Suggested policy areas for review:**

In these cases, did extended pretrial incarceration lead innocent people to plead guilty? If so, did appointed counsel adequately investigate these cases and represent their clients' interests, or was their assistance ineffective? To what extent does low-quality counsel for indigent defendants contribute additional pressure on innocent defendants to plead guilty?

Should Texas consider eliminating money bail and replacing it with risk-assessment-based decision making and monitoring by pretrial services? Doing so would confront the problem by enhancing individual rights, since there would be far less incentive to waive them than would be the case if a guilty plea were the only way to get out of jail quickly.

To what extent do crime lab delays contribute to false convictions or improper detentions? Does this phenomenon extend beyond drug cases?

Should the state increase funds for state and local crime labs to process cases more rapidly, and if so what funding level would be sufficient?

Are there other procedural fixes which might reduce pressure on defendants to plea guilty before crime labs have time to process the evidence?

### **III. Updating Recommendations from the Timothy Cole Advisory Panel on Wrongful Convictions (2010)**

Separate and apart from individual case reviews, HB 48 explicitly directs the Timothy Cole Exoneration Review Commission to “review and update the research, reports, and recommendations of the Timothy Cole advisory panel established in the 81st Regular Session and shall include in its report under Section 9 the degree to which the panel's recommendations were implemented.”

The Timothy Cole advisory panel made eleven recommendations.<sup>14</sup> Five of them related to eyewitness identification procedures and were implemented with the passage of HB 215 by Gallegos/Ellis in 2011. A recommendation to expand access to post-conviction DNA testing was implemented through the passage of SB 121 and SB 122 by Ellis/Gallegos that same year. A recommendation to expand discovery available to the defense was implemented through the Michael Morton Act in 2013. The same year, SB 344 by Whitmire/Herrero created Texas’ first-in-the-nation junk science writ to ensure that courts’ habeas corpus authority is sufficient to rectify wrongful convictions based on junk science. (HB 3724 by Herrero/Whitmire, passed in 2015, clarified that the new writ applies both to debunked science and to bad scientists.) Recommendations to formalize funding of innocence clinics at Texas law schools and to create a position at the Indigent Defense Commission to oversee them were implemented through the budget process.

The only recommendation from the Tim Cole advisory panel which did not result in legislation implementing it was to, “Adopt a mandatory electronic recording policy, from delivery of Miranda warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.”

The commission has a clear directive to revisit these issues. Here are some of the topics the Innocence Project of Texas believes they should consider:

#### **Reiterate recommendation on recording interrogations**

The commission should revisit and reprise its suggestion that Texas should enact a statute to require recording of custodial interrogations in their entirety for certain felony crimes with judicial discretion to issue a jury instruction in the case of an unexcused failure to record.

When the TCAP report was issued in 2010, 17 states and the District of Columbia recorded custodial interrogations in their entirety—today 22 states have adopted the practice.<sup>15</sup> In addition, the U.S. Department of Justice announced in 2014 that federal law enforcement agencies, including the FBI, would be required to record interrogations.

As technology advances, recording equipment has become more affordable. In 2015 the national Innocence Project conducted a survey on the costs associated with recording of

interrogations and received responses from over 100 law enforcement agencies in Massachusetts and Wisconsin, where the practice is required by law. In that survey, some agencies reported purchasing digital cameras for as little as \$50 each, and entering into equipment-sharing agreements with other agencies to defray costs.<sup>16</sup> Initial purchasing costs can be outweighed by long-term savings, such as reduced court time for law enforcement and fewer frivolous lawsuits claiming officer misconduct during the interrogation.

Since TCAP issued its report, law enforcement across the country has become increasingly focused on improving public trust and transparency by capturing footage of police-civilian interactions. A growing number of agencies use body-worn cameras, and the Texas legislature enacted a statute in 2015 directing the governor's office to create a grant program for the equipment, and requiring law enforcement agencies that receive such grants to adopt policies and training for their use.<sup>17</sup>

Given this backdrop, recording custodial interrogations promises greater accuracy and accountability for both police and suspects. A statutory recording requirement would establish transparency in the interrogation process, enhancing public confidence in the criminal-justice system. In an era when police-civilian interactions are routinely captured on tape via body-worn cameras or citizens' cell phones, public trust will be diminished if the most vulnerable interactions in the interrogation room remain beyond view.

### **Create remedy for non-compliance with eyewitness identification policies**

The most commonly lamented shortcoming regarding Texas' eyewitness identification statute is that it does not include an enforcement mechanism. Indeed, the statute specifically states that "a failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under this article or with the minimum requirements of this article does not bar the admission of eyewitness identification testimony in the courts of this state." The only consequence for non-compliance is that a defense attorney and eyewitness identification expert may raise doubts about the reliability of an identification to judges and juries.

During the process of passing Texas' eyewitness identification legislation, numerous stakeholders expressed discomfort with applying the exclusionary rule as a remedy for failure to comply with eyewitness identification procedures. But a complete lack of enforcement leaves the statute nearly toothless.

A middle ground the commission should consider is a jury instruction. Indeed, the National Academy of Sciences last year specifically recommended "the use of clear and concise jury instructions as an alternative means of conveying information regarding the factors that the jury should consider."<sup>18</sup> Among states which have enacted eyewitness identification laws, jury instructions are the most common enforcement mechanism. (See the appendix.)

## Improving Discovery: After the Michael Morton Act

A couple of issues have arisen regarding implementation of the Michael Morton Act which merit the commission's consideration.

**Ensure impeachment evidence available for police witnesses.** The Texas Criminal Justice Integrity Unit identified a gap in reporting impeachment information about police officers who've been disciplined for lying or other serious misconduct.<sup>19</sup> Particularly in civil service cities, that information is treated as part of a confidential personnel file which is not disclosed to local District Attorneys' offices, even though prosecutors have a duty under *Brady v. Maryland* and the Michael Morton Act to disclose that information to the defense. In many jurisdictions, DA's offices maintain what's sometimes called a "do not sponsor" list – in Tarrant County it's known as the "pink list" – of officers with disciplinary problems so severe that prosecutors won't put them on the stand. But if agencies don't disclose that information to prosecutors, they never get to make those judgments.

A simple fix to this problem might be to apply the Public Information Act to law enforcement agencies operating under Ch. 143 of the Local Government Code. More than 2,500 law enforcement agencies statewide operate with disciplinary files largely public under the Public Information Act, with just more than 70 agencies operating with secret files under the civil service code. Often, agencies with overlapping jurisdictions have different laws governing their disciplinary records. For example, the Public Information Act governs disciplinary files at the Travis County Sheriff, while Ch. 143.089(g) of the Local Government Code governs them at the Austin Police Department. Making that information uniformly transparent under the Public Information Act would both solve the discovery problem and promote greater accountability among law enforcement.

**Ensure disclosure of informant deals.** While the Michael Morton Act requires prosecutors to turn over evidence that is favorable to the defense, including impeachment material about witnesses, it does not detail specific information which must be disclosed when the prosecution plans to use incentivized witness testimony. In its research document, the Tim Cole advisory panel recommended that prosecutors provide affirmative disclosure to the defense of all "statements made by the informant, rewards or benefits the informant has or will receive for his or her testimony, whether the informant has testified against other defendants, and any inconsistent statements made by the jailhouse informant."<sup>20</sup> The commission should revisit that research and recommend specific disclosure requirements for incentivized testimony.

Other states have enacted laws to strengthen pre-trial discovery requirements when the government plans to introduce informant testimony. In Illinois, upon the recommendation of the Illinois Commission on Capital Punishment, the legislature enacted a statute imposing special disclosure requirements for capital cases including: 1) the complete criminal history of the informant; any deal, promise, inducement or benefit that the offering party has made or will make in the future to the informant; 2) the statements made by the accused; 3) the time and place of the statements and their disclosure to law enforcement, and the names of all individuals present when the statements were made; 4) whether the informant recanted statements; 5) other cases the informant has testified in and any incentives he received for that testimony; and 6) any other information relevant to the informant's credibility.<sup>21</sup>

The Oklahoma Criminal Court of Criminal Appeals ruled in 2000, that before jailhouse informant testimony is admissible in court, prosecutors must disclose certain information to the defense at least 10 days before trial such as the informant’s criminal history, any benefit that has or may be offered, any other cases where the informant testified or offered statements, and any benefits received in those cases.<sup>22</sup> Nebraska enacted a similar statute in 2008.<sup>23</sup>

## **Clarify definition of ‘exculpatory result’ for DNA testing**

The commission should consider whether to amend Chapter 64 of the Texas Code of Criminal Procedure to clarify that a potential DNA database match could be considered an “exculpatory result” for the purpose of a defendant qualifying for DNA testing. A provision to that effect was proposed by Sen. Rodney Ellis in the filed version of SB 487, which passed this year, but the final version of the bill did not include it.

Local, state and federal DNA databases contain profiles of millions of known offenders and play a critical role in both identifying perpetrators and exonerating the innocent. Nationally, database matches have helped establish innocence and identify actual offenders in 104 of the nation’s 330 wrongful convictions proven with DNA.

In Texas, the exoneration of Michael Morton and other wrongfully convicted individuals would have been unlikely if third-party guilt had not been established through DNA databases. Mr. Morton was able to prove he was wrongfully convicted after DNA testing of a handkerchief located near the crime scene generated a profile of an unknown male offender. The profile was uploaded into the Combined DNA Index System and matched with Mark Norwood, who was later convicted of the crime.

Recognizing the importance of utilizing DNA database technology, Texas enacted SB 122 in 2011 to require that every eligible DNA profile obtained during post-conviction DNA testing is compared to state and federal DNA databases. To ensure that DNA databases are utilized both to identify the guilty and exonerate the innocent, the legislature should amend Chapter 64 to clarify that a potential DNA database match could be considered an “exculpatory result” for a defendant to qualify for post-conviction DNA testing.

## **Junk science habeas writ: No recommendation at present**

The recommendation to create Texas’ first-in-the-nation junk science writ, ensuring that courts’ can rectify wrongful convictions based on junk science through habeas corpus, was implemented with the passage of SB 344 by Whitmire/Herrero in 2013. The Court of Criminal Appeals raised several issues regarding the new law in a case styled *Ex Parte Robbins*. In response, the Legislature this spring clarified the new law with the passage of HB 3724 by Herrero/Whitmire, making clear that the new writ applies both to outdated science and to bad scientists who testified erroneously.

Notably, this year California enacted their own, similar version of this statute<sup>24</sup> in response to a conviction overturned based on flawed bite mark evidence. So the TCAP recommendation resulted in Texas exercising important leadership which has already been recognized nationwide.

Texas presently awaits the results from the Court of Criminal Appeals' case of first impression regarding Texas' updated junk science writ. Until they register their opinions, for now it appears the Legislature has addressed the main, extant issues regarding this new law. The Innocence Project of Texas recommends that the commission not advocate additional changes to the statute at this time to give the courts a chance to interpret and utilize this new tool.

### **Supporting innocence clinics**

The final two TCAP recommendations were to formalize funding of innocence clinics at Texas law schools and to create a position at the Indigent Defense Commission to oversee them. These have been enacted through the budget process and appear to be functioning as envisioned. There is no need to revisit these recommendations at this time.<sup>25</sup>



## IV. New Cases: Emerging Innocence Issues

*Examining causes of Texas exonerations from 2010 to present*

### **The Commission's Charge to Review New Exonerations**

HB 48 directed the Timothy Cole Exoneration Review Commission to “review and examine all cases in this state in which an innocent defendant was convicted and then, on or after January 1, 2010, was exonerated” in order to:

- (1) identify the causes of wrongful convictions and suggest ways to prevent future wrongful convictions and improve the reliability and fairness of the criminal justice system;
- (2) ascertain errors and defects in the laws, evidence, and procedures applied or omitted in the defendant's case;
- (3) consider suggestions to correct the identified errors and defects through legislation or procedural changes;
- (4) identify procedures, programs, and educational or training opportunities designed to eliminate or minimize the identified causes of wrongful convictions;
- (5) collect and evaluate data and information from an actual innocence exoneration reported to the commission by a state-funded innocence project, for inclusion in the commission's report under Section 9;
- (6) identify any patterns in errors or defects in the criminal justice system in this state that impact the pretrial, trial, appellate, or habeas review process; or
- (7) consider and suggest legislative, training, or procedural changes to correct the patterns, errors, and defects in the criminal justice system that are identified through the work of the commission.

According to a spreadsheet provided by the National Registry of Exonerations, since 2010 Texas has witnessed 113 total exonerations.<sup>26</sup>

Of those 113 overturned convictions, 67 were for drug possession or sale, 14 were for murder, 9 were for child-sex abuse, 8 were for robbery, and just 7 were for sexual assault, which for several years was the charge which predominated among DNA exonerations. (Assorted other offenses accounted for one or two exonerations each during the period.)

Now, though, a more varied array of cases presents itself among Texas exonerations than faced the Tim Cole Panel on Wrongful Convictions five years ago. Then, eyewitness identification

issues overwhelmingly accounted for false convictions on the list, most of which were discovered through post-conviction DNA testing. Today, while misidentification remains a dominant cause of false convictions (21 cases on the registry list from 2010-2015), DNA exonerations (12 cases) played a smaller role and more wrongful convictions can be attributed to perhaps less well-understood causes.

As detailed earlier, the overturned drug convictions have implication for the ways in which money bail pressures innocent people to accept plea deals to end pretrial detention and persistent underfunding at Texas crime labs. Those account for three out of five exonerations over the period to be studied. But what other issues are raised by the remaining 46 cases?

Many of the issues causing false convictions in this sample of 113 cases repeat themselves from those discovered by the Timothy Cole Advisory Panel on Wrongful Convictions in its 2010 report.

But there are an array of additional issues which arise from recent exonerations which deserve particular focus:

## **Reining in mendacious informants**

Unreliable informants who receive incentives to testify in exchange for lighter sentences, cash, or other considerations contribute significantly to false convictions. Just this week in Dallas, a prosecutor was called to testify in a habeas hearing for having concealed evidence in a potential innocence case that jailhouse informants received reduced sentences in exchange for their testimony.<sup>27</sup>

Jailhouse informants, as evidenced in the Richard and Megan Winfrey cases, deserve particular attention from the commission. "The ability of such snitches to fabricate confessions and other evidence has become infamous," wrote Alexandra Natapoff,<sup>28</sup> arguably the nation's leading authority on the topic.

There are several reforms potentially implied by the cases which the Commission may want to consider:

**Reliability hearings.** Natapoff and other experts argue for reliability hearings for incentivized informants similar to the way Daubert hearings screen expert testimony. "At least two courts and one state legislature have mandated reliability hearings whenever incarcerated informants ("jailhouse snitches") are proposed witnesses."<sup>29</sup> Illinois, for example, by statute requires a reliability hearing before a jailhouse informant may testify in a capital case.

The Exoneration Review Commission should examine cases involving jailhouse informants, and any witnesses receiving benefits in exchange for false testimony, to determine whether their

contributions to wrongful convictions could have been mitigated by more thorough vetting prior to taking the stand.

**Record conversations with informants.** The Commission should consider whether to require law enforcement conversations with informants to be recorded. Doing so would mitigate the risk that law enforcement may “feed facts” about a case to a potential informant. And it would prevent post hoc disputes – as played out this week in Dallas in the cases of Dennis Allen and Stanley Mozee – over whether or not an informant was promised benefits in exchange for testimony. In light of the ever-increasingly common practice of electronically recording interrogations, the Commission should investigate whether Texas law enforcement also be required to electronically record informant statements to law enforcement?

**Right to counsel for informants.** Extending a right to counsel to people when they’re being pressured by police or prosecutors to become informants could better protect their rights as well as innocent folk who might otherwise be falsely accused.

**Incentives for exculpatory evidence.** Should Texas consider offering rewards for exculpatory information to balance out the government's monopoly on the ability to reward witnesses for inculpatory information (e.g. the former inmates who have come forward in the Glossip case in Oklahoma)?

## **Preventing intimidation of grand jury witnesses**

In the Alfred Brown case, one of the exonerations from the 2010-2015 registry list, improper threats and pressure by the prosecutor and a grand jury foreman who was also a police officer intimidated Brown’s girlfriend from offering alibi testimony. Might Mr. Brown have been spared his false conviction if she’d had an attorney with her that day to protect her rights and should there be a right to counsel for grand jury witnesses? Should there be greater transparency surrounding the grand jury system? For example, should state law require that grand jury testimony be transcribed or recorded?<sup>30</sup> And should such recordings or transcriptions be made available to defendants or become public once the grand jury is no longer seated. These are questions the Exoneration Review Commission should study.

## **Confronting overstated forensics**

Since the 2009 publication of the groundbreaking National Academy of Sciences analysis, “Strengthening Forensic Science: A Path Forward,”<sup>31</sup> the problem of false convictions based on invalid and/or unscientific forensics has presented itself with ever-greater regularity. While some forensics qualify as “hard science,” many others are based on subjective comparisons or brands of evidence which are not derived from an application of the scientific method.<sup>32</sup>

The commission should study the extent to which Texas case law (in particularly, the *Kelly* and *Nenno* cases) allows invalid or overstated forensic testimony into evidence. Megan and Richard Winfrey's case hinged on a dog-scent lineup which the Court of Criminal Appeals later ruled invalid. But the same method reportedly was used in hundreds of other cases in the two decades prior to their ruling. Michael Morton's conviction was supported by invalid medical examiner testimony about time-of-death based on his murdered wife's stomach contents. Richard Miles' conviction was bolstered by overstated testimony by a forensic analyst regarding whether there was gunshot residue on his hands. Ricky Wyatt's case saw a serology expert imply that evidence implicated him when, courts later concluded, such no inference should have been drawn. In addition, Texas courts have identified forensic errors regarding future dangerousness<sup>33</sup> and sexual assault nurse examiners.<sup>34</sup>

There are several brands of problematic forensic evidence: Non-probative results which are presented as probative, exculpatory evidence which is discounted, inaccurate frequency or probability estimates, statistics or other evidence provided without empirical support, and invalid conclusions that a piece of evidence originated from the defendant.<sup>35</sup> The NAS recommended a rigorous scientific study of forensic methods which has only just begun in earnest.

The commission should consider: Are existing standards (particularly *Kelly* and *Nenno*) sufficient to keep junk science out of the courtroom? Should courts be required to authorize payments for defense experts more frequently to counter expert testimony put on by the state? Is crime lab funding sufficient to ensure staff are sufficiently trained and stay abreast of the latest developments? (In the case of DNA mixtures, scientific standards had changed years before the Texas Department of Public Safety updated its protocols.) Should Texas require crime labs' administrative structures be independent of law enforcement agencies?<sup>36</sup> Are crime lab employees and supervisors sufficiently trained to supply prosecutors with all necessary information to fulfill their obligations under *Brady v. Maryland* and the Michael Morton Act? Should the Forensic Science Commission's jurisdiction be expanded to include flawed testimony from medical examiners, as in the Michael Morton case, as well as other non-accredited disciplines? Should the state of Texas itself finance research into forensic methods in furtherance of the NAS objectives, or wait on the federal government to do this?

## **Ineffective Assistance of Counsel**

At least a dozen cases among the 2010-2015 cohort involve ineffective defense attorneys, typically appointed, who failed to investigate the basic facts of their cases, whether it's allowing sex-offender conditions to be applied when they're not required (Glen Nobles, Darrell Bivens) or allowing someone to plead guilty of felon in possession of a firearm when they only possessed an air pistol (Darian Contee). Billy Allen's attorney failed to adequately investigate when a victim accused a different "Billy Allen" with a different middle name and his client was

falsely convicted. Ricky Dale Wyatt's attorney failed to challenge forensic testimony which was false, scientifically inaccurate, and misleading.

Ineffective assistance can be raised on direct appeal in Texas, but short timelines for a first appeal mean that, in most instances, the same lawyer who served as trial counsel will prepare her client's appeal. That attorney is unlikely to claim their work was ineffective, whether or not that's the case. On the other hand, defendants are not entitled to appointed counsel to pursue habeas corpus claims, making pursuit of an ineffective assistance finding much more difficult at that phase.

The commission should consider: Should Texas create a limited right to counsel for inmates to pursue ineffective assistance of counsel claims via habeas corpus writs?<sup>37</sup> More broadly, what could Texas do to improve the quality of indigent defense in Texas? What role does low compensation play in the provision of ineffective legal defense? Should there be resource equity between prosecutors and attorneys representing presumed-innocent clients? Should new caseload guidelines for indigent defense be made mandatory or per-attorney maximums created?

## **Appendix: Eyewitness ID Statutes and Remedies from Other States**

## Eyewitness Identification

### *Statewide Adoption of “Core Four” Reforms through Legislation or Court Action*

Thirteen states have achieved uniform adoption of the ‘core four’ eyewitness identification best practices, which include blind/blinded administration, proper fillers, witness instructions and witness confidence statements. Eleven states achieved reform through statute, one through court action, and one by Attorney General plenary authority.

<p><b>Connecticut</b> <i>Law Enacted 2012</i> (CT ST § 54-1p CT HB 6344 CT HB 5501)</p>	<p><u>Summary:</u> Connecticut enacted HB6344 in July 2011, which requires that law enforcement agencies adopt procedures for conducting of photo and live lineups that comply with minimum standard best practices. The state's Eyewitness Identification Task Force, created in 2011, released its findings in February 2012 and “voted unanimously to require law enforcement in Connecticut to use sequential rather than simultaneous presentations of photo arrays to witnesses.” In June 2012, Connecticut enacted HB5501, which requires that no later than February 1, 2013, the Police Officer Standard Trainings Council and the Division of State Police will jointly develop and promulgate uniform mandatory eyewitness identification policies based on best practices, which include: blind administration, sequential presentation, instructions, proper filler selection, and certainty statements. No later than May 1, 2013, each municipal police department and the Department of Emergency Services and Public Protection will adopt procedures for lineups in accordance with those policies and guidelines.</p> <p><u>Remedy for Failure to Comply:</u> None</p>
<p><b>Colorado</b> <i>Law Enacted 2015</i> (C.R.S.A. § 16-1-109)</p>	<p><u>Summary:</u> Requires all Colorado law enforcement agencies to adopt written policies and procedures regarding eyewitness identifications that meet specific criteria and to submit this information to the Peace Officers Standards and Training (POST) Board by July 1, 2016. If a law enforcement agency chooses not to adopt agency-specific policies, they are required to adopt and use model policies developed by the Attorney General's Office and the Colorado District Attorneys' Council (CDAC). Policies must be made available on the agency's website, if applicable, or made available to the public upon request, at no cost. Subject to available resources, the POST Board is directed to create, conduct, or facilitate professional training to law enforcement personnel on methods and technical aspects of eyewitness identification policies and procedures.</p> <p><u>Remedy for Failure to Comply:</u> Both compliance and failure to comply with the requirements of the bill is considered relevant evidence in any case involving eyewitness identification, provided the evidence is otherwise admissible.</p>
<p><b>Georgia</b> <i>Law Enacted 2015</i> (Ga. Code Ann. §17-20-1, et seq.)</p>	<p><u>Summary:</u> By July 1<sup>st</sup> 2016 any law enforcement agency that conducts live lineups, photo lineups, or showups shall adopt written policies for using such procedures. Live lineup, photo lineup and showup policies shall include the following: 1) with respect to a live lineup, having an individual who does not know the identity of the suspect conduct the live procedure; with respect to a photo lineup, having an individual who does not know the suspect’s identity conduct the lineup, or using the folder shuffle technique; 2) providing the</p>

	<p>witness with instructions that the perpetrator may or not be present in the photo or live lineup; 3) composing a live lineup or photo lineup so that the fillers generally resemble the witness’s description of the perpetrator; using a minimum of four fillers in a live lineup and a minimum of five fillers in a photo lineup and; 4) having the individual conducting a live lineup, photo lineup, or showup seek and document, at the time that an identification is made and in the witness’s own words, a clear statement as to the witness’s confidence level in the selection.</p> <p><u>Remedy for Failure to Comply:</u> The court may consider the failure to comply with the requirements of this chapter with respect to any challenge to an identification provided however, that such failure shall not mandate the exclusion of identification evidence.</p>
<p><b>Maryland</b> <i>Law Enacted 2014</i> (Md. Code Ann., Pub. Safety § 3-506)</p>	<p><u>Summary:</u> Requires each law enforcement agency in the State to adopt and implement an eyewitness identification policy that minimally includes blind administration, specific instructions to the witness, appropriate filler selection, and acquisition of confidence statements.</p> <p><u>Remedy for Failure to Comply:</u> None</p>
<p><b>New Jersey</b> <i>Attorney General Guidelines 2001</i> <i>Court Action 2011</i> (State v. Henderson 2011)</p>	<p><u>Summary:</u> Statewide guidelines mandated by the Office of the Attorney General include blind administration of lineups, sequential presentation, witness instructions, appropriate filler photo usage, obtaining of confidence statements, and recording the entire procedure. Because the NJ Attorney General has unique plenary authority, the guidelines are effectively a mandate.</p> <p>In <i>Henderson</i> the NJ Supreme Court revised the legal framework for evaluating and admitting eyewitness identification evidence. Under the new rules and jury instructions, factors about the eyewitness’s circumstances at the time of the offense (i.e. lighting, distance, presence of a weapon, cross-racial identification), along with law enforcement’s behavior when conducting identification procedures, must be weighed by jurors to determine the reliability of eyewitness testimony.</p> <p><u>Remedy for Failure to Comply:</u> <i>Henderson</i> said that the defendant has the burden of demonstrating that system variables led to a very substantial likelihood of irreparable misidentification. If a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions.</p>
<p><b>North Carolina</b> <i>Law Enacted 2007</i> (N.C. Gen Stat. § 15A-284.52)</p>	<p><u>Summary:</u> State statute requires that law enforcement agencies follow specific policies in eyewitness identification procedures. These include: blind administration, sequential presentation, specific instructions to the witness, appropriate filler photo usage, obtaining a confidence statement and recording the procedure when practicable. The statute also provides for training of law enforcement officers in employing these practices and offers possible legal remedies in cases where the law enforcement agency failed to comply.</p>



	<p><u>Remedy for Failure to Comply:</u> All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section: (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification. (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible. (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.</p>
<p><b>Ohio</b> <i>Law Enacted 2010</i> (OH ST § 2933.83)</p>	<p><u>Summary:</u> Ohio law mandates blind administration, specific instructions to the witness, appropriate filler selection, acquisition of confidence statements and the recording of the procedure when practicable. It also provides for the folder shuffle method as an acceptable option to blind administration.</p> <p><u>Remedy for Failure to Comply:</u> Evidence of non-compliance is specifically admissible at trial and the jury is to be instructed that it may take that evidence into account when determining reliability of the identification.</p>
<p><b>Oregon</b> <i>Court Action 2013</i> (State v. Lawson, 291 P.3d 673)</p>	<p><u>Summary:</u> In <i>State v. Lawson</i>, 291 P.3d 673 (Or. 2013)(en banc), the Oregon Supreme Court shifted the burden to the state to establish that the evidence is admissible (must show that witness had personal knowledge of the matters to which he/she will testify, proof that identification is rationally based on witness’s first-hand perceptions and helpful to trier of fact.”</p> <p>In response to <i>Lawson</i>, law enforcement has implemented scientifically-supported best practices, including blind, sequential, proper fillers, proper instructions and confidence statements.</p> <p><u>Remedy for Failure to Comply:</u> If the state satisfies its initial burden, the court charges that judges may still need to impose remedies, including suppressing the evidence in some circumstances, to prevent injustice if the defendant establishes that he or she would be unfairly prejudiced by the evidence.</p>
<p><b>Rhode Island</b> <i>Law Enacted 2010</i> (Gen. Laws 1956, § 12-1-16)</p>	<p><u>Summary:</u> The Rhode Island Legislature created a taskforce to identify and recommend policies and procedures to improve the accuracy of eyewitness identifications. The task force recommended that the ‘core four’ best practices be implemented across the state. The Rhode Island Police Chiefs Association voted unanimously to adopt a uniform written policy based on the task force’s recommendations. A compliance survey found that all 43 agencies in the state had successfully implemented evidence-based policies.</p> <p><u>Remedy for Failure to Comply:</u> None</p>
<p><b>Texas</b> <i>Law Enacted 2011</i> (C.C.P. Art. 38.20)</p>	<p><u>Summary:</u> The Texas legislature mandated that law enforcement agencies adopt written policies for the administration of identification procedures based either on a model policy or minimum standards that conform to those best practices identified by the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT). LEMIT’s model</p>

	<p>policy endorses evidence-based practices including blind administration; sequential presentation, proper filler selection, and recording of confidence statements.</p> <p><u>Remedy for Failure to Comply:</u> None</p>
<p><b>Vermont</b> <i>Law Enacted 2014</i> (13 V.S.A. § 5581)</p>	<p><u>Summary:</u> Requires that law enforcement agencies adopt written policies for the administration of identification procedures, which at minimum must be based on the essential elements of Law Enforcement Advisory Board model policy. The model policy endorses blind administration, witness instructions, proper show-ups, proper filler selection, and recording of confidence statements. If a law enforcement agency does not comply with this statute by the designated deadline, the Law Enforcement Advisory Board model policy will automatically become their policy.</p> <p><u>Remedy for Failure to Comply:</u> None</p>
<p><b>West Virginia</b> <i>Law Enacted 2013</i> (W. Va. Code § 62-1E-1 to -3)</p>	<p><u>Summary:</u> West Virginia law requires that all law enforcement agencies adopt a written policy for eyewitness identification procedures by January 1, 2014. It also suggests that all lineups should be conducted using blind administration, sequential presentation, witness instructions, confidence statements, appropriate filler photo usage, audiovisual recording of the entire procedure, and that show-ups be performed only in exigent circumstances. A follow-up survey found that law enforcement agencies covering more than two-thirds of the state's population have adopted policies that comport with the law's recommended best practices.</p> <p><u>Remedy for Failure to Comply:</u> None</p>
<p><b>Wisconsin</b> <i>Law Enacted 2005</i> (Wis. Stat. § 175.50)</p>	<p><u>Summary:</u> State statute requires that law enforcement agencies adopt written policies for eyewitness identification. The Wisconsin Attorney General issued guidelines on best practices that policies should contain, such as blind administration, sequential presentation, specific instructions to the witness, appropriate filler photo usage and obtaining a confidence statement from witnesses. The Attorney General's office has also provided trainings and otherwise worked with local jurisdictions to support effective implementation of the reforms. Note that the law only requires written policies and the AG training roll-out led to broad adoption of evidence-based practices.</p> <p><u>Remedy for Failure to Comply:</u> None</p>

## Endnotes:

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- <sup>1</sup> Spreadsheet of Texas exonerations obtained from the National Exoneration Registry by Amanda Marzullo of the Texas Defender Service, July 2015.
- <sup>2</sup> These cases have become commonplace on Texas Court of Criminal Appeals hand-down lists. Some sources estimate there may be hundreds of such cases before crime labs work through the full backlog.
- <sup>3</sup> A few defendants in these cases received innocence compensation from the state Comptroller.
- <sup>4</sup> National Exoneration Registry, definition of “exoneration” last accessed online 10/2/15 at: <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>
- <sup>5</sup> *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013).
- <sup>6</sup> Kent Russell, “Habeas Hints: Actual Innocence,” *Prison Legal News*, Sept. 15, 2013.
- <sup>7</sup> Michael Barajas, “Lab reports show hundreds ‘convicted in error’ of drug offenses,” Oct. 29, 2014. Last accessed online 10/20 at: <http://www.houstonpress.com/news/lab-reports-show-hundreds-convicted-in-error-for-drug-offenses-6751687>.
- <sup>8</sup> *Austin Statesman*, 2014.
- <sup>9</sup> “Lab delays create Texas’ unknown exonerees,” *Austin American Statesman*, April 19, 2014. Accessed online 10/7/15 at: [http://www.mystatesman.com/news/news/state-regional/lab-delays-create-texas-unknown-exonerees/nfdTW/?icmp=statesman\\_internallink\\_textlink\\_apr2013\\_statesmanstubtomystatesman\\_launch](http://www.mystatesman.com/news/news/state-regional/lab-delays-create-texas-unknown-exonerees/nfdTW/?icmp=statesman_internallink_textlink_apr2013_statesmanstubtomystatesman_launch)
- <sup>10</sup> E.g., Rhonda Gainus and Sherri Frederick.
- <sup>11</sup> *Austin Statesman*, 2014.
- <sup>12</sup> “Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes, and Costs,” Texas Indigent Defense Commission, October 2012.
- <sup>13</sup> Lise Olsen, “Study: Inmates who can’t afford bond face tougher sentences,” *Houston Chronicle*, Sept. 15, 2013.
- <sup>14</sup> Timothy Cole Advisory Panel on Wrongful Convictions, Report to the Texas Task Force on Indigent Defense, August 2010.
- <sup>15</sup> “False confessions and the recording of custodial interrogations,” August 12, 2015, accessed online 10/23/15 at: <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/false-confessions-recording-of-custodial-interrogations>.
- <sup>16</sup> Survey results provided to the author via email by Michele Feldman, national Innocence Project, 9/29/15.
- <sup>17</sup> SB 158 84<sup>th</sup> Leg. (2015). Authored by Senator West and Rep. Johnson.
- <sup>18</sup> National Research Council. *Identifying the Culprit: Assessing Eyewitness Identification*. Washington, DC: The National Academies Press, 2014.
- <sup>19</sup> Texas Criminal Justice Integrity Unit meeting, May 1, 2014, author’s notes.
- <sup>20</sup> Timothy Cole Advisory Panel on Wrongful Convictions: Research Details (2010).
- <sup>21</sup> 725 ILCS 5/115-21 (2009).
- <sup>22</sup> *Dodd v. State*, 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100<sup>th</sup> Leg., Sess. (Neb. 2008).
- <sup>23</sup> Email to author from Michele Feldman, national Innocence Project, 9/29/15.
- <sup>24</sup> SB 1058 (2014), last accessed online 10/22/15 at: [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB1058](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1058).
- <sup>25</sup> The Innocence Project of Texas operates innocence programs at the Texas Tech and Texas A&M law schools.
- <sup>26</sup> National Exoneration Registry. Summaries of Texas cases in the registry from 2010 to present, as well as related court documents, have been uploaded to a cloud drive made available to members of the Timothy Cole Exoneration Review Commission. References below to those recent cases without a footnote are taken from those summaries.
- <sup>27</sup> The hearing, in the cases of Dennis Allen and Stanley Mozee, has not taken place at the time of this writing but is scheduled for Monday, Oct. 26, three days before the first Exoneration Review Commission meeting.
- <sup>28</sup> Alexandra Natapoff, “Beyond Unreliable: How Snitches Contribute to Wrongful Convictions,” 37 *Golden Gate U.L. Rev.* (2006). Last accessed online 10/19/15 at: <http://digitalcommons.law.ggu.edu/ggulrev/vol37/iss1./5>.
- <sup>29</sup> *Ibid.*

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<sup>30</sup> In 2013, Rep. Bryan Hughes filed HB 3334 to require grand jury witnesses be recorded or transcribed by a stenographer. The bill passed the Texas House, passed the Senate Criminal Justice Committee, and died on the intent calendar waiting for a vote from the full Senate.

<sup>31</sup> National Academy of Sciences analysis, "Strengthening Forensic Science: A Path Forward," 2009.

<sup>32</sup> Even DNA evidence, when it comes to analyzing mixtures, contains a strongly subjective element. Other comparative forensics like fingerprints, ballistics, bite marks, hair microscopy, handwriting analysis, have higher error rates than has historically been acknowledged.

<sup>33</sup> *Coble v. State*, No. AP-76,109, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. Oct. 13, 2010).

<sup>34</sup> *Escamilla v. State*, No. 04-09-00530-CR, 2010 Tex. App. LEXIS 8227 (Tex. App.—San Antonio, Oct. 13, 2010, no pet. hist.).

<sup>35</sup> Brandon Garrett and Peter Neufeld, "Invalid Forensic Science Testimony and Wrongful Convictions," *Virginia Law Review*, Vol. 95, No. 1, March 2009.

<sup>36</sup> This was a key recommendation of the 2009 National Academies of Sciences report, "Strengthening Forensic Science: A Path Forward."

<sup>37</sup> See: Eve Brensike Primus, "Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings" *American Bar Association, Criminal Justice*, Volume 24, Number 3, Fall 2009. Accessed online 10/24/15 at:

[http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_cjmag\\_24\\_3\\_primus.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_primus.authcheckdam.pdf).