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

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

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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, [1] 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. [2] 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.[3]

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,[4] 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,[5] 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,”[6] 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."[7]

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."[8]

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,"[9] 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.[10] In others, defendants may be eligible for compensation but may never be notified, or may become ineligible due to subsequent convictions.[11]

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,[12] 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." [13]

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 pleas 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.[14] 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.[15] 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.[16] 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.[17]

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."[18] 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.[19] 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."[20] 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.[21]

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.[22] Nebraska enacted a similar statute in 2008.[23]

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[24] 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.[25]

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.[26]

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. [27]

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, [28] 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 contemplated reliability hearings whenever incarcerated informants ("jailhouse snitches") are proposed witnesses."[29] And Illinois 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? [30] 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,"[31] 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.[32]

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[33] and sexual assault nurse examiners.[34]

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.[35] 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?[36] 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?[37] 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.

Connecticut *Law Enacted 2012* (CT ST § 54-1p CT HB 6344 CT HB 5501)	Summary: 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. Remedy for Failure to Comply: None
Colorado *Law Enacted 2015* *(*C.R.S.A. § 16-1-109*)*	Summary: 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. Remedy for Failure to Comply: 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.
Georgia *Law Enacted 2015* (Ga. Code Ann. §17-20-1, et seq.)	Summary: By July 1st 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

	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. Remedy for Failure to Comply: 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.
Maryland *Law Enacted 2014* (Md. Code Ann., Pub. Safety § 3-506)	Summary: 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. Remedy for Failure to Comply: None
New Jersey *Attorney General Guidelines 2001* *Court Action 2011* (State v. Henderson 2011)	Summary: 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. In *Henderson* 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. Remedy for Failure to Comply: *Henderson* 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.
North Carolina *Law Enacted 2007* (N.C. Gen Stat. § 15A-284.52)	Summary: 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.

	Remedy for Failure to Comply: 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.
Ohio *Law Enacted 2010* (OH ST § 2933.83)	Summary: 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. Remedy for Failure to Comply: 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.
Oregon *Court Action 2013* (State v. Lawson, 291 P.3d 673)	Summary: In *State v. Lawson*, 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." In response to *Lawson*, law enforcement has implemented scientifically-supported best practices, including blind, sequential, proper fillers, proper instructions and confidence statements. Remedy for Failure to Comply: 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.
Rhode Island *Law Enacted 2010* (Gen. Laws 1956, § 12-1-16)	Summary: 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. Remedy for Failure to Comply: None
Texas *Law Enacted 2011* (C.C.P. Art. 38.20)	Summary: 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

	policy endorses evidence-based practices including blind administration; sequential presentation, proper filler selection, and recording of confidence statements. Remedy for Failure to Comply: None
Vermont *Law Enacted 2014* (13 V.S.A. § 5581)	Summary: 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 wriwill automatically becomes their policy. Remedy for Failure to Comply: None
West Virginia *Law Enacted 2013* (W. Va. Code § 62-1E-1 to -3)	Summary: 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. Remedy for Failure to Comply: None
Wisconsin *Law Enacted 2005* (Wis. Stat. § 175.50)	Summary: 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. Remedy for Failure to Comply: None

Endnotes:

[1] Spreadsheet of Texas exonerations obtained from the National Exoneration Registry by Amanda Marzullo of the Texas Defender Service, July 2015.
[2] 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
[3] A few defendants in these cases received innocence compensation from the state Comptroller.
[4] National Exoneration Registry, definition of "exoneration" last accessed online 10/2/15 at: http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx
[5] McQuiggin v. Perkins, 133 S.Ct. 1924 (2013).
[6] Kent Russell, "Habeas Hints: Actual Innocence," Prison Legal News, Sept. 15, 2013.
[7] 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.
[8] Austin Statesman, 2014.
[9] "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
[10] E.g., Rhonda Gainus and Sherri Frederick.
[11] Austin Statesman, 2014.
[12] "Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes, and Costs," Texas Indigent Defense Commission, October 2012.
[13] Lise Olsen, "Study: Inmates who can't afford bond face tougher sentences," Houston Chronicle, Sept. 15, 2013.
[14] Timothy Cole Advisory Panel on Wrongful Convictions, Report to the Texas Task Force on Indigent Defense, August 2010.
[15] "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.
[16] Survey results provided to the author via email by Michele Feldman, national Innocence Project, 9/29/15.
[17] SB 158 84th Leg. (2015). Authored by Senator West and Rep. Johnson.
[18] National Research Council. *Identifying the Culprit: Assessing Eyewitness Identification*. Washington, DC: The National Academies Press, 2014.
[19] Texas Criminal Justice Integrity Unit meeting, May 1, 2014, author's notes.
[20] Timothy Cole Advisory Panel on Wrongful Convictions: Research Details (2010).
[21] 725 ILCS 5/115-21 (2009).
[22] *Dodd v. State,* 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100th Leg., Sess. (Neb. 2008).
[23] Email to author from Michele Feldman, national Innocence Project, 9/29/15.
[24] SB 1058 (2014), last accessed online 10/22/15 at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1058.
[25] The Innocence Project of Texas operates innocence programs at the Texas Tech and Texas A&M law schools.
[26] 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.
[27] 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.
[28] 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.
[29] Ibid.

[30] 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.
[31] National Academy of Sciences analysis, "Strengthening Forensic Science: A Path Forward," 2009.
[32] 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.
[33] Coble v. State, No. AP-76,109, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. Oct. 13, 2010).
[34] Escamilla v. State, No. 04-09-00530-CR, 2010 Tex. App. LEXIS 8227 (Tex. App.—San Antonio, Oct. 13, 2010, no pet. hist.).
[35] Brandon Garrett and Peter Neufeld, "Invalid Forensic Science Testimony and Wrongful Convictions,"Virginia Law Review, Vol. 95, No. 1, March 2009.
[36] This was a key recommendation of the 2009 National Academies of Sciences report, "Strengthening Forensic Science: A Path Forward.".
[37] 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.