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# **Recent Legislative and Rule Changes for Criminal Appellate Practitioners**

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## A Review of Recent Legislative and Rule Changes for Criminal Appellate Practitioners

In 1985, Michele Mallin was abducted at knifepoint and raped. Officers took a color Polaroid photo of Timothy Cole, a 26-year-old Texas Tech student and military veteran, and placed it next to five black-and-white photos in a lineup.<sup>1</sup> Mallin picked Cole out of the lineup and said, “I think that’s him.”<sup>2</sup> As a result, a jury found Cole guilty of raping Mallin and sentenced him to twenty-five years in prison. In 1999, Cole suffered a severe asthma attack and died in prison.<sup>3</sup> However, in 1995, another man had confessed to raping Mallin. DNA evidence eventually tied that man to the crime.<sup>4</sup> In 2009, a district judge in Travis County held a hearing in which he announced “to a 100 percent moral, factual and legal certainty” that Cole did not commit the 1985 rape that sent him to prison—a ruling which pundits labeled the first “posthumous exoneration” in Texas history.<sup>5</sup>

Cole’s tragic and moving story has served as a catalyst and an inspiration for legislation aimed at addressing the problem of wrongful convictions in Texas. In 2009, the Texas Legislature passed the Tim Cole Act, which created a financial compensation program for wrongfully convicted individuals whom a judge, prosecutor, or appellate court has declared to be “actually innocent.”<sup>6</sup> By 2016, Texas had paid 101 wrongfully convicted individuals \$93.6 million. Cumulatively, these individuals spent 1,000 years behind bars for crimes they did not commit.<sup>7</sup>

The Tim Cole Act also established the Timothy Cole Advisory Panel on Wrongful Convictions.<sup>8</sup> The advisory panel advised the Task Force on Indigent Defense (now the Texas Indigent Defense Commission) regarding the causes of wrongful convictions and made recommendations to prevent future wrongful convictions. The Advisory Panel made eleven recommendations addressing eyewitness identification procedures, the recording of custodial interrogations, open discovery policies, post-conviction procedures, and the creation of an

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<sup>1</sup> Steven Kreytak, *Judge Clears Name of Late Convict in Rape*, AUSTIN AMERICAN-STATESMAN, Feb. 7, 2009.

<sup>2</sup> *Id.*

<sup>3</sup> Wade Goodwin, *Family of Man Cleared by DNA Still Seeks Justice*, NPR, MORNING EDITION (Feb. 5, 2009, 1:00 a.m.), <https://www.npr.org/templates/story/story.php?storyId=100249923>.

<sup>4</sup> Kreytak.

<sup>5</sup> *Id.*; Jordan Smith, *Cole’s Posthumous Exoneration a First for Texas*, AUSTIN CHRONICLE (Feb. 13, 2009), <https://www.austinchronicle.com/news/2009-02-13/740144/>.

<sup>6</sup> Johnathan Silver and Lindsay Carbonell, *Wrongful Convictions Have Cost Texans More Than \$93 Million*, TEXAS TRIBUNE (Jun. 24, 2016, 6:00 a.m.), <https://www.texastribune.org/2016/06/24/wrongful-convictions-cost-texans-over-93-million/>.

<sup>7</sup> *Id.*

<sup>8</sup> *Timothy Cole Advisory Panel on Wrongful Convictions*, TEXAS INDIGENT DEFENSE COMMISSION (accessed Mar. 27, 2018), <http://www.tidc.texas.gov/innocence/innocence-program-overview/tcap/>.

innocence commission to investigate wrongful convictions.<sup>9</sup>

In June 2015, Governor Greg Abbott signed legislation creating the Timothy Cole Exoneration Review Commission (“the Commission”) and directing the Commission to study exonerations since 2010 to identify what went wrong in those cases and to recommend how to prevent future wrongful convictions.<sup>10</sup> The Commission was composed of criminal justice stakeholders, including lawmakers, judges, prosecutors, defense attorneys, and law enforcement officers.<sup>11</sup> In 2016, the Commission reviewed and updated the research and recommendations of the Timothy Cole Advisory Panel related to critical areas, including eyewitness identification procedures, mandatory discovery procedures, post-conviction proceedings, and the recording of custodial interrogations.<sup>12</sup>

The Commission’s expansion on the Advisory Panel’s work formed the pillar of groundbreaking legislation passed in the last few Texas Legislative Sessions. The following section of this paper summarizes some of this legislation and other new laws relevant to criminal appellate and post-conviction practitioners. The second section of this paper reviews recent rule changes pertinent to criminal appellate and post-conviction practitioners.

## **SELECTED LEGISLATIVE CHANGES IMPACTING CRIMINAL APPELLATE PRACTITIONERS**

The Commission’s eyewitness identification recommendations included requiring the development, adoption, and dissemination of a model policy and training materials on the administration of photo and live lineups that comports with science and best practices. The Advisory Panel’s original recommendations were partially implemented through House Bill 215 during the 82<sup>nd</sup> Legislative Session. The Legislature further implemented these recommendations through bills passed last year.<sup>13</sup> The Commission also endorsed the adoption of a discovery policy that is “mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.”<sup>14</sup> The Legislature largely implemented this recommendation during the 83<sup>rd</sup> Legislative session through Senate Bill 1611 (otherwise known as the Michael Morton Act). The Morton Act implemented requirements for prosecutors to

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<sup>9</sup> *Id.*

<sup>10</sup> Johnathan Silver, *Commission Begins Study of Wrongful Convictions*, TEXAS TRIBUNE (Oct. 29, 2015, 5:00 p.m.), <https://www.texastribune.org/2015/10/29/commission-begins-work-prevent-wrongful-conviction/>.

<sup>11</sup> Julia Lucivero, *Texas Governor Signs Landmark Comprehensive Legislation to Prevent Wrongful Convictions*, THE INNOCENCE PROJECT: POLICY, (Jun. 15, 2017), <https://www.innocenceproject.org/category/policy>.

<sup>12</sup> TIMOTHY COLE EXONERATION REVIEW COMMISSION REPORT, 9-10 (Dec. 2016), <http://www.txcourts.gov/media/1436589/tcerc-final-report-december-9-2016.pdf>.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 10.

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