

**IN THE 299TH DISTRICT COURT  
IN AND FOR  
TRAVIS COUNTY, TEXAS**

IN THE MATTER OF	X	
	X	
A	X	NO. D1-DC 08- 100- 051
	X	
COURT OF INQUIRY	X	

**OPINION AND ORDER OF THE COURT**

On June 26, 2008 the Petitioners in this case, RUBY SESSION, KAREN KENNARD, KEVIN KENNARD, REGINALD KENNARD, RODNEY KENNARD, SHAWN SESSION and CORY SESSION, the surviving family of TIMOTHY BRIAN COLE, and MICHELE MALLIN, the original crime victim, filed a Petition for a Court of Inquiry in the 99<sup>th</sup> District Court of Lubbock County, Texas. The purpose of their petition was to get a hearing and order that would clear the name of Timothy Cole, a young man who had been convicted by a Lubbock jury in 1986 and died in prison in 1999.

The Petitioners were never given a chance to be heard. The Lubbock court denied their claim in a written order on August 5, 2008.

Having been denied a forum in the courts of Lubbock, the Petitioners exercised their right under Article 52.01 of the Code of Criminal Procedure to go to another judge and filed their petition in this Court.

The Court set this matter for a hearing. Evidence, which consisted of documentary proof and sworn testimony, was presented on February 5<sup>th</sup> and 6<sup>th</sup>, 2009. Petitioners were represented by Jeff Blackburn of the Innocence Project of Texas and Barry Scheck of the Innocence Project, admitted to the Texas bar *pro hac vice*.

After listening to the testimony, reading all the documents, carefully weighing the evidence, and hearing the argument of counsel, the Court now enters the following findings, opinions and orders.

**1. JURISDICTION AND VENUE**

The Petitioners asked for relief pursuant to Article 1, Section 13 of the Texas Constitution; Article 1, Section 30 of the Texas Constitution, and Article 52.01 of the Texas Code of Criminal Procedure.

Article 1, Section 13 provides that “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law”.

Article 1, Section 30, also known as the “Crime Victim’s Bill of Rights”, gives crime victims such as Petitioners the right to be treated with fairness and with respect for their dignity.

Article 52.01 of the Code of Criminal Procedure sets forth the method by which Courts of Inquiry are conducted. This Article allowed the Petitioners to file their claim in “any district court of this state”. *Tex. Code of Crim. Proc. Art. 52.01 (Vernon 2009)*.

Article 5, Section 8 of our constitution addresses which courts can hear such claims. It says:

District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

*Texas Constitution, Article 5, Section 8 (Vernon 2009)*.

This Court has the exclusive and original right to judge the claims presented and issue a remedy.

Venue is proper in Travis County because the Petitioners had the right to bring their case to any district judge in the state under Article 52.01 of the Code of Criminal Procedure.

## **2. FINDINGS OF FACT**

Petitioners proved beyond a reasonable doubt these facts:

### **A. THE “TECH RAPIST”**

From late December of 1984 to March of 1985 five young women were abducted and raped in Lubbock, Texas. The crimes were strikingly similar:

1.They happened within a very small geographical area in and around the campus of Texas Tech University;

2. The assailant, a black male described as being in his twenties, of medium build, and with a short afro, forced the victim into the passenger seat of the car and then drove to a remote location;

3. The assailant continuously threatened the victim at knifepoint;
4. The assailant smoked cigarettes;
5. The assailant vaginally penetrated the victims;
6. The assailant robbed the victims of personal effects;
7. The assailant then drove the victim back into town.

The Lubbock Police Department prepared a chart of these crimes and their common patterns. A true copy of this chart was entered into evidence.

These crimes happened on December 27, 1984; January 13, 1985; February 1, 1985; February 3, 1985; and March 24, 1985.

#### B. THE CRIME AGAINST MICHELE MALLIN

On March 24, 1985 at about 10 P.M. Michele Murray (now Mallin), a 20 year-old student at Texas Tech University, was getting into her car in a parking lot across the street from the university. A black man approached her and asked her if she had jumper cables. The church parking lot was, as she recalled, noticeably better-lit than it had been before.

Within a few seconds, this man grabbed her, forced her into the passenger seat, and drove her car to a secluded spot a few miles outside of town. He threatened her with a small pocket knife, which he held in his hand during the entire process. After driving to a field, he forced her to have oral and vaginal sex with him.

He drove her back to town, took \$2.00, her watch, and a small diamond ring and let himself out. She drove back to the University.

She reported the crime immediately. She was taken to the hospital and talked with medical personnel, rape crisis volunteers, and police officers within a few hours after the crime.

Ms. Mallin described her attacker as as a black male, between 5'6" -5'9" in height, with a light beard and wearing thongs and a yellow terry cloth shirt. She reported that he smoked in her car before and after the rape. She also said that he appeared to be "bug-eyed".

## C. HOW THE POLICE HANDLED THE CASE

### 1. What Happened that Night

After getting Ms. Mallin's account of the crime officers lifted at least one fingerprint from the cigarette lighter of her car. According to the police, these prints had "no ID value" and were destroyed on March 25, 1985. They also recovered cigarette butts.

Ms. Mallin was then referred to a detective.

### 2. Detectives Take Over

The first detective assigned to the case was Joe Nevarez of the Lubbock Police Department. He began his investigation on March 27, meeting with Ms. Mallin at his office.

After taking a more detailed narrative from her, he prepared a composite picture that she identified as looking like the man who raped her. This picture was preserved and examined by the Court. He also had her look at a "mug book" of pictures. It is not known what the "mug book" was or whose pictures it contained, but Nevarez reported that she did not identify anyone in it.

This composite picture appeared in the Texas Tech newspaper shortly thereafter.

### 3. Police Efforts Intensify

Detective Ronnie Goolsby, a police supervisor, was assigned to take charge of the case soon after. On March 31, 1985 he compiled the chart mentioned above that tracked the similarities between cases. Based on the similarities presented, he ordered a massive surveillance of the area from which the victims had been abducted. The first two stake-outs came up with nothing. The third came up with Tim Cole.

### 4. Tim Cole Becomes a Suspect

On Sunday evening, April 7, 1985 Texas Tech student and U.S. Army veteran Tim Cole drove to the Mr. Gatti's pizza parlor located across the street from the parking lot where Ms. Mallin had been abducted. On the way, he stopped his car and spoke to a young lady. He then went into Mr. Gatti's. An undercover officer, Rosanna Bagby, was sent into the restaurant. On his way out, Mr. Cole talked to Bagby for about five minutes. He introduced himself by name, made small talk, and left.

## 5. The Officers Become Certain

This chance encounter changed Mr. Cole's life. Bagby was later to testify in trial, dramatically, that from the moment she met Tim Cole in this encounter, she thought he was the Tech Rapist:

“Q: (Darnell) What happened after you got in the vehicle with Detective Hudgins and Detective White?”

A: (Bagby) We went over and talked about what he had said and what I had said, and you know, what he looked like, and I thought he was the person we were looking for.

Q: Based on what?

A: The description that the victims had given us.

Q: Had you ever seen the composite shown here in State's Exhibit 3?

A: Yes, I had.

Q: After you came into contact with Timothy Brian Cole on the evening of April 7, 1985, did you feel that you had met that individual?

A: Yes, I did.

Some of the police officers went back to the station. They searched for mug shots of Mr. Cole but found none. On Monday, Goolsby found a Sheriff's Office mug shot of Mr. Cole, taken when he was arrested for a misdemeanor in January 1985.

According to the officers' later accounts, this photo showed Mr. Cole laughing and was somehow unacceptable for use in a photographic spread procedure. Goolsby decided to find a way to get another picture of Mr. Cole to present to Ms. Mallin.

On Tuesday, April 9, 1985, Officer George White went to see Mr. Cole at his home. White lied to Mr. Cole, saying that he needed a photo to help with a robbery investigation. Mr. Cole let White take a Polaroid of him.

## 6. The Photo Spread

White went back to the station and hurriedly put together a “photo spread.” Mr. Cole's Polaroid was placed in a folder along with five other pictures and designated as picture number “5”. Although the original group of photos have never been made

available, copies show that Mr. Cole's picture looked markedly different than the others- his was a Polaroid, they were all mugshots. His facial expression and the direction of his head are also different. Ms. Mallin looked at the photos the same day. The detective who presented them was Nevarez, the same officer who had taken her report the week before.

According to the police report, she "positively identified" Mr. Cole right away.

According to her trial testimony, it was not so simple. After describing how the officers showed her the photos, this exchange occurred:

Q: When that was shown to you, do you remember what you said to the detectives?

A: I said, "I think that is him".

Q: And what did they reply after you said that?

A: They said: "Are you positive?" And I said "Yes, I am positive that is him".

Q: What did you mean when you said: I think that is him?

A: I just had to get a better look, I mean I had to look at all of them.

After this was done, the police wrote the words "That is him" next to Mr. Cole's picture in an effort to cement the identification of Mr. Cole. At trial, Ms. Mallin made it clear that, appearances notwithstanding, those were not her words:

Q: Who was that written by, do you know?

A: "That is him"?

Q: Right.

A: It wasn't me.

## 7. The Arrest of Tim Cole

That same afternoon officers got an arrest warrant for Tim Cole. He was arrested the next day, April 10, 1985. His apartment was searched and he was jailed for the aggravated sexual assault of Ms. Mallin. Officers seized a gold ring and a yellow shirt from Mr. Cole's apartment.

## 8. The Full Line-Up

Detective Goolsby then decided to do a full, “in-person” or “live” lineup. Within an hour or so after Mr. Cole’s arrest, he found one prior rape victim and two women who had reported seeing a suspicious male that fit the composite picture. He had these witnesses come to the station late that afternoon.

Mr. Cole was placed at the number “4” position. He was displayed, along with others, to each witness individually. The two women who had reported a suspicious person said he was not the man they saw. The other rape victim said Mr. Cole “looked like” her assailant but that she could not be sure.

Ms. Mallin, who had hesitantly picked Mr. Cole out of the photo spread the day before, now re-identified him in the lineup. This identification was further solidified by an affidavit that the police prepared for her after the lineup: that document said that she was “positive of [her] identification and there [was] no doubt in her mind”. The words were theirs, not hers. Officer Nevarez, the investigating detective that had been working the case ever since taking her report, was present for the entire process.

## 9. Evidence That Was Consciously Ignored

In every Tech Rapist case, the assailant had acted the same: he approached victims on foot, asking for a favor of some kind, and then forced his way into their car. Tim Cole did not act this way at all toward Bagby: he was in his car, was polite, and identified himself by name.

A fingerprint had been recovered from the car of one of the other victims. On April 10, 1985- the same day the line-up was being put together- this fingerprint was compared to Mr. Cole’s. They did not match.

Police also asked Ms. Mallin about the ring and the shirt found in Mr. Cole’s apartment. She told them unequivocally that the ring was not hers and the shirt was not the one worn by her assailant.

Ms. Mallin was also truthful when, under oath, she admitted that she may have been uncertain about her description of her assailant’s height. Although the police reports made it appear that she had been consistent in her description, she testified under oath that she was “just guessing”.

All of this evidence was downplayed or deliberately ignored by the State.

## 10. Other Forensic Evidence

The State took blood and hair samples of Mr. Cole on the day before his trial

started. The results of comparison testing, using serology and gross hair analysis, were “inconclusive” but “did not exclude” him.

#### D. HOW THE COURTS HANDLED THE CASE: THE JURY TRIAL OF TIM COLE

Mr. Cole’s trial began on September 10, 1986 in the 99<sup>th</sup> District Court of Lubbock County. The proceedings were sensationalized in the *Lubbock Avalanche Journal*, which ran articles suggesting that Mr. Cole was guilty of all of the Tech rapes.

Mr. Cole’s able counsel, Mike Brown, repeatedly tried to introduce evidence that others had committed the crime- including a violent felon named Jerry Johnson. These efforts were ridiculed by the District Attorney, Jim Bob Darnell, and largely blocked by the trial court on the ground that facts pointing to the existence of another suspect were “irrelevant”.

Mr. Cole was convicted and sentenced to twenty-five years in prison on September 18, 1986.

#### E. TIM COLE DIES IN PRISON

Mr. Cole continued to fight his case and protest his innocence. Eventually his appeals ran out. He was repeatedly refused parole because he would not say he was guilty of the crime. Although he suffered from severe asthma his medical condition was never properly attended to.

He died in prison on December 2, 1999 of an asthma attack.

#### F. JERRY JOHNSON TRIES TO TELL THE TRUTH- AND IS IGNORED BY THE SYSTEM

Jerry Johnson, the man the defense said committed the crime against Ms. Mallin, came forward in 1995. He was, and is, serving two consecutive life sentences for other crimes committed in Lubbock in 1985.

Johnson waited until the statute of limitations had expired before he wrote his first letter to authorities. This letter, sent in 1995- four years before Mr. Cole died- was ignored. In this document, he apparently asked for the appointment of counsel to represent him so that he could confess to the crime for which Tim Cole was convicted. Although a copy of this letter has not been located, documents alluding to it and an order denying it were found. According to these papers, which were found in Lubbock County courthouse filings, Johnson was emphatic that he wanted to clear Tim Cole and confess to the crime. Six years after Johnson contacted the judges of Lubbock County, his request was denied in a *pro-forma* order signed on January 12, 2001.

## G. JOHNSON TAKES HIS CASE TO OTHERS AND GIVES A DETAILED CONFESSION

Johnson kept up his efforts. In 2006 and 2007, he contacted Elliott Blackburn of the *Lubbock Avalanche Journal*. He wrote a letter to Mr. Cole, whom he did not know was dead. He also wrote the Innocence Project of Texas.

Law students from Texas Tech affiliated with the Innocence Project of Texas followed up on his letter, eventually seeing him in prison. This visit resulted in a signed confession, dated June 5, 2007. A copy of this confession, which recounts details that could only have been known by the perpetrator, is before the Court.

## H. THE INNOCENCE PROJECT OF TEXAS INVESTIGATES FURTHER

Based on these developments, Texas Tech law students began an extensive examination into the facts of the original case. Aided by Mr. Cole's trial attorney, they reconstructed the crime and the trial by independent efforts. That investigation revealed the facts that are now before the Court.

## I. THE DNA REPORT

On May 19, 2008 the Texas Department of Public Safety informed the Lubbock County District Attorney's Office that it had tested known biological samples from Michele Mallin, Mr. Cole, and Johnson. After extensive DNA testing, the agency concluded that the sperm cells left by Ms. Mallin's assailant belonged to Johnson and not to Mr. Cole. The report, which stated that "to a reasonable degree of scientific certainty, Johnson is the source of the DNA on the sperm cell fraction from stain two from the panties" is before the Court .

## J. ADDITIONAL FACTS REVEALED AT THE HEARING

The Court heard evidence of great value at the hearing.

Michael Logan Ware, Special Fields Bureau Chief of the Dallas County District Attorney's office, testified to the Court as an expert on the causes and consequences of wrongful convictions in Texas. Mr. Ware is a highly qualified attorney with a specialized body of knowledge in this area, and the Court finds him to be qualified as an expert witness. He compared this case to others he has seen in the course of his work in Dallas.

Dr. Gary Wells, Ph. D., testified to the Court as an expert on the issue of eyewitness identification. Dr. Wells is one of the nation's leading scientists in this area, and the Court finds him to be qualified as an expert. After discussing the ways and means

by which eyewitness identifications can be wrong, Dr. Wells analyzed this case and applied his scientific understanding to the facts presented.

Johnson, ably represented by Dexter Gilford, freely confessed his guilt of the crime Tim Cole was convicted of in open court.

Michele Mallin testified not only to the facts of the crime and the trial but also to the emotional impact of discovering that she had identified the wrong man. For the first time, she was able to confront the man who had sexually assaulted her decades ago.

Members of Tim Cole's family also testified to the devastating impact of his wrongful conviction on their lives. All of them believed in his innocence. None of them ever gave up hope that his name would ultimately be cleared.

### **3. THE COURT'S CONCLUSIONS FROM THESE FACTS**

Was Tim Cole innocent of the charges against him? Yes. The evidence is crystal clear that he died in prison an innocent man, and the Court finds to a 100 % moral, legal, and factual certainty that he did not commit the crime for which he was convicted.

But other questions remain: Why was he arrested? How was he misidentified as the perpetrator? Why did he get convicted? Why was he unable to regain his freedom even after Johnson confessed? What can be done so that tragedies such as this can be prevented from happening?

#### **A. WHY TIM COLE WAS ARRESTED: "TUNNEL VISION"**

No evidence linked Tim Cole to the crimes committed by the Tech Rapist. Police suspicion focused on him because he decided to go to a pizza parlor one night in the same neighborhood the abductions had occurred and he resembled a vague description created by a composite drawing.

His behavior that night was entirely ordinary, and as Mr. Ware pointed out, it was also not consistent with what the police knew at that point about how the Tech Rapist approached and overtook his victims. Nonetheless, the police decided that Mr. Cole was the perpetrator. This snap judgment led to terrible consequences.

From that point forward, all attention was focused on Tim Cole. There was no effort to broaden or expand the investigation. Even worse, the police deliberately ignored facts that got in the way of their theory. There are several glaring examples of this: the deliberate destruction of a fingerprint left in Ms. Mallin's car, the failure to investigate a fingerprint left in another victim's car once it was found that it did not match Tim Cole, the disregard of Ms. Mallin when she told them she had never seen the shirt and ring seized from Mr. Cole's home.

Mr. Ware called this lack of objectivity “tunnel vision.” He testified that it has played a contributing role in many of the wrongful convictions analyzed by his office, and the Court finds that it did in this case as well. It is plain from the record that once the Lubbock police fixed their sights on Tim Cole all other avenues of investigation were ignored. To them, it became more a matter of justifying their arrest than finding the truth.

## B. WHY TIM COLE WAS MISIDENTIFIED

A large body of scientific data now exists concerning how and why witnesses identify the wrong person. Dr. Wells testified extensively concerning this, and it is clear that some of the problems that cause eyewitness misidentification happened here. The photos shown to Ms. Mallin were suggestive, the procedures used to get her to identify Tim Cole were improper, and the failure to truthfully document what really happened was inexcusable.

### 1. The Photo Array

After deciding that Tim Cole was their suspect, the Lubbock police assembled a spread of photographs to take to Ms. Mallin. This spread of photographs featured a photo of Tim Cole that was completely unlike the other photos in the spread: the others were mug shots; Tim Cole’s was a Polaroid. The others featured men looking away. Tim Cole’s photo had him looking straight ahead. Even a cursory glance at the photo spread shows gross dissimilarities between Mr. Cole’s picture and all of the others. As Dr. Wells testified, the likelihood of a witness picking a photo that is clearly different from the others around it has been scientifically proven to be very high.

The Court concludes that the photographic line-up put together by the police was clearly suggestive.

### 2. Who Showed It To Ms. Mallin

The officer who showed the photo spread to Ms. Mallin was part of the investigation and thus “knew” that Tim Cole was the person they wanted Ms. Mallin to pick out. Dr. Wells testified that having such a person administer an eyewitness procedure greatly increases the danger that verbal and physical cues will be given to the witness as to who to pick.

### 3. How It Was Shown to Her

It is clear from the record that Ms. Mallin felt pressure to identify someone in the photo spread so that the case could be closed. She was never told that the suspect may or may not have been in the photo spread, that she should not feel compelled to identify anyone in the photos, or that the investigation of the case would continue regardless of her identification. Dr. Wells testified that these admonishments greatly reduce the

chances of misidentification. He also testified that the failure to make them here contributed to the misidentification made by Ms. Mallin.

#### 4. What Was Done Afterward

Despite all of this, Ms. Mallin was still uncertain of her identification- but the officer made it seem as if she was absolutely sure of it, however- even marking her initials next to an emphatic “That’s Him” that he, not she, wrote next to Tim Cole’s picture.

No record of what really happened that day was ever made. Instead, the impression created by the police officers was that her identification of Tim Cole had been quick and straightforward. The evidence, including Ms. Mallin’s recollection, now shows that was not the case. Dr. Wells testified that the failure to completely record what a witness really said and did is another contributing factor to misidentifications because it can easily lead to distortion of memory by the time of trial. This problem clearly existed here.

The live lineup conducted the next day, as well as Ms. Mallin’s courtroom testimony, were tainted by these errors in the initial identification. The damage had already been done, and further procedures only served to make it worse. Dr. Wells testified that this process of reinforcing a faulty identification is a common cause of error in eyewitness cases.

#### 5. Conclusions About The Misidentification of Tim Cole

Ms. Mallin, who this Court finds to be an exceptionally honest witness, did her best during the investigation of this case. The police did not. The failure of the Lubbock police to assemble an accurate photo spread, their use of an officer who had already reached a conclusion about who he wanted her to pick, their decision not to admonish Ms. Mallin properly, and their refusal to document what happened all contributed to the misidentification of Tim Cole as the Tech Rapist. This Court finds that the police, not Ms. Mallin, are responsible for what occurred and that the way in which the eyewitness identification of Tim Cole was procured by them played a major role in Mr. Cole’s wrongful conviction.

#### C. WHY DID TIM COLE GET CONVICTED?

The only real evidence against Mr. Cole at his trial was Ms. Mallin’s eyewitness identification of him.

Prosecutors and defense lawyers alike know the power of such testimony: there are few more dramatic moments in a trial than the one in which the victim points to the

defendant and accuses him in open court. Tim Cole's trial was no exception. What the jurors saw, and heard, was a courageous young woman unshakeable in her belief of who had raped her. What they did not know was how that belief had been shaped and formed by the police.

The Court concludes that the faulty work of the police and the misidentification produced by it was the primary reason why Tim Cole was wrongfully convicted.

#### D. WHY DID TIM COLE DIE IN PRISON?

From the day he was falsely convicted Mr. Cole asserted his innocence. Through years of appeals and later effort, he told anyone who would listen that he had not committed the crime.

Court officials did not listen. His appeals and writs were routinely denied and his pleas were ignored.

Worse, however, was the attitude of the courts to Johnson's claim of guilt. As early as 1995- four years before Tim Cole died- Johnson tried to clear Tim Cole and admit to the rape of Michelle Mallin. His letters were ignored, set aside, and thrown away until one was received by the family of Tim Cole and the Innocence Project of Texas.

Up until that time, no official of the state had conducted any sort of investigation into the innocence of Tim Cole despite repeated pleas to do so.

It is no secret that our current system for resolving claims of actual innocence by prisoners is bureaucratic and hypertechnical. Such claims are lost, ignored, or denied on procedural grounds that have nothing to do with whether the petitioner is innocent. The death of Tim Cole in prison four years after Johnson tried to clear him is a tragic example of how broken our post-conviction system has become.

The Court concludes that Tim Cole died in prison an innocent man because of the failure of our system to investigate and act upon his case. Had the system responded to his claims or those of Jerry Johnson, it is probable that Mr. Cole would have been released years before his death.

#### 4. TO THE TEXAS LEGISLATURE

Under our form of government, a Court can only adjudicate the case before it. It is up to the legislative branch to make laws that improve our system and ensure results that are both reliable and worthy of public confidence.

Courts can, and frequently do, point out problems in the law that only the Legislature can fix. This case highlights several such problems.

## A. THE PROBLEM OF FALSE EYEWITNESS IDENTIFICATION

There is no excuse for the way in which the Lubbock police got Michele Mallin to identify Tim Cole in this case. The procedures they employed were suggestive, improper, and unfair.

It is apparent that there were no rules, policies, or procedures in place forbidding them from doing what they did. This is a problem that exists throughout Texas and begs for a statewide solution.

Laws can and should be passed mandating the use of fair practices in eyewitness identification procedures.

At a minimum, these laws should require police officers to fully inform the witness, in writing, that:

1. The perpetrator may or may not be in the lineup or array;
2. The witness does not have to make an identification;
3. The investigation will continue regardless of whether the witness identifies someone.

They should also require that lineups and photo spreads not be suggestive and mandate the full recording and documentation of the entire procedure from start to finish.

A statute requiring the use of these common-sense practices would go a long way toward preventing another injustice like the one done to Tim Cole. The Court calls upon the elected representatives of the people of this state to pass such a statute as soon as possible.

## B. THE PROBLEM OF LACK OF ACCESS TO THE COURTS BY THE INNOCENT

If our system worked as it should, Tim Cole's claim of innocence and Johnson's claim of guilt would have been fully investigated years before Mr. Cole died. As it turned out, it took a small volunteer group of lawyers and law students and a cooperative prosecutor to finally get justice done, albeit many years too late for Tim Cole.

We can improve our system so that this does not happen again.

Laws should be enacted to provide judicial review to prisoners claiming innocence. Technical hurdles should be removed in such cases, especially where there is a solid claim based on newly discovered or established scientific evidence.

Programs need to be initiated which will give state-funded law schools greater resources to investigate such claims. The Court commends the Innocence Project of Texas clinic at Texas Tech for the uncompromising, solid and creative effort it made on

behalf of the Cole family and Ms. Mallin in this case. Without such work this case would never have been heard. At the same time, the Texas Tech clinic and others like it in the state are understaffed, underfunded, and overburdened. The Legislature can and should address this problem by increasing resources available for law school-based programs like the one at Texas Tech.

The Court also commends the present District Attorney of Lubbock County, Matt Powell, for assisting the Innocence Project of Texas by locating physical evidence and subjecting it to DNA testing. Without his actions, which were taken voluntarily and in the interest of justice, this case would never have been brought. The Legislature can and should encourage more prosecutors to take actions similar to those of Mr. Powell and his Dallas counterpart, Craig Watkins. This could take the form of grants or other assistance to prosecutors who are willing to review claims of actual innocence in cooperation with law school programs.

### C. THE PROBLEM OF COMPENSATING THE INNOCENT FOR THEIR LOSS

There needs to be improvement upon our system of compensating exonerees and their survivors for the devastating wrong done to them. Laws for the compensation of the wrongfully convicted should include provisions to compensate the survivors of those who die in prison.

## 4. FINAL ORDER OF THE COURT

This case properly came to the Court as a Petition for Court of Inquiry. The Petitioners also pled for relief under various provisions of the Texas Constitution, including Article 1, Section 13 and Article 1, Section 30.

Article 1, Section 13 provides that: “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. “

Article 1, Section 30 provides that: “A crime victim has the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process”.

The Petitioners, in open court and through counsel, submitted their case to the Court on these grounds alone at the conclusion of the hearing. After due consideration of the evidence and arguments, it is crystal clear to the Court that Tim Cole’s person and reputation were irreparably harmed and that Petitioners were treated unfairly and without respect. It is the further opinion of the Court that for these injuries he, his survivors, and Ms. Mallin shall have a remedy. It is an axiom of our law that “Justice is to be denied no one who seeks it honestly from a court of law”. No Court can bring back this young man, and no Court can restore to him, his family or Ms. Mallin what they lost due to the

actions of the State of Texas. This Court can, however, rule within the law to right this tragic wrong.

Therefore, it is ORDERED, ADJUDGED, and DECREED on this, the 7<sup>th</sup> day of April 2009, that:

Tim Cole was, and is, innocent of the crime for which he was convicted and imprisoned and is thus exonerated by this Court;

All legal disabilities attaching to him or his survivors as a result of his wrongful conviction are forever removed.

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JUDGE CHARLES BAIRD  
Judge Presiding, 299<sup>th</sup> District Court

Approved as to form and substance:

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JEFF BLACKBURN  
Petitioner's Lawyer