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H.B. No. 34

A BILL TO BE ENTITLED

AN ACT

relating to measures to prevent wrongful convictions.

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

SECTION 1. Chapter 2, Code of Criminal Procedure, is amended by adding Articles 2.023 and 2.32 to read as follows:

Art. 2.023. TRACKING USE OF CERTAIN TESTIMONY. (a) In this article:

(1) "Attorney representing the state" means a district attorney, a criminal district attorney, or a county attorney with criminal jurisdiction.

(2) "Correctional facility" has the meaning assigned by Section 1.07, Penal Code.

(b) An attorney representing the state shall track:

(1) the use of proffered testimony of a person to whom a defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, regardless of whether the testimony is presented at trial; and

(2) any benefits offered or provided to a person in exchange for testimony described by Subdivision (1).

Art. 2.32. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS. (a) In this article:

(1) "Electronic recording" means an audio or audiovisual electronic recording that begins at the time the person

1 being interrogated enters the area of the place of detention in
2 which the interrogation will take place and that continues until
3 the time the interrogation ceases.

4 (2) "Place of detention" means a police station or
5 other building that is a place of operation for a law enforcement
6 agency, including a municipal police department or county sheriff's
7 department, and is owned or operated by the law enforcement agency
8 for the purpose of detaining individuals in connection with the
9 suspected violation of a penal law. The term does not include a
10 courthouse.

11 (b) A law enforcement agency shall make an electronic
12 recording of any custodial interrogation that is of a person
13 suspected of committing or charged with the commission of a felony
14 offense and that the law enforcement agency conducts in a place of
15 detention.

16 (c) An electronic recording of a custodial interrogation
17 that complies with this article is exempt from public disclosure as
18 provided by Section 552.108, Government Code.

19 SECTION 2. Article 38.075, Code of Criminal Procedure, is
20 amended by adding Subsection (c) to read as follows:

21 (c) Evidence of a prior offense committed by a person who
22 gives testimony described by Subsection (a) may be admitted for the
23 purpose of impeachment if the person received a benefit described
24 by Article 39.14(h-1)(2) with respect to the offense, regardless of
25 whether the person was convicted of the offense.

26 SECTION 3. Section 3, Article 38.20, Code of Criminal
27 Procedure, is amended by amending Subsection (c) and adding

1 Subsection (d) to read as follows:

2 (c) The model policy or any other policy adopted by a law
3 enforcement agency under Subsection (a) must:

4 (1) be based on:

5 (A) credible field, academic, or laboratory
6 research on eyewitness memory;

7 (B) relevant policies, guidelines, and best
8 practices designed to reduce erroneous eyewitness identifications
9 and to enhance the reliability and objectivity of eyewitness
10 identifications; and

11 (C) other relevant information as appropriate;
12 and

13 (2) include ~~[address]~~ the following information
14 regarding evidence-based practices ~~[topics]~~:

15 (A) procedures for selecting ~~[the selection of]~~
16 photograph and live lineup filler photographs or participants to
17 ensure that the photographs or participants:

18 (i) are consistent in appearance with the
19 description of the alleged perpetrator that was provided by a
20 witness; and

21 (ii) do not make the suspect noticeably
22 stand out;

23 (B) instructions given to a witness before
24 conducting a photograph or live lineup identification procedure
25 that must include a statement that the person who committed the
26 offense may or may not be present in the procedure and that the
27 investigation will continue regardless of whether the witness

1 identifies a person in the procedure;

2 (C) procedures for documenting and preserving
3 ~~the [documentation and preservation of]~~ results of a photograph or
4 live lineup identification procedure, including the documentation
5 of witness statements, regardless of the outcome of the procedure;

6 (D) procedures for administering a photograph or
7 live lineup identification procedure to an illiterate person or a
8 person with limited English language proficiency;

9 (E) for a live lineup identification procedure,
10 ~~[if practicable,]~~ procedures for assigning an administrator who is
11 unaware of which member of the live lineup is the suspect in the
12 case ~~[or alternative procedures designed to prevent opportunities~~
13 ~~to influence the witness];~~

14 (F) for a photograph identification procedure,
15 procedures for assigning an administrator who is capable of
16 administering a photograph array in a blind manner or in a manner
17 consistent with other proven or supported best practices designed
18 to prevent opportunities to influence the witness; and

19 (G) any other procedures or best practices
20 supported by credible research or commonly accepted as a means to
21 reduce erroneous eyewitness identifications and to enhance the
22 objectivity and reliability of eyewitness identifications.

23 (d) A witness who makes an identification based on a
24 photograph or live lineup identification procedure shall be asked
25 immediately after the procedure to state, in the witness's own
26 words, the witness's level of confidence in making the
27 identification. A law enforcement agency shall document in

1 accordance with Subsection (c)(2)(C) any statement made under this
2 subsection.

3 SECTION 4. Section 5, Article 38.20, Code of Criminal
4 Procedure, is amended to read as follows:

5 Sec. 5. (a) Any evidence or expert testimony presented by
6 the state or the defendant on the subject of eyewitness
7 identification is admissible only subject to compliance with the
8 Texas Rules of Evidence. Except as provided by Subsection (c),
9 evidence [~~Evidence~~] of compliance with the model policy or any
10 other policy adopted under this article [~~or with the minimum~~
11 ~~requirements of this article~~] is not a condition precedent to the
12 admissibility of an out-of-court eyewitness identification.

13 (b) Notwithstanding Article 38.23 as that article relates
14 to a violation of a state statute and except as provided by
15 Subsection (c), a failure to conduct a photograph or live lineup
16 identification procedure in substantial compliance with the model
17 policy or any other policy adopted under this article [~~or with the~~
18 ~~minimum requirements of this article~~] does not bar the admission of
19 eyewitness identification testimony in the courts of this state.

20 (c) If a witness makes an in-court identification of the
21 accused, the eyewitness identification is admissible into evidence
22 against the accused only if the evidence is accompanied by:

23 (1) the details of any prior identification made of
24 the accused by the witness, including the manner in which that
25 identification procedure was conducted; and

26 (2) evidence showing the witness's confidence level as
27 described by the witness at the time of the prior identification.

1 SECTION 5. Section 1, Article 38.22, Code of Criminal
2 Procedure, is amended to read as follows:

3 Sec. 1. In this article:

4 (1) "Electronic recording" has the meaning assigned by
5 Article 2.32.

6 (2) "Written [~~a written~~] statement" [~~of an accused~~]
7 means:

8 (A) [~~(1)~~] a statement made by the accused in the
9 accused's [~~his~~] own handwriting; or

10 (B) [~~(2)~~] a statement made in a language the
11 accused can read or understand that:

12 (i) [~~(A)~~] is signed by the accused; or

13 (ii) [~~(B)~~] bears the mark of the accused,
14 if the accused is unable to write and the mark is witnessed by a
15 person other than a peace officer.

16 SECTION 6. Sections 3(a) and (b), Article 38.22, Code of
17 Criminal Procedure, are amended to read as follows:

18 (a) Except as provided by Section 9, no oral, sign language,
19 or written statement made as a result of a custodial interrogation
20 of a person accused of a felony offense is admissible against the
21 accused in a criminal proceeding, and no [~~No~~] oral or sign language
22 statement made as a result of a custodial interrogation of a person
23 [~~of an~~] accused of any other offense is [~~made as a result of~~
24 custodial interrogation shall be] admissible against the accused in
25 a criminal proceeding, unless:

26 (1) an electronic recording [~~, which may include~~
27 ~~motion picture, video tape, or other visual recording,~~] is made of

1 the custodial interrogation [~~statement~~];

2 (2) after being [~~prior to the statement but during the~~
3 ~~recording the accused is~~] given the warning described by Section
4 2(a), [~~in Subsection (a) of Section 2 above and~~] the accused
5 knowingly, intelligently, and voluntarily waives any rights set out
6 in the warning;

7 (3) the recording device was capable of making an
8 accurate recording, the operator was competent, and the recording
9 is accurate and has not been altered;

10 (4) all voices on the recording are identified; and

11 (5) not later than the 20th day before the date of the
12 proceeding, the attorney representing the defendant is provided
13 with a true, complete, and accurate copy of all recordings of the
14 defendant made under this article.

15 (b) Every electronic recording of [~~any statement made by an~~
16 ~~accused during~~] a custodial interrogation of an accused must be
17 preserved until such time as the defendant's conviction for any
18 offense relating thereto is final, all direct appeals therefrom are
19 exhausted, or the prosecution of such offenses is barred by law.

20 SECTION 7. Article 38.22, Code of Criminal Procedure, is
21 amended by adding Section 9 to read as follows:

22 Sec. 9. An oral, sign language, or written statement of an
23 accused made as a result of a custodial interrogation is admissible
24 without an electronic recording otherwise required by Section 3(a)
25 if the attorney introducing the statement shows good cause for the
26 lack of the recording. For purposes of this section, "good cause"
27 includes:

1 (1) the accused refused to respond to questioning or
2 cooperate in a custodial interrogation of which an electronic
3 recording was made, provided that:

4 (A) a contemporaneous recording of the refusal
5 was made; or

6 (B) the peace officer or agent of the law
7 enforcement agency conducting the interrogation attempted, in good
8 faith, to record the accused's refusal but the accused was
9 unwilling to have the refusal recorded, and the peace officer or
10 agent contemporaneously, in writing, documented the refusal;

11 (2) the statement was not made exclusively as the
12 result of a custodial interrogation, including a statement that was
13 made spontaneously by the accused and not in response to a question
14 by a peace officer;

15 (3) the peace officer or agent of the law enforcement
16 agency conducting the interrogation attempted, in good faith, to
17 record the interrogation but the recording equipment did not
18 function, the officer or agent inadvertently operated the equipment
19 incorrectly, or the equipment malfunctioned or stopped operating
20 without the knowledge of the officer or agent;

21 (4) exigent public safety concerns prevented or
22 rendered infeasible the making of an electronic recording of the
23 custodial interrogation; or

24 (5) the peace officer or agent of the law enforcement
25 agency conducting the interrogation reasonably believed at the time
26 the interrogation began that the accused was not taken into custody
27 for or being interrogated concerning the commission of a felony

1 offense.

2 SECTION 8. Article 39.14, Code of Criminal Procedure, is
3 amended by adding Subsection (h-1) to read as follows:

4 (h-1) In this subsection, "correctional facility" has the
5 meaning assigned by Section 1.07, Penal Code. Notwithstanding any
6 other provision of this article, if the state intends to use at a
7 defendant's trial testimony of a person to whom the defendant made a
8 statement against the defendant's interest while the person was
9 imprisoned or confined in the same correctional facility as the
10 defendant, the state shall disclose to the defendant:

11 (1) the person's complete criminal history, including
12 any charges that were dismissed or reduced as part of a plea
13 bargain;

14 (2) any grant, promise, or offer of immunity from
15 prosecution, reduction of sentence, or other leniency or special
16 treatment, given by the state in exchange for the person's
17 testimony;

18 (3) information concerning other criminal cases in
19 which the person has testified, or offered to testify, against a
20 defendant with whom the person was imprisoned or confined,
21 including any grant, promise, or offer as described by Subdivision
22 (2) given by the state in exchange for the testimony; and

23 (4) other information in the possession, custody, or
24 control of the state that is relevant to the person's credibility.

25 SECTION 9. Section 1701.253, Occupations Code, is amended
26 by adding Subsection (n) to read as follows:

27 (n) As part of the minimum curriculum requirements, the

1 commission shall establish a statewide comprehensive education and
2 training program on eyewitness identification, including the
3 variables that affect a witness's vision and memory, practices for
4 minimizing contamination, and effective eyewitness identification
5 protocols.

6 SECTION 10. STUDY REGARDING USE OF DRUG FIELD TEST KITS.

7 (a) The Texas Forensic Science Commission shall conduct a study
8 regarding the use of drug field test kits by law enforcement
9 agencies in this state. The commission shall:

10 (1) evaluate the quality, accuracy, and reliability of
11 drug field test kits;

12 (2) identify any common problems with drug field test
13 kits;

14 (3) evaluate the availability and adequacy of training
15 for law enforcement officers regarding the use of drug field test
16 kits and the interpretation of the test results; and

17 (4) develop legislative recommendations regarding the
18 use of drug field test kits by law enforcement agencies and
19 regarding related training for law enforcement officers.

20 (b) Not later than December 1, 2018, the Texas Forensic
21 Science Commission shall submit to the governor, the lieutenant
22 governor, and each member of the legislature a written report that
23 summarizes the results of the study conducted under this section
24 and includes any legislative recommendations.

25 SECTION 11. CRIME SCENE INVESTIGATION STUDY. (a) The Texas
26 Forensic Science Commission shall conduct a study regarding the
27 manner in which crime scene investigations are conducted in this

1 state. The commission shall:

2 (1) evaluate the standard procedures used in
3 processing a crime scene and evaluate the quality of crime scene
4 investigations;

5 (2) evaluate the availability and adequacy of the
6 training or continuing education provided to crime scene
7 investigators; and

8 (3) develop legislative recommendations regarding
9 improvements to crime scene investigation procedures and training.

10 (b) Not later than December 1, 2018, the Texas Forensic
11 Science Commission shall submit to the governor, the lieutenant
12 governor, and each member of the legislature a written report that
13 summarizes the results of the study conducted under this section
14 and includes any legislative recommendations.

15 SECTION 12. Article 2.32 and Section 9, Article 38.22, Code
16 of Criminal Procedure, as added by this Act, and Sections 1 and 3,
17 Article 38.22, Code of Criminal Procedure, as amended by this Act,
18 apply to the use of a statement made as a result of a custodial
19 interrogation that occurs on or after the effective date of this
20 Act, regardless of whether the criminal offense giving rise to that
21 interrogation is committed before, on, or after the effective date
22 of this Act.

23 SECTION 13. Article 38.075(c), Code of Criminal Procedure,
24 as added by this Act, applies to the admissibility of evidence in a
25 criminal proceeding that commences on or after the effective date
26 of this Act. The admissibility of evidence in a criminal proceeding
27 that commences before the effective date of this Act is governed by

1 the law in effect on the date the proceeding commenced, and the
2 former law is continued in effect for that purpose.

3 SECTION 14. (a) Section 3(d), Article 38.20, Code of
4 Criminal Procedure, as added by this Act, applies only to a
5 photograph or live lineup identification procedure conducted on or
6 after the effective date of this Act, regardless of whether the
7 offense to which the procedure is related was committed before, on,
8 or after the effective date of this Act.

9 (b) Section 5, Article 38.20, Code of Criminal Procedure, as
10 amended by this Act, applies only to the trial of an offense with
11 respect to which a prior identification of the accused occurred on
12 or after the effective date of this Act, regardless of whether the
13 offense that is the subject of the trial was committed before, on,
14 or after the effective date of this Act.

15 SECTION 15. Article 39.14(h-1), Code of Criminal Procedure,
16 as added by this Act, applies to the prosecution of an offense
17 committed on or after the effective date of this Act. The
18 prosecution of an offense committed before the effective date of
19 this Act is governed by the law in effect on the date the offense was
20 committed, and the former law is continued in effect for that
21 purpose. For purposes of this section, an offense is committed
22 before the effective date of this Act if any element of the offense
23 occurs before the effective date.

24 SECTION 16. Not later than January 1, 2018, the Texas
25 Commission on Law Enforcement shall establish the eyewitness
26 identification education and training program as required by
27 Section 1701.253(n), Occupations Code, as added by this Act.

1 SECTION 17. This Act takes effect September 1, 2017.