

1-1 By: Smithee, et al. (Senate Sponsor - Perry) H.B. No. 34
 1-2 (In the Senate - Received from the House May 3, 2017;
 1-3 May 18, 2017, read first time and referred to Committee on Criminal
 1-4 Justice; May 21, 2017, reported adversely, with favorable
 1-5 Committee Substitute by the following vote: Yeas 7, Nays 0;
 1-6 May 21, 2017, sent to printer.)

1-7 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-8				
1-9	X			
1-10			X	
1-11			X	
1-12	X			
1-13	X			
1-14	X			
1-15	X			
1-16	X			
1-17	X			

1-18 COMMITTEE SUBSTITUTE FOR H.B. No. 34 By: Whitmire

1-19 A BILL TO BE ENTITLED
 1-20 AN ACT

1-21 relating to measures to prevent wrongful convictions.
 1-22 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
 1-23 SECTION 1. Chapter 2, Code of Criminal Procedure, is
 1-24 amended by adding Articles 2.023 and 2.32 to read as follows:
 1-25 Art. 2.023. TRACKING USE OF CERTAIN TESTIMONY. (a) In this
 1-26 article:
 1-27 (1) "Attorney representing the state" means a district
 1-28 attorney, a criminal district attorney, or a county attorney with
 1-29 criminal jurisdiction.
 1-30 (2) "Correctional facility" has the meaning assigned
 1-31 by Section 1.07, Penal Code.
 1-32 (b) An attorney representing the state shall track:
 1-33 (1) the use of testimony of a person to whom a
 1-34 defendant made a statement against the defendant's interest while
 1-35 the person was imprisoned or confined in the same correctional
 1-36 facility as the defendant, regardless of whether the testimony is
 1-37 presented at trial; and
 1-38 (2) any benefits offered or provided to a person in
 1-39 exchange for testimony described by Subdivision (1).
 1-40 Art. 2.32. ELECTRONIC RECORDING OF CUSTODIAL
 1-41 INTERROGATIONS. (a) In this article:
 1-42 (1) "Electronic recording" means an audiovisual
 1-43 electronic recording, or an audio recording if an audiovisual
 1-44 electronic recording is unavailable, that is authentic, accurate,
 1-45 and unaltered.
 1-46 (2) "Law enforcement agency" means an agency of the
 1-47 state, or of a county, municipality, or other political subdivision
 1-48 of this state, that employs peace officers who, in the routine
 1-49 performance of the officers' duties, conduct custodial
 1-50 interrogations of persons suspected of committing criminal
 1-51 offenses.
 1-52 (3) "Place of detention" means a police station or
 1-53 other building that is a place of operation for a law enforcement
 1-54 agency, including a municipal police department or county sheriff's
 1-55 department, and is owned or operated by the law enforcement agency
 1-56 for the purpose of detaining persons in connection with the
 1-57 suspected violation of a penal law. The term does not include a
 1-58 courthouse.
 1-59 (b) Unless good cause exists that makes electronic
 1-60 recording infeasible, a law enforcement agency shall make a

2-1 complete and contemporaneous electronic recording of any custodial
2-2 interrogation that occurs in a place of detention and is of a person
2-3 suspected of committing or charged with the commission of an
2-4 offense under:

2-5 (1) Section 19.02, Penal Code (murder);
2-6 (2) Section 19.03, Penal Code (capital murder);
2-7 (3) Section 20.03, Penal Code (kidnapping);
2-8 (4) Section 20.04, Penal Code (aggravated
2-9 kidnapping);

2-10 (5) Section 20A.02, Penal Code (trafficking of
2-11 persons);

2-12 (6) Section 20A.03, Penal Code (continuous
2-13 trafficking of persons);

2-14 (7) Section 21.02, Penal Code (continuous sexual abuse
2-15 of young child or children);

2-16 (8) Section 21.11, Penal Code (indecent with a
2-17 child);

2-18 (9) Section 21.12, Penal Code (improper relationship
2-19 between educator and student);

2-20 (10) Section 22.011, Penal Code (sexual assault);
2-21 (11) Section 22.021, Penal Code (aggravated sexual
2-22 assault); or

2-23 (12) Section 43.25, Penal Code (sexual performance by
2-24 a child).

2-25 (c) For purposes of Subsection (b), an electronic recording
2-26 of a custodial interrogation is complete only if the recording:

2-27 (1) begins at or before the time the person being
2-28 interrogated enters the area of the place of detention in which the
2-29 custodial interrogation will take place or receives a warning
2-30 described by Section 2(a), Article 38.22, whichever is earlier; and
2-31 (2) continues until the time the interrogation ceases.

2-32 (d) For purposes of Subsection (b), good cause that makes
2-33 electronic recording infeasible includes the following:

2-34 (1) the person being interrogated refused to respond
2-35 or cooperate in a custodial interrogation at which an electronic
2-36 recording was being made, provided that:

2-37 (A) a contemporaneous recording of the refusal
2-38 was made; or

2-39 (B) the peace officer or agent of the law
2-40 enforcement agency conducting the interrogation attempted, in good
2-41 faith, to record the person's refusal but the person was unwilling
2-42 to have the refusal recorded, and the peace officer or agent
2-43 contemporaneously, in writing, documented the refusal;

2-44 (2) the statement was not made as the result of a
2-45 custodial interrogation, including a statement that was made
2-46 spontaneously by the accused and not in response to a question by a
2-47 peace officer;

2-48 (3) the peace officer or agent of the law enforcement
2-49 agency conducting the interrogation attempted, in good faith, to
2-50 record the interrogation but the recording equipment did not
2-51 function, the officer or agent inadvertently operated the equipment
2-52 incorrectly, or the equipment malfunctioned or stopped operating
2-53 without the knowledge of the officer or agent;

2-54 (4) exigent public safety concerns prevented or
2-55 rendered infeasible the making of an electronic recording of the
2-56 statement; or

2-57 (5) the peace officer or agent of the law enforcement
2-58 agency conducting the interrogation reasonably believed at the time
2-59 the interrogation commenced that the person being interrogated was
2-60 not taken into custody for or being interrogated concerning the
2-61 commission of an offense listed in Subsection (b).

2-62 (e) A recording of a custodial interrogation that complies
2-63 with this article is exempt from public disclosure as provided by
2-64 Section 552.108, Government Code.

2-65 SECTION 2. Article 38.075, Code of Criminal Procedure, is
2-66 amended by adding Subsection (c) to read as follows:

2-67 (c) Evidence of a prior offense committed by a person who
2-68 gives testimony described by Subsection (a) may be admitted for the
2-69 purpose of impeachment if the person received a benefit described

3-1 by Article 39.14(h-1)(2) with respect to the offense, regardless of
3-2 whether the person was convicted of the offense.

3-3 SECTION 3. Section 3, Article 38.20, Code of Criminal
3-4 Procedure, is amended by amending Subsection (c) and adding
3-5 Subsection (d) to read as follows:

3-6 (c) The model policy or any other policy adopted by a law
3-7 enforcement agency under Subsection (a) must:

3-8 (1) be based on:
3-9 (A) credible field, academic, or laboratory
3-10 research on eyewitness memory;

3-11 (B) relevant policies, guidelines, and best
3-12 practices designed to reduce erroneous eyewitness identifications
3-13 and to enhance the reliability and objectivity of eyewitness
3-14 identifications; and

3-15 (C) other relevant information as appropriate;
3-16 and

3-17 (2) include [address] the following information
3-18 regarding evidence-based practices [topics]:

3-19 (A) procedures for selecting [the selection of]
3-20 photograph and live lineup filler photographs or participants to
3-21 ensure that the photographs or participants:

3-22 (i) are consistent in appearance with the
3-23 description of the alleged perpetrator that was provided by a
3-24 witness; and

3-25 (ii) do not make the suspect noticeably
3-26 stand out;

3-27 (B) instructions given to a witness before
3-28 conducting a photograph or live lineup identification procedure
3-29 that must include a statement that the person who committed the
3-30 offense may or may not be present in the procedure and that the
3-31 investigation will continue regardless of whether the witness
3-32 identifies a person in the procedure;

3-33 (C) procedures for documenting and preserving
3-34 the [documentation and preservation of] results of a photograph or
3-35 live lineup identification procedure, including the documentation
3-36 of witness statements, regardless of the outcome of the procedure;

3-37 (D) procedures for administering a photograph or
3-38 live lineup identification procedure to an illiterate person or a
3-39 person with limited English language proficiency;

3-40 (E) for a live lineup identification procedure,
3-41 [if practicable,] procedures for assigning an administrator who is
3-42 unaware of which member of the live lineup is the suspect in the
3-43 case [or alternative procedures designed to prevent opportunities
3-44 to influence the witness];

3-45 (F) for a photograph identification procedure,
3-46 procedures for assigning an administrator who is capable of
3-47 administering a photograph array in a blind manner or in a manner
3-48 consistent with other proven or supported best practices designed
3-49 to prevent opportunities to influence the witness; and

3-50 (G) any other procedures or best practices
3-51 supported by credible research or commonly accepted as a means to
3-52 reduce erroneous eyewitness identifications and to enhance the
3-53 objectivity and reliability of eyewitness identifications.

3-54 (d) A witness who makes an identification based on a
3-55 photograph or live lineup identification procedure shall be asked
3-56 immediately after the procedure to state, in the witness's own
3-57 words, the witness's level of confidence in making the
3-58 identification. A law enforcement agency shall document in
3-59 accordance with Subsection (c)(2)(C) any statement made under this
3-60 subsection.

3-61 SECTION 4. Section 5, Article 38.20, Code of Criminal
3-62 Procedure, is amended to read as follows:

3-63 Sec. 5. (a) Any evidence or expert testimony presented by
3-64 the state or the defendant on the subject of eyewitness
3-65 identification is admissible only subject to compliance with the
3-66 Texas Rules of Evidence. Except as provided by Subsection (c),
3-67 evidence [Evidence] of compliance with the model policy or any
3-68 other policy adopted under this article [or with the minimum
3-69 requirements of this article] is not a condition precedent to the

4-1 admissibility of an out-of-court eyewitness identification.

4-2 (b) Notwithstanding Article 38.23 as that article relates
4-3 to a violation of a state statute and except as provided by
4-4 Subsection (c), a failure to conduct a photograph or live lineup
4-5 identification procedure in substantial compliance with the model
4-6 policy or any other policy adopted under this article [~~or with the~~
4-7 ~~minimum requirements of this article~~] does not bar the admission of
4-8 eyewitness identification testimony in the courts of this state.

4-9 (c) If a witness who has previously made an out-of-court
4-10 photograph or live lineup identification of the accused makes an
4-11 in-court identification of the accused, the eyewitness
4-12 identification is admissible into evidence against the accused only
4-13 if the evidence is accompanied by:

4-14 (1) the details of each prior photograph or live
4-15 lineup identification made of the accused by the witness, including
4-16 the manner in which the identification procedure was conducted; and

4-17 (2) evidence showing the witness's confidence level as
4-18 described by the witness at the time of a prior photograph or live
4-19 lineup identification specified under Subdivision (1).

4-20 SECTION 5. Article 38.22, Code of Criminal Procedure, is
4-21 amended by adding Section 9 to read as follows:

4-22 Sec. 9. Notwithstanding any other provision of this
4-23 article, no oral, sign language, or written statement that is made
4-24 by a person accused of an offense listed in Article 2.32(b) and made
4-25 as a result of a custodial interrogation occurring in a place of
4-26 detention, as that term is defined by Article 2.32, is admissible
4-27 against the accused in a criminal proceeding unless:

4-28 (1) an electronic recording was made of the statement,
4-29 as required by Article 2.32(b); or

4-30 (2) the attorney representing the state offers proof
4-31 satisfactory to the court that good cause, as described by Article
4-32 2.32(d), existed that made electronic recording of the custodial
4-33 interrogation infeasible.

4-34 SECTION 6. Article 39.14, Code of Criminal Procedure, is
4-35 amended by adding Subsection (h-1) to read as follows:

4-36 (h-1) In this subsection, "correctional facility" has the
4-37 meaning assigned by Section 1.07, Penal Code. Notwithstanding any
4-38 other provision of this article, if the state intends to use at a
4-39 defendant's trial testimony of a person to whom the defendant made a
4-40 statement against the defendant's interest while the person was
4-41 imprisoned or confined in the same correctional facility as the
4-42 defendant, the state shall disclose to the defendant:

4-43 (1) the person's complete criminal history, including
4-44 any charges that were dismissed or reduced as part of a plea
4-45 bargain;

4-46 (2) any grant, promise, or offer of immunity from
4-47 prosecution, reduction of sentence, or other leniency or special
4-48 treatment, given by the state in exchange for the person's
4-49 testimony;

4-50 (3) information concerning other criminal cases in
4-51 which the person has testified, or offered to testify, against a
4-52 defendant with whom the person was imprisoned or confined,
4-53 including any grant, promise, or offer as described by Subdivision
4-54 (2) given by the state in exchange for the testimony; and

4-55 (4) other information in the possession, custody, or
4-56 control of the state that is relevant to the person's credibility.

4-57 SECTION 7. Section 1701.253, Occupations Code, is amended
4-58 by adding Subsection (n) to read as follows:

4-59 (n) As part of the minimum curriculum requirements, the
4-60 commission shall establish a statewide comprehensive education and
4-61 training program on eyewitness identification, including the
4-62 variables that affect a witness's vision and memory, practices for
4-63 minimizing contamination, and effective eyewitness identification
4-64 protocols.

4-65 SECTION 8. STUDY REGARDING USE OF DRUG FIELD TEST KITS. (a)
4-66 The Texas Forensic Science Commission shall conduct a study
4-67 regarding the use of drug field test kits by law enforcement
4-68 agencies in this state. The commission shall:

4-69 (1) evaluate the quality, accuracy, and reliability of

5-1 drug field test kits;

5-2 (2) identify any common problems with drug field test
5-3 kits;

5-4 (3) evaluate the availability and adequacy of training
5-5 for law enforcement officers regarding the use of drug field test
5-6 kits and the interpretation of the test results; and

5-7 (4) develop legislative recommendations regarding the
5-8 use of drug field test kits by law enforcement agencies and
5-9 regarding related training for law enforcement officers.

5-10 (b) Not later than December 1, 2018, the Texas Forensic
5-11 Science Commission shall submit to the governor, the lieutenant
5-12 governor, and each member of the legislature a written report that
5-13 summarizes the results of the study conducted under this section
5-14 and includes any legislative recommendations.

5-15 SECTION 9. CRIME SCENE INVESTIGATION STUDY. (a) The Texas
5-16 Forensic Science Commission shall conduct a study regarding the
5-17 manner in which crime scene investigations are conducted in this
5-18 state. The commission shall:

5-19 (1) evaluate the standard procedures used in
5-20 processing a crime scene and evaluate the quality of crime scene
5-21 investigations;

5-22 (2) evaluate the availability and adequacy of the
5-23 training or continuing education provided to crime scene
5-24 investigators; and

5-25 (3) develop legislative recommendations regarding
5-26 improvements to crime scene investigation procedures and training.

5-27 (b) Not later than December 1, 2018, the Texas Forensic
5-28 Science Commission shall submit to the governor, the lieutenant
5-29 governor, and each member of the legislature a written report that
5-30 summarizes the results of the study conducted under this section
5-31 and includes any legislative recommendations.

5-32 SECTION 10. Article 2.32 and Section 9, Article 38.22, Code
5-33 of Criminal Procedure, as added by this Act, apply to the use of a
5-34 statement resulting from a custodial interrogation that occurs on
5-35 or after March 1, 2018, regardless of whether the criminal offense
5-36 giving rise to that interrogation is committed before, on, or after
5-37 that date.

5-38 SECTION 11. Article 38.075(c), Code of Criminal Procedure,
5-39 as added by this Act, applies to the admissibility of evidence in a
5-40 criminal proceeding that commences on or after the effective date
5-41 of this Act. The admissibility of evidence in a criminal proceeding
5-42 that commences before the effective date of this Act is governed by
5-43 the law in effect on the date the proceeding commenced, and the
5-44 former law is continued in effect for that purpose.

5-45 SECTION 12. (a) Section 3(d), Article 38.20, Code of
5-46 Criminal Procedure, as added by this Act, applies only to a
5-47 photograph or live lineup identification procedure conducted on or
5-48 after the effective date of this Act, regardless of whether the
5-49 offense to which the procedure is related was committed before, on,
5-50 or after the effective date of this Act.

5-51 (b) Section 5, Article 38.20, Code of Criminal Procedure, as
5-52 amended by this Act, applies only to the trial of an offense with
5-53 respect to which a prior photograph or live lineup identification
5-54 of the accused occurred on or after the effective date of this Act,
5-55 regardless of whether the offense that is the subject of the trial
5-56 was committed before, on, or after the effective date of this Act.

5-57 SECTION 13. Article 39.14(h-1), Code of Criminal Procedure,
5-58 as added by this Act, applies to the prosecution of an offense
5-59 committed on or after the effective date of this Act. The
5-60 prosecution of an offense committed before the effective date of
5-61 this Act is governed by the law in effect on the date the offense was
5-62 committed, and the former law is continued in effect for that
5-63 purpose. For purposes of this section, an offense is committed
5-64 before the effective date of this Act if any element of the offense
5-65 occurs before the effective date.

5-66 SECTION 14. Not later than January 1, 2018, the Texas
5-67 Commission on Law Enforcement shall establish the eyewitness
5-68 identification education and training program as required by
5-69 Section 1701.253(n), Occupations Code, as added by this Act.

6-1 SECTION 15. This Act takes effect September 1, 2017.

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