

By: Smithee

H.B. No. 3127

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 Article 2.023 to read as follows:

Art. 2.023. POLICY REGARDING USE OF CERTAIN TESTIMONY. (a)

In this article:

(1) "Attorney representing the state" means a district attorney, criminal district attorney, or county attorney performing the duties of a district attorney.

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

(b) An attorney representing the state shall adopt a written policy regarding the 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 and regarding how that testimony may be used at the defendant's trial. The policy must require the attorney representing the state to:

(1) implement a system to track the use of, and benefits offered or provided in exchange for, testimony described by this article; and

(2) promptly disclose information regarding the testifying person as required by Article 39.14(h-1).

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

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

5 (1) "Custodial interrogation" means any investigative  
6 questioning, other than routine questions associated with booking,  
7 by a peace officer during which:

8 (A) a reasonable person in the position of the  
9 person being interrogated would consider himself or herself to be  
10 in custody; and

11 (B) a question is asked that is reasonably likely  
12 to elicit an incriminating response.

13 (2) "Electronic recording" means an audio or  
14 audiovisual electronic recording that begins at the time the person  
15 being interrogated enters the area of the place of detention in  
16 which the custodial interrogation will take place and that  
17 continues until the time the interrogation ceases.

18 (3) "Place of detention" means a police station or  
19 other building that is a place of operation for a law enforcement  
20 agency, including a municipal police department or county sheriff's  
21 department, and is owned or operated by the law enforcement agency  
22 for the purpose of detaining individuals in connection with the  
23 suspected violation of a penal law. The term does not include a  
24 courthouse.

25 (b) A law enforcement agency shall make an electronic  
26 recording of any custodial interrogation that is of a person  
27 suspected of committing or charged with the commission of a felony

1 offense and that the law enforcement agency conducts in a place of  
2 detention.

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

6 SECTION 3. Article 38.075, Code of Criminal Procedure, is  
7 amended by adding Subsection (c) to read as follows:

8 (c) Notwithstanding Rules 404 and 405, Texas Rules of  
9 Evidence, evidence of other crimes, wrongs, or acts committed by,  
10 and information described by Article 39.14(h-1) regarding, a  
11 person who gives testimony described by Subsection (a) shall be  
12 admitted for its bearing on relevant matters, including the  
13 character of the person.

14 SECTION 4. Sections 3(a) and (c), Article 38.20, Code of  
15 Criminal Procedure, are amended to read as follows:

16 (a) Each law enforcement agency shall adopt and [~~7~~]  
17 ~~implement [7, and as necessary amend a detailed written policy~~  
18 ~~regarding the administration of photograph and live lineup~~  
19 ~~identification procedures in accordance with this article. A law~~  
20 ~~enforcement agency may adopt:~~

21 [~~1~~] the model policy adopted under Subsection (b) [~~7~~]  
22 ~~or~~

23 [~~2~~] ~~the agency's own policy that, at a minimum,~~  
24 ~~conforms to the requirements of Subsection (c)].~~

25 (c) The model policy [~~or any other policy adopted by a law~~  
26 ~~enforcement agency]~~ under Subsection (b) [~~a~~] must:

27 (1) be based on:

1 (A) credible field, academic, or laboratory  
2 research on eyewitness memory;

3 (B) relevant policies, guidelines, and best  
4 practices designed to reduce erroneous eyewitness identifications  
5 and to enhance the reliability and objectivity of eyewitness  
6 identifications; and

7 (C) other relevant information as appropriate;  
8 and

9 (2) address the following topics:

10 (A) the selection of photograph and live lineup  
11 filler photographs or participants;

12 (B) instructions given to a witness before  
13 conducting a photograph or live lineup identification procedure;

14 (C) the documentation and preservation of  
15 results of a photograph or live lineup identification procedure,  
16 including the documentation of witness statements, regardless of  
17 the outcome of the procedure;

18 (D) procedures for administering a photograph or  
19 live lineup identification procedure to an illiterate person or a  
20 person with limited English language proficiency;

21 (E) for a live lineup identification procedure,  
22 if practicable, procedures for assigning an administrator who is  
23 unaware of which member of the live lineup is the suspect in the  
24 case or alternative procedures designed to prevent opportunities to  
25 influence the witness;

26 (F) for a photograph identification procedure,  
27 procedures for assigning an administrator who is capable of

1 administering a photograph array in a blind manner or in a manner  
2 consistent with other proven or supported best practices designed  
3 to prevent opportunities to influence the witness; and

4 (G) any other procedures or best practices  
5 supported by credible research or commonly accepted as a means to  
6 reduce erroneous eyewitness identifications and to enhance the  
7 objectivity and reliability of eyewitness identifications.

8 SECTION 5. Section 4(b), Article 38.20, Code of Criminal  
9 Procedure, is amended to read as follows:

10 (b) Not later than September 1 of each even-numbered year,  
11 each law enforcement agency shall adopt the updated model policy as  
12 modified by the institute under Subsection (a) in the preceding  
13 year [~~review its policy adopted under this article and shall modify~~  
14 ~~that policy as appropriate~~].

15 SECTION 6. Section 5, Article 38.20, Code of Criminal  
16 Procedure, is amended to read as follows:

17 Sec. 5. (a) Any evidence or expert testimony presented by  
18 the state or the defendant on the subject of eyewitness  
19 identification is admissible only subject to compliance with the  
20 Texas Rules of Evidence. Except as provided by Subsection (c),  
21 evidence [~~Evidence~~] of compliance with the model policy [~~or any~~  
22 ~~other policy~~] adopted under this article [~~or with the minimum~~  
23 ~~requirements of this article~~] is not a condition precedent to the  
24 admissibility of an out-of-court eyewitness identification.

25 (b) Notwithstanding Article 38.23 as that article relates  
26 to a violation of a state statute and except as provided by  
27 Subsection (c), a failure to conduct a photograph or live lineup

1 identification procedure in substantial compliance with the model  
2 policy [~~or any other policy~~] adopted under this article [~~or with the~~  
3 ~~minimum requirements of this article~~] does not bar the admission of  
4 eyewitness identification testimony in the courts of this state.

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

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

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

13 SECTION 7. Section 1, Article 38.22, Code of Criminal  
14 Procedure, is amended to read as follows:

15 Sec. 1. In this article:

16 (1) "Electronic recording" has the meaning assigned by  
17 Article 2.32.

18 (2) "Written [~~, a written~~] statement" [~~of an accused~~]  
19 means:

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

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

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

25 (ii) [~~(B)~~] bears the mark of the accused,

26 if the accused is unable to write and the mark is witnessed by a  
27 person other than a peace officer.

1 SECTION 8. Sections 3(a) and (b), Article 38.22, Code of  
2 Criminal Procedure, are amended to read as follows:

3 (a) Except as provided by Section 9, no oral, sign language,  
4 or written statement made as a result of a custodial interrogation  
5 of a person accused of a felony offense is admissible against the  
6 accused in a criminal proceeding, and no ~~[No]~~ oral or sign language  
7 statement made as a result of a custodial interrogation of a person  
8 ~~[of an]~~ accused of any other offense is ~~[made as a result of~~  
9 ~~custodial interrogation shall be]~~ admissible against the accused in  
10 a criminal proceeding, unless:

11 (1) an electronic recording ~~[, which may include~~  
12 ~~motion picture, video tape, or other visual recording,]~~ is made of  
13 the custodial interrogation ~~[statement]~~;

14 (2) after being ~~[prior to the statement but during the~~  
15 ~~recording the accused is]~~ given the warning described by Section  
16 2(a), ~~[in Subsection (a) of Section 2 above and]~~ the accused  
17 knowingly, intelligently, and voluntarily waives any rights set out  
18 in the warning;

19 (3) the recording device was capable of making an  
20 accurate recording, the operator was competent, and the recording  
21 is accurate and has not been altered;

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

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

27 (b) Every electronic recording of ~~[any statement made by an~~

1 ~~accused during]~~ a custodial interrogation must be preserved until  
2 such time as the defendant's conviction for any offense relating  
3 thereto is final, all direct appeals therefrom are exhausted, or  
4 the prosecution of such offenses is barred by law.

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

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

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

16 (A) a contemporaneous recording of the refusal  
17 was made; or

18 (B) the peace officer or agent of the law  
19 enforcement agency conducting the interrogation attempted, in good  
20 faith, to record the accused's refusal but the accused was  
21 unwilling to have the refusal recorded, and the peace officer or  
22 agent contemporaneously, in writing, documented the refusal;

23 (2) the statement was not made exclusively as the  
24 result of a custodial interrogation, including a statement that was  
25 made spontaneously by the accused and not in response to a question  
26 by a peace officer;

27 (3) the peace officer or agent of the law enforcement



1 agency conducting the interrogation attempted, in good faith, to  
2 record the interrogation but the recording equipment did not  
3 function, the officer or agent inadvertently operated the equipment  
4 incorrectly, or the equipment malfunctioned or stopped operating  
5 without the knowledge of the officer or agent;

6 (4) exigent public safety concerns prevented or  
7 rendered infeasible the making of an electronic recording of the  
8 custodial interrogation; or

9 (5) the peace officer or agent of the law enforcement  
10 agency conducting the interrogation reasonably believed at the time  
11 the interrogation began that the accused interrogated was not taken  
12 into custody for or being interrogated concerning the commission of  
13 a felony offense.

14 SECTION 10. Article 39.14, Code of Criminal Procedure, is  
15 amended by adding Subsection (h-1) to read as follows:

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

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

26 (2) any grant, promise, or offer of immunity from  
27 prosecution, reduction of sentence, or other leniency or special

1 treatment, given by the state in exchange for the person's  
2 testimony;

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

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

10 SECTION 11. Section 1701.253, Occupations Code, is amended  
11 by adding Subsection (n) to read as follows:

12 (n) As part of the minimum curriculum requirements, the  
13 commission shall establish a statewide comprehensive education and  
14 training program on eyewitness identification, including the  
15 variables that affect a witness's vision and memory, practices for  
16 minimizing contamination, and effective eyewitness identification  
17 protocols.

18 SECTION 12. STUDY REGARDING USE OF DRUG FIELD TEST KITS.

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

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

24 (2) identify any common problems with drug field test  
25 kits;

26 (3) evaluate the availability and adequacy of training  
27 for law enforcement officers regarding the use of drug field test

1 kits and the interpretation of the test results; and

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

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

10 SECTION 13. CRIME SCENE INVESTIGATION STUDY. (a) The Texas  
11 Forensic Science Commission shall conduct a study regarding the  
12 manner in which crime scene investigations are conducted in this  
13 state. The commission shall:

14 (1) evaluate the standard procedures used in  
15 processing a crime scene and evaluate the quality of crime scene  
16 investigations;

17 (2) evaluate the availability and adequacy of the  
18 training or continuing education provided to crime scene  
19 investigators; and

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

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

27 SECTION 14. Not later than December 1, 2017, each attorney

1 representing the state, as defined by Article 2.023, Code of  
2 Criminal Procedure, as added by this Act, shall adopt the written  
3 policy required by that article.

4 SECTION 15. Article 2.32 and Section 9, Article 38.22, Code  
5 of Criminal Procedure, as added by this Act, and Sections 1 and 3,  
6 Article 38.22, Code of Criminal Procedure, as amended by this Act,  
7 apply to the use of a statement made as a result of a custodial  
8 interrogation that occurs on or after the effective date of this  
9 Act, regardless of whether the criminal offense giving rise to that  
10 interrogation is committed before, on, or after that date.

11 SECTION 16. Article 38.075(c), Code of Criminal Procedure,  
12 as added by this Act, applies to the admissibility of evidence in a  
13 criminal proceeding that commences on or after the effective date  
14 of this Act. The admissibility of evidence in a criminal proceeding  
15 that commences before the effective date of this Act is governed by  
16 the law in effect on the date the proceeding commenced, and the  
17 former law is continued in effect for that purpose.

18 SECTION 17. (a) Not later than October 1, 2017, each law  
19 enforcement agency to which Article 38.20, Code of Criminal  
20 Procedure, as amended by this Act, applies shall adopt the model  
21 policy as required by that article.

22 (b) Sections 5(a) and (b), Article 38.20, Code of Criminal  
23 Procedure, as amended by this Act, apply only to a photograph or  
24 live lineup identification procedure conducted on or after January  
25 1, 2018, regardless of whether the offense to which the procedure is  
26 related was committed before, on, or after January 1, 2018.

27 (c) Section 5(c), Article 38.20, Code of Criminal

1 Procedure, as added by this Act, applies only to the trial of an  
2 offense with respect to which a prior identification of the accused  
3 occurred on or after January 1, 2018, regardless of whether the  
4 offense that is the subject of the trial was committed before, on,  
5 or after January 1, 2018.

6 SECTION 18. Article 39.14(h-1), Code of Criminal Procedure,  
7 as added by this Act, applies to the prosecution of an offense  
8 committed on or after the effective date of this Act. The  
9 prosecution of an offense committed before the effective date of  
10 this Act is governed by the law in effect on the date the offense was  
11 committed, and the former law is continued in effect for that  
12 purpose. For purposes of this section, an offense is committed  
13 before the effective date of this Act if any element of the offense  
14 occurs before the effective date.

15 SECTION 19. Not later than January 1, 2018, the Texas  
16 Commission on Law Enforcement shall establish the eyewitness  
17 identification education and training program as required by  
18 Section 1701.253(n), Occupations Code, as added by this Act.

19 SECTION 20. This Act takes effect September 1, 2017.