

House Bill 34
Senate Amendments
Section-by-Section Analysis

HOUSE VERSION

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

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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 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, if known by the attorney representing the state, 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). [FA1(1)]

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

(1) "Electronic recording" means an audiovisual electronic recording, or an audio recording if an audiovisual electronic recording is unavailable, that is authentic, accurate, and unaltered.

(2) "Law enforcement agency" means an agency of the state, or of a county, municipality, or other political subdivision of this state, that employs peace officers who, in the routine performance of the officers' duties, conduct custodial interrogations of persons suspected of committing criminal offenses.

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

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

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

(b) Unless good cause exists that makes electronic recording infeasible, a law enforcement agency shall make a complete and contemporaneous electronic recording of any custodial interrogation that occurs in a place of detention and is of a person suspected of committing or charged with the commission of an offense under:

- (1) Section 19.02, Penal Code (murder);
- (2) Section 19.03, Penal Code (capital murder);
- (3) Section 20.03, Penal Code (kidnapping);
- (4) Section 20.04, Penal Code (aggravated kidnapping);
- (5) Section 20A.02, Penal Code (trafficking of persons);
- (6) Section 20A.03, Penal Code (continuous trafficking of persons);
- (7) Section 21.02, Penal Code (continuous sexual abuse of young child or children);
- (8) Section 21.11, Penal Code (indecent with a child);
- (9) Section 21.12, Penal Code (improper relationship between educator and student);
- (10) Section 22.011, Penal Code (sexual assault);
- (11) Section 22.021, Penal Code (aggravated sexual assault);
- or
- (12) Section 43.25, Penal Code (sexual performance by a child).

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

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(1) begins at or before the time the person being interrogated enters the area of the place of detention in which the custodial interrogation will take place or receives a warning described by Section 2(a), Article 38.22, whichever is earlier; and
(2) continues until the time the interrogation ceases.
(d) For purposes of Subsection (b), good cause that makes electronic recording infeasible includes the following:
(1) the person being interrogated refused to respond or cooperate in a custodial interrogation at which an electronic recording was being made, provided that:
(A) a contemporaneous recording of the refusal was made; or
(B) the peace officer or agent of the law enforcement agency conducting the interrogation attempted, in good faith, to record the person's refusal but the person was unwilling to have the refusal recorded, and the peace officer or agent contemporaneously, in writing, documented the refusal;
(2) the statement was not made as the result of a custodial interrogation, including a statement that was made spontaneously by the accused and not in response to a question by a peace officer;
(3) the peace officer or agent of the law enforcement agency conducting the interrogation attempted, in good faith, to record the interrogation but the recording equipment did not function, the officer or agent inadvertently operated the equipment incorrectly, or the equipment malfunctioned or stopped operating without the knowledge of the officer or agent;
(4) exigent public safety concerns prevented or rendered infeasible the making of an electronic recording of the statement; or
(5) the peace officer or agent of the law enforcement agency conducting the interrogation reasonably believed at the time

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

No equivalent provision.

No equivalent provision.

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the interrogation commenced that the person being interrogated was not taken into custody for or being interrogated concerning the commission of an offense listed in Subsection (b).

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

SECTION __. Chapter 2, Code of Criminal Procedure, is amended by adding Article 2.1386 to read as follows:

Art. 2.1386. EYEWITNESS IDENTIFICATION PROTOCOLS. (a) In this article, "law enforcement agency" means an agency of the state or an agency of a political subdivision of the state authorized by law to employ peace officers.

(b) The Texas Commission on Law Enforcement shall establish a comprehensive education and training program on eyewitness identification, including material regarding variables that affect a witness's vision and memory, practices for minimizing contamination, and effective eyewitness identification protocols.

(c) Each law enforcement agency shall require each peace officer who is employed by the agency and who performs eyewitness identification procedures to complete the education and training described by Subsection (b). [FA4(3)]

SECTION __. Not later than January 1, 2018, the Texas Commission on Law Enforcement shall adopt the comprehensive education and training program required by Article 2.1386, Code of Criminal Procedure, as added by this Act. [FA4(3)]

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

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

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

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

(1) be based on:

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

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

(C) other relevant information as appropriate; and

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

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

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

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

(B) instructions given to a witness before conducting a photograph or live lineup identification procedure that must

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SECTION 2. Same as House version.

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

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

(1) be based on:

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

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

(C) other relevant information as appropriate; and

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

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

(i) are consistent in appearance with the description of the alleged perpetrator; and

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

(B) instructions given to a witness before conducting a photograph or live lineup identification procedure that must

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include a statement that the person who committed the offense may or may not be present in the procedure and that the investigation will continue regardless of whether the witness identifies a person in the procedure;

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

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

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

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

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

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

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include a statement that the person who committed the offense may or may not be present in the procedure;

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

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

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

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

(G) any other procedures or best practices supported by credible research or commonly accepted as a means to reduce erroneous eyewitness identifications and to enhance the objectivity and reliability of eyewitness identifications.
[FA1(2)-(4)]

(d) A witness who makes an identification based on a photograph or live lineup identification procedure shall be asked immediately after the procedure to state, in the witness's own words, how confident the witness is in making the identification. A law enforcement agency shall document in accordance with Subsection (c)(2)(C) any statement made

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under this subsection.

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

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

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

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

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

(2) evidence showing the witness's confidence level as

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under this subsection. [FA2]

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

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

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

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

the details of each prior photograph or live lineup identification made of the accused by the witness, including the manner in which the identification procedure was conducted. [FA3]

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described by the witness at the time of the prior identification.

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

Sec. 1. In this article:

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

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

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

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

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

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

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

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

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

(2) after being [~~prior to the statement but during the recording~~]

No equivalent provision.

No equivalent provision.

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~~the accused is]~~ given the warning described by Section 2(a),
~~[in Subsection (a) of Section 2 above and]~~ the accused
knowingly, intelligently, and voluntarily waives any rights set
out in the warning;

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

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

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

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

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

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

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

- (A) a contemporaneous recording of the refusal was made; or
- (B) the peace officer or agent of the law enforcement agency

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

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

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

(2) the attorney representing the state offers proof satisfactory
to the court that good cause, as described by Article 2.32(d),

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conducting the interrogation attempted, in good faith, to record the accused's refusal but the accused was unwilling to have the refusal recorded, and the peace officer or agent contemporaneously, in writing, documented the refusal;

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

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

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

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

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

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

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existed that made electronic recording of the custodial interrogation infeasible.

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

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

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same correctional facility as the defendant, the state shall disclose to the defendant:

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

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

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

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

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

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

SECTION 10. STUDY REGARDING USE OF DRUG FIELD TEST KITS. (a) The Texas Forensic Science Commission shall conduct a study regarding the use of drug field test kits by law enforcement agencies in this state. The

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same correctional facility as the defendant, the state shall disclose to the defendant any information in the possession, custody, or control of the state that is relevant to the person's credibility, including:

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

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

(3) information concerning other criminal cases in which the person has testified, or offered to testify, against a defendant with whom the person was imprisoned or confined, including any grant, promise, or offer as described by Subdivision (2) given by the state in exchange for the testimony. [FA1(5)-(8)]

No equivalent provision. SECTION 7. [Deleted by FA4(1)]

SECTION 8. Same as House version.

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commission shall:

- (1) evaluate the quality, accuracy, and reliability of drug field test kits;
 - (2) identify any common problems with drug field test kits;
 - (3) evaluate the availability and adequacy of training for law enforcement officers regarding the use of drug field test kits and the interpretation of the test results; and
 - (4) develop legislative recommendations regarding the use of drug field test kits by law enforcement agencies and regarding related training for law enforcement officers.
- (b) Not later than December 1, 2018, the Texas Forensic Science Commission shall submit to the governor, the lieutenant governor, and each member of the legislature a written report that summarizes the results of the study conducted under this section and includes any legislative recommendations.

SECTION 11. CRIME SCENE INVESTIGATION STUDY.

- (a) The Texas Forensic Science Commission shall conduct a study regarding the manner in which crime scene investigations are conducted in this state. The commission shall:
- (1) evaluate the standard procedures used in processing a crime scene and evaluate the quality of crime scene investigations;
 - (2) evaluate the availability and adequacy of the training or continuing education provided to crime scene investigators; and
 - (3) develop legislative recommendations regarding improvements to crime scene investigation procedures and training.
- (b) Not later than December 1, 2018, the Texas Forensic

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Science Commission shall submit to the governor, the lieutenant governor, and each member of the legislature a written report that summarizes the results of the study conducted under this section and includes any legislative recommendations.

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

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

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

(b) Section 5, Article 38.20, Code of Criminal Procedure, as amended by this Act, applies only to the trial of an offense

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

SECTION 11. Same as House version.

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

(b) Section 5, Article 38.20, Code of Criminal Procedure, as amended by this Act, applies only to the trial of an offense

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with respect to which a prior identification of the accused occurred on or after the effective date of this Act, regardless of whether the offense that is the subject of the trial was committed before, on, or after the effective date of this Act.

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

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

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

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with respect to which a prior **photograph or live lineup** identification of the accused occurred on or after the effective date of this Act, regardless of whether the offense that is the subject of the trial was committed before, on, or after the effective date of this Act.

SECTION 13. Same as House version.

No equivalent provision. SECTION 14. [Deleted by FA4(2)]

SECTION 15. Same as House version.

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