

SUBJECT: Creating uniform procedures to prevent wrongful convictions

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Moody, Hunter, Canales, Gervin-Hawkins, Hefner, Lang,  
Wilson

0 nays

WITNESSES: For — Staley Heatly, 46th District Attorney; Michael Morton, Innocence Project; Gary Udashen, Innocence Project of Texas; Christopher Ochoa, New York Innocence Project; Olga Flores; (*Registered, but did not testify*: Nicholas Hudson, American Civil Liberties Union of Texas; Michael Boulette, Archdiocese of San Antonio; Chas Moore and Alexandra Peek, Austin Justice Coalition; Kathryn Freeman, Christian Life Commission; Curtis Guillory, Diocese of Beaumont; Daniel Flores, Diocese of Brownsville; Robert Coerver, Diocese of Lubbock; Joseph Strickland, Diocese of Tyler; Elizabeth Ramirez, Cassandra Rivera, and Anna Vasquez, Innocence Project of Texas; Patricia Cummings, Innocence Project of Texas and Innocence Project of New York; Gloria Leal, Mexican American Bar Association of Texas; Michael Johnson, Proclaim Justice; Mary Mergler, Texas Appleseed; Shea Place, Texas Criminal Defense Lawyers Association; Trey Owens and Douglas Smith, Texas Criminal Justice Coalition; Amanda Marzullo, Texas Defender Service; Emily Gerrick, Texas Fair Defense Project; Haley Holik, Texas Public Policy Foundation; and eight individuals)

Against — None

On — David Slayton, Texas Judicial Council; (*Registered, but did not testify*: John Helenberg, Texas Commission on Law Enforcement; Shannon Edmonds, Texas District and County Attorneys Association (TDCAA))

**BACKGROUND:** The Timothy Cole Exoneration Commission was created by the 84th Legislature to review cases in which an innocent person was convicted and later exonerated in Texas on or after January 1, 2010. The goal of the commission was to identify areas of law where legislative reform would be beneficial in preventing wrongful convictions. The commission submitted a report of its findings and recommendations. The report made several recommendations, including recommendations related to photograph and live lineup procedures, custodial interrogations, jailhouse informants, and forensic science.

Code of Criminal Procedure, art. 38.20 requires law enforcement agencies to adopt and implement detailed written policies on the administration of photograph and live lineup identification procedures. Agencies may adopt the state's model policy or a policy based on credible research on eyewitness memory designed to reduce incorrect identifications and enhance reliability and objectivity. The written policy also must address:

- selection of filler photographs or live lineup participants;
- instructions to the witness before the identification procedure;
- documentation and preservation of results of the procedure, including witness statements, regardless of the outcome of the procedure; and
- when practicable, procedures for assigning an administrator who is unaware of which member of the live lineup is the suspect or alternative procedures designed to prevent opportunities to influence the witness.

Failure to conduct an identification procedure in substantial compliance with the agency's policy does not bar admission of the eyewitness's testimony in court.

Art. 38.22, sec. 3(a) establishes that oral or sign language statements made as a result of a custodial interrogation by a person accused of a crime are not admissible in court unless an electronic recording is made of the statement and:

- during the recording, prior to the statement, a Miranda warning was given and the accused knowingly and voluntarily waived the rights set out in the warning;
- the operator was competent and the recording is accurate and has not been altered;
- all voices on the recording are identified; and
- at least 20 days before the proceeding, the attorney representing the defendant is given a true, complete, and accurate copy of all recordings made.

DIGEST:

CSHB 34 would create uniform standards for certain law enforcement procedures, including suspect identification, custodial interrogations, the use of jailhouse informants, and forensic science.

**Photograph and live lineup procedures.** The bill would require a law enforcement agency's detailed written policy regarding the administration of photograph and live lineup identification procedures to include:

- procedures for selecting filler photographs or participants to ensure that they appeared consistent with the description of the alleged perpetrator and that the suspect did not noticeably stand out;
- instructions including a statement noting that the perpetrator might or might not be present and the investigation would continue with or without the witness's identification of a person; and
- procedures for assigning an administrator who was unaware of which member of the live lineup was the suspect in the case, without allowing for alternative procedures or considering whether doing so was practicable.

A witness making an identification based on one of these identification procedures immediately would be asked to state the witness's level of confidence in the identification. This statement would have to be documented.

Before an in-court eyewitness identification could be admitted as evidence, it would have to be accompanied by details of any prior

identification of the accused made by the witness, including the manner in which that identification procedure was conducted and evidence showing the witness's confidence level at the time of the prior identification.

The bill would require the Texas Commission on Law Enforcement, by January 1, 2018, to include in the minimum curriculum requirements for law enforcement officers a statewide comprehensive education and training program on eyewitness identification, including variables that affect a witness's vision and memory, practices for minimizing contamination, and effective eyewitness identification protocols.

**Custodial interrogations.** Law enforcement agencies would have to electronically record any custodial interrogation of a person accused of a felony offense for any statement resulting from that investigation to be admissible in court, except under certain circumstances. These recordings would be exempt from public disclosure.

A statement of any kind made as a result of a custodial interrogation by a person would be admissible in court without an electronic recording if the attorney introducing the statement showed good cause for its lack. Good cause could include:

- the accused person refused to respond to questioning or to cooperate in the interrogation and a recording of the refusal was made or attempted in good faith and documented in writing;
- the statement did not exclusively result from a custodial interrogation, including one made spontaneously by the accused and not in response to an officer's question;
- the agent conducting the interrogation attempted in good faith to record the interrogation but was unsuccessful due to operator or equipment error;
- exigent public safety concerns prevented or rendered infeasible the making of an electronic recording; or
- at the time the interrogation began, the agent reasonably believed the accused was not being interrogated concerning the commission of a felony.

**Jailhouse informants.** The bill would make several changes regarding proffered testimony of a person to whom a defendant made a statement against the defendant's own interest while the person and defendant were confined or imprisoned in the same correctional facility. Attorneys representing the state would have to track the use of this testimony, regardless of whether it was presented at trial, as well as any benefits offered or provided in exchange for this testimony.

If the state intended to use this testimony at trial, it would have to disclose to the defendant:

- the person's complete criminal history, including any dismissed or reduced charges resulting from a plea bargain;
- any leniency or special treatment given by the state in exchange for the person's testimony;
- information about other criminal cases in which the person had testified or offered to testify against another defendant with whom this person was confined or imprisoned; and
- other information in the possession, custody, or control of the state that was relevant to the person's credibility.

Evidence of a prior offense committed by a person giving this kind of testimony could be admitted for the purpose of impeachment if the person received a benefit with respect to the offense, regardless of whether the person was convicted of the offense.

**Forensic science.** The Texas Forensic Science Commission would be required to conduct two studies: one on the use of drug field test kits by Texas law enforcement agencies in the state and another on the manner in which crime scene investigations are conducted in Texas. The commission would submit a report summarizing the results and recommendations of each study to the governor, lieutenant governor, and the Legislature by December 1, 2018.

This bill would take effect September 1, 2017, and would apply to the use

of statements made, the admissibility of evidence in a proceeding that began, a line up procedure conducted, a trial involving prior identification of the accused that occurred, or the prosecution of an offense committed on or after this date.

NOTES: A companion bill, SB 1577 by Perry, was referred to the Senate Criminal Justice Committee on March 21.