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New and Pending Legislation

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ATTACHMENT 1
HB 215 and SB 121 -
Relating to photographic and live line up identification procedures in criminal cases

By: Gallego, Hartnett, Giddings, Carter H.B. No. 215

A BILL TO BE ENTITLED
AN ACT

relating to photograph and live lineup identification procedures in criminal cases.

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

SECTION 1. Chapter 38, Code of Criminal Procedure, is amended by adding Article 38.20 to read as follows:

Art. 38.20. PHOTOGRAPH AND LIVE LINEUP IDENTIFICATION PROCEDURES

Sec. 1. In this article, "institute" means the Bill Blackwood Law Enforcement Management Institute of Texas located at Sam Houston State University.

Sec. 2. This article applies only to a law enforcement agency of this state or of a county, municipality, or other political subdivision of this state that employs peace officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties.

Sec. 3. (a) Each law enforcement agency shall adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures in accordance with this article. A law enforcement agency may adopt:

(1) the model policy adopted under Subsection (b); or

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

(b) The institute, in consultation with large, medium, and small law enforcement agencies and with law enforcement associations, scientific experts in eyewitness memory research, and appropriate organizations engaged in the development of law enforcement policy, shall develop, adopt, and disseminate to all law enforcement agencies in this state a model policy and associated training materials regarding the administration of photograph and live lineup identification procedures. The institute shall provide for a period of public comment before adopting the policy and materials.

(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) address the following topics:

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

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

(C) 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.

Sec. 4. (a) Not later than December 31 of each odd-numbered year, the institute shall review the model policy and training materials adopted under this article and shall modify the policy and materials as appropriate.

(b) Not later than September 1 of each even-numbered year, each law enforcement agency shall review its policy adopted under this article and shall modify that policy as appropriate.

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. 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, 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.

SECTION 2. (a) Not later than December 31, 2011, the Bill Blackwood Law Enforcement Management Institute of Texas shall develop, adopt, and disseminate the model policy and associated training materials required under Article 38.20, Code of Criminal Procedure, as added by this Act.

(b) Not later than September 1, 2012, each law enforcement agency to which Article 38.20, Code of Criminal Procedure, as added by this Act, applies shall adopt a policy as required by that article.

(c) The change in law made by Section 5, 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 September 1, 2012, regardless of whether the offense to which the procedure is related occurred before, on, or after September 1, 2012.

SECTION 3. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: HB 215 **Legislative Session:** 82(R) **Council Document:** 82R 469 SJM-D

Last Action: *04/04/2011 S Received from the House*

Caption Version: Engrossed
Caption Text: Relating to photograph and live lineup identification procedures in criminal cases.

Author: Gallego | Hartnett | Giddings | Carter | Branch

Cosponsor:

Subjects: Criminal Procedure--Pretrial Procedure (I0203)
Law Enforcement (I0510)
CRIMINAL INVESTIGATIONS (S0042)
WITNESSES (S0015)
BILL BLACKWOOD LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TX (V0332)
LAW ENFORCEMENT OFFICER STANDARDS & EDUCATION, COMMN. ON (V0163)

House Committee: Criminal Jurisprudence
Status: Out of committee
Vote: Ayes=8 Nays=0 Present Not Voting=0 Absent=1

Actions: (descending date order)
Viewing Votes: Most Recent House Vote

	Description	Comment	Date ▼	Time	Journal Page
S	Received from the House		04/04/2011		870
H	Reported engrossed		03/31/2011	01:20 PM	1373
H	Statement(s) of vote recorded in Journal		03/31/2011		1157
H	Record vote	RV#166	03/31/2011		1157
H	Passed		03/31/2011		1157
H	Read 3rd time		03/31/2011		1156
H	Nonrecord vote recorded in Journal		03/30/2011		1135
H	Passed to engrossment as amended		03/30/2011		1135
H	Amended	1-Gallego	03/30/2011		1133
H	Read 2nd time		03/30/2011		1133
H	Placed on General State Calendar		03/30/2011		
H	Considered in Calendars		03/28/2011		
H	Committee report sent to Calendars		03/02/2011		
H	Committee report distributed		03/02/2011	04:11 PM	
H	Comte report filed with Committee Coordinator		03/02/2011		679
	Reported favorably as substituted		02/22/2011		
	Committee substitute considered in committee		02/22/2011		
H	Testimony taken/registration(s) recorded in committee		02/22/2011		

H Considered in public hearing	02/22/2011	
H Scheduled for public hearing on . . .	02/22/2011	
H Referred to Criminal Jurisprudence	02/14/2011	338
H Read first time	02/14/2011	338
H Filed	11/09/2010	

By: Ellis, et al. S.B. No. 121

A BILL TO BE ENTITLED
AN ACT

relating to photograph and live lineup identification procedures in criminal cases.

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

SECTION 1. Chapter 38, Code of Criminal Procedure, is amended by adding Article 38.20 to read as follows:

Art. 38.20. PHOTOGRAPH AND LIVE LINEUP IDENTIFICATION PROCEDURES

Sec. 1. In this article, "institute" means the Bill Blackwood Law Enforcement Management Institute of Texas located at Sam Houston State University.

Sec. 2. This article applies only to a law enforcement agency of this state or of a county, municipality, or other political subdivision of this state that employs peace officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties.

Sec. 3. (a) Each law enforcement agency shall adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures in accordance with this article. A law enforcement agency may adopt:

(1) the model policy adopted under Subsection (b); or

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

(b) The institute, in consultation with large, medium, and small law enforcement agencies and with law enforcement associations, scientific experts in eyewitness memory research, and appropriate organizations engaged in the development of law enforcement policy, shall develop, adopt, and disseminate to all law enforcement agencies in this state a model policy and associated training materials regarding the administration of photograph and live lineup identification procedures. The institute shall provide for a period of public comment before adopting the policy and materials.

(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) address the following topics:

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

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

(C) 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.

Sec. 4. (a) Not later than December 31 of each odd-numbered year, the institute shall review the model policy and training materials adopted under this article and shall modify the policy and materials as appropriate.

(b) Not later than September 1 of each even-numbered year, each law enforcement agency shall review its policy adopted under this article and shall modify that policy as appropriate.

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. 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, 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.

SECTION 2. (a) Not later than December 31, 2011, the Bill Blackwood Law Enforcement Management Institute of Texas shall develop, adopt, and disseminate the model policy and associated training materials required under Article 38.20, Code of Criminal Procedure, as added by this Act.

(b) Not later than September 1, 2012, each law enforcement agency to which Article 38.20, Code of Criminal Procedure, as added by this Act, applies shall adopt a policy as required by that article.

(c) The change in law made by Section 5, 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 September 1, 2012, regardless of whether the offense to which the procedure is related occurred before, on, or after September 1, 2012.

SECTION 3. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: SB 121 **Legislative Session:** 82(R) **Council Document:** 82R 469 SJM-D

Last Action: *03/29/2011 H Referred to Criminal Jurisprudence*

Caption Version: Engrossed
Caption Text: Relating to photograph and live lineup identification procedures in criminal cases.

Author: Ellis

Coauthor: Carona | Hinojosa | West

Cosponsor:

Subjects: Criminal Procedure--Pretrial Procedure (I0203)
Law Enforcement (I0510)
CRIMINAL INVESTIGATIONS (S0042)
WITNESSES (S0015)
BILL BLACKWOOD LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TX (V0332)
LAW ENFORCEMENT OFFICER STANDARDS & EDUCATION, COMMN. ON (V0163)

Senate Committee: Criminal Justice
Status: Out of committee
Vote: Ayes=7 Nays=0 Present Not Voting=0 Absent=0

House Committee: Criminal Jurisprudence
Status: In committee

Actions: (descending date order)
Viewing Votes: Most Recent Senate Vote

	Description	Comment	Date ▼	Time	Journal Page
H	Referred to Criminal Jurisprudence		03/29/2011		1109
H	Read first time		03/29/2011		1109
H	Received from the Senate		03/17/2011		899
S	Reported engrossed		03/16/2011		617
S	Record vote		03/16/2011		549
S	Passed		03/16/2011		549
S	Read 3rd time		03/16/2011		549
S	Record vote		03/16/2011		548
S	Three day rule suspended		03/16/2011		548
S	Vote recorded in Journal		03/16/2011		548
	Read 2nd time & passed to engrossment		03/16/2011		548
S	Rules suspended-Regular order of business		03/16/2011		548

S	Placed on intent calendar	03/16/2011	
S	Not again placed on intent calendar	03/15/2011	
S	Co-author authorized	03/14/2011	522
S	Placed on intent calendar	03/09/2011	
S	Committee report printed and distributed	03/07/2011 01:58 PM	
S	Reported favorably as substituted	03/07/2011	486
S	Testimony taken in committee	03/01/2011	
S	Considered in public hearing	03/01/2011	
S	Scheduled for public hearing on . . .	03/01/2011	
S	Co-author authorized	02/17/2011	359
S	Referred to Criminal Justice	01/31/2011	214
S	Read first time	01/31/2011	214
S	Co-author authorized	01/24/2011	62
S	Filed	11/08/2010	
S	Received by the Secretary of the Senate	11/08/2010	

BILL ANALYSIS

Senate Research Center
82R469 SJM-D

S.B. 121
By: Ellis, et al.
Criminal Justice
2/24/2011
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Mistaken eyewitness identification is the leading cause of wrongful convictions in Texas and the United States (U.S.).

Texas has had more DNA exonerations than any other state. According to the national Innocence Project, approximately 75 percent of the 266 DNA exonerations in the U.S. have been due to eyewitness misidentification. In Texas, 85 percent of the 44 DNA wrongful convictions have been largely or exclusively due to incorrect eyewitness identifications.

Despite the fact that certain "best practices" have been shown to improve the accuracy and reliability of eyewitness evidence, the Justice Project found in November 2008 that only 12 percent of police departments in Texas have written policies or guidelines for conducting lineups. There is no law requiring law enforcement agencies to have a written policy regarding eyewitness identification or that such policies should be based on best practices.

S.B. 121 requires all law enforcement agencies in the state to adopt written eyewitness identification policies based on best practices proven effective by scientific research on eyewitness memory and use in law enforcement agencies in other parts of the country. This bill requires the Bill Blackwood Law Enforcement Management Institute of Texas to develop and disseminate a model policy and associated training materials to local law enforcement agencies regarding eyewitness identification procedures.

Eyewitness identification procedures would have to address the following topics: the selection of photograph and live lineup filler photographs or participants; instructions that will be given to a witness before conducting a photograph or live lineup identification procedure; documentation and preservation of lineup procedures; procedures for administering lineups to illiterate persons or persons with limited English proficiency; procedures for assigning a lineup administrator who is unaware of the suspect in a lineup or photo array; and any other procedures or best practices supported by credible research or commonly accepted as a means to reduce erroneous identifications and enhance the objectivity and reliability of eyewitness identifications.

As proposed, S.B. 121 amends current law relating to photograph and live lineup identification procedures in criminal cases.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 38, Code of Criminal Procedure, by adding Article 38.20, as follows:

Art. 38.20. PHOTOGRAPH AND LIVE LINEUP IDENTIFICATION PROCEDURES

Sec. 1. Defines "institute" in this article to mean the Bill Blackwood Law Enforcement Management Institute of Texas (institute) located at Sam Houston State University.

Sec. 2. Provides that this article applies only to a law enforcement agency of this state or of a county, municipality, or other political subdivision of this state that employs peace officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties.

Sec. 3. (a) Requires each law enforcement agency to adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures in accordance with this article. Authorizes a law enforcement agency to adopt:

(1) the model policy adopted under Subsection (b); or

(2) the agency's own policy that conforms to the requirements of the model policy adopted under Subsection (b).

(b) Requires the institute, with the advice and assistance of law enforcement agencies and scientific experts in eyewitness memory research, to develop, adopt, and disseminate to all law enforcement agencies a model policy and associated training materials regarding the administration of photograph and live lineup identification procedures.

(c) Requires that the model policy:

(1) be based on:

(A) scientific research on eyewitness memory;

(B) relevant policies and guidelines developed by the federal government, other states, and other law enforcement organizations; and

(C) other relevant information as appropriate; and

(2) address the following topics:

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

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

(C) 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) procedures for assigning an administrator who, as applicable:

(i) is unaware of which member of the live lineup is the suspect in the case or, if that is not practicable, alternative procedures designed to prevent opportunities to influence the witness; or

(ii) is capable of administering a photograph array in a blind manner or, if that is not practicable, alternative procedures designed to prevent opportunities to influence the witness; and

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

identifications.

Sec. 4. Requires the institute to complete an annual review of the model policy and training materials adopted under this article and to modify the policy and materials as necessary.

Sec. 5. (a) Provides that evidence of compliance or noncompliance with the model policy adopted under this article is relevant and admissible in a criminal case but is not a condition precedent to the admissibility of an out-of-court eyewitness identification.

(b) Provides that, notwithstanding Article 38.23 (Evidence Not To Be Used), a failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy adopted under this article does not bar the admission of eyewitness identification testimony in the courts of this state.

SECTION 2. (a) Requires the institute, not later than June 1, 2012, to develop, adopt, and disseminate the model policy and associated training materials required under Article 38.20, Code of Criminal Procedure, as added by this Act.

(b) Requires each law enforcement agency to which Article 38.20, Code of Criminal Procedure, as added by this Act, applies to adopt a policy as required by that article not later than September 1, 2012.

(c) Makes the change in law made by Section 5, Article 38.20, Code of Criminal Procedure, as added by this Act, prospective to lineup identification procedures conducted on or after September 1, 2012, regardless of whether the offense to which the procedure is related occurred before, on, or after September 1, 2012.

SECTION 3. Effective date: September 1, 2011.

BILL ANALYSIS

Senate Research Center

C.S.S.B. 121
By: Ellis et al.
Criminal Justice
3/2/2011
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Mistaken eyewitness identification is the leading cause of wrongful convictions in Texas and the United States (U.S.).

Texas has had more DNA exonerations than any other state. According to the national Innocence Project, approximately 75 percent of the 266 DNA exonerations in the U.S. have been due to eyewitness misidentification. In Texas, 85 percent of the 44 DNA wrongful convictions have been largely or exclusively due to incorrect eyewitness identifications.

Despite the fact that certain "best practices" have been shown to improve the accuracy and reliability of eyewitness evidence, the Justice Project found in November 2008 that only 12 percent of police departments in Texas have written policies or guidelines for conducting lineups. There is no law requiring law enforcement agencies to have a written policy regarding eyewitness identification or that such policies should be based on best practices.

C.S.S.B. 121 requires all law enforcement agencies in the state to adopt written eyewitness identification policies based on best practices proven effective by scientific research on eyewitness memory and use in law enforcement agencies in other parts of the country. This bill requires the Bill Blackwood Law Enforcement Management Institute of Texas to develop and disseminate a model policy and associated training materials to local law enforcement agencies regarding eyewitness identification procedures.

Eyewitness identification procedures would have to address the following topics: the selection of photograph and live lineup filler photographs or participants; instructions that will be given to a witness before conducting a photograph or live lineup identification procedure; documentation and preservation of lineup procedures; procedures for administering lineups to illiterate persons or persons with limited English proficiency; procedures for assigning a lineup administrator who is unaware of the suspect in a lineup or photo array; and any other procedures or best practices supported by credible research or commonly accepted as a means to reduce erroneous identifications and enhance the objectivity and reliability of eyewitness identifications.

C.S.S.B. 121 amends current law relating to photograph and live lineup identification procedures in criminal cases.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 38, Code of Criminal Procedure, by adding Article 38.20, as follows:

Art. 38.20. PHOTOGRAPH AND LIVE LINEUP IDENTIFICATION PROCEDURES

Sec. 1. Defines "institute" in this article to mean the Bill Blackwood Law Enforcement Management Institute of Texas (institute) located at Sam Houston State University.

Sec. 2. Provides that this article applies only to a law enforcement agency of this state or of a county, municipality, or other political subdivision of this state that employs peace officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties.

Sec. 3. (a) Requires each law enforcement agency to adopt, implement, and as necess amend a detailed written policy regarding the administration of photograph and live lineup identification procedures in accordance with this article. Authorizes a law enforcement agency to adopt:

(1) the model policy adopted under Subsection (b); or

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

(b) Requires the institute, in consultation with large, medium, and small law enforcement agencies and with law enforcement associations, scientific experts in eyewitness memory research, and appropriate organizations engaged in the development of law enforcement policy, to develop, adopt, and disseminate to all law enforcement agencies in this state a model policy and associated training materials regarding the administration of photograph and live lineup identification procedures. Requires the institute to provide for a period of public comment before adopting policy and materials.

(c) Requires that the model policy or any other policy adopted by a law enforcement agency under Subsection (a):

(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) address the following topics:

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

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

(C) 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, procedı for assigning an administrator who is unaware of which member of tne 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.

Sec. 4. (a) Requires the institute, not later than December 31 of each odd-numbered yeai review the model policy and training materials adopted under this article and to modify the policy and materials as appropriate.

(b) Requires each law enforcement agency, not later than September 1 of each even-numbered year, to review its policy adopted under this article and to modify that policy as appropriate.

Sec. 5. (a) Provides that 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. Provides that 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) Provides that, notwithstanding Article 38.23 (Evidence Not To Be Used) as that article relates to a violation of a state statute, a failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or 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.

SECTION 2. (a) Requires the institute, not later than December 31, 2011, to develop, adopt, and disseminate the model policy and associated training materials required under Article 38.20, Code of Criminal Procedure, as added by this Act.

(b) Requires each law enforcement agency to which Article 38.20, Code of Criminal Procedure, as added by this Act, applies to adopt a policy as required by that article not later than September 1, 2012.

(c) Makes the change in law made by Section 5, Article 38.20, Code of Criminal Procedure, as added by this Act, prospective to lineup identification procedures conducted on or after September 1, 2012, regardless of whether the offense to which the procedure is related occurred before, on, or after September 1, 2012.

SECTION 3. Effective date: September 1, 2011.

ATTACHMENT 2:
HB 219 and SB 123
Relating to the electronic recording and admissibility of certain custodial interrogations

82R471 GCB-D

By: Gallego H.B. No. 219

A BILL TO BE ENTITLED
AN ACT

relating to the electronic recording and admissibility of certain custodial interrogations.

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

SECTION 1. Chapter 2, Code of Criminal Procedure, is amended by adding Article 2.31 to read as follows:

Art. 2.31. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS. (a) In this article:

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

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

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

(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 individuals suspected of committing criminal offenses.

(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 individuals 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, contemporaneous, audio or audiovisual 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 21.02, Penal Code (continuous sexual abuse of young child or children);

(6) Section 21.11, Penal Code (indecency with a child);

(7) Section 21.12, Penal Code (improper relationship between educator and student);

(8) Section 22.011, Penal Code (sexual assault);

(9) Section 22.021, Penal Code (aggravated sexual assault); or

(10) 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 begins at or before the time the person being interrogated receives a warning described by Section 2(a), Article 38.22, and continues, without interruption, 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 audio or audiovisual 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 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 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 audio or audiovisual recording of the statement; or

(5) the peace officer or agent of the law enforcement agency conducting the interrogation reasonably believed at the time 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 law enforcement agency shall preserve an electronic recording described by Subsection (b) until the later of the date on which:

(1) any conviction for an offense that is the subject of the interrogation or that results from the interrogation is final, all direct appeals of the case are exhausted, and the time to file a petition for a writ of habeas corpus has expired; or

(2) the prosecution of the offense that is the subject of the interrogation or that arises from the interrogation is barred by law.

(f) The attorney representing the state shall provide to the defendant, in a timely manner and not later than the 60th day before the date the trial begins, a copy of an electronic recording described by Subsection (b).

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

SECTION 2. Chapter 38, Code of Criminal Procedure, is amended by adding Article 38.24 to read as follows:

Art. 38.24. USE OF CERTAIN EVIDENCE CONCERNING ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS. (a) Evidence of compliance

or noncompliance with Article 2.31 concerning the electronic recording of a custodial interrogation is relevant and admissible before the trier of fact.

(b) Evidence of compliance with Article 2.31 concerning the electronic recording of a custodial interrogation is not a condition precedent to the admissibility of a defendant's statement under Article 38.23, another provision of this chapter, or another law.

(c) If the statement of a person suspected of committing or charged with the commission of an offense listed in Article 2.31(b) that is made by the person during a custodial interrogation conducted in a place of detention is admitted in evidence during trial, and if an electronic recording of the complete interrogation is not available, the court:

(1) if the court is the trier of fact, may consider the absence of an electronic recording of the interrogation in evaluating the evidence relating to and resulting from the interrogation; and

(2) if the jury is the trier of fact, shall on request of the defendant instruct the jury that:

(A) it is the policy of this state to electronically record custodial interrogations of persons suspected of having committed an offense listed in Article 2.31(b); and

(B) the jury may consider the absence of an electronic recording of the interrogation in evaluating the evidence relating to and resulting from the interrogation.

(d) The court may refuse to give the jury instruction described by Subsection (c)(2) if the attorney representing the state offers proof satisfactory to the court that:

(1) good cause, as described by Article 2.31(d), existed that made electronic recording of a custodial interrogation infeasible; or

(2) the law enforcement agency that failed to electronically record the interrogation acted in good faith at the time the agency failed to make the recording.

SECTION 3. Article 38.24, Code of Criminal Procedure, as added by this Act, applies to the use of a statement resulting from a custodial interrogation that occurs on or after September 1, 2012, regardless of whether the criminal offense giving rise to that interrogation is committed before, on, or after that date.

SECTION 4. This Act takes effect September 1, 2011.

COMMITTEE AMENDMENT NO. 1

Amend H.B. No. 219 (introduced version) as follows:

(1) Between pages 2 and 3, insert the following:

(b-1) If, during a custodial interrogation of an offense other than an offense listed in Subsection (b), the person being interrogated discloses information that causes the peace officer to have reasonable suspicion to believe that the person has committed an offense that requires an electronic recording under that subsection, the officer may continue the interrogation, and good cause exists making electronic recording infeasible, as provided by Subsection(d)(5).

(2) On page 3, lines 4-5, strike ", without interruption,".

(3) On page 3, line 5, between "ceases" and the underlined period, insert the following:

, except that the recording may contain one or more pauses if the pauses occur to:

(1) ensure that the recording complies with Subsection (b-1); or

(2) accommodate a temporary break from interrogation.

(4) On page 5, line 5, after the underlined period, insert the following:

Evidence of a pause in the recording is not admissible based solely on the existence of the pause..

Carter

Texas Legislature Online
History

Bill: HB 219 **Legislative Session:** 82(R) **Council Document:** 82R 471 GCB-D

Last Action: *04/29/2011 H Committee report distributed: Apr 29 2011 10:35PM*

Caption Version: House Committee Report
Caption Text: Relating to the electronic recording and admissibility of certain custodial interrogations.

Author: Gallego

Cosponsor:

Subjects: Criminal Procedure--General (I0208)
Criminal Procedure--Pretrial Procedure (I0203)
Law Enforcement (I0510)
EVIDENCE (S0250)

House Committee: Criminal Jurisprudence
Status: Out of committee
Vote: Ayes=5 Nays=1 Present Not Voting=0 Absent=3

Actions: (descending date order)

	Description	Comment	Date ▼	Time	Journal Page
..	Committee report distributed		04/29/2011	10:35 PM	
H	Comte report filed with Committee Coordinator		04/29/2011		
H	Reported favorably as amended		04/18/2011		
H	Amendment(s) considered in committee		04/18/2011		
H	Considered in formal meeting		04/18/2011		
H	Left pending in committee		02/22/2011		
H	Testimony taken/registration(s) recorded in committee		02/22/2011		
H	Considered in public hearing		02/22/2011		
H	Scheduled for public hearing on . . .		02/22/2011		
H	Referred to Criminal Jurisprudence		02/14/2011		339
H	Read first time		02/14/2011		339
H	Filed		11/09/2010		

82R471 GCB-D

By: Ellis S.B. No. 123

A BILL TO BE ENTITLED
AN ACT

relating to the electronic recording and admissibility of certain custodial interrogations.

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

SECTION 1. Chapter 2, Code of Criminal Procedure, is amended by adding Article 2.31 to read as follows:

Art. 2.31. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS. (a) In this article:

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

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

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

(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 individuals suspected of committing criminal offenses.

(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 individuals 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, contemporaneous, audio or audiovisual 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 21.02, Penal Code (continuous sexual abuse of young child or children);

(6) Section 21.11, Penal Code (indecency with a child);

(7) Section 21.12, Penal Code (improper relationship between educator and student);

(8) Section 22.011, Penal Code (sexual assault);

(9) Section 22.021, Penal Code (aggravated sexual assault); or

(10) 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 begins at or before the time the person being interrogated receives a warning described by Section 2(a), Article 38.22, and continues, without interruption, 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 audio or audiovisual 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 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 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 audio or audiovisual recording of the statement; or

(5) the peace officer or agent of the law enforcement agency conducting the interrogation reasonably believed at the time 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 law enforcement agency shall preserve an electronic recording described by Subsection (b) until the later of the date on which:

(1) any conviction for an offense that is the subject of the interrogation or that results from the interrogation is final, all direct appeals of the case are exhausted, and the time to file a petition for a writ of habeas corpus has expired; or

(2) the prosecution of the offense that is the subject of the interrogation or that arises from the interrogation is barred by law.

(f) The attorney representing the state shall provide to the defendant, in a timely manner and not later than the 60th day before the date the trial begins, a copy of an electronic recording described by Subsection (b).

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

SECTION 2. Chapter 38, Code of Criminal Procedure, is amended by adding Article 38.24 to read as follows:

Art. 38.24. USE OF CERTAIN EVIDENCE CONCERNING ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS. (a) Evidence of compliance

or noncompliance with Article 2.31 concerning the electronic recording of a custodial interrogation is relevant and admissible before the trier of fact.

(b) Evidence of compliance with Article 2.31 concerning the electronic recording of a custodial interrogation is not a condition precedent to the admissibility of a defendant's statement under Article 38.23, another provision of this chapter, or another law.

(c) If the statement of a person suspected of committing or charged with the commission of an offense listed in Article 2.31(b) that is made by the person during a custodial interrogation conducted in a place of detention is admitted in evidence during trial, and if an electronic recording of the complete interrogation is not available, the court:

(1) if the court is the trier of fact, may consider the absence of an electronic recording of the interrogation in evaluating the evidence relating to and resulting from the interrogation; and

(2) if the jury is the trier of fact, shall on request of the defendant instruct the jury that:

(A) it is the policy of this state to electronically record custodial interrogations of persons suspected of having committed an offense listed in Article 2.31(b); and

(B) the jury may consider the absence of an electronic recording of the interrogation in evaluating the evidence relating to and resulting from the interrogation.

(d) The court may refuse to give the jury instruction described by Subsection (c)(2) if the attorney representing the state offers proof satisfactory to the court that:

(1) good cause, as described by Article 2.31(d), existed that made electronic recording of a custodial interrogation infeasible; or

(2) the law enforcement agency that failed to electronically record the interrogation acted in good faith at the time the agency failed to make the recording.

SECTION 3. Article 38.24, Code of Criminal Procedure, as added by this Act, applies to the use of a statement resulting from a custodial interrogation that occurs on or after September 1, 2012, regardless of whether the criminal offense giving rise to that interrogation is committed before, on, or after that date.

SECTION 4. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: SB 123 **Legislative Session:** 82(R) **Council Document:** 82R 471 GCB-D

Last Action: *01/31/2011 S Referred to Criminal Justice*

Caption Version: Introduced

Caption Text: Relating to the electronic recording and admissibility of certain custodial interrogations.

Author: Ellis

Coauthor: Hinojosa

Cosponsor:

Subjects: Criminal Procedure--General (I0208)
Criminal Procedure--Pretrial Procedure (I0203)
Law Enforcement (I0510)
EVIDENCE (S0250)

Senate Committee: Criminal Justice

Status: In committee

Actions: (descending date order)

Description	Comment	Date ▼	Time	Journal Page
S Co-author authorized		02/17/2011		359
S Referred to Criminal Justice		01/31/2011		214
S Read first time		01/31/2011		214
S Filed		11/08/2010		
S Received by the Secretary of the Senate		11/08/2010		

ATTACHMENT 3:
HB 220 and SB 317
Relating to procedures for Applications for Writs of Habeas Corpus based on relevant scientific evidence

82R473 SJM-D

By: Whitmire S.B. No. 317

A BILL TO BE ENTITLED
AN ACT

relating to procedures for applications for writs of habeas corpus based on relevant scientific evidence.

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

SECTION 1. Chapter 11, Code of Criminal Procedure, is amended by adding Article 11.073 to read as follows:

Art. 11.073. PROCEDURES RELATED TO CERTAIN SCIENTIFIC EVIDENCE. (a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by the convicted person at the convicted person's trial; or

(2) discredits scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing sufficient specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, it is reasonably probable that the person would not have been convicted.

(c) For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the scientific knowledge or method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

SECTION 2. The change in law made by this Act applies only

to an application for a writ of habeas corpus filed on or after the effective date of this Act. An application for a writ of habeas corpus filed before the effective date of this Act is governed by the law in effect at the time the application was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: SB 317 **Legislative Session:** 82(R) **Council Document:** 82R 473 SJM-D

Last Action: *02/02/2011 S Referred to Criminal Justice*

Caption Version: Introduced

Caption Text: Relating to procedures for applications for writs of habeas corpus based on relevant scientific evidence.

Author: Whitmire

Cosponsor:

Subjects: Criminal Procedure--General (I0208)
Criminal Procedure--Posttrial Procedure (I0206)
Science & Technology (I0751)
EVIDENCE (S0250)
HABEAS CORPUS (S0263)

Senate Committee: Criminal Justice

Status: In committee

ctions: (descending date order)

Description	Comment	Date ▼	Time	Journal Page
S Referred to Criminal Justice		02/02/2011		257
S Read first time		02/02/2011		257
S Filed		01/05/2011		
S Received by the Secretary of the Senate		01/05/2011		

82R473 SJM-D

By: Gallego H.B. No. 220

A BILL TO BE ENTITLED
AN ACT

relating to procedures for applications for writs of habeas corpus based on relevant scientific evidence.

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

SECTION 1. Chapter 11, Code of Criminal Procedure, is amended by adding Article 11.073 to read as follows:

Art. 11.073. PROCEDURES RELATED TO CERTAIN SCIENTIFIC EVIDENCE. (a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by the convicted person at the convicted person's trial; or

(2) discredits scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing sufficient specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, it is reasonably probable that the person would not have been convicted.

(c) For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the scientific knowledge or method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

SECTION 2. The change in law made by this Act applies only

to an application for a writ of ○*habeas*○ ○*corpus*○ filed on or after the effective date of this Act. An application for a writ of ○*habeas*○ ○*corpus*○ filed before the effective date of this Act is governed by the law in effect at the time the application was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: HB 220 **Legislative Session:** 82(R) **Council Document:** 82R 473 SJM-D

Last Action: *04/28/2011 H Reported favorably as amended*

Caption Version: Introduced

Caption Text: Relating to procedures for applications for writs of habeas corpus based on relevant scientific evidence.

Author: Gallego

Cosponsor:

Subjects: Criminal Procedure--General (I0208)
Criminal Procedure--Posttrial Procedure (I0206)
Science & Technology (I0751)
EVIDENCE (S0250)
HABEAS CORPUS (S0263)

House Committee: Criminal Jurisprudence

Status: Out of committee

Vote: Ayes=6 Nays=1 Present Not Voting=2 Absent=0

ctions: (descending date order)

	Description	Comment	Date ▼	Time	Journal Page
H	Reported favorably as amended		04/28/2011		
H	Amendment(s) considered in committee		04/28/2011		
H	Considered in formal meeting		04/28/2011		
H	Left pending in committee		02/22/2011		
H	Testimony taken/registration(s) recorded in committee		02/22/2011		
H	Considered in public hearing		02/22/2011		
H	Scheduled for public hearing on . . .		02/22/2011		
H	Referred to Criminal Jurisprudence		02/14/2011		339
H	Read first time		02/14/2011		339
H	Filed		11/09/2010		

ATTACHMENT 4:
SB 122
Relating to post-conviction DNA analysis

By: Ellis, Hinojosa S.B. No. 122

A BILL TO BE ENTITLED
AN ACT

relating to postconviction forensic DNA analysis.

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

SECTION 1. Article 64.01, Code of Criminal Procedure, is amended by amending Subsections (a) and (b) and adding Subsection (a-1) to read as follows:

(a) In this section, "biological material":

(1) means an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing; and

(2) includes the contents of a sexual assault evidence collection kit.

(a-1) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a-1) [~~(a)~~] that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing[~~:~~

[~~(A) because DNA testing was:~~

[~~(i) not available; or~~

[~~(ii) - - available, but not technologically capable of providing probative results; or~~

[~~(B) - - through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing~~]; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

SECTION 2. Chapter 64, Code of Criminal Procedure, is amended by adding Article 64.035 to read as follows:

Art. 64.035. UNIDENTIFIED DNA PROFILES. If an analyzed sample meets the applicable requirements of state or federal submission policies, on completion of the testing under Article 64.03, the convicting court shall order any unidentified DNA profile to be compared with the DNA profiles in:

(1) the DNA database established by the Federal Bureau of Investigation; and

(2) the DNA database maintained by the Department of Public Safety under Subchapter G, Chapter 411, Government Code.

SECTION 3. Article 64.04, Code of Criminal Procedure, is amended to read as follows:

Art. 64.04. FINDING. After examining the results of testing under Article 64.03 and any comparison of a DNA profile

under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.

SECTION 4. The change in law made by this Act applies to a motion for forensic DNA testing filed on or after the effective date of this Act. A motion for forensic DNA testing filed before the effective date of this Act is covered by the law in effect at the time the motion was filed, and the former law is continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: SB 122 **Legislative Session:** 82(R) **Council Document:** 82R 472 SJM-D

Last Action: *04/28/2011 H Referred to Criminal Jurisprudence*

Caption Version: Engrossed
Caption Text: Relating to postconviction forensic DNA analysis.

Author: Ellis

Coauthor: Hinojosa

Subjects: Criminal Procedure--General (I0208)
Criminal Procedure--Posttrial Procedure (I0206)
DNA (S0100)
FORENSIC TESTING (S0545)

Senate Committee: Criminal Justice
Status: Out of committee
ote: Ayes=6 Nays=0 Present Not Voting=0 Absent=1

House Committee: Criminal Jurisprudence
Status: In committee

Actions: (descending date order)
Viewing Votes: Most Recent Senate Vote

Description	Comment	Date ▼	Time	Journal Page
H Referred to Criminal Jurisprudence		04/28/2011		2382
H Read first time		04/28/2011		2382
H Received from the Senate		04/07/2011		1571
S Reported engrossed		04/06/2011		1004
S Record vote		04/06/2011		955
S Passed		04/06/2011		955
S Read 3rd time		04/06/2011		955
S Record vote		04/06/2011		954
S Three day rule suspended		04/06/2011		954
S Vote recorded in Journal		04/06/2011		954
S Read 2nd time & passed to engrossment		04/06/2011		954
S Rules suspended-Regular order of business		04/06/2011		954
S Placed on intent calendar		04/06/2011		
Not again placed on intent calendar		03/31/2011		
⌣ Placed on intent calendar		03/30/2011		
S Committee report printed and distributed		03/28/2011	02:01 PM	

S	Reported favorably as substituted	03/28/2011	789
S	Testimony taken in committee	03/22/2011	
S	Considered in public hearing	03/22/2011	
S	Scheduled for public hearing on . . .	03/22/2011	
S	Co-author authorized	02/17/2011	359
S	Referred to Criminal Justice	01/31/2011	214
S	Read first time	01/31/2011	214
S	Filed	11/08/2010	
S	Received by the Secretary of the Senate	11/08/2010	

BILL ANALYSIS

Senate Research Center

C.S.S.B. 122
By: Ellis, Hinojosa
Criminal Justice
3/23/2011
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

C.S.S.B. 122 would clarify Texas' post-conviction DNA statute to address issues that arose in the Ricardo Rachell exoneration in Houston and the *Routier v. State* decision by the Court of Criminal Appeals. Under this bill, a motion for post-conviction DNA testing would be granted if the biological evidence was not previously tested; or the biological evidence was previously tested, but can be subjected to newer testing techniques that provide a reasonable likelihood that the results will be more accurate and probative than the previous test results.

The bill would also require the court to order any unidentified DNA profile discovered during post-conviction DNA testing to be compared with the DNA profiles in the Federal Bureau of Investigation's CODIS DNA database. Such a comparison could be used to identify the actual perpetrator and exonerate e convicted.

Under existing law, post-conviction DNA testing can be granted only if the evidence containing biological material was not previously subjected to DNA testing because DNA testing was not available, testing was available but not technologically capable of providing probative results, or was not tested through no fault of the convicted person, and should be tested in the interests of justice. If the biological material was previously tested and can be subjected to newer testing techniques that could result in a more accurate and probative result, then it can be ordered to be tested again.

There is no specific statute that authorizes the courts to order an unidentified DNA profile to be compared with the DNA profiles in the FBI's database.

C.S.S.B. 122 amends current law relating to postconviction forensic DNA analysis.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

ECTION 1. Amends Article 64.01, Code of Criminal Procedure, by amending Subsections (a) and (b) and dding Subsection (a-1), as follows:

(a) Defines "biological material" in this section.

(a-1) Redesignates existing Subsection (a) as Subsection (a-1). Makes no further changes to subsection.

(b) Authorizes a motion to request forensic DNA testing only of evidence described by Subsection (a-1) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

Deletes existing text relating to evidence that was not previously subjected to DNA testing because DNA testing was not available or was available but not technologically capable of providing probative results; or through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing.

SECTION 2. Amends Chapter 64, Code of Criminal Procedure, by adding Article 64.035, as follows:

Art. 64.035. UNIDENTIFIED DNA PROFILES. Requires the convicting court, if an analyzed sample meets the applicable requirements of state or federal submission policies, on completion of the testing under Article 64.03 (Requirements; Testing), to order any unidentified DNA profile to be compared with the DNA profiles in:

(1) the DNA database established by the Federal Bureau of Investigation; and

(2) the DNA database maintained by the Department of Public Safety under Subchapter G (DNA Database System), Chapter 411 (Department of Public Safety of the State of Texas), Government Code.

SECTION 3. Amends Article 64.04, Code of Criminal Procedure, as follows:

Art. 64.04. FINDING. Requires the convicting court, after examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, to hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.

SECTION 4. Makes application of this Act prospective.

SECTION 5. Effective date: September 1, 2011.

ATTACHMENT 5:
HB 115
Relating to the creation of a commission to investigate convictions after exoneration and to prevent wrongful convictions

82R11314 AJZ-F

By: McClendon, Gallego H.B. No. 115

Substitute the following for H.B. No. 115:

By: Gallego C.S.H.B. No. 115

A BILL TO BE ENTITLED
AN ACT

relating to the creation of a commission to investigate convictions after exoneration and to prevent wrongful convictions.

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

SECTION 1. Chapter 43, Code of Criminal Procedure, is amended by adding Article 43.27 to read as follows:

Art. 43.27. TEXAS INNOCENCE COMMISSION

Sec. 1. CREATION. The Texas Innocence Commission is created.

Sec. 2. COMPOSITION. The commission is composed of nine members appointed by the governor. The governor shall make appointments to the commission without regard to the race, color, disability, sex, religion, age, or national origin of the appointee.

Sec. 3. TERMS; VACANCIES. (a) Members serve staggered six-year terms, with one-third of the members' terms expiring February 1 of each odd-numbered year.

(b) In the event of a vacancy, the governor shall appoint a replacement to fill the unexpired portion of the term.

(c) The presiding officer of the commission shall be elected on an annual basis by the members of the commission.

Sec. 4. MEETINGS. (a) The commission may hold its meetings, hearings, and other proceedings at times and places as the commission shall determine, but shall meet in Austin at least once each year. Proceedings shall be by majority vote of those present.

(b) The commission shall conduct a public hearing at least once a year, the agenda of which must include a review of the work of the commission in reviewing and investigating matters considered by the commission under this article.

Sec. 5. QUALIFICATIONS. (a) Each member must be a registered voter of the state.

(b) A member of the commission may not hold any other public office or be an employee of any state department or agency, or be an employee or member of another state board or commission during the member's tenure on the commission.

(c) An individual may not be a member of the commission or act as the general counsel to the commission if the individual or individual's spouse is required to register as a lobbyist under Chapter 305, Government Code, because of the individual's activities for compensation on behalf of a profession or entity related to the operation of the commission.

Sec. 6. GROUNDS FOR REMOVAL. (a) It is a ground for removal from the commission that a member:

(1) does not have at the time of appointment the qualifications required by this article;

(2) does not maintain during service on the commission the qualifications required by this article;

(3) violates a prohibition established by this article;

(4) is ineligible for membership under this article;

(5) cannot, because of illness or disability, discharge the member's duties for a substantial part of the member's term; or

(6) is absent from more than half of the regularly scheduled meetings that the member is eligible to attend during a calendar year, unless the absence is excused by a majority vote of the commission.

(b) The validity of an action of the commission is not affected by the fact that it is taken when a ground for removal of a commission member exists.

Sec. 7. COMMISSION MEMBER TRAINING. (a) A person who is appointed to and qualifies for office as a member of the commission shall complete a training program that meets the requirements of this section.

(b) The training program must provide the person with information regarding:

(1) the legislation that created the commission;

(2) the programs operated by the commission;

(3) the role and functions of the commission;

(4) the rules of the commission, with an emphasis on the rules that relate to its investigatory authority;

(5) the requirements of laws relating to public officials and public meetings, including conflict-of-interest laws; and

(6) any applicable ethics policies adopted by the commission or the Texas Ethics Commission.

Sec. 8. SUNSET PROVISION. The Texas Innocence Commission is subject to Chapter 325, Government Code (Texas Sunset Act). Unless continued in existence as provided by that chapter, the Texas Innocence Commission is abolished and this article expires September 1, 2023.

Sec. 9. DUTIES. (a) The commission shall make thorough review or investigation of all cases in which an innocent person was convicted and exonerated, including convictions vacated based on a plea to time served, to:

(1) identify the causes of wrongful convictions;

(2) ascertain errors and defects in the laws, rules, proof, and procedures applied in prosecuting the defendant's case at issue or implicated by each identified cause of wrongful convictions;

(3) identify errors and defects in the criminal justice process in this state generally, using peer-reviewed research, expert analysis, and demographic data;

(4) consider and develop solutions and methods to correct the identified errors and defects through legislation, rule, regulation, or procedural changes; and

(5) identify procedures, programs, and educational or training opportunities demonstrated to eliminate or minimize the causes of wrongful convictions and prevent the future occurrence of wrongful convictions and resulting executions.

(b) The commission shall consider potential implementation plans, costs, cost savings, and the impact on the criminal justice

system for each potential solution.

(c) The commission may enter into contracts for research and professional services as may be necessary or appropriate to facilitate the work and activities of the commission or complete the investigation of a particular post-exoneration case, including forensic testing and autopsies.

Sec. 10. REPORTS AND RECORDS. (a) The commission shall compile a detailed annual report of its findings and recommendations, including any proposed legislation, rule, or policy changes necessary or appropriate to implement procedures and programs to prevent the causes and occurrence of future wrongful convictions or executions. The commission may also compile interim reports for the same or similar purposes.

(b) Official annual and interim reports issued by the commission must be made available to the public on request.

(c) The findings and recommendations contained in the official reports issued by the commission may be used as evidence in any subsequent civil or criminal proceeding, according to the applicable procedural and evidentiary rules for the tribunal in which a particular matter is or may be pending.

(d) Working papers and records, including all documentary or other information, prepared or maintained by the commission, members, or staff in performing the commission's duties under this article or other law to conduct an evaluation and prepare a report, are excepted from the public disclosure requirements of Section 552.021, Government Code. A record held by another entity that is considered to be confidential by law and that the commission receives in connection with the performance of the commission's functions under this article or another law remains confidential and is excepted from the public disclosure requirements of Section 552.021, Government Code.

Sec. 11. SUBMISSION. The commission shall submit the reports described by Section 10 to the governor, the lieutenant governor, the speaker of the house of representatives, and the legislature not later than December 1 of each even-numbered year, or not later than the 60th day after the issuance of the report, whichever occurs first.

Sec. 12. GIFTS AND GRANTS. (a) The commission may apply for and accept gifts, grants, and donations from any organization described in Section 501(c)(3) or (4), Internal Revenue Code of 1986, for the purpose of funding any activity of the commission under this article. The commission may apply for and accept grants under federal programs.

(b) The commission may also receive donations from private individuals or entities.

(c) All gifts, grants, and donations must be accepted in an open meeting by a majority of the members of the commission then present and voting, and must be reported in the public records of the commission with the name of the donor and purpose of the gift, grant, or donation accepted.

(d) The commission may authorize and disburse subgrants of funds from those funds that it may accept from time to time under this section for appropriate programs, services, and activities related to and in accord with the purposes and activities of the commission.

Sec. 13. COMPENSATION; REIMBURSEMENT. A member of the commission may not receive compensation for the services provided

as a member. A member is entitled to reimbursement by the commission for the member's actual and necessary expenses incurred in performing commission duties, subject to the availability of funds from general revenue that may be appropriated to the commission by the state. Reimbursements to members for actual and necessary expenses incurred may be authorized by the commission through funds received and administered by the commission from gifts, grants, and donations it accepts under Section 12.

Sec. 14. ASSISTANCE OF STATE AGENCIES; ACCESS TO STATE AGENCIES. (a) The Texas Legislative Council, the Legislative Budget Board, and The University of Texas at Austin shall assist the commission in performing the commission's duties.

(b) The commission may also request the assistance of other state agencies and officers. When assistance is requested, a state agency or officer shall assist the commission in carrying out its functions under this article. The commission or its designee may inspect the records, documents, and files of any state agency in carrying out the commission's duties.

Sec. 15. OTHER LAW. The commission is not subject to Chapter 2110, Government Code.

SECTION 2. In appointing the initial members of the Texas Innocence Commission, the governor shall appoint three persons to terms expiring February 1, 2013, three to terms expiring February 1, 2015, and three to terms expiring February 1, 2017.

SECTION 3. The appointments to the Texas Innocence Commission required by Article 43.27, Code of Criminal Procedure, as added by this Act, shall be made not later than the 60th day after the effective date of this Act.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: HB 115 **Legislative Session:** 82(R)

Last Action: *04/21/2011 H Motion to reconsider spread on the Journal*

Caption Version: House Committee Report

Caption Text: Relating to the creation of a commission to investigate convictions after exoneration and to prevent wrongful convictions.

Author: McClendon | Gallego | Johnson | Dukes | Giddings

Coauthor: Burnam | King, Susan | Naishtat | Reynolds | Veasey | Walle

Subjects: Criminal Procedure--Posttrial Procedure (I0206)
Criminal Procedure--Sentencing & Punishment (I0205)
State Agencies, Boards & Commissions--Newly Proposed (I0773)
TEXAS INNOCENCE COMMISSION (V0306)

House Committee: Criminal Jurisprudence

Status: Out of committee

Vote: Ayes=7 Nays=1 Present Not Voting=0 Absent=1

Actions: (descending date order)

Viewing Votes: Most Recent House Vote

Description	Comment	Date	Time	Journal Page
H Motion to reconsider spread on the Journal		04/21/2011		2161
H Statement(s) of vote recorded in Journal		04/21/2011		2152
H Record vote	RV#506	04/21/2011		2152
H Failed to pass		04/21/2011		2152
H Amended	1-Zedler	04/21/2011		2151
H Read 3rd time		04/21/2011		2151
H Statement(s) of vote recorded in Journal		04/20/2011		2071
H Record vote	RV#497	04/20/2011		2071
H Passed to engrossment as amended		04/20/2011		2071
H Amended	3-Zedler	04/20/2011		2071
H Amended	2-McClendon	04/20/2011		2070
H Amended	1-McClendon	04/20/2011		2070
H Laid out as postponed business		04/20/2011		2070
H Postponed	4/20/11 10:00 AM	04/19/2011		1991
H Laid out as postponed business		04/19/2011		1991
Postponed		04/19/2011		1936
H Laid out as postponed business		04/19/2011		1936

H	Postponed	4/19/11 10:00 AM	04/14/2011	1829
H	Read 2nd time		04/14/2011	1829
H	Placed on General State Calendar		04/14/2011	
H	Considered in Calendars		04/11/2011	
H	Committee report sent to Calendars		04/01/2011	
H	Committee report distributed		03/31/2011 08:49 PM	
H	Comte report filed with Committee Coordinator		03/31/2011	1373
H	Reported favorably as substituted		03/22/2011	
H	Committee substitute considered in committee		03/22/2011	
H	Vote reconsidered in committee		03/22/2011	
H	Reported favorably as substituted		03/22/2011	
H	Considered in public hearing		03/22/2011	
H	Left pending in committee		03/08/2011	
H	Testimony taken/registration(s) recorded in committee		03/08/2011	
H	Committee substitute considered in committee		03/08/2011	
H	Considered in public hearing		03/08/2011	
H	Scheduled for public hearing on . . .		03/08/2011	
H	Posting rule suspended		03/07/2011	683
H	Referred to Criminal Jurisprudence		02/11/2011	322
H	Read first time		02/11/2011	322
H	Filed		11/08/2010	

ATTACHMENT 6:
SB 1684
Relating to procedures on Application for Habeas Corpus under certain circumstances

82R11100 GCB-F

By: Ellis S.B. No. 1684

A BILL TO BE ENTITLED
AN ACT

relating to procedures applicable to an applicant entitled to habeas corpus under certain circumstances.

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

SECTION 1. Section 3, Article 11.07, Code of Criminal Procedure, is amended by adding Subsections (d-1) and (d-2) to read as follows:

(d-1) If the convicting court finds the applicant is entitled to relief based on evidence of actual innocence, or if the convicting court finds the applicant is entitled to relief based on findings of fact and conclusions of law stipulated to by the applicant and the attorney representing the state, the convicting court shall:

(1) vacate the order convicting the applicant;

(2) order the applicant's immediate release from custody; and

(3) as applicable, order the applicant's release from other conditions of confinement or supervision imposed as a result of the conviction.

(d-2) If the convicting court vacates the order convicting the applicant, as described by Subsection (d-1), the attorney representing the state may file a notice of appeal of the order vacating the conviction order not later than 30 days after the date of the entry of that order. On filing of a notice of appeal, the judgment of the convicting court is stayed, and the court of criminal appeals retains jurisdiction over the writ of habeas corpus and may proceed in the same manner as the court otherwise proceeds under this article.

SECTION 2. The changes in law made by this Act relating to the application of writ of habeas corpus apply regardless of whether the offense for which the applicant is in custody was committed before, on, or after the effective date of this Act.

SECTION 3. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: SB 1684 **Legislative Session:** 82(R) **Council Document:** 82R 11100 GCB-F

Last Action: *04/19/2011 S No action taken in committee*

Caption Version: Introduced

Caption Text: Relating to procedures applicable to an applicant entitled to habeas corpus under certain circumstances.

Author: Ellis

Subjects: Criminal Procedure--General (I0208)
HABEAS CORPUS (S0263)

Senate Committee: Criminal Justice

Status: In committee

Actions: (descending date order)

Description	Comment	Date ▼	Time	Journal Page
S No action taken in committee		04/19/2011		
S Scheduled for public hearing on . . .		04/19/2011		
Referred to Criminal Justice		03/23/2011		713
Read first time		03/23/2011		713
S Filed		03/11/2011		
S Received by the Secretary of the Senate		03/11/2011		

BILL ANALYSIS

Senate Research Center
82R11100 GCB-F

S.B. 1684
By: Ellis
Criminal Justice
4/18/2011
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In Texas, only the Court of Criminal Appeals has the power to grant the relief that is sought in a writ of habeas corpus, including vacating a conviction, ordering a habeas applicant's release from custody, and ruling on other conditions of confinement or supervision imposed as a result of the conviction.

A person who has been wrongly convicted and seeks to have the conviction overturned to be exonerated, must file an application for writ of habeas corpus with the district court, which then recommends to the Court of Criminal Appeals that the relief be granted. This can take months and leads to unnecessary delays in the exoneree being compensated by the state for the wrongful conviction.

S.B. 1684 gives the convicting court the power to vacate the order convicting the habeas applicant if the convicting court finds that the applicant is entitled to relief based on evidence of actual innocence or findings of fact and conclusions of law stipulated to by the applicant and the prosecuting attorney. In such circumstances, it would require the convicting court to order the applicant's immediate release from custody and other conditions of confinement or supervision as a result of the conviction.

The attorney representing the state could appeal the convicting court's order to vacate the conviction. If the prosecuting attorney files a notice of appeal, the judgment of the convicting court is stayed and the Court of Criminal Appeals retains jurisdiction over the writ of habeas corpus and proceeds as it would otherwise.

As proposed, S.B. 1684 amends current law relating to procedures applicable to an applicant entitled to habeas corpus under certain circumstances.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 3, Article 11.07, Code of Criminal Procedure, by adding Subsections (d-1) and (d-2), as follows:

(d-1) Requires the convicting court, if the convicting court finds the applicant is entitled to relief based on evidence of actual innocence, or if the convicting court finds the applicant is entitled to

relief based on findings of fact and conclusions of law stipulated to by the applicant and the attorney representing the state, to:

(1) vacate the order convicting the applicant;

(2) order the applicant's immediate release from custody; and

(3) as applicable, order the applicant's release from other conditions of confinement or supervision imposed as a result of the conviction.

(d-2) Authorizes the attorney representing the state, if the convicting court vacates the order convicting the applicant, as described by Subsection (d-1), to file a notice of appeal of the order vacating the conviction order not later than 30 days after the date of the entry of that order. Provides that, on filing of a notice of appeal, the judgment of the convicting court is stayed, and the court of criminal appeals retains jurisdiction over the writ of habeas corpus and may proceed in the same manner as the court otherwise proceeds under this article.

SECTION 2. Provides that the changes in law made by this Act relating to the application of writ of habeas corpus apply regardless of whether the offense for which the applicant is in custody was committed before, on, or after the effective date of this Act.

SECTION 3. Effective date: September 1, 2011.

ATTACHMENT 7:
SB 1308
Relating to the standards for attorneys representing indigent defendants in capital cases

By: Seliger S.B. No. 1308

A BILL TO BE ENTITLED
AN ACT

relating to the standards for attorneys representing indigent defendants in capital cases.

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

SECTION 1. Article 26.052, Code of Criminal Procedure, is amended by amending Subsection (d) and adding Subsection (n) to read as follows:

(d)(1) The committee shall adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought.

(2) The standards must require that a trial attorney appointed as lead counsel to a capital case:

(A) be a member of the State Bar of Texas;

(B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;

(C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;

(D) have at least five years of criminal law experience;

(E) have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second or first degree felonies or capital felonies;

(F) have trial experience in:

(i) the use of and challenges to mental health or forensic expert witnesses; and

(ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and

(G) have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

(3) The standards must require that an attorney appointed as lead appellate counsel in the direct appeal of a capital case:

(A) be a member of the State Bar of Texas;

(B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;

(C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;

(D) have at least five years of criminal law

experience;

(E) have authored a significant number of appellate briefs, including appellate briefs for homicide cases and other cases involving an offense punishable as a capital felony or a felony of the first degree or an offense described by Section 3g(a)(1), Article 42.12;

(F) have trial or appellate experience in:

(i) the use of and challenges to mental health or forensic expert witnesses; and

(ii) the use of mitigating evidence at the penalty phase of a death penalty trial; and

(G) have participated in continuing legal education courses or other training relating to criminal defense in appealing death penalty cases.

(4) The committee shall prominently post the standards in each district clerk's office in the region with a list of attorneys qualified for appointment.

(5) Not later than the second anniversary of the date an attorney is placed on the list of attorneys qualified for appointment in death penalty cases and each year following the second anniversary, the attorney must present proof to the committee that the attorney has successfully completed the minimum continuing legal education requirements of the State Bar of Texas, including a course or other form of training relating to criminal defense in death penalty cases or in appealing death penalty cases, as applicable. The committee shall remove the attorney's name from the list of qualified attorneys if the attorney fails to provide the committee with proof of completion of the continuing legal education requirements.

(n) At the request of an attorney, the local selection committee shall make a determination under Subsection (d)(2)(C) or (3)(C), as applicable, regarding an attorney's current ability to provide effective representation following a judicial finding that the attorney previously rendered ineffective assistance of counsel in a capital case.

SECTION 2. The change in law made by this Act applies to an attorney who, before, on, or after the effective date of this Act, has been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of a capital case.

SECTION 3. A local selection committee shall amend its standards as necessary to conform with the requirements of Subsection (n), Article 26.052, Code of Criminal Procedure, as added by this Act, not later than the 30th day after the effective date of this Act.

SECTION 4. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: SB 1308 **Legislative Session:** 82(R) **Council Document:** 82R 8877 SJM-F

Last Action: *05/03/2011 H Scheduled for public hearing on . . .*

Caption Version: Engrossed

Caption Text: Relating to the standards for attorneys representing indigent defendants in capital cases.

Author: Seliger

Cosponsor:

Subjects: Crimes--Capital Punishment (I0195)
Criminal Procedure--Defense Counsel (I0207)
Lawyers (I0515)
INDIGENT LEGAL SERVICES (S0598)

Senate Committee: Jurisprudence

Status: Out of committee

Vote: Ayes=7 Nays=0 Present Not Voting=0 Absent=0

House Committee: Criminal Jurisprudence

Status: In committee

Actions: (descending date order)

Viewing Votes: Most Recent Senate Vote

	Description	Comment	Date ▼	Time	Journal Page
H	Scheduled for public hearing on . . .		05/03/2011		
H	Withdrawn from schedule		04/19/2011		
H	Scheduled for public hearing on . . .		04/19/2011		
H	Referred to Criminal Jurisprudence		04/11/2011		1660
H	Read first time		04/11/2011		1660
H	Received from the Senate		04/06/2011		1545
S	Reported engrossed		04/05/2011		964
S	Record vote		04/05/2011		940
S	Passed		04/05/2011		940
S	Read 3rd time		04/05/2011		940
S	Record vote		04/05/2011		939
S	Three day rule suspended		04/05/2011		939
S	Vote recorded in Journal		04/05/2011		939
	Read 2nd time & passed to engrossment		04/05/2011		939
	Rules suspended-Regular order of business		04/05/2011		939
S	Motion withdrawn		04/05/2011		938

S	Motion to suspend regular order of business	04/05/2011	938
S	Placed on local & uncontested calendar	04/07/2011	
S	Placed on intent calendar	04/04/2011	
S	Committee report printed and distributed	03/30/2011 01:10 PM	
S	Recommended for local & uncontested calendar	03/30/2011	
S	Reported favorably w/o amendments	03/30/2011	832
S	Considered in public hearing	03/29/2011	
S	Scheduled for public hearing on . . .	03/29/2011	
S	Referred to Jurisprudence	03/16/2011	581
S	Read first time	03/16/2011	581
S	Filed	03/08/2011	
S	Received by the Secretary of the Senate	03/08/2011	

Texas Legislature Online
Companions

Bill: SB 1308 **Legislative Session:** 82(R) **Author:** Seliger

Note: Companion documents are designated at the time of introduction. These are to be used as an aid only! Final determination of companion documents rests with the presiding officers of the house and senate.

HB 3323 **Degree of Association:** Identical
Author: McClendon
Last Action: 04/26/2011 H Committee report sent to Calendars
Relating to the standards for attorneys representing indigent defendants in capital cases.

BILL ANALYSIS

Senate Research Center
82R8877 SJM-F

S.B. 1308
By: Seliger
Jurisprudence
3/21/2011
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Current statute states that in order for an attorney to be appointed to represent indigent defendants in both capital cases and appellate cases, the attorney must have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case. Currently, the permanent ban has removed highly skilled attorneys from the appointments list even when some findings of ineffective assistance of counsel may be very case-specific and not be indicative of future representation. The demand for more qualified capital defense lawyers to defend indigent clients continues to be problematic.

This bill would allow for the review of attorneys who are no longer eligible to represent indigent defendants in capital cases due to a single finding of ineffective counsel. The determination will be made by the regional Selection Committee, which includes an administrative law judge, a district judge, a representative from the local bar association, and a board-certified criminal attorney.

As proposed, S.B. 1308 amends current law relating to the standards for attorneys representing indigent defendants in capital cases.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 26.052, Code of Criminal Procedure, by amending Subsection (d) and adding Subsection (n), as follows:

(d)(1) Requires the local selection committee to adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought.

(2) Requires that the standards require that a trial attorney appointed as lead counsel to a capital case meet certain requirements, including that the trial attorney have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability

to provide effective representation.

(3) Requires that the standards require an attorney appointed as lead appellate counsel in direct appeal of a capital case meet certain requirements, including that the attorney have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation.

(4)-(5) Makes no changes to these subdivisions.

(n) Requires the local selection committee, at the request of an attorney, to make a determination under Subsection (d)(2)(C) (relating to the standards required of a trial attorney in a capital case) or (3)(C) (relating to the standards required of a lead appellate counsel in a capital case), as applicable, regarding the attorney's current ability to provide effective representations following a judicial finding that the attorney previously rendered ineffective assistance of counsel in a capital case.

SECTION 2. Provides that the change in law made by this Act applies to an attorney who, before, on, or after the effective date of this Act, has been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of a capital case.

SECTION 3. Requires a local selection committee to amend its stands as necessary to conform with the requirements of Article 26.052(n), Code of Criminal Procedure, as added by this Act, not later than the 30th day after the effective date of this Act.

SECTION 4. Effective date: September 1, 2011.

ATTACHMENT 8:
HB 1647
Relating to discovery in a criminal case

82R470 SJM-D

By: Gallego H.B. No. 1647

A BILL TO BE ENTITLED
AN ACT

relating to discovery in a criminal case.

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

SECTION 1. Article 39.14, Code of Criminal Procedure, is amended to read as follows:

Art. 39.14. DISCOVERY

Sec. 1. DISCLOSURE BY STATE. (a) Subject to the restrictions provided by Article 39.15, as soon as practicable after receiving a timely request from the defendant, the attorney representing the state shall disclose to the defendant's counsel and permit inspection, photocopying, and photographing of the following materials and information in the possession, custody, or control of the state or any of its agencies:

(1) any exculpatory or impeachment evidence material to the defendant's guilt or punishment;

(2) any written or recorded statements that are made by the defendant or by any witness the attorney representing the state intends to call at the trial and that are related to the case charged, including offense reports by law enforcement personnel and electronically recorded statements, if any;

(3) any written record containing the substance of any oral statement that is made by the defendant and that is related to the case charged, whether made before or after the defendant's arrest, in response to interrogation by any person whom the defendant believed to be a peace officer;

(4) the defendant's prior criminal record;

(5) any record of a criminal conviction admissible for impeachment under Rule 609, Texas Rules of Evidence, of a witness the attorney representing the state intends to call at the trial;

(6) any affidavit, warrant, or return pertaining to a search or seizure in connection with the case;

(7) any physical or documentary evidence that was obtained from or that belongs to the defendant or that the attorney representing the state intends to use at the trial and, on a showing of materiality by the defendant, the opportunity to test that evidence;

(8) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence, and the names of all other witnesses the attorney representing the state intends to call at the trial;

(9) any report produced by or for an expert witness the attorney representing the state intends to call at the trial; and

(10) any plea agreement, grant of immunity, or other agreement for testimony issued by the attorney representing the state in connection with the case. [~~Upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the~~

~~defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the rights herein granted shall not extend to written communications between the State or any of its agents or representatives or employees. Nothing in this Act shall authorize the removal of such evidence from the possession of the State, and any inspection shall be in the presence of a representative of the State.~~]

(b) If the defendant gives notice of a defense under Section 2(b), the attorney representing the state shall disclose to the defendant's counsel as soon as practicable the names of the witnesses of whom the state has knowledge and whom the state intends to use to rebut the defense or the testimony of any of the defendant's witnesses called to establish that defense [~~On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins~~].

(c) This article does not authorize the removal of physical evidence from the possession of the state, and any inspection of physical evidence shall be conducted in the presence of a representative of the state.

Sec. 2. DISCLOSURE BY DEFENDANT. (a) As soon as practicable after receiving the initial disclosure under Section 1 from the attorney representing the state, the defendant shall disclose to the attorney representing the state and permit inspection, photocopying, and photographing of the following materials and information:

(1) any written or recorded statement by a witness, other than the defendant, that is related to the offense charged, if the defendant intends to call the witness at the trial;

(2) any record of a criminal conviction admissible for impeachment under Rule 609, Texas Rules of Evidence, of a witness, other than the defendant, the defendant intends to call at the trial, if that information is known to the defendant;

(3) any physical or documentary evidence that the defendant intends to use at the trial and, on a showing of materiality by the attorney representing the state, the opportunity to test that evidence;

(4) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence, and the names of all other witnesses, other than the defendant, the defendant intends to call at the trial; and

(5) any report produced by or for an expert witness the defendant intends to call at the trial.

(b) On a request by the state, a defendant planning to offer evidence of one or more defenses listed in Chapter 8 or 9, Penal Code, or evidence of an alibi defense, shall file a good faith notice of intent to raise the defense with the court and the attorney representing the state not later than the 30th day before the date the trial begins or as soon as practicable after the date the defendant receives a disclosure under Section 1 to which the defense is responsive, whichever is later. If the defendant intends to raise an alibi defense, the notice must include the place at which the defendant claims to have been at the time of the alleged offense and the names of the witnesses the defendant intends to use to establish the alibi. Any notice provided under this subsection is for purposes of discovery only and is not admissible at trial unless the court finds that the contents of the notice were not made in good faith.

(c) After the filing of the indictment or information, the court may require the defendant to submit nontestimonial evidence to the state. This subsection does not limit any law enforcement agency or prosecutor's office from seeking or obtaining nontestimonial evidence to the extent permitted by law.

Sec. 3. EXCEPTIONS TO DISCLOSURE. (a) Neither the attorney representing the state nor the defendant is required to disclose materials or information that is:

(1) recorded proceedings of a grand jury, except as provided by Rule 615, Texas Rules of Evidence;

(2) a work product other than an offense report by law enforcement personnel, including a report, memorandum, or other internal document of the attorney representing the state, the attorney representing the defendant, or an investigator or other agent of the attorney representing the state or the attorney representing the defendant that is made in connection with the investigation, prosecution, or defense of the case; or

(3) privileged under a rule of evidence, an express statutory provision, the Texas Constitution, or the United States Constitution.

(b) This article does not authorize disclosure of the name, address, or telephone number of a victim in violation of Chapter 57.

(c) A victim impact statement is subject to disclosure before the testimony of the victim is taken only if the court determines that the statement contains exculpatory material.

Sec. 4. CONTINUING DUTY TO DISCLOSE. If, before a trial begins, but subsequent to compliance with this article or a relevant court order, a party discovers additional material or information subject to disclosure, the party shall immediately notify the other party's counsel of the existence of the additional material or information.

Sec. 5. EXCISION. (a) Except as provided by Subsection (b), if a portion of material or information is subject to discovery under this article and a portion is not subject to discovery, only the portion that is subject to discovery must be disclosed. The disclosing party shall inform the other party's counsel that the portion of material or information that is not subject to discovery has been excised and withheld. On request, the court shall conduct a hearing to determine whether the reasons for excision are justifiable. Material or information excised pursuant to judicial

order shall be sealed and preserved in the records of the court and shall be made available to an appellate court in the event of an appeal.

(b) Excision of a witness statement produced in accordance with Rule 615, Texas Rules of Evidence, is governed by that rule.

(c) Notwithstanding any other provision of this article, the attorney representing the state, without a protective court order or a hearing before the court, may excise from an offense report or other report any information related to the victim of an offense that is listed under:

(1) Section 3g, Article 42.12; or

(2) Article 62.001(5).

Sec. 6. PROTECTIVE ORDERS. On a showing of good cause, the court may at any time enter an appropriate protective order that a specified disclosure be denied, restricted, or deferred. "Good cause," for purposes of this section, includes threats, harm, intimidation, or possible danger to the safety of a victim or witness, possible loss, destruction, or fabrication of evidence, or possible compromise of other investigations by law enforcement or a defense offered by a defendant.

Sec. 7. IN CAMERA PROCEEDINGS. On request, the court may permit to be made in camera an excision hearing under Section 5(a), a showing of good cause for denial or regulation of a disclosure under Section 6, or any portion of a proceeding. A verbatim record shall be made of a proceeding in camera. If the court excises a portion of the material or information or enters an order granting relief following a showing of good cause, the entire record shall be sealed and preserved in the records of the court and shall be made available to an appellate court in the event of an appeal.

Sec. 8. CONFERENCE. On request of the attorney representing the state or the defendant, the court shall hold a discovery hearing under Section 1(8), Article 28.01, not later than the 10th day before the date the trial begins, to:

(1) ensure that the parties are fully aware of their respective disclosure obligations under this article; and

(2) verify compliance by each party with this article.

Sec. 9. COMPLIANCE; SANCTIONS. (a) The disclosures required under this article may be performed in any manner that is mutually agreeable to the attorney representing the state and the attorney representing the defendant or that is ordered by the court in accordance with this article. The order issued by the court may specify the time, place, and manner of making the required disclosures.

(b) On a showing that a party has not made a good faith effort to comply with this article or a relevant court order, the court may make any order the court finds necessary under the circumstances, including an order related to immediate disclosure, contempt proceedings, delay or prohibition of the use of a defense or the introduction of evidence, or continuance of the matter. The court may also inform the jury of any failure or refusal to disclose or any untimely disclosure under this article.

(c) The court may prohibit the use of a defense or the introduction of evidence under Subsection (b) only if all other sanctions have been exhausted or the discovery violation amounts to wilful misconduct designed to obtain a tactical advantage that would minimize the effectiveness of cross-examination or the ability to adduce rebuttal evidence. The court may not dismiss a

charge under Subsection (b) unless authorized or required to do so by other law.

(d) The failure of the attorney representing the state or the defendant to comply with this article is not a ground for a court to set aside the conviction or sentence of the defendant, unless the court's action is authorized or required by other law.

Sec. 10. COSTS. (a) All reasonable and necessary costs related to a disclosure required under this article, including the photocopying of materials, shall be paid by the requesting party.

(b) The commissioners court of the county in which the indictment, information, or complaint is pending may not, as a result of any payment by the defendant of the costs required by this article, reduce the amount of money provided by the county to the office of the attorney representing the state.

Sec. 11. DISCLOSURE TO THIRD PARTIES. Before the date on which the trial begins, the attorney representing the state, the attorney representing the defendant, or an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant may not disclose, without obtaining approval of the trial court, information or witness statements received from the opposing party to any third party, other than to an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant, as applicable. Information or witness statements received under this article may not be made available to the public.

Sec. 12. PRO SE DEFENDANTS. This article, including the provisions regarding the nondisclosure of a witness statement or an offense report by law enforcement personnel, applies to a defendant who has elected to proceed pro se only to the extent approved by the court.

Sec. 13. CONFLICT OF LAW. To the extent of any conflict, this article prevails over Chapter 552, Government Code.

SECTION 2. The change in law made 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 covered by the law in effect when the offense was committed, and the former law is continued in effect for this 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 3. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: HB 1647 **Legislative Session:** 82(R) **Council Document:** 82R 470 SJM-D

Last Action: *03/15/2011 H Left pending in committee*

Caption Version: Introduced
Caption Text: Relating to discovery in a criminal case.

Author: Gallego

Cosponsor:

Subjects: Courts--Prosecuting Attorneys (I0165)
Criminal Procedure--Pretrial Procedure (I0203)
EVIDENCE (S0250)

House Committee: Criminal Jurisprudence
Status: In committee

Actions: (descending date order)

	Description	Comment	Date ▼	Time	Journal Page
H	Left pending in committee		03/15/2011		
	Testimony taken/registration(s) recorded in committee		03/15/2011		
	Considered in public hearing		03/15/2011		
H	Scheduled for public hearing on . . .		03/15/2011		
H	Referred to Criminal Jurisprudence		03/03/2011		663
H	Read first time		03/03/2011		663
H	Filed		02/22/2011		

Texas Legislature Online
Companions

Bill: HB 1647 **Legislative Session:** 82(R) **Author:** Gallego

Note: Companion documents are designated at the time of introduction. These are to be used as an aid only! Final determination of companion documents rests with the presiding officers of the house and senate.

SB 1526 **Degree of Association:** Identical
Author: Hinojosa
Last Action: 05/03/2011 S Scheduled for public hearing on . . .
Relating to discovery in a criminal case.

ATTACHMENT 9:
HB 1646
Relating to representation of certain Applicans for Writs of Habeas Corpus involving the death penalty

82R6626 SJM-F

By: Gallego H.B. No. 1646

A BILL TO BE ENTITLED
AN ACT

relating to representation of certain applicants for writs of habeas corpus in cases involving the death penalty.

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

SECTION 1. Section 6, Article 11.071, Code of Criminal Procedure, is amended by adding Subsection (b-1) to read as follows:

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint competent counsel and provide for the compensation and reimbursement of expenses of that counsel as is provided by Sections 2A and 3, including compensation for time previously spent and reimbursement of expenses previously incurred and regardless of whether the subsequent application is ultimately dismissed.

SECTION 2. The change in law made by this Act applies to a subsequent application for a writ of habeas corpus filed on or after January 1, 2012. A subsequent application filed before January 1, 2012, is covered by the law in effect when the application was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: HB 1646 **Legislative Session:** 82(R) **Council Document:** 82R 6626 SJM-F

Last Action: *04/07/2011 H Reported favorably w/o amendment(s)*

Caption Version: Introduced

Caption Text: Relating to representation of certain applicants for writs of habeas corpus in cases involving the death penalty.

Author: Gallego

Cosponsor:

Subjects: Courts--General (I0160)
Crimes--Capital Punishment (I0195)
Criminal Procedure--Defense Counsel (I0207)
Criminal Procedure--Posttrial Procedure (I0206)
HABEAS CORPUS (S0263)

House Committee: Criminal Jurisprudence

Status: Out of committee

Vote: Ayes=7 Nays=0 Present Not Voting=0 Absent=2

ctions: (descending date order)

Description	Comment	Date ▼	Time	Journal Page
H Reported favorably w/o amendment(s)		04/07/2011		
H Recommended to be sent to Local & Consent		04/07/2011		
H Committee substitute considered in committee		04/07/2011		
H Considered in formal meeting		04/07/2011		
H Left pending in committee		03/29/2011		
H Testimony taken/registration(s) recorded in committee		03/29/2011		
H Committee substitute considered in committee		03/29/2011		
H Considered in public hearing		03/29/2011		
H Scheduled for public hearing on . . .		03/29/2011		
H Referred to Criminal Jurisprudence		03/03/2011		663
H Read first time		03/03/2011		663
H Filed		02/22/2011		

Texas Legislature Online
Companions

Bill: HB 1646 **Legislative Session:** 82(R) **Author:** Gallego

Note: Companion documents are designated at the time of introduction. These are to be used as an aid only! Final determination of companion documents rests with the presiding officers of the house and senate.

SB 1078 **Degree of Association:** Identical
Author: Ellis
Last Action: 03/16/2011 S Referred to Criminal Justice
Relating to representation of certain applicants for writs of habeas corpus in cases involving the death penalty.

ATTACHMENT 10:
SB 167
Relating to the automatic expunctions of arrest records and files after an individual receives a pardon or a grant of certain other relief

By: West S.B. No. 167

A BILL TO BE ENTITLED
AN ACT

relating to the automatic expunction of arrest records and files after an individual receives a pardon or a grant of certain other relief with respect to the offense for which the individual was arrested.

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

SECTION 1. Subsection (a), Article 55.01, Code of Criminal Procedure, is amended to read as follows:

(a) A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if:

(1) the person is tried for the offense for which the person was arrested and is:

(A) acquitted by the trial court, except as provided by Subsection (c) of this section; or

(B) convicted and subsequently:

(i) pardoned; or

(ii) otherwise granted relief on the basis of actual innocence with respect to that offense; or

(2) each of the following conditions exist:

(A) an indictment or information charging the person with commission of a felony has not been presented against the person for an offense arising out of the transaction for which the person was arrested or, if an indictment or information charging the person with commission of a felony was presented, the indictment or information has been dismissed or quashed, and:

(i) the limitations period expired before the date on which a petition for expunction was filed under Article 55.02; or

(ii) the court finds that the indictment or information was dismissed or quashed because the person completed a pretrial intervention program authorized under Section 76.011, Government Code, or because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense or because it was void;

(B) the person has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court ordered community supervision under Article 42.12 for any offense other than a Class C misdemeanor; and

(C) the person has not been convicted of a felony in the five years preceding the date of the arrest.

SECTION 2. Article 55.02, Code of Criminal Procedure, is amended by adding Section 1a to read as follows:

Sec. 1a. (a) The trial court presiding over a case in which a defendant is convicted and subsequently pardoned or otherwise subsequently granted relief on the basis of actual innocence of the offense of which the defendant was convicted, if the trial court is a district court, or a district court in the county in which the trial court is located, shall enter an order of expunction for a

person entitled to expunction under Article 55.01(a)(1)(B) not later than the 30th day after the date the court receives notice of the pardon or other grant of relief. The person shall provide to the district court all of the information required in a petition for expunction under Section 2(b).

(b) The attorney for the state shall:

(1) prepare an expunction order under this section for the court's signature; and

(2) notify the Texas Department of Criminal Justice if the person is in the custody of the department.

(c) The court shall include in an expunction order under this section a listing of each official, agency, or other entity of this state or political subdivision of this state and each private entity that there is reason to believe has any record or file that is subject to the order. The court shall also provide in an expunction order under this section that:

(1) the Texas Department of Criminal Justice shall send to the court the documents delivered to the department under Section 8(a), Article 42.09; and

(2) the Department of Public Safety and the Texas Department of Criminal Justice shall delete or redact, as appropriate, from their public records all index references to the records and files that are subject to the expunction order.

(d) The court shall retain all documents sent to the court under Subsection (c)(1) until the statute of limitations has run for any civil case or proceeding relating to the wrongful imprisonment of the person subject to the expunction order.

SECTION 3. Subsection (a), Section 2, Article 55.02, Code of Criminal Procedure, is amended to read as follows:

(a) A person who is entitled to expunction of records and files under Article 55.01(a)(2) [~~55.01(a)~~] or a person who is eligible for expunction of records and files under Article 55.01(b) may file an ex parte petition for expunction in a district court for the county in which:

(1) the petitioner was arrested; or

(2) the offense was alleged to have occurred.

SECTION 4. Subsection (c), Section 3, Article 55.02, Code of Criminal Procedure, is amended to read as follows:

(c) When the order of expunction is final, the clerk of the court shall send a certified copy of the order to the Crime Records Service of the Department of Public Safety and to each official or agency or other governmental entity of this state or of any political subdivision of this state named in [~~designated by the person who is the subject of~~] the order. The certified copy of the order must be sent by secure electronic mail, electronic transmission, or facsimile transmission or otherwise by certified mail, return receipt requested. In sending the order to a governmental entity named in the order [~~designated by the person~~], the clerk may elect to substitute hand delivery for certified mail under this subsection, but the clerk must receive a receipt for that hand-delivered order.

SECTION 5. Subsection (a), Section 5, Article 55.02, Code of Criminal Procedure, is amended to read as follows:

(a) Except as provided by Subsections (f) and (g), on receipt of the order, each official or agency or other governmental entity named in the order shall:

(1) return all records and files that are subject to

the expunction order to the court or in cases other than those described by Section 1a, if removal is impracticable, obliterate all portions of the record or file that identify the person who is the subject of the order and notify the court of its action; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order.

SECTION 6. This Act applies to the expunction of arrest records related to a criminal offense for which a pardon or other relief on the basis of actual innocence was granted before, on, or after the effective date of this Act.

SECTION 7. This Act takes effect September 1, 2011.

Texas Legislature Online
History

Bill: SB 167 **Legislative Session:** 82(R) **Council Document:** 82R 401 GCB-D

Last Action: *04/28/2011 H Referred to Criminal Jurisprudence*

Caption Version: Engrossed

Caption Text: Relating to the automatic expunction of arrest records and files after an individual receives a pardon or a grant of certain other relief with respect to the offense for which the individual was arrested.

Author: West

Subjects: Corrections--Parole, Probation & Pardons (I0093)
Criminal Procedure--General (I0208)
EXPUNCTION OF RECORDS (S0189)

Senate Committee: Criminal Justice

Status: Out of committee

Vote: Ayes=7 Nays=0 Present Not Voting=0 Absent=0

House Committee: Criminal Jurisprudence

Status: In committee

Actions: (descending date order)

Viewing Votes: Most Recent Senate Vote

	Description	Comment	Date ▼	Time	Journal Page
H	Referred to Criminal Jurisprudence		04/28/2011		2382
H	Read first time		04/28/2011		2382
H	Received from the Senate		04/19/2011		2004
S	Reported engrossed		04/19/2011		1280
S	Record vote		04/19/2011		1181
S	Passed		04/19/2011		1181
S	Read 3rd time		04/19/2011		1181
S	Record vote		04/19/2011		1181
S	Three day rule suspended		04/19/2011		1181
S	Vote recorded in Journal		04/19/2011		1181
S	Read 2nd time & passed to engrossment		04/19/2011		1181
S	Rules suspended-Regular order of business		04/19/2011		1180
S	Placed on intent calendar		04/18/2011		
S	Committee report printed and distributed		04/11/2011	01:56 PM	
	Recommended for local & uncontested calendar		04/11/2011		
	Reported favorably as substituted		04/11/2011		1025
S	Testimony taken in committee		04/05/2011		

S	Considered in public hearing	04/05/2011	
S	Scheduled for public hearing on . . .	04/05/2011	
S	Referred to Criminal Justice	01/31/2011	219
S	Read first time	01/31/2011	219
S	Filed	11/08/2010	
S	Received by the Secretary of the Senate	11/08/2010	

BILL ANALYSIS

Senate Research Center
82R20607 GCB-D

C.S.S.B. 167
By: West
Criminal Justice
4/6/2011
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Since the first DNA exoneration in 1989, there have been 266 such exonerations in the United States. The most recent figures say that 41 of those exonerations have occurred in Texas, the most in any state. Twenty-four have come from Dallas County, the most from any single jurisdiction.

Although exonerated, the criminal records connected to the arrest, indictment, and conviction for the offense still exist. While an exoneration and pardon overturn the conviction and release the subject from incarceration, an expunction is still needed to remove records of the offense from various national, state, and local criminal history records repositories.

Presently, the expunction process that must be handled through the court system is required to be handled by private attorney or a legal representative working on behalf of the exoneree. There are court costs and possible attorney fees involved that could cost thousands of dollars.

The actions of wrongful arrest, indictment, conviction, and incarceration were carried forth by the various components of the criminal justice system. The final act of overturning a wrongful conviction is the expunction of all criminal records related to the alleged offense, and wrongful conviction should also be completed by the criminal justice system.

C.S.S.B. 167 provides the opportunity for Texas' criminal justice system to complete the cycle.

C.S.S.B. 167 amends current law relating to the automatic expunction of arrest records and files after an individual receives a pardon or a grant of certain other relief with respect to the offense for which the individual was arrested.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 55.01(a), Code of Criminal Procedure, to provide that a person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if the person is tried for the offense for which

the person was arrested and is convicted and subsequently pardoned or otherwise granted relief on the basis of actual innocence with respect to that offense.

SECTION 2. Amends Article 55.02, Code of Criminal Procedure, by adding Section 1a, as follows:

Sec. 1a. (a) Requires the trial court presiding over a case in which a defendant is convicted and subsequently pardoned or otherwise subsequently granted relief on the basis of actual innocence of the offense on which the defendant was convicted, if the trial court is a district court, or a district court in the county in which the trial court is located, to enter an order of expunction for a person entitled to expunction under Article 55.01(a)(1)(B) (relating to a person convicted and subsequently pardoned or granted relief on the basis of innocence) not later than the 30th day after the date the court receives notice of the pardon or other grant of relief. Requires the person to provide to the district court all of the information required in a petition for expunction under Section 2(b) (relating to the contents of and verification of an ex parte petition).

(b) Requires the attorney for the state to prepare an expunction order under this section for the court's signature, and notify the Texas Department of Criminal Justice (TDCJ) if the person is in the custody of TDCJ.

(c) Requires the court to include in an expunction order under this section a listing of each official, agency, or other entity of this state or political subdivision of this state and each private entity that there is reason to believe has any record or file that is subject to the order. Requires the court to also provide in an expunction order under this section that:

(1) TDCJ is required to send to the court the documents delivered to TDCJ un. Section 8(a) (relating to requiring a county that transfers a defendant to TDCJ under this article to deliver to an officer designated by the TDCJ certain documents), Article 42.09 (Commencement of Sentence; Status During Appeal; Pen Packet); and

(2) the Department of Public Safety of the State of Texas (DPS) and TDCJ are required to delete or redact, as appropriate, from their public records all index references to the records and files that are subject to the expunction order.

(d) Requires the court to retain all documents sent to the court under Subsection (c)(1) until the statute of limitations has run for any civil case or proceeding relating to the wrongful imprisonment of the person subject to the expunction order.

SECTION 3. Amends Section 2(a), Article 55.02, Code of Criminal Procedure, as follows:

(a) Authorizes a person who is entitled to expunction of records and files under Article 55.01(a)(2) (relating to the required conditions for all records and files relating to the arrest to be expunged), rather than under Article 55.01(a), or a person eligible for expunction of records and files under Article 55.01(b) (authorizing a district court to expunge all records and files relating to the arrest of a person who has been arrested for commission of a felony or misdemeanor under the procedure established under Article 55.02 of this code if the person meets certain conditions), to file an ex parte petition for expunction in a district court for the county in which the petitioner was arreste the county in which the offense was alleged to have occurred.

SECTION 4. Amends Section 3(c), Article 55.02, Code of Criminal Procedure, as follows:

(c) Requires the clerk of the court, when the order of the expunction is final, to send a certified copy of the order to the Crime Records Service of DPS and to each official or agency or other governmental entity of this state or of any political subdivision of this state named in the order, rather than sending a certified copy of the order to those entities designated by the person who is the subject of the order. Makes a conforming change.

SECTION 5. Amends Section 5(a), Article 55.02, Code of Criminal Procedure, as follows:

(a) Requires each official or agency or other governmental entity named in the order, except as provided by Subsections (f) (relating to the requirements of each official, agency, or other governmental entity named in an order granting expunction to a person) and (g) (relating to authorization to retain certain records), on receipt of the order, to:

(1) return all records and files that are subject to the expunction order to the court or in cases other than those described by Section 1a, if removal is impracticable, obliterate all portions of the record or file that identify the person who is the subject of the order and notify the court of its action; and

(2) Makes no changes to this subdivision.

SECTION 6. Provides that this Act applies to the expunction of arrest records related to a criminal offense for which a pardon or other relief on the basis of actual innocence was granted before, on, or after the effective date of this Act.

SECTION 7. Effective date: September 1, 2011.

ATTACHMENT 11:
Excerpts from Timothy Cole Advisory Panel on Wrongful Convictions: Report and Recommendation

Timothy Cole Advisory Panel on Wrongful Convictions

Report to the Texas Task Force on Indigent Defense

Timothy Cole Advisory Panel on Wrongful Convictions

Membership

The Honorable John Whitmire
Chair, Criminal Justice Committee

The Honorable Jeff Wentworth
Chair, Jurisprudence Committee

The Honorable Jim McReynolds
Chair, Corrections Committee

The Honorable Pete Gallego
Chair, Criminal Jurisprudence

Ms. Kathryn M. Kase
Texas Criminal Defense Lawyers Association

The Honorable Barry Macha
President, Texas District and County
Attorneys Association

The Honorable Barbara Hervey
Judge, Court of Criminal Appeals

Prof. Sandra Guerra Thompson
University of Houston Law Center

Ms. Mary Anne Wiley
Deputy General Counsel
Office of the Governor

Mr. James D. Bethke
Director, Task Force on Indigent Defense

Chief James McLaughlin
Executive Director and General Counsel
Texas Police Chiefs Association

Timothy Cole Advisory Panel on Wrongful Convictions
Summary Panel Recommendation

The Panel recommends that the State of Texas should:

Eyewitness Identification Procedures:

1. Require Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to work with scientific experts in eyewitness memory research and law enforcement agencies to develop, adopt, disseminate to all law enforcement agencies, and annually review a model policy and training materials regarding the administration of photo and live lineups. That model policy should comport with science in the areas of cautionary instructions, filler selection, double-blind administration, documentation of identification procedures, and other procedures or best practices supported by credible research.
2. Require all law enforcement agencies to adopt eyewitness identification procedures that comply with the model policy promulgated by LEMIT.
3. Integrate training on eyewitness identification procedures into the required curricula of the LEMIT and the Texas Commission on Law Enforcement Standards and Education (TCLEOSE).
4. Permit evidence of compliance or noncompliance with the model policy to be admissible in court.
5. Allow law enforcement agencies discretion on the adoption of sequential procedures.

Recording Custodial Interrogations:

6. Adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.

Discovery Procedures:

7. Adopt a discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.

Post-Conviction Proceedings:

8. Amend the Chapter 64 motion for post-conviction DNA testing to allow testing of any previously untested biological evidence, regardless of the reason the evidence was not previously tested, or evidence previously tested using older, less accurate methods.
9. Amend the Chapter 11 writs of habeas corpus to include a writ based on changing scientific evidence.

Innocence Commission:

10. Formalize the current work of the innocence projects that receive state funding to provide further detail in the projects' annual reports and distribute those reports to the Governor, Lieutenant Governor, Speaker of the House, and Chairs of the Senate Jurisprudence, House Corrections, House Criminal Jurisprudence and Senate Criminal Justice Committees. Report input should be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations.
11. Provide an FTE for the Task Force using the current appropriation or other grant funding to administer these responsibilities, and contracts between the innocence projects and the Task Force on Indigent Defense should be amended to reflect the new administrator and additional responsibilities.

The Justice Project: The Texas DNA Exonerated[8]

Last Name	First Name	Year Convicted	Year Exonerated	County	Crime	Mistaken Eyewitness Identification	Faulty Forensic Testimony	Unreliable or Limited Forensic Methods	Jailhouse Informant & Accomplice Testimony	False Confession or Plea	Suppression of Exculpatory Evidence or Other Misconduct	Approximate Years in Prison
Alejandro	Gilbert	1990	1994	Uvalde	rape	✓	✓					4
Blair	Michael Nawee	1994	2003	Collin	rape, murder	✓	✓	✓				14
Butler	A.B.	1983	2000	Smith	rape, kidnapping	✓						17
Byrd	Kevin	1985	1997	Harris	rape	✓		✓				12
Chatman	Charles	1981	2007	Dallas	rape	✓		✓				27
Cole*	Timothy Brian	1986	2008	Lubbock	rape	✓		✓			✓	13*
Criner	Roy	1990	2000	Montgomery	rape, murder				✓			10
Danziger	Richard	1990	2001	Travis	rape, murder			✓	✓	✓		12
Fountain	Wiley	1986	2003	Dallas	rape	✓						16
Fuller	Larry	1981	2006	Dallas	rape	✓	✓					20
Giles	James Curtis	1983	2007	Dallas	rape	✓					✓	10
Good	Donald	1984	2004	Dallas	rape	✓		✓			✓	10
Gossett	Andrew	2000	2007	Dallas	rape	✓						7
Henton	Eugene	1984	2006	Dallas	rape	✓				✓		2
Karage	Entre Nax	1997	2004	Dallas	murder							7
Lavernia	Carlos	1985	2000	Travis	rape	✓						16
Lindsey	Johnnie Earl	1983	2008	Dallas	rape	✓						26
McGowan	Thomas	1985	2006	Dallas	rape, burglary	✓						23
Miller	Billy Wayne	1984	2006	Dallas	rape	✓						22
Moon	Brandon	1988	2005	El Paso	rape	✓	✓				✓	17
Mumphrey	Arthur	1986	2006	Montgomery	rape				✓			18
Ochoa	Christopher	1989	2001	Travis	murder					✓		12
Phillips	Steven Charles	1983	2007	Dallas	rape, burglary	✓		✓		✓	✓	26
Pope	David Shawn	1986	2001	Dallas	rape	✓		✓				15
Rachell	Ricardo	2003	2008	Harris	child sex assault	✓					✓	6
Robinson	Anthony	1987	2000	Harris	rape	✓						10
Rodriguez	George	1987	2004	Harris	rape, kidnapping	✓	✓	✓	✓			17
Salazar	Ben	1992	1997	Travis	rape	✓		✓				5
Smith	Billy James	1987	2006	Dallas	rape	✓						19
Sutton	Josiah	1999	2004	Harris	rape	✓	✓					4
Taylor	Ronald	1995	2007	Harris	rape	✓	✓					14
Thomas	Victor Larue	1986	2002	Ellis	rape	✓						15
Turner	Keith E.	1983	2005	Dallas	rape	✓						4
Waller	James	1983	2007	Dallas	rape	✓						11
Waller	Patrick	1992	2008	Dallas	robbery, kidnapping	✓				✓		16
Wallis	Gregory	1989	2007	Dallas	rape	✓						18
Washington	Calvin	1987	2001	McLennan	rape, murder			✓	✓			13
Webb	Mark	1987	2001	Tarrant	rape	✓						13
Woodard	James Lee	1981	2008	Dallas	murder, rape	✓					✓	27
TOTALS						33	7	11	5	5	7	548

Died in prison in 1999

[8] THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM (2009), *reprinted with permission from The Justice Project.*

New and Pending DNA Exonerations[9]

Last Name	First Name	Year Convicted	Year Exonerated	County	Crime	Mistaken Eyewitness Identification	Faulty Forensic Testimony	Unreliable or Limited Forensic Methods	Jailhouse Informant & Accomplice Testimony	False Confession or Plea	Suppression of Exculpatory Evidence or Other Misconduct	Approximate Years in Prison
Evans	**Jerry Lee**	1986	2009	Dallas	rape	✓						23
Sonnier**	**Ernest**	1986		Harris	kidnapping	✓	✓					23
Porter**	**Allen Wayne**	1990		Harris	rape	✓						19
Green**	**Michael A.**	1983		Harris	rape	✓						27

***Released on new DNA evidence, awaiting final exoneration from the State of Texas*

[9] THE JUSTICE PROJECT, CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: TEXAS DNA EXONERATION UPDATE (2010).

Chapter 1: Eyewitness Identification Procedures

Panel Recommendations

In a survey of 1,038 Texas law enforcement agencies, 750 responded and only 88 (12%) had any written policies to guide investigators as they prepare and administer eyewitness identification procedures.[1] Based on the seriousness of eyewitness misidentification, the Panel makes the following recommendations. These proposals are in line with the language in the House committee substitute to SB 117 during the 81st Legislature (*see Appendix A of the Research Details*). These consensus procedures were supported by a broad range of criminal justice stakeholders during the session and continue to be supported by this diverse Panel:

1. **The State of Texas should require Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) to work with scientific experts in eyewitness memory research and law enforcement agencies to develop, adopt, disseminate to all law enforcement agencies, and annually review a model policy and training materials regarding the administration of photo and live lineups. That model policy should comport with science in the areas of cautionary instructions, filler selection, double-blind administration, documentation of identification procedures, and other procedures or best practices supported by credible research.**

By working with experts in the field of eyewitness memory and identification procedures, LEMIT can develop a standardized procedure that will guide the photo and live lineups conducted throughout the state. Annual review of this model policy will ensure that eyewitness identification procedures in Texas are guided by the most current science and best practices available.

2. **The State of Texas should require all law enforcement agencies to adopt eyewitness identification procedures that comply with a model policy promulgated by the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT).**

The Panel recommends that a model policy be developed and promulgated by LEMIT to make implementation easy for Texas law enforcement agencies.

3. **The State of Texas should integrate training on eyewitness identification procedures into the required curricula of the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) and the Texas Commission on Law Enforcement Standards and Education (TCLEOSE).**

The Panel believes the law enforcement community can benefit from increased training on the science of eyewitness misidentification and how to prevent those errors through the policies advocated above.

4. **The State of Texas should permit evidence of compliance or noncompliance with the model policy to be admissible in court.**

Because jurors must weigh the quality and value of the evidence that is presented to them in order to determine the guilt or innocence of a defendant, it is important for evidence of

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[1] THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION PROCEDURES IN TEXAS 3 (2008), *available at* http://www.thejusticeproject.org/wp-content/uploads/texas-eyewitness-report-final2.pdf.

compliance or noncompliance with the model policy to be presented to them during a criminal trial. Without appropriate context for identification evidence, jurors may inadvertently rely on testimony resulting from a flawed procedure in their deliberations.

5. **The State of Texas should allow law enforcement agencies discretion on the adoption of sequential procedures.**

Although several jurisdictions in Texas have included sequential presentation in their eyewitness identification standard operating procedures, the majority of the Panel believes that the science is not yet settled on whether sequential presentation is superior to simultaneous presentation.

Panel Report

Introduction

Erroneous eyewitness identification has played a role in over 80 percent of Texas exonerations, making it is the most common factor that has contributed to wrongful convictions in Texas.[2] To guide policy discussions on this important subject, the Panel reviewed the existing laws relating to eyewitness identification procedures and evaluation, and the science of eyewitness identification. The Panel recommends that standardized eyewitness identification procedures and training are needed in law enforcement agencies across the state to prevent wrongful conviction through mistaken identifications, in line with the recommendations proposed in CSSB 117 during the 81st Legislature.

Texas Case and Statutory Law

Currently, there is no Texas statutory law governing eyewitness identification procedures, leaving methodology up to the discretion of local authorities. Although the Texas Court of Criminal Appeals and the United States Supreme Court have addressed problems of eyewitness error in their opinions, courtroom remedies alone may not be the most effective method available to prevent wrongful convictions. First, judicial remedies are applied only after potentially flawed eyewitness evidence is presented in court, and jurors may find it difficult to discount eyewitness testimony once presented. Second, science indicates that there are many facets of the identification procedure itself that can impact the outcome of the procedure. The composition of the lineup, the instructions given to the eyewitness, the lineup administrator, and the method of presentation may all play a role in: 1) whether an identification is made and 2) the lineup member who is identified. In order to effectively prevent wrongful conviction due to eyewitness error, those errors must be eliminated at the investigatory phase.

The Science of Eyewitness Identification

Filler Selection

One of the first considerations of an identification procedure is the selection of fillers for either a live or photographic lineup. Fillers (also known as "foils" or "distracters") are people investigators believe to be innocent of a crime (*e.g.*, plain clothes officers or jail inmates, photos taken from a mug book or database) and are shown to an eyewitness witness along with the police suspect for a crime. When composing a lineup, fillers may be chosen using two common methods: those who resemble the suspect (*resemble-suspect*), or those who match the description

[2] *Id.* at 1.

of the perpetrator (*match-description*). Although the theory is that fillers should resemble the suspect in a lineup (*resemble-suspect*) so the suspect does not unduly stand out, some argue that the strategy "promotes unnecessary or gratuitous similarities between distracters and the suspect."[3] These researchers advocate the match-description strategy, arguing that as long as all fillers match the initial description of the culprit given by the eyewitness, the police suspect should be sufficiently hidden among the fillers to ensure that the procedure is a recognition test.

Cautionary Instructions and Sequential Presentation

When an eyewitness is given the task of reviewing a lineup, a reasonable expectation may exist that the police would not make the effort to assemble a lineup unless they felt they had a viable suspect for the crime. If the eyewitness assumes that the perpetrator is in the lineup, then he or she is likely to simply select the subject who most closely resembles the perpetrator.[4] To guard against this potential problem, lineup administrators should explicitly instruct the witness that the lineup *may or may not* contain the actual perpetrator and to give additional guidance that it is just as important to free innocent people from suspicion as it is to identify the guilty party.[5] Such cautionary instructions are unbiased and may reduce the pressure on an eyewitness to make an identification.[6]

To further reduce this pressure, scholars have tested a method of sequential presentation. With sequential presentation, an eyewitness is shown lineup members individually and asked after each photo to determine if that photo is of the perpetrator. Initial results using the sequential method seemed to support the superiority of the method,[7] but subsequent studies on the procedure have not provided a definitive answer on the utility of sequential over simultaneous lineups. Results have shown that although sequential lineups may reduce false identifications, they may also reduce correct identifications.[8]

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[3] Gary L. Wells, Sheila M. Rydell & Eric P. Seelau, *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835, 835 (1993) The authors suggest that if the suspect does not match the eyewitness' description, fillers should be chosen who match on the features where there is a discrepancy (*e.g.*, eyewitness described curly hair, but the suspect has straight hair; fillers should have straight hair), but they are free to vary on other features. *Id.*

[4] Gary L. Wells, Roy S. Malpass, R.C.L. Lindsay, Ronald P. Fisher, John W. Turtle & Solomon M. Fulero, *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 585 (2000).

[5] *Id.* at 575-76.

[6] *Id.* at 576.

[7] *See* Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281 (1988); R. C. L. Lindsay, James A. Lea & Jennifer A. Fulford, *Sequential Lineup Presentations: Technique Matters*, 76 J. APPLIED PSYCHOL. 741 (1991); R. C. L. Lindsay, James A. Lea, Glenn J. Nosworthy. Jennifer A. Fulford, Julia Hector, Virginia LeVan & Carolyn Seabrook, *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796 (1991); R. C. L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556 (1985).

[8] *See* R. C. L. Lindsay, Jamal K. Mansour, Jennifer L. Beaudry, Amy-May Leach & Michelle I. Bertrand, *Sequential Lineup Presentation: Patterns and Policy,* 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 13 (2009); Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 PSYCHOL. PUB. POL'Y & L. 394 (2006); Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surret, *Public Policy and Sequential Lineups*, 14 LEGAL AND CRIMINOLOGICAL PSYCHOL. 1 (2009); Roy S. Malpass, Colin G. Tredoux & Dawn McQuiston-Surret, *Response to Lindsay, Mansour, Beaudry, Leach and Bertrand's Sequential Lineup Presentation: Patterns and Policy*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 25 (2009).

Confidence, Accuracy, and Double-Blind Procedures

Research into the relationship between eyewitness confidence and accuracy has demonstrated that the relationship is inconsistent at best, most likely because the confidence-accuracy relationship is malleable through both expectancy effects and post-identification feedback. Expectancy effects exist when an administrator knows the identity of a suspect in an eyewitness lineup and gives (often unintentional) verbal and nonverbal cues that enhance the likelihood that the suspect will be chosen. Research has found that administrators who know the identity of the suspect can influence the selection made by the eyewitness. In addition, administrators who know the identity of a police suspect may impact the confidence-accuracy relationship through post-identification feedback.[9] This feedback occurs when police communicate to an eyewitness that he or she has identified the suspect through either verbal ("Good, you picked the suspect.") or nonverbal (nodding, smiles, etc.) means, and studies have shown that feedback can artificially inflate an eyewitness' confidence in that identification.[10]

Researchers have tested ways to prevent these impacts on the confidence-accuracy relationship. First, eyewitnesses may be asked for their confidence in their identifications before any feedback is provided to them. This is valuable because "the certainty of the witness at the time of the identification, uncontaminated by feedback, would then be available at trial through discovery motions."[11] Second, scholars suggest that law enforcement can ensure that the person who conducts the lineup is unaware of which member is the police suspect.[12] Researchers have found that these measures all but eliminate administrator influence from the procedures.[13]

Organizations' Recommended Practices

The studies summarized above have led researchers to develop a set of recommendations for the conduct of eyewitness identification lineups. Scientists generally agree that lineups should contain only one suspect, the suspect should not unduly stand out from the fillers, appropriate cautionary instructions are needed, the administrator of the lineup should not know who is the police suspect (double-blind procedures), and the administrator should collect a confidence statement from the eyewitness at the time of the identification before any feedback is given.[14] Many of these recommendations have been adopted by organizations such as the Department of Justice, the American Bar Association, and the International Association of Chiefs of Police (*see table below*). In Texas, the Governor's Criminal Justice Advisory Council and the Texas Criminal Justice Integrity Unit have both called for additional study and reform of eyewitness identification procedures.

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[9] *See* Gary L. Wells, Amina Memon & Steven Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45 (2006) (reviewing the literature on confidence and accuracy).

[10] Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 59 J. APPLIED PSYCHOL. 334, 342 (2004).

[11] Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. OF APPLIED PSYCHOL. 112, 119 (2002).

[12] *See generally* Wells et al., *supra* note 3.

[13] Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 59 J. APPLIED PSYCHOL. 334, 335 (2004).

[14] *See* Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (2006); Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero & C. A. E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 1 (1998).

Summary of Organizations' Recommended Practices

	DOJ[15]	ABA[16]	IACP[17]
Filler Selection	• One suspect per lineup • Fillers should match witness' description of perpetrator • Minimum of 5 fillers (4 for live lineups)	• Fillers should match witness' description of perpetrator • Sufficient number of fillers needed	• One suspect per lineup • Individuals of similar physical characteristics • Minimum of 5 fillers (4 for live lineups) • Photographs themselves should be similar
Cautionary Instructions	• "Just as important to clear innocent persons" • "Person who committed the crime may or may not be present" • "Regardless of whether an identification is made, police will continue to investigate"	• "Perpetrator may or may not be in the lineup" • "Do not assume that the person administering lineup knows identity of suspect" • "Need not identify anyone"	• "Just as important to clear innocent persons" • "Person who committed the crime may or may not be present" • "You do not have to identify anyone" • "Regardless of whether an identification is made, we will continue to investigate"
Lineup Administration	• Instructions for both simultaneous and sequential procedures • Blind administration not addressed	• Blind administration whenever practicable	• Blind administration whenever possible • Note that sequential procedures have been recommended by some
Documentation	• Ask witness to state, in her own words, how certain she is of any identification • Preserve photos and presentation order • Video or audio recommended for live lineups • Record identification and nonidentification results in writing	• Ask witness to state, in her own words, how certain she is of any identification • Video record recommended of lineup procedure • Photos should be taken of lineup	• Video or audio tape live lineup whenever possible • Preserve photo array for future reference
Other	• Recommendations for initial reports by first responders, mug books and composites, procedures for interviewing witness, show-ups	• Training for police and prosecutors on how to implement recommendations, conduct non-suggestive lineups	• Recommendations for multiple witnesses, blank lineups, right to counsel at eyewitness identifications

[15] TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, U.S. DEP'T OF JUSTICE, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf.

[16] ABA CRIMINAL JUSTICE SECTION, *Report to the House of Delegates: Recommendation of Best Practices for Promoting the Accuracy of Eyewitness identification Procedures* (2004), *available at* http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAEyewitnessID recommendations.pdf

[17] INT'L ASS'N OF CHIEFS OF POLICE, *Training Key No. 600, Eyewitness Identification* (2006).

Chapter 2: Recording Custodial Interrogations

Panel Recommendation

6. The State of Texas should adopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes. The policy should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record.

Creating a complete, accurate, and reviewable document that captures the entirety of a custodial interrogation will help prevent wrongful convictions. The Panel therefore recommends that electronic recording be made mandatory in Texas for custodial interrogations in cases of murder, capital murder, kidnapping, aggravated kidnapping, continuous sexual abuse of a child, indecency with a child, sexual performance by a child, sexual assault, and aggravated sexual assault.

The Panel also recommends that exceptions to electronic recording be allowed for good cause, such as equipment malfunction, uncooperative witnesses, spontaneous statements, public safety exigencies, or instances where the investigating officer was unaware that a crime that required recorded interrogations had been committed. This takes into consideration the contingencies that investigating officers may face when dealing with a witness or suspect in the field.

The final recommendation from the Panel is that in instances where the Court determines that unrecorded interrogations are not the result of good faith attempts to record or that none of the exceptions to recording apply, the Court may deliver an instruction to the jury that it is the policy of the State of Texas to record interrogations, and they may consider the absence of a recording when evaluating evidence that arose from the interrogation.

Panel Report

Introduction

False confessions have contributed to wrongful convictions in Texas.[1] In order to assess the adequacy of Texas statutes that govern statement evidence and to determine the best policy, the Timothy Cole Advisory Panel on Wrongful Convictions examined the science behind false confessions, recommended practices endorsed by a variety of criminal justice organizations, and the policies adopted by U.S. and Texas jurisdictions. Based on this study, the Panel recommends that Texas adopt a statewide policy to record interrogations in certain classes of crimes.

Texas Law

Statement evidence in Texas is regulated by Articles 38.21-.22 of the Texas Code of Criminal Procedure. Statements may be used in court if they are "freely and voluntarily made without compulsion or persuasion"[2] and follow the rules established in *Miranda v. Arizona*[3] and

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[1] *See* THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/convicting-the-innocent.pdf.

[2] TEX. CODE CRIM. PROC. ANN. art. 38.21 (Vernon 2010).

Art. 38.22. These rules require that the suspect be informed that he has the right to remain silent, that any statement may be used in court, that he has the right to an attorney, and that he has the right to end an interview at any time. Suspects must knowingly and voluntarily waive these rights in order for an interview to commence.[4]

Although the existing statutes provide that statements in certain situations be recorded, the provisions differ significantly from the practices voluntarily adopted by many jurisdictions within Texas and other states. First, audio and/or video recording under the existing statute is only required for a statement—not a custodial interrogation. Second, recording is only required in the case of oral or sign language statements, which are relatively rare. Law enforcement agencies overwhelmingly rely on the written statements that are described in Art. 38.22 Sec. 1.

The Science of False Confessions

Post-conviction DNA testing has proven that people at times confess to crimes that they did not commit. Scientists studying this phenomenon have documented, elicited, and categorized the causes of false confessions.

Types of False Confessions

Researchers and theorists have classified the known cases of false confessions into three types: voluntary, coerced-compliant, and coerced-internalized.[5] In a voluntary false confession, an innocent person may offer a false confession without being questioned by investigators. The two types of coerced confessions are elicited through the process of interrogation. In coerced-compliant false confessions, the suspect confesses for a functional purpose, such as to escape a situation or avoid a threat.[6] Those who give coerced-internalized false confessions, however, "come not only to capitulate in their behavior, but also to believe that they committed the crime in question."[7]

Miranda *Waivers*

Most false confessions begin with a suspect who signs a *Miranda* waiver and agrees to be interviewed by investigators without an attorney present. At some point during the interview the investigators, convinced of the person's guilt, switch to interrogation, refuse to accept a statement of innocence, and instead pursue a confession until it is obtained.[8] Researchers have concluded that innocent suspects may waive their right to counsel because they believe that since they are innocent, they have nothing to hide.

Investigator Bias and Ability to Detect Deception

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[3] 384 U.S. 436 (1966). *See also* Montejo v. Louisiana, 130 S. Ct. 23 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), which sought to assure that the right to counsel is not lost during police interrogation); Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (ruling that a suspect must vocalize his or her wish to remain silent).

[4] *Miranda*, 294 U.S. at 475.

[5] Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 49 (reviewing the types and theories of false confessions). No Texas DNA exoneration cases that involved false confessions were related to voluntary confessions; all were coerced, but the record does not indicate whether any of the false confessions were internalized. *See* THE JUSTICE PROJECT, *supra* note 3.

[6] Kassin & Gudjonsson, *supra* note 6, at 49.

[7] *Id.* at 50.

[8] *See* Steven A. Drizin & Richard A. Leo. *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911 (2004).

Numerous studies demonstrate that investigators enter interviews with a presumption of the suspect's guilt.[9] One such study concluded that "interrogators saw themselves as the most aggressive when they interviewed suspects who—unbeknownst to them—were truly innocent."[10] These findings illustrate that an innocent suspect's decision to waive *Miranda* rights may result in a particularly aggressive interrogation, increasing the likelihood of a false confession.

Studies have also tested the ability to detect deception. Research indicates that people are poor judges of deception, in part because "people who stand falsely accused of lying often exhibit patterns of anxiety and behavior that are indistinguishable from those who are really lying."[11] Studies have also shown trained investigators are no more accurate in judging the veracity of confessions than untrained college students, yet act with significantly more confidence.[12]

Traits, Techniques, and Theories of False Confessions

There are a variety of factors that contribute to whether or not an innocent individual will make a false confession. These include youth, low intelligence or developmental or intellectual disability, and mental illness; psychological factors such as sleep deprivation and drug use or withdrawal; as well as personality variables such as antisocial tendencies, anxiety, depression, compliance, suggestibility, and low self esteem.[13] In addition to personal traits and interrogations techniques, theories of false confession indicate that the psychoanalytic perspective,[14] the decision-making model,[15] the cognitive-behavior perspective,[16] and cultural considerations[17] each may contribute to false confessions.

False Confessions and Wrongful Conviction

A large proportion of documented false confessions from across the nation have come from suspects who were young, including 35 percent under age 18 and more than half under age 25.[18] Those who provided false confessions were also subjected to lengthy interrogations. More than 90 percent of normal interrogations last less than two hours, but in 44 studied cases of false confessions, 84 percent lasted more than six hours, with two lasting between 48 and 96 hours. Further, confessions have a significant impact on jury verdicts and sentencing. Studies have

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[9] *See, e.g.*, Saul M. Kassin, et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187 (2003).
[10] *Id.* at 194.
[11] Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499, 501 (1999).
[12] Saul M. Kassin, et al., *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211 (2005); Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469 (2002).
[13] Jessica R. Klaver, et al., *Effects of Personality, Interrogation Techniques, and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 71, 72 (2008).
[14] Kassin & Gudjonsson, *supra* note 6, at 45.
[15] *Id.*
[16] *Id.* at 46.
[17] *See* Richard A. Leo, et al., *Chapter 2: Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-Making, in* 2 PSYCHOLOGICAL EXPERTISE IN COURT: PSYCHOLOGY IN THE COURTROOM 25 (Daniel A. Krauss & Joel D. Lieberman, eds., 2009).
[18] Drizin & Leo, *supra* note 8, at 945.

found that confession evidence has a greater impact *on* jurors and is seen as having a greater impact *by* jurors than any other type of evidence.[19]

Organizations' Recommended Practices

Based on the body of research that has been done, legal scholars and associations, law enforcement organizations, and policy organizations have made recommendations to reduce the likelihood that suspects will be wrongfully convicted of crimes to which they falsely confess. By far, the most common recommendation has been to record interrogations from the time a suspect is read his *Miranda* rights through the end.

Legal scholars have long called for complete documentation of interrogations through audio and/or video recording because "it favors neither the defense nor the prosecution but only the pursuit of reliable and accurate fact-finding."[20] Taping also lends transparency to the process, which leads to better interrogation practices.[21] Finally, scholars argue that recorded interrogations allow judges and juries to better gauge the reliability of confession evidence.

Both professional and policy organizations also recommend complete recording of interrogations. Among these organizations are the American Law Institute,[22] the New York County Lawyers' Association,[23] the American Bar Association Section of Criminal Justice,[24] the National Association of Criminal Defense Lawyers,[25] state bar associations in Michigan[26] and New York ,[27] The Justice Project,[28] and the *Chicago Tribune*.[29]

Perhaps the most ringing endorsement for recording interrogations comes from the hundreds of jurisdictions around the country that already record complete interrogations. A survey found that almost 2400 police and sheriffs' departments videotaped interrogations in at least some cases, with 84 percent believing that videotaping improved the quality of police interrogations.[30] A study of the law enforcement perspective on the practice found that

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[19] Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 481 (1997).
[20] *Id.* at 995.
[21] *Id.* at 997.
[22] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975), *available at* http://www.nacdl.org/sl_docs.nsf/a1bf9dda21904164852566d50069b69c/e1a4d2c7cf86cbed852570820072a805/$FILE/ALI-Model_Recording_Code-1975.pdf.
[23] The N.Y. County Lawyers' Ass'n & A.B.A. Section of Criminal Justice, *Report to the House of Delegates* 15, *available at* http://www.abanet.org/crimjust/policy/revisedmy048a.pdf.
[24] *Id.*
[25] Nat'l Ass'n of Criminal Def. Lawyers, *Resolution of the Board of Directors Supporting Mandatory Videotaping of Law Enforcement Interrogations* (May 4, 2002), *available at* http://www.nacdl.org/public.nsf/resolutions/7cac8b149d7416a385256d97005.
[26] State Bar of Michigan. *Revised Resolution* (September 21, 2005), *available at* http://www.michbar.org/generalinfo/pdfs/ 9-22Custodial2.pdf.
[27] New York State Bar Association. *Memorandum No. 11* (June 13, 2007), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&section=Legislative_Memoranda_2007_2008&template=/CM/ContentDisplay.cfm&ContentFileID=2009.
[28] THE JUSTICE PROJECT. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf.
[29] Editorial, *No More Excuses. Go to the Tape*, CHI. TRIB., Apr. 21, 2002, at C6.
[30] William A. Geller, *Videotaping Interrogations and Confessions*, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN BRIEF, March 1993.

"virtually every officer who has had experience with custodial recordings enthusiastically favors the practice."[31]

Recording in the States and Texas

To date, 17 states and the District of Columbia record interrogations as either a result of statutory law[32] or court rulings.[33] In contrast to Texas, each of these states requires audio and/or video recording of interrogations from the reading of *Miranda* rights through any confession that is given. In addition, some states have spelled out exceptions to recording in order to meet the needs of local authorities and provide remedies when there is a failure to comply.

Although not required by statute, many Texas jurisdictions record interrogations, at least in some classes of offenses. Three hundred and eighty of 441 departments who participated in a survey "indicated that they either routinely record custodial interrogations, record interrogations for certain classes of felonies, or record interrogations at the discretion of the lead investigator."[34] These jurisdictions have found that the practice of recording custodial interrogations lends a variety of benefits to the officers, the defendant, and the prosecution, and it has not been cost-prohibitive for these departments. Communication with Dallas and Alpine Police Departments, for example, indicate that rooms may be outfitted for recording interrogations at a cost of $500 to $600 per room.[35]

In addition, a review of the recording policies of the largest counties and municipalities indicated that over half provided no written policies or procedures on electronic recording of custodial interrogations beyond statutory requirements. By contrast, policies for departments in Amarillo, Austin, Corpus Christi, Dallas, El Paso, Houston, Irving, Pasadena, and San Antonio provide for more robust recording of interrogations. Although false confessions may never be completely eradicated from criminal investigations due to personal or situational factors, statewide policies can be adopted to guide law enforcement, judges, and juries on the best methods to document and preserve confessions in the context in which they were elicited.

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[31] THOMAS SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 6 (Nw. U. Sch. of L. Center on Wrongful Convictions 2005), *available at* http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/SullivanReport.pdf.

[32] D.C. CODE § 5-116.01 (2010) (District of Columbia); 725 ILL. COMP. STAT. 5/103-2.1 (2010) (Illinois); ME. REV. STAT. ANN. tit. 25, § 2803-B(I)(K) (2010) (Maine); MD. CODE ANN., [Crim. Proc.] § 2-401 (LexisNexis 2010) (Maryland); MO. REV. STAT. § 590.701 (2010) (Missouri); MONT. CODE ANN. § 46-4.4 (2010) (Montana); NEB. REV. STAT. § 29-4501 (2010) (Nebraska); N.M. STAT. ANN. § 29-1-16 (West 2010) (New Mexico); N.C. GEN. STAT. § 15A-211 (2010) (North Carolina); OHIO REV. CODE ANN. § 2933.81 (LexisNexis 2010) (Ohio); OR. REV. STAT. § 419C.270 (2010) (Oregon); WIS. STAT. ANN. § 972.115 (West 2010) (Wisconsin).

[33] N.J. SUP. CT. RULE 3.17 (2005); Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985); State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006); Commonwealth v. Digiambattista, 442 Mass. 423 (2004); State v. Scales, 518 N.2d 587, 591 (Minn. 1994); State v. Barnett, 147 N.H. 334 (2001).

[34] THE JUSTICE PROJECT. ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/tx-recording-report-tjp-may-2009.pdf.

[35] E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Lieutenant Losoya, Alpine, Texas Police Department (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense). E-mail from Edwin Colfax, Texas Policy Director, The Justice Project, to Jennifer Willyard, Grant Program Specialist, Texas Task Force on Indigent Defense (Aug. 2, 2010) (on file with Texas Task Force on Indigent Defense).

Chapter 3: Discovery Procedures

Panel Recommendation

Texas' discretionary discovery policy has left the state with a wide variance in practices, where the quality of defense, investigation, and preparation is at least partially dependent upon geography. All other factors being equal, cases in two counties may have different outcomes due to the timing, manner, and nature of materials that are—or are not—exchanged through discovery. This result is contrary to the general premise of discovery, which is to encourage case investigation and preparation, to support efficient resolution of cases where the facts are not disputed, and, where the facts are disputed, to ensure that those facts are fairly presented to the ultimate factfinder—the judge or jury. To achieve those goals, the defense should have the opportunity to review and test the evidence that the prosecution would use to convict and sentence, and the prosecution should have the opportunity to obtain certain information from the defense that will enable the prosecutor to carry out his or her duty "not to convict, but to see that justice is done."[1]

7. The State of Texas should adopt a statewide discovery policy that is mandatory, automatic, and reciprocal, and requires either electronic access to or photocopies of materials subject to discovery.

Texas is in the distinct minority when it comes to limiting discovery in criminal cases; as explored below, many states and the federal courts currently operate under a system in which the prosecution and the defense must share information, reports, witness statements, witness lists, and more with the other party before trial. As such, the Panel agrees that Texas law should align with the prevailing trend in criminal discovery by mandating reciprocal discovery in criminal cases. The Panel further recommends that in accordance with policy that best prevents wrongful convictions, either photocopying of, or electronic access to, discoverable materials be required.

Panel Report

Introduction

One of the most important ways that jurisdictions can provide for effective counsel is to adopt discovery policies that allow the defense early and complete access to essential documents in the case against the defendant. Without access to offense and expert reports until the time of trial, the ability for defense counsel to provide a meaningful defense is diminished. Although discovery policies cannot completely guard against ineffective assistance of counsel claims, they set the foundation for a quality and meaningful defense.

Discovery as a component of effective counsel is especially important in helping to guard against wrongful convictions. A relationship between discovery and wrongful conviction is sometimes difficult to ascertain at first glance, but "[t]he record of wrongful convictions has demonstrated that exculpatory evidence can be withheld for years, even decades, while an innocent person sits in prison."[2] In fact, seven of Texas' first thirty-nine DNA exonerations

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[1] TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2010).

[2] THE JUSTICE PROJECT. CONVICTING THE INNOCENT: TEXAS JUSTICE DERAILED: STORIES OF INJUSTICE AND THE REFORMS THAT CAN PREVENT THEM 11 (2009), *available at* http://www.thejusticeproject.org/wp-content/ uploads/ convicting-the-innocent.pdf.

involved suppression of exculpatory evidence or other prosecutorial misconduct.[3] This statistic includes the case of Timothy Cole, whose defense counsel was never informed that only one victim chose Cole out of a photo lineup as the perpetrator of a rape on the Texas Tech campus.

Although the Supreme Court's decision in *Brady v. Maryland*[4] provides defendants with a constitutional right of access to exculpatory information held by the State and in the possession of law enforcement, it is an insufficient tool to prevent wrongful convictions because *Brady* complaints are made post-conviction. Since a wrongful conviction cannot be retroactively prevented once it has already occurred,[5] other means of prevention must be explored. One way to reduce the potential for errors is to increase the scope of discovery, the process of pre-trial information exchange between prosecution and defense.

Brady and Criminal Discovery Procedures in Texas

The Supreme Court ruled in *Brady v. Maryland* that defendants have a constitutional right to any evidence the State may have in its possession that tends to exculpate the defendant. *Brady*, however, does little to prevent wrongful conviction of the innocent because the burden to determine what constitutes exculpatory information rests with prosecutors, who do not construct theories of the case for the defense. This has led some observers to argue that *Brady* is incompatible with an adversarial system because prosecutors and defense attorneys have fundamentally opposing positions, the *Brady* holding provides for only weak enforcement, it excludes incriminating evidence (which is much more common that exculpatory evidence), it is poorly suited to plea bargaining[6] and informant testimony,[7] and it requires misconduct on the part of the state rather than innocence of the defendant.[8]

As mentioned above, *Brady* is an inefficient tool to prevent wrongful conviction because *Brady* motions are not raised until after a defendant has been convicted of a crime and new evidence that was in the possession of the prosecution comes to light. Therefore, by definition, it cannot prevent wrongful conviction before it happens. Additionally, the standards of review are complex, as a *Brady* claim requires judges to weigh *materiality* and *relevance*. These factors are difficult to measure separately, so judges often attempt to address whether the "evidence in question [would] have changed the outcome of the trial."[9] The difficulty in making this decision

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[3] *Id.*

[4] 373 U.S. 83 (1963). For holdings that helped to further define *Brady* obligations, see United States v. Agurs, 427 U.S. 97 (1976); Moore v. Illinois 408 U.S. 786 (1972); Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967).

[5] *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004).

[6] *See* Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gameship Toward the Search for Innocence? in* CRIMINAL PROCEDURE STORIES 129, 149 (Carol Steiker ed., 2005); John D. Douglas, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargains*, 57 CASE W. RES. L. REV. 581 (2007); Lee Sheppard, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J. CRIM. L. & CRIMINOLOGY 165 (1981).

[7] *See Giglio*, 405 U.S. 150 (1972); Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887 (1981); Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619 (2007).

[8] Bibas, *supra* note 6.

[9] Victor Bass, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 126 (1972).

"is exacerbated by the fact that the trial may have been distorted by the defendant's inability to use the suppressed evidence to prepare."[10]

Criminal Discovery Procedures in Texas

Texas discovery is controlled by Article 39.14 of the Texas Code of Criminal Procedure.[11] Article 39.14 does not mandate automatic defense access to police reports and witness statements, and there is no provision specifically allowing the defense to obtain copies of these items. Rather, defense counsel is required to file motions to request access to basic case information, including offense reports and expert reports. In order to receive the requested access, the defense must make a showing of "good cause."[12]

There is no certification process or specified timelines for either party, with the exception of the disclosure of expert witnesses. In some local jurisdictions, defense counsel is only permitted to make notes about items in the prosecution's file. In addition, the prosecution does not have access to reciprocal discovery. Unlike many other states, Texas law provides no formal rules for case conferences, wherein the prosecution, defense, and judge meet to discuss the evidence that is available and will be presented at trial. Article 39.14 does not define "exculpatory evidence" to guide the prosecution in what material is subject to discovery obligations. Therefore, although Texas does have a criminal discovery statute, policy groups and practitioners argue that the statutes are "so minimal that they fail to guarantee the opportunity for evidence to be fully investigated and meaningfully challenged."[13]

Texas case law has further held that the trial court must allow discovery of evidence that is shown to be material to the defense of the accused,[14] but no general right to discovery exists.[15] Instead, the decision as to what is discoverable rests with the discretion of the trial court.[16] To determine materiality, the omission is evaluated in the context of the entire record, and error is found only if the omitted evidence creates a reasonable doubt that did not otherwise exist. As with other avenues reviewed in this section, existing Texas case law may not provide an effective means to prevent wrongful convictions of the innocent due to suppression of exculpatory evidence. The existing statute provides little direction to the courts and has been interpreted to leave discretion with prosecutors and trial courts. The end result has been a wide range of discovery practices and policies across the state that may or may not provide meaningful protection to innocent suspects under investigation for crimes they did not commit.

Organizations' Recommended Practices

The American Bar Association's (ABA) Standards for Criminal Justice: Discovery and Trial by Jury address the general principles of discovery, the obligations of the prosecution and

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[10] *Id.*
[11] TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 2010).
[12] *Id.*
[13] THE JUSTICE PROJECT, *supra* note 1, at 11.
[14] *See, e.g.*, Massey v. State, 933 S.W.2d 141, 153 (Tex. Crim. App. 1996).
[15] *See, e.g.*, Kinnamon v. State, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990); Whitchurch v. State, 650 S.W.2d 422, 425 (Tex. Crim. App. 1983).
[16] *See Whitchurch*, 650 S.W.2d at 425.

defense, special procedures, timing and manner of disclosure, depositions, general provisions, and sanctions if discovery rules are not properly implemented.[17]

Timing Although the ABA standards outline no specific time requirement within which discovery should be completed, the standards encourage discovery "as early as practicable in the process."[18] The ABA recommends that each jurisdiction adopt time limits and notes that the prosecution should first disclose discoverable materials.[19] Under the ABA standards, parties operate under a "continuing obligation to produce discoverable materials to the other side."[20]

Obligations of the Prosecution and Defense The ABA standards specifically state that the prosecution should "permit inspection, copying, testing, and photographing" of any statement from the defendant or codefendant; names, addresses, and written statements of witnesses; any inducements for cooperation between the prosecution and the witness; written statements from experts; any tangible objects that pertain to the case; any record of previous criminal history; information related to any identification procedures conducted; and any material that tends to negate or mitigate the guilt of the defendant.[21] In addition, the defense should be informed of character evidence, evidence gathered through electronic surveillance, and information or documentation of the acquisition of evidence gathered through search and seizure.[22]

The ABA standards promote reciprocal discovery and suggest a more limited list of defense materials to be shared with the prosecution. These include the names and addresses of all witnesses that will be called at trial; any expert reports or written statements; and any tangible objects that will be introduced as evidence at trial.[23] The standards also recommend discovery of character evidence not-relating to the defendant and the names and addresses of witnesses who will be asked to support an alibi or insanity defense.[24]

Additional Recommendations The ABA standards also address where counsel must search for discoverable information. The standards extend the obligation of the prosecutor and defense attorney "to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office."[25] This applies the standards to not only prosecutors and defense attorneys, but also to investigators, previous attorneys, and other staff.

Sanctions Should a party fail to fulfill discovery obligations, the ABA recommends one of the following actions on behalf of the court: order the noncomplying party to permit the discovery of the material and information not previously disclosed; grant a continuance; prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the defendant's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or enter such other order as it deems just

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[17] A.B.A. STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed., 1995).
[18] *Id.* § 11-4.1(a).
[19] *Id.* § 11-4.1(b).
[20] *Id.* § 11-4.1(c).
[21] *Id.* § 11-2(a).
[22] *Id.* § 11-2.1(b) to (d).
[23] *Id.* § 11-2.2(a).
[24] *Id.* § 11-2.2(b) to (c).
[25] *Id.* § 11-4.3(a).

under the circumstances.[26] The standards also recommend that the court may find counsel in contempt if it is revealed that she "willfully violated a discovery rule or order."[27]

While not included in the ABA standards, the subject of certification has been addressed by advocacy groups such as The Justice Project. The organization recommends that "a discovery certificate should be filed by the District Attorney's office with the court during pretrial procedures, and should specify when evidence was exchanged and by what method of delivery."[28] This type of certification creates a court record stating that both defense and prosecution have fulfilled their discovery responsibilities, provides documentation of information received from third parties, and makes it more difficult for evidence to be willfully suppressed.[29]

Recommended Practices and the States

Only five states have discovery provisions that are equivalent in scope to the current ABA standards.[30] The majority of the remaining states have standards more in line with either Federal Rule 16[31] (providing the most limited discovery) or some area in between the two standards.[32] Current Texas law, however, is considerably more restrictive than Federal Rule 16.

Analysis and Evaluation

A comprehensive review of state discovery policies was conducted in 2004 by the Federal Judicial Center (FJC).[33] The organization surveyed all fifty states and the District of Columbia and found a patchwork of different policies across the nation.

FJC found that "all fifty states and the District of Columbia address the prosecutor's obligation to disclose information favorable to the defendant,"[34] but that is where the similarities end. The states differ in how *Brady* material is defined,[35] whether discovery is mandatory,[36] the timing of discovery,[37] certification of complete discovery,[38] sanctions,[39] and whether suppression of exculpatory evidence constitutes a violation of due process.[40]

Texas consistently falls into the narrowest category of discovery policies. Texas requires a written discovery motion, and is also one of only ten states that places additional conditions on discovery and requires the defendant to demonstrate that the materials are necessary to the preparation of the defense or "show 'good cause.'"[41]

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[26] *Id.* § 11-7.1(a).
[27] *Id.* § 11-7.1(b).
[28] THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 6 (2007).
[29] *Id.* at 3, 6.
[30] WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 20.2(b) & n.34 (3d ed. 2009).
[31] Bibas, *supra* note 6, at 16 (reviewing FED R. CRIM. P. 12.1-2, 16(a)(1), 16(b), 16 advisory committee's note).
[32] LaFave et al., *supra* note 30, § 20.2(b).
[33] LAURAL L. HOOPER, ET AL., TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES (Federal Judicial Center 2004).
[34] *Id.* at 17.
[35] *Id.* at 18-19
[36] *Id.* at 23.
[37] *Id.* at 26.
[38] *Id.* at 27.
[39] *Id.* at 27-28.
[40] *Id.* at 18.
[41] TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 2010), *quoted in id.* at 23.

Expanded discovery procedures are consistently recognized as an area of Texas law in which reform is needed. Several Texas counties, however, are leading the way to modernize discovery procedures and broadening defense access to evidence; some point to Tarrant County's system as a model for the state.[42] Tarrant County's open file discovery utilizes an electronic case filing system to manage the discovery process.

[42]Alex Branch, *Tarrant County's Electronic Open-File System Seen as Gold Standard for Reducing Wrongful Convictions*, FORT WORTH STAR TELEGRAM, March 18, 2010.

Chapter 4: Post-Conviction DNA Testing and Writs of Habeas Corpus Based On Changing Science

Panel Recommendations

In the areas of post-conviction DNA testing and writs of habeas corpus based on changing science, the Timothy Cole Advisory Panel on Wrongful Convictions recommends the following:

8. **The State of Texas should amend the Chapter 64 motion for post-conviction DNA testing to allow testing of any previously untested biological evidence, regardless of the reason the evidence was not previously tested, or evidence previously tested using older, less accurate methods.**

The Panel reached consensus that the language proposed in SB 1864 during the 81st Legislative Session would make needed adjustments and improvements to the existing statute (*see Appendix F in Research Details*).

9. **The State of Texas should amend the Chapter 11 writs of habeas corpus to include a writ based on changing scientific evidence.**

The Panel agreed that a writ of the type proposed in SB 1976 during the 81st Legislative Session would provide meaningful access to the courts to those with claims of actual innocence following a conviction based on science that has since been falsified (*see Appendix G in Research Details*). Creation of a dedicated writ and procedure will allow those with claims to be heard without opening all convictions up to scrutiny. The Panel believes this is a valuable reform for the criminal justice system in Texas.

Panel Report

Introduction

To date in Texas, 41 people have been exonerated of crimes for which they were convicted after post-conviction DNA testing revealed that they were not the true perpetrators of those crimes. One of the lessons we can learn from the wrongful convictions revealed through DNA testing is that post-conviction access to DNA and other forensic tests are an important and meaningful way to ensure the integrity of our criminal justice system and to see that justice is done for victims of crime and the wrongfully convicted.

Texas Law

Post-conviction DNA testing is controlled by Chapter 64 of the Texas Code of Criminal Procedure. The statute allows those who have been convicted of crimes to petition the court for DNA tests to be performed on biological material that was not previously subjected to DNA testing through no fault of the convicted person because DNA testing 1) was not available, 2) was available but not technologically capable of providing probative results, or 3) has improved so that material can be tested using more accurate and probative testing methods.[1]

Those who have claims of wrongful conviction based on other types of forensic error apart from DNA testing (e.g. bullet lead comparison, arson investigation, or dog scent evidence)

[1] TEX. CODE CRIM. PROC. ANN. art. 64.01 (Vernon 2010).

may petition the court with a writ of habeas corpus as defined in Article 11.07 of the Code of Criminal Procedure for those who have not been sentenced to death, and Article 11.071 for those who have been sentenced to death. Specifically, 11.07 states that "it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement."[2] If it is found that there are, "the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection"[3] to resolve those issues.

Organizations' Recommended Practices

In 1999, under the leadership of Attorney General Janet Reno, the National Commission on the Future of DNA Evidence released its publication, *Postconviction DNA Testing: Recommendations for Handling Requests*. In it, the group outlined five categories of cases that contain claims of actual innocence and request DNA testing and suggested responses for each category. The group's range of recommendations included granting tests in cases where DNA was collected, still exists, and will provide exclusionary results, to rejecting requests when frivolous. Regardless of whether the categories should be considered as "hard and fast" rules, the group offered additional recommendations for prosecutors, defense counsel, the judiciary, victim assistance, and lab personnel regarding post-conviction DNA testing that emphasized communication between all parties.

Post-conviction DNA testing guidance is provided by the American Bar Association in two documents.[4] In Resolution No. 115, the ABA states that "all biological evidence should be made available to defendants and convicted person upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law."[5] Standard 16-6.1 further states that those who have been convicted of serious crimes should be granted post-conviction DNA tests if testing that was unavailable at the time of the trial has become available or there is reason to believe that the testing conducted at trial is now unreliable.[6]

Recommended Practices Specific to Texas Law

During the last legislative session in 2009, two bills were introduced to increase post-conviction access to the courts. The first bill, SB 1864,[7] would have amended §64.01, the motion for post-conviction DNA testing, to provide "that a motion could be made for DNA testing if the material was not previously subjected to testing, no matter the reason testing was not done, if the other stated conditions were met."[8] Supporters of the bill argued that this change was necessary because although "current law provides that untested material can be tested if it is

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[2] TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(c) (Vernon 2010).
[3] *Id.* § 3(d).
[4] For information on the ABA's recommendations on post-conviction matters, see ABA STANDARDS FOR CRIMINAL JUSTICE, POSTCONVICTION REMEDIES (2d ed., 1978), *available at* http://www.abanet.org/crimjust/standards/postconviction_toc.html; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE § 16-6.1 cmt. (3d ed., 2006) (quoting ABA House of Delegates Resolution No. 115 (August 2000)), *available at* http://www.abanet.org/crimjust/standards/ dnaevidence.pdf.
[5] ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE, *supra* note 6.
[6] *Id.* § 16-6.1(a)(i)
[7] Tex. S.B. 1864, 81st Leg., R.S. (2009) (authored by Sen. Rodney Ellis and sponsored by Rep. Scott Hochberg).
[8] House Research Org., Bill Analysis, Tex. S.B. 1864, 81st Leg., R.S. at 2 (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/sb1864.pdf#navpanes=0.

in the interests of justice. . . [,] an unsympathetic judge still could deny the motion, even where material went untested due to failure on the part of the defense attorney rather than the defendant."[9]

A second bill from the 81st legislative session, SB 1976, would have addressed those who had been convicted of crimes using science that had since been discredited.[10] According to the House Research Organization, the bill "would authorize courts to grant relief on writs of habeas corpus that, subject to criteria in the bill, raised relevant scientific evidence that was not available at the time of a trial or that discredited scientific evidence relief on by the prosecution at a trial."[11] The language also provided that petitioners could file this writ even if a previous writ of habeas corpus had been made. This provision is important because many writs of habeas corpus "are filed without an attorney or soon after a conviction."[12] Without the ability to file a writ that is based on science, inmates may lose the opportunity to demonstrate that the science that convicted them previously has since been disproved.

After reviewing the recommendations from national and state leaders, the Panel agreed that the provisions laid out in the 81st Legislature represent sound post-conviction policy for the State of Texas.

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[9] *Id.*

[10] *See* Tex. S.B. 1976, 81st Leg., R.S. (2009) (authored by Sen. John Whitmire and co-authored by Sen. Juan Hinojosa). *See also* Tex. H.B. 3579, 81st Leg., R.S. (2009) (companion bill, authored by Rep. Pete Gallego, who also sponsored the Senate bill). Although the bill received unanimous passage from both the Senate Criminal Justice and House Criminal Jurisprudence committees, there was one witness who testified against the bill (Harris County District Attorney's Office) and one who registered against the bill (Lubbock County District Attorney's Office) during the Senate committee hearing. Senate Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 1976, 81st Leg., R.S. (2009). There was no opposition to the bill during the House committee hearing. . House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 3579, 81st Leg., R.S. (2009).

[11] House Research Org., Bill Analysis, Tex. S.B. 1976, 81st Leg., R.S. at 2 (2009), *available at* http://www.hro.house.state.tx.us/pdf/ba81r/sb1976.pdf#navpanes=0.

[12] *Id.* at 3.

Chapter 5: Feasibility of Establishing an Innocence Commission

Panel Recommendations

10. **The State of Texas should formalize the current work of the innocence projects that receive state funding to provide further detail in the projects' annual reports and distribute those reports to the Governor, Lieutenant Governor, Speaker of the House, and Chairs of the Senate Jurisprudence, House Corrections, House Criminal Jurisprudence and Senate Criminal Justice Committees. Report input should be solicited from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations.**

The Panel recommends that the annual reports currently filed with the Task Force on Indigent Defense by each innocence project be filed jointly and amended to include analysis of the requests and cases received, investigated, and litigated to identify any systemic criminal justice issues that are revealed by claims of actual innocence. The Panel further recommends that this report be presented to the Governor, Lieutenant Governor, Speaker, and committees, along with input from other innocence projects, interested bar associations, judicial entities, law enforcement agencies, prosecutor associations, and advocacy organizations. The report may address such topics as showups and informant testimony.

11. **The State of Texas should provide an FTE for the Task Force using the current appropriation or other grant funding to administer these responsibilities, and contracts between the innocence projects and the Task Force on Indigent Defense should be amended to reflect the new administrator and additional responsibilities.**

Because the innocence projects are located in geographically diverse areas and have many responsibilities to their students and the cases they investigate, the Panel recommends that a full-time employee position be created that is dedicated to the coordination and administration of the innocence projects. This FTE will further help the innocence projects meet the recommendations listed above and serve to organize and audit the funding received from the Task Force.

Panel Report

Introduction

The possibility of establishing an innocence commission in Texas has been under consideration for several years, with legislation filed in however many sessions. Questions have concerned how to establish a commission; the makeup of the commission and method of appointment; the duties, power, and independence of a commission; and the quantity and source of funding needed to create and sustain a commission. Several states have established innocence commissions under a variety of formats to achieve these ends. For example, study commissions like the Timothy Cole Advisory Panel on Wrongful Convictions have been created in California, Connecticut, Illinois, North Carolina, Pennsylvania and Wisconsin. North Carolina additionally created an innocence commission to investigate claims of wrongful conviction. The Panel reviewed the approaches taken by other states and countries in order to determine if an innocence commission is feasible for the State of Texas. Following a workgroup meeting with representatives from the innocence projects, the Panel recommends formalization of the work already underway by innocence projects.

Study Commissions

As noted above, several states have passed legislation creating commissions to study the causes of wrongful conviction and recommend policies to prevent those errors in the future. One advantage of study commission is that, like innocence commissions, they are comprised of a wide variety of criminal justice stakeholders including judges, academic researchers, prosecutors and defense attorneys, law enforcement, spiritual and other community leaders, representatives for governors' and attorneys general offices, or state legislators. This helps to ensure that the recommendations are based on the broadest level of consensus possible and that those who have the power to implement those changes are party to the research and recommendation process. Another benefit is that study commissions are inexpensive. As the Innocence Project stated, participation in a study commission is often "consistent with most members' existing work, and in many cases can simply be an extension of their existing jobs."[1]

A disadvantage of the study commission method is that it is generally a one-shot approach to wrongful conviction reform because study commissions are sometimes created to expire at a time certain. Second, study commissions generally do not investigate claims of actual innocence, but rather examine known (usually through post-conviction DNA results) cases of wrongful conviction. While their recommendations will benefit future innocent suspects of crime, they do not necessarily provide relief to specific individuals who have claims of actual innocence for review.

Innocence Commissions

In the United States, only North Carolina has established an operating innocence commission that actively investigates claims of wrongful conviction.[2] The North Carolina Innocence Inquiry Commission (NCIIC) was signed into law in August of 2006. Made up of eight members from the judiciary, law enforcement, prosecution, defense, the victims' rights community, and the public, "the commission and its staff carefully review evidence and investigate cases in a non-advocatory, fact-finding manner."[3]

Cases reviewed by the NCIIC follow a three-step process: review, investigation, and hearing. Upon receipt of a claim of innocence, it is evaluated to determine whether it meets the criteria set by the Commission, upon which time it enters the review process. During review, information about the facts of the case and the claim of innocence are gathered. If the claim still meets statutory requirements, it proceeds to the investigation phase. The investigation may be stopped at any time if it is revealed that the claim no longer meets the statutory criteria. If the claim withstands these criteria, it will move to the first of two hearing phases. In the first, the claim and evidence of actual innocence are presented before all NCIIS members, and the Commissioners determine whether to send the claim to a three-judge panel for a final hearing. At that hearing, the panel decides whether to dismiss the conviction. Three total hearings have been held, with one ending in exoneration.

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[1] The Innocence Project, Criminal Justice Reform Commissions, http://www.innocenceproject.org/Content/248.php# (last visited Aug. 2, 2010).

[2] Although Connecticut passed a bill authorizing a similar commission, the members voted for a broader focus and instead issued the report noted above. The Innocence Project, Innocence Commissions in the U.S., http://www.innocenceproject.org/Content/415.php (last visited Aug. 2, 2010).

[3] NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, REPORT TO THE 2009-2010 LONG SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 3 (2009), *available at* http://www.innocencecommission-nc.gov/Report2009.htm.

Innocence Projects

Innocence projects are non-profit organizations that often work in conjunction with law schools to investigate claims of actual innocence. In Texas, state funds are provided to four innocence projects located at the four state university law schools: 1) Innocence Project of Texas at Texas Tech University, 2) Texas Innocence Network at the University of Houston, 3) Texas Center for Actual Innocence at the University of Texas at Austin, and 4) the Thurgood Marshall Innocence Project at Texas Southern University. Each of the four innocence projects is eligible to receive reimbursement of expenditures up to $100,000 per year. They secure additional funding through grants and donations.

The most recent report shows that between September 1, 2004 and August 31, 2009, the four projects received innocence claims from over 12,000 cases that met the selection criteria. The offenses ranged from capital murder (473 cases) to sexual assault of a child (1,373 cases) to felony DWI (65 cases). Although innocence projects rely greatly on students and have often lacked resources and funding,[4] the projects in Texas have accomplished a great deal, including the posthumous exoneration of Timothy Cole.

Analysis

Although the predominant model of post-conviction investigation in the United States is the innocence project, the United Kingdom's adoption of the Criminal Cases Review Commission (CCRC) provides scholars with a way to compare and contrast the two systems. Increased creation of innocence projects in the United Kingdom further augments the comparison.

The CCRC has developed a three-stage review process to evaluate claims it receives. In stage one, applications are reviewed for eligibility. A case manager and commissioner are assigned in stage two, and police are employed if an investigation is needed. Stage three of the CCRC process is the "real probability" test,[5] in which the case manager and commissioner determine whether there is "'more than an outside chance that the conviction will be found unsafe."[6] If the application meets that test, it proceeds to a panel of three commissioners who must unanimously vote to send the case to the Court of Appeals. At that time, the CCRC's involvement ends, and the case is turned over to attorneys who will handle the appeal.

Even with innocence commissions, innocence projects continue to play a vital role in legal education and policy reform. Students involved in the projects learn writing and critical thinking skills, how to conduct investigations and organize those findings into the law, and ethical considerations related to the wrongfully convicted and victims of crime.[7] Moreover, the work and research of the innocence projects provides valuable information to policy makers and legislators as they craft effective legislation. Even with these contributions, the founders of the

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[4] Stephanie Roberts & Lynn Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Project and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43 (2009).
[5] Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 113 (2009).
[6] *Id.*
[7] Roberts & Weathered, *supra* note 4.

Innocence Project of New York, Barry Scheck and Peter Neufeld, have called for the creation of innocence commissions in the United States.[8]

Innocence Commission Debate in Texas

To help further the conversation on innocence commissions in Texas, the Panel invited representatives from the innocence projects at the four state universities to join a Panel workgroup meeting on April 21, 2010. Together, the workgroup meeting participants suggested a unique approach for the State of Texas. Instead of creating an innocence commission to perpetuate the study of wrongful convictions, the Panel and innocence projects suggested an approach that would formalize the work currently underway by the innocence projects. The innocence projects provide a report of their activities to the Task Force each year as part of the statute that provides state funding to the projects. By augmenting this report and distributing their findings to the Governor, Lieutenant Governor, Speaker, and chairs of relevant committees, the State can benefit from knowledge of both individual and systemic issues that require reform to prevent wrongful convictions. As non-profits, innocence projects can further inform policy makers on behalf of those initiatives, an area in which governmental agencies are limited. Taken together, the Panel believes that these recommendations will provide a novel approach to the study of wrongful convictions that fits the unique association between the State of Texas and innocence projects.

[8] Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98 (2002).

ATTACHMENT 12:
Innocence Project information on eyewitness identification, false confessions, unvalidated or improper forensic science and forensic science misconduct

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Eyewitness Misidentification

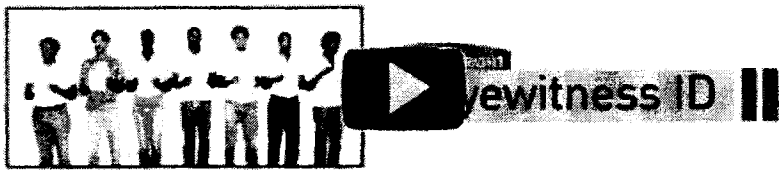
- Eyewitness

GETTING IT RIGHT

An interactive resource on the causes of wrongful conviction and the reforms to prevent injustice.

- Video
- Case
- Reform
- Research

Eyewitness Identification - Getting it Right



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Produced by the Innocence Project
and Brandon Garrett, author of "Convicting the Innocent"

Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.

While eyewitness testimony can be persuasive evidence before a judge or jury, 30 years of strong social science research has proven that eyewitness identification is often unreliable. Research shows that the human mind is not like a tape recorder; we neither record events exactly as we see them, nor recall them like a tape that has been rewound. Instead, witness memory is like any other evidence at a crime scene; it must be preserved carefully and retrieved methodically, or it can be contaminated.

When witnesses get it wrong

In case after case, DNA has proven what scientists already know — that eyewitness identification is frequently inaccurate. In the wrongful convictions caused by eyewitness misidentification, the circumstances varied, but judges and juries all relied on testimony that could have been more accurate if reforms proven by science had been implemented. The Innocence Project has worked on cases in which:

• A witness made an identification in a "show-up" procedure from the back of a police car hundreds of feet away from the suspect in a poorly lit parking lot in the middle of the night.

• A witness in a rape case was shown a photo array where only one photo of the person police suspected was the perpetrator was marked with an "R."

• Witnesses substantially changed their description of a perpetrator (including key information such as height, weight and presence of facial hair) after they learned more about a particular suspect.

• Witnesses only made an identification after multiple photo arrays or lineups — and then made hesitant identifications (saying they "thought" the person "might be" the perpetrator, for example), but at trial the jury was told the witnesses did not waver in identifying the suspect.

Variables impacting accuracy of identifications
Leading social science researchers identify two main categories of variables affecting eyewitness identification: estimator variables and system variables.

Estimator variables are those that cannot be controlled by the criminal justice system. They include simple factors like the lighting when the crime took place or the distance from which the witness saw the perpetrator. Estimator variables also include more complex factors, including race (identifications have proven to be less accurate when witnesses are identifying perpetrators of a different race), the presence of a weapon during a crime and the degree of stress or trauma a witness experienced while seeing the perpetrator.

System variables are those that the criminal justice system can and should control. They include all of the ways that law enforcement agencies retrieve and record witness memory, such as lineups, photo arrays and other identification procedures. System variables that substantially impact the accuracy of identifications include the type of lineup used, the selection of "fillers" (or members of a lineup or photo array who are not the actual suspect), blind administration, instructions to witnesses before identification procedures, administration of lineups or photo arrays, and communication with witnesses after they make an identification.

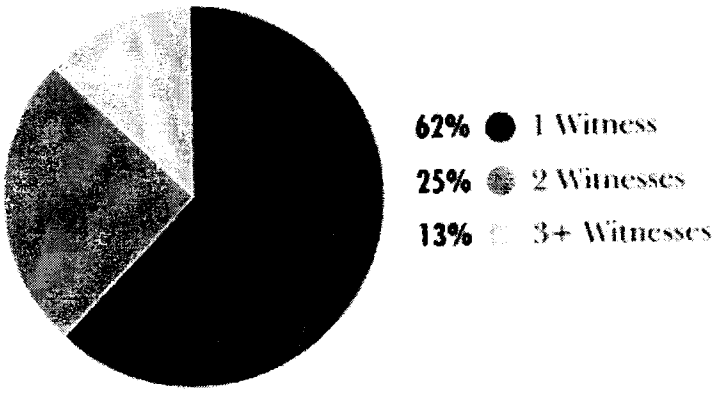
Click here to learn about reforms the Innocence Project strongly recommends for individual law enforcement agencies and state legislatures.

Decades of solid scientific evidence supports reform
As far back as the late 1800s, experts have known that eyewitness identification is all-too-susceptible to error, and that scientific study should guide reforms for identification procedures. In 1907, Hugo Munsterberg published "On the Witness Stand," in which he questioned the reliability of eyewitness identification. When Yale law professor Edwin Borchard studied 65 wrongful convictions for his pioneering 1932 book, "Convicting the Innocent," he found that eyewitness misidentification was the leading cause of wrongful convictions.

Since then, hundreds of scientific studies (particularly in the last three decades) have affirmed that eyewitness identification is often inaccurate — and that it can be made more accurate by implementing specific identification reforms.

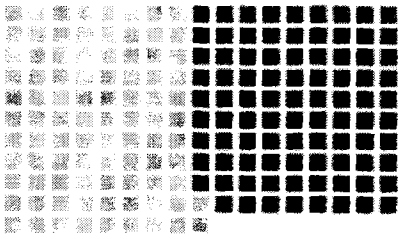
Number of witnesses misidentifying the same innocent defendant

(based on 175 eyewitness misidentification cases in the first 239 DNA exonerations)



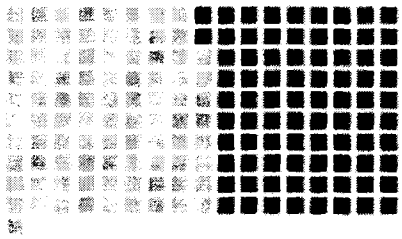
Eyewitness misidentification as the central cause

(based on 179 eyewitness misidentification cases in the first 239 DNA exonerations)



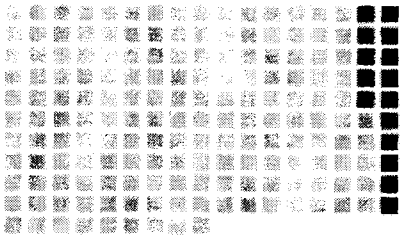
50%

just misidentification



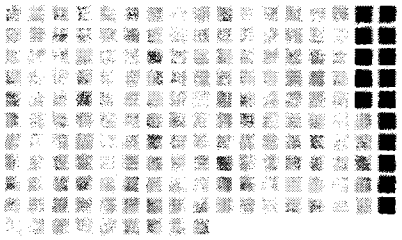
48%

with unvalidated or improper forensic science



8%

with false confession or admission

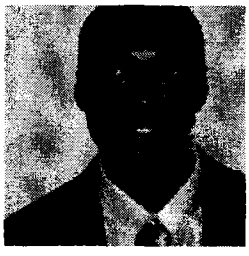


8%

with informant testimony

The percentages will not add up to 100 because more than one cause may contribute to a wrongful conviction in any given case.

Featured Case: Calvin Willis



One night in 1982, three young girls were sleeping alone in a Shreveport, Louisiana home when a man in cowboy boots came into the house and raped the oldest girl, who was 10 years old. When police started to investigate the rape, the three girls all remembered the attack differently. One police report said the 10-year-old victim didnâ't see her attacker's face. Another report — which wasn't introduced at trial — said she identified Calvin Willis, who lived in the neighborhood. The girl's mother testified at trial that neighbors had mentioned Willis's name when discussing who might have committed the crime. The victim testified that she was shown photos and told to pick

the man without a full beard. She testified that she didn't pick anyone, police said she picked Willis. Willis was convicted by a jury and sentenced to life in prison. In 2003, DNA testing proved Willis' innocence and he was released. He had served nearly 22 years in prison for a crime he didn't commit.

Click here to read more about Willis' case.

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Eyewitness Identification

The most common element in all wrongful convictions later overturned by DNA evidence has been eyewitness misidentification. Misleading lineup methods have been used for decades without serious scrutiny. Now is the time for change.

Despite solid proof of the inaccuracy of traditional methods – and the availability of simple measures to reform them – eyewitness IDs remain among the most common and compelling evidence brought against criminal defendants.

Misidentifications don't only threaten the innocent, they also derail investigations. While police focus on finding evidence against an innocent person, the perpetrator can get away.

How the wrong person gets picked
Most law enforcement agencies use the same methods they have used for decades – live and photo lineups, usually conducted without a blind administrator or proper instructions. It is stressful for victims and eyewitnesses to identify a perpetrator, and they make mistakes.

Sometimes these mistakes are triggered by a gap in memory or the desire to make an identification at all costs. In other cases, subtle cues by police – intentional or not – lead to a false identification. Almost all of these mistakes are preventable.

Time for reform
Several easy-to-implement procedures have been proven to significantly decrease the number of misidentifications. However, acceptance of these changes has been slow. The Innocence Project recommends that all jurisdictions immediately adopt the following policies:

- **Blind administration:** Research and experience have shown that the risk of misidentification is sharply reduced if the police officer administering a photo or live lineup is not aware of who the suspect is.

- **Lineup composition:** "Fillers" (the non-suspects included in a lineup) should resemble the eyewitness' description of the perpetrator. The suspect should not stand out (for example, he should not be the only member of his race in the lineup, or the only one with facial hair). Eyewitnesses should not view multiple lineups with the same suspect.

- **Instructions:** The person viewing a lineup should be told that the perpetrator may not be in the lineup and that the investigation will continue regardless of the lineup result. They should also be told not to look to the administrator for guidance.

- **Confidence statements:** Immediately following the lineup procedure, the eyewitness should provide a statement, in his own words, articulating his the level of confidence in the identification.

- **Recording:** Identification procedures should be videotaped whenever possible – this protects innocent suspects from any misconduct by the lineup administrator, and it helps the prosecution by showing a jury that the procedure

was legitimate.

Jurisdictions should also consider adopting **sequential presentation of lineups:** Research has shown that presenting lineup members one-by-one (sequential), rather than all at once (simultaneous), decreases the rate at which innocent people are identified. Research has also demonstrated that when viewing several subjects at once, witnesses tend to choose the person who looks the most like – but may not actually be – the perpetrator. Click here for a more thorough discussion of why the Innocence Project separately supports sequential presentations.

Reforms at work
Changes recommended by National Institute of Justice, the Innocence Project and others have proven to be successful. New Jersey, North Carolina, Wisconsin and several large cities have implemented new procedures and improved the quality of their identifications. Following are examples of reforms that several jurisdictions have made:

- State of Wisconsin (.pdf)
- State of New Jersey (.pdf)
- State of North Carolina (.pdf)
- Northampton, MA (.pdf)
- Suffolk County, MA (Boston) (.pdf)
- Santa Clara County, CA (.pdf)

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Sequential Presentation of Lineups

The Innocence Project endorses as a reform the sequential – as opposed to simultaneous – presentation of lineup members to the witness. This endorsement is based on both scientific research and "real world" experience of jurisdictions that use sequential presentation.

A large body of peer-reviewed research conducted over the last 20 years demonstrates that sequential presentation, when coupled with a "blind" administrator, greatly minimizes the likelihood of incorrect identifications. An increasing number of jurisdictions across the country are using this practice and find it highly effective in improving the accuracy and reliability of eyewitness identifications.

But some jurisdictions remain resistant because the research shows that sequential presentations lead to fewer overall identifications. (In short, research shows that sequential/blind presentations decrease both correct and incorrect identifications. However, the research clearly shows that incorrect identifications are reduced much more substantially than correct identifications.) Sequential presentation is one among several elements of reform in eyewitness identification procedures, but disputes about the ultimate value of sequential have often prevented clear consideration of the other important and accepted reforms; these disputes have led to political defeat of reforms that are proven to increase the accuracy of eyewitness identifications.

To ensure that critical eyewitness identification reforms that can prevent wrongful convictions are not blocked because of concerns about sequential presentation, the Innocence Project has refrained from including sequential in its current eyewitness identification reform package. The Innocence Project continues to provide all interested parties with substantial information on the scientific research about sequential presentation and the experiences of jurisdictions that are effectively using the practice, including studies, protocol, law enforcement references, and other information.

To help address concerns about the benefits of sequential lineup presentations, the Innocence Project, in collaboration with other interested parties and specific jurisdictions, is supporting field studies of sequential lineup procedures which employ the use of laptop computers and use solid scientific methodology. We hope this research will further clarify the benefits of employing sequential lineups in actual practice and resolve any lingering questions.

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False Confessions

In about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.

These cases show that confessions are not always prompted by internal knowledge or actual guilt, but are sometimes motivated by external influences.

Why do innocent people confess?
A variety of factors can contribute to a false confession during a police interrogation. Many cases have included a combination of several of these causes. They include:

•duress
•coercion
•intoxication
•diminished capacity
•mental impairment
•ignorance of the law
•fear of violence
•the actual infliction of harm
•the threat of a harsh sentence
•Misunderstanding the situation

Some false confessions can be explained by the mental state of the confessor.

•Confessions obtained from juveniles are often unreliable – children can be easy to manipulate and are not always fully aware of their situation. Children and adults both are often convinced that that they can "go home" as soon as they admit guilt.

•People with mental disabilities have often falsely confessed because they are tempted to accommodate and agree with authority figures. Further, many law enforcement interrogators are not given any special training on questioning suspects with mental disabilities. An impaired mental state due to mental illness, drugs or alcohol may also elicit false admissions of guilt.

•Mentally capable adults also give false confessions due to a variety of factors like the length of interrogation, exhaustion or a belief that they can be released after confessing and prove their innocence later.

Regardless of the age, capacity or state of the confessor, what they often have in common is a decision – at some point during the interrogation process – that confessing will be more beneficial to them than continuing to maintain their innocence.

From threats to torture
Sometimes law enforcement use harsh interrogation tactics with uncooperative suspects. But some police officers, convinced of a suspect's guilt, occasionally use tactics so persuasive that an innocent person feels compelled to confess. Some suspects have confessed to avoid physical harm or discomfort. Others are told they will be convicted with or without a confession, and that their sentence will be more lenient if they confess. Some are told a confession is the only way to avoid the death penalty.

Recording of interrogations
The Innocence Project has recommended specific changes in the practice of suspect interrogations in the U.S., including the mandatory electronic recording of interrogations, which has been shown to decrease the number of false confessions and increase the reliability of confessions as evidence. Read more about recommended policy reforms to prevent false confessions.

Featured Case: Eddie Joe Lloyd

Lloyd was convicted of the 1984 murder of a 16-year-old girl in Detroit after he wrote to police with suggestions on how to solve various recent crimes. During several interviews, police fed details of the crime to Lloyd, who was mentally ill, and convinced him that by confessing he was helping them "smoke out" the real killer. Lloyd eventually signed a confession and gave a tape-recorded statement. The jury deliberated less than an hour before convicting him and the judge said at sentencing that execution, which had been outlawed in Michigan, would have been the "only justifiable sentence" if it were available. In 2002, DNA testing proved that Lloyd was innocent and he was exonerated. As mandated in a settlement with Lloyd's family, Detroit Police officials said in 2006 they would start videotaping all interrogations in crimes that could carry a sentence of life.

Read Lloyd's full profile.

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False Confessions & Mandatory Recording of Interrogations

For many reasons – including mental health issues and aggressive law enforcement tactics – innocent people sometimes confess to crimes they did not commit.

While it can be hard to understand why someone would falsely confess to a crime, psychological research has provided some answers – and DNA exonerations have proven that the problem is more widespread than many people think. In approximately 25% of the wrongful convictions overturned with DNA evidence, defendants made false confessions, admissions or statements to law enforcement officials.

The electronic recording of interrogations, from the reading of Miranda rights onward, is the single best reform available to stem the tide of false confessions.

Watch Texas exoneree Chris Ochoa explain how proper recording of his interrogation could have prevented his false confession.

Watch in Spanish.

Benefits of recording interrogations

For the recording of interrogations to be effective, the entire custodial interrogation must be recorded. This record will

improve the credibility and reliability of authentic confessions, while protecting the rights of innocent suspects.

In some false confession cases, details of the crime are inadvertently communicated to a suspect by police during questioning. Later, when a suspect knows these details, the police take the knowledge as evidence of guilt. Often, threats or promises are made to the suspect off camera and then the camera is turned on for a false confession. Without an objective record of the custodial interrogation, it is difficult to gauge the reliability of the confession.

For law enforcement agencies, recording interrogations can prevent disputes about how a suspect was treated, create a clear record of a suspect's statements and increase public confidence in the criminal justice system. Recording interrogations can also deter officers from using illegal tactics to secure a confession.

A reform that has proven successful

Over 500 jurisdictions nationwide, including the states of Alaska, Minnesota and Illinois, regularly record police interrogations. A 2004 study conducted by Illinois officials of 200 locations that implemented this reform found that police departments overwhelmingly embrace the measure as good law enforcement whose time has come.

- The Supreme Courts of Alaska and Minnesota have declared that, under their state constitutions, defendants are entitled as a matter of due process to have their custodial interrogations recorded.
- In 2003, Illinois became the first state to require by law that all police interrogations of suspects in homicide cases must be recorded.
- Police departments in Broward County (Florida) and Santa Clara County (California), among others, have begun to record interrogations without a law requiring them. Proactive policies like these have been adopted because the practice benefits police and prosecutors as well as innocent suspects.

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Unvalidated or Improper Forensic Science

Since the late 1980s, DNA analysis has helped identify the guilty and exonerate the innocent nationwide. While DNA testing was developed through extensive scientific research at top academic centers, many other forensic techniques – such as hair microscopy, bite mark comparisons, firearm tool mark analysis and shoe print comparisons – have never been subjected to rigorous scientific evaluation. Meanwhile, forensics techniques that have been properly validated – such as serology, commonly known as blood typing – are sometimes improperly conducted or inaccurately conveyed in trial testimony. In some cases, forensic analysts have fabricated results or engaged in other misconduct.

All of these problems constitute unvalidated or improper forensic science, which is the second-greatest contributor to wrongful convictions that have been overturned with DNA testing. In more than 50% of DNA exonerations, unvalidated or improper forensic science contributed to the wrongful conviction. Click here for a complete table with information on each case where unvalidated or improper forensic science contributed to a wrongful conviction that was later overturned with DNA testing.

While DNA exonerations are a window into the effect of unvalidated or improper forensic science contributing to wrongful convictions, DNA does not solve the problem. In fact, experts estimate that only 5-10% of all criminal cases involve biological evidence that could be subjected to DNA testing. In the other 90-95% of crimes, DNA testing is not an option – so the criminal justice system relies on other kinds of evidence, including forensic disciplines that may not be scientifically sound or properly conducted.

The Absence of Scientific Standards

Unlike DNA testing, many forensic disciplines – particularly those that deal with comparing impression marks and objects like hair and fiber – were developed solely to solve crime. These disciplines have evolved primarily through their use in individual cases. Without the benefit of basic research or adequate financial resources, applied research has also been minimal.

In fact, many forensic testing methods have been applied with little or no scientific validation and with inadequate assessments of their robustness or reliability. Furthermore, they lacked scientifically acceptable standards for quality assurance and quality control before their implementation in cases.

As a result, forensic analysts sometimes testify in cases without a proper scientific basis for their findings. Testimony about more dubious forensic disciplines, such as efforts to match a defendant's teeth to marks on a victim or attempts to compare a defendant's voice to a voicemail recording, are cloaked in science but lack even the most basic scientific standards. Even within forensic disciplines that are more firmly grounded in science, evidence is often made to sound more precise than it should. For example, analysts will testify that hairs from a crime scene "match" or "are consistent with" defendants' hair – but because scientific research on validity and reliability of hair analysis is lacking, they have no way of knowing how rare these similarities are, so there is no way to know how meaningful this evidence is.

Improper Forensic Testimony

Too often, forensic analysts' testimony goes further than the science allows. Many forensic techniques that have been practiced for years – but not subjected to the rigors of scientific research – are accepted and repeated as fact. Juries are left with the impression that the evidence is more scientific than it is, and the potential for wrongful convictions increases.

Improper forensic testimony is not limited to unvalidated disciplines, however. Among the DNA exoneration cases, scores of people were wrongfully convicted after forensic testimony misrepresented serology results. Serology is still used, but before DNA testing it was the only way to help identify the source of blood, semen or other bodily fluids at a crime scene. Using serology, forensic analysts could determine what blood type was present in fluids collected in a rape kit, for example. In many cases, analysts testify properly about what the serology can tell and what percentage of the population shares the perpetrator's blood type. But in other cases, analysts fail to recognize that the biological sample could be a mixture of fluids from the victim and perpetrator, and the victim's blood type could mask the perpetrator's – making it impossible to know the blood type of the perpetrator. In other cases, analysts provide

inaccurate statistics for the percentage of the population who share the perpetrator's blood type.

Forensic Misconduct
The vast majority of forensic employees are hardworking, ethical and responsible. They use the best scientific techniques available to deliver objective, solid information – regardless of whether the science favors the defendant, supports the prosecution or is inconclusive.

In many cases, the science – rather than the scientist – is inadequate. In other cases, forensic analysts make mistakes that could result from lack of training, poor support or insufficient resources to meet an ever-growing demand. But in some cases, forensic analysts have engaged in misconduct. While these "bad apples" don't reflect the entire forensic field, one fraudulent forensic analyst can taint countless cases. For example, in some wrongful convictions later overturned with DNA testing, forensic analysts fabricated test results, reported results when no tests were conducted or concealed parts of test results that were favorable to defendants. In virtually all of these cases, analysts had engaged in misconduct that led to multiple separate wrongful convictions, sometimes in multiple states.

Making Real Reform a Priority
The Innocence Project works at the local, state and federal levels to ensure quality forensics. Nationally, the Innocence Project supports creating a federal forensic science agency that will stimulate research to validate forensic science disciplines, and will also set and enforce standards. In states, the Innocence Project supports commissions and advisory boards that help make sure forensic facilities have the information and resources they need to do quality work. Meanwhile, the Innocence Project advocates for full enforcement of the existing forensic oversight mechanisms in the Paul Coverdell Forensic Science Improvement Grant Program. This federal program provides critical funding for state and local crime labs and other forensic facilities – on the condition that grant recipients have proper oversight mechanisms in place to handle allegations of serious negligence or misconduct.

Featured Case: Alejandro Dominguez

Dominguez was 16 years old when he was convicted in Illinois of a rape he didn't commit. In addition to an eyewitness misidentification, the limited science of a blood type match led jurors to believe that evidence against Dominguez was stronger than it actually was. One of several errors in the trial was a reckless omission by a forensic scientist who testified for the prosecution. Semen was found on the victim's body, the scientist testified, and Dominguez's blood type matched the semen sample, meaning he could have been the perpetrator. The scientist did not tell the jury, however, that two-thirds of men in America would have matched that sample. Dominguez was convicted and sentenced to nine years in prison. He was released after serving four years and sought DNA testing at his own expense. The tests proved his innocence. His case is one of many in which limited forensic science or erroneous forensic testimony has led to wrongful convictions.

Click here to read Dominguez's full profile.

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Forensic Science Misconduct

Because forensic science results can mean the difference between life and death in many cases, fraud and other types of misconduct in the field are particularly troubling. False testimony, exaggerated statistics and laboratory fraud have led to wrongful conviction in several states.

Since forensic evidence is offered by "experts," jurors routinely give it much more weight than other evidence. But when misconduct occurs, the weight is misplaced. In some instances, labs or their personnel have allied themselves with police and prosecutors, rather than prioritizing the search for truth. Other times, criminalists lacking the requisite knowledge have embellished findings and eluded detection because judges and juries lacked background in the relevant sciences, themselves.

In some cases, critical evidence has been consumed or destroyed, so that re-testing to uncover misconduct has proven impossible. Evidence in these cases can never be tested again, preventing the truth from being revealed.

One weak link

The identification, collection, testing, storage, handling and reporting of any piece of forensic evidence involves a number of people. Evidence can be deliberately or accidentally mishandled at any stage of this process.

The risk of misconduct starts at the crime scene, where evidence can be planted, destroyed or mishandled. Evidence is later sent to a forensic lab or independent contractor, where it can be contaminated, poorly tested, consumed unnecessarily or mislabeled. Then, in the reporting of test results, technicians and their superiors sometimes have misrepresented their findings. DNA exonerations have even revealed instances of "drylabbing" evidence – reporting results when no test was actually performed.

All over the map

The Innocence Project has seen forensic misconduct by scientists, experts and prosecutors lead to wrongful conviction in many states. The following are among the more notorious:

- A former director of the West Virginia state crime lab, Fred Zain, testified for the prosecution in 12 states over his career, including dozens of cases in West Virginia and Texas. DNA exonerations and new evidence in other cases have shown that Zain fabricated results, lied on the stand about results and willfully omitted evidence from his reports.

- Pamela Fish, a Chicago lab technician, testified for the prosecution about false matches and suspicious results in the trials of at least eight defendants who were convicted, then proven innocent years later by DNA testing.

- A two-year investigation of the Houston crime lab, completed in 2007, showed that evidence in that lab was mishandled and results were misreported.

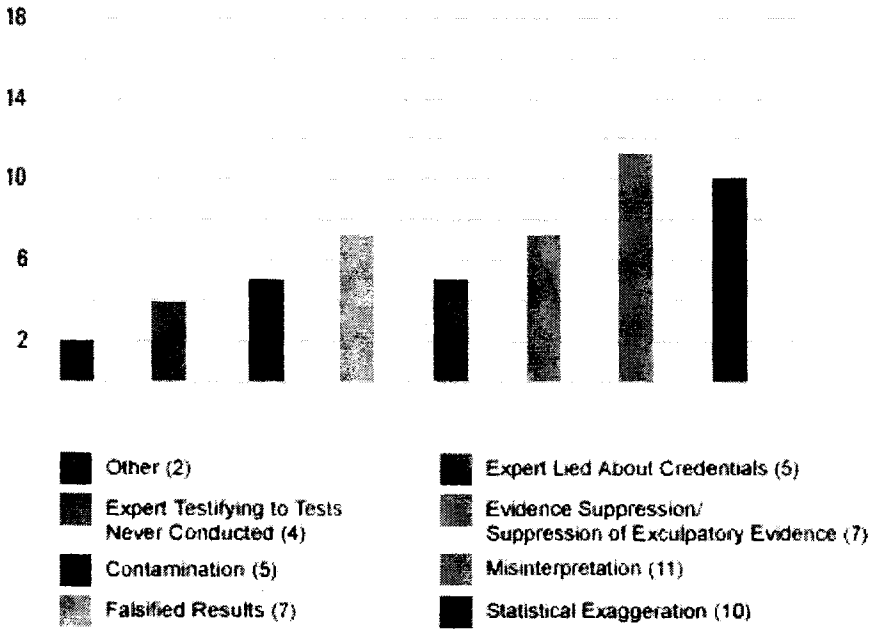
Ending forensic fraud

The Innocence Project has uncovered these abuses since 1992 and has developed recommendations for forensic labs, law enforcement agencies and courts to ensure that forensic science misconduct is prevented whenever possible. The Innocence Project calls for states to impose standards on the preservation and handling of evidence. When exonerations suggest that an analyst engaged in misconduct or that a facility lacked proper procedures or oversight, the Innocence Project advocates for independent audits of their work in other cases that may have also resulted in wrongful convictions.

Visit our Fix The System: Crime Lab Oversight page for more information.

Defective or Fraudulent Science (first 74 cases)

Scientific fraud by type. Many cases featured a combination of these types of fraud.



Featured Case: George Rodriguez

George Rodriguez was exonerated in 2005 after serving 17 years for a sexual assault he didn't commit. Rodriguez's case helped to reveal a pattern of error and fraud in the Houston Police Department Crime Lab that is still being investigated and corrected today. In Rodriguez's case, lab director Jim Bolding testified that a hair found in the victim's underwear could have belonged to Rodriguez. He also testified that blood type evidence showed that Rodriguez – and not a co-defendant – could have deposited biological fluids. This was false – later tests showed that the co-defendant could have been a contributor. DNA testing also showed that the hair used against Rodriguez could not have been his. Audits of the Houston lab since Rodriguez's exoneration have revealed a wide range of misconduct.

Click here to read Rodriguez's full profile.

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Forensic Oversight

Unvalidated or improper forensic science is a leading cause of wrongful convictions. In more than 50% of the DNA exonerations nationwide, unvalidated or improper forensic science contributed to the underlying wrongful conviction.

These problems include: forensic techniques that have not been subjected to rigorous scientific evaluation (such as hair microscopy, bite mark comparisons, firearm tool mark analysis and shoe print comparisons); testing that is improperly conducted or analysis that is not accurate (regardless of whether the forensic technique involved is validated); and forensic misconduct (such as fabricated test results and misleading testimony).

The Innocence Project supports a range of reforms that can improve the quality of forensic science nationwide. For more on federal forensic reforms recommended by the Innocence Project, visit the Just Science Coalition website.

In all of this work, the Innocence Project supports the forensic science field in its efforts to secure the funding it deserves as caseloads grow and demand for forensic testing increases. Crime victims, police, prosecutors and courts all gain from an efficient system that minimizes errors and focuses resources on identifying the guilty. The following recommendations, developed by the Innocence Project during years of research and experience, can substantively address forensic problems and help ensure quality forensic analysis.

Federal Support for Research and National Standards/Enforcement
A national forensic science agency with comparable authority to the Food and Drug Administration (FDA) can scrutinize the forensic devices and assays that are both in use and in development. The Innocence Project believes that a national forensic science agency should focus on three main areas that will most improve the quality of forensics used in the criminal justice system: research; assessment of validity and reliability; and quality assurance, accreditation and certification of laboratories and practitioners. Each area is described below:

Research: A national forensic science agency would identify research needs, establish priorities, and design criteria for reviewing forensic disciplines. Funding should also exist for expanded basic and applied research in order to test the validity of extant forensic methods, devices, and assays; and help develop new technologies to solve crime.

Assessment of Validity and Reliability: This agency would also be responsible for reviewing both existing and new research data to determine whether a technique, device or assay is scientifically valid and reliable for use in casework, and what the parameters of the assay should include. Furthermore, the agency should ensure the discontinuation of any invalid or unreliable methods, and support others only to the extent their practitioners present and interpret data within scientifically acceptable parameters.

Quality Assurance, Accreditation and Certification: A national forensic science agency would set and oversee enforcement of standards for public and private laboratories, as well as for individuals conducting forensic tests and examinations with intended use in U.S. federal and state courts. Quality controls and quality assurance programs must secure the integrity of the ultimate forensic product in the laboratory and in the courthouse. Forensic oversight should be obligatory, and non-compliance with accreditation and certification should allow for a loss of accreditation or individual certification and a cessation of business.

State Oversight Commissions or Advisory Boards
Independent panels should be created in each state to help secure adequate resources for forensic work. These independent panels should include a wide range of experts who understand the needs of the forensic community and the criminal justice system alike. Several states have already created commissions or advisory boards; they vary in many ways, but they are independent, expert panels committed to ensuring quality forensics.

Enforcement of Existing Requirements
Every state receives federal grant money under the Paul Coverdell Forensic Science Improvement Grant program. The 2004 Justice for All Act, which was passed by Congress and signed into law by President Bush, says states must have oversight mechanisms in place if they receive federal money for their crime labs. Specifically, the law requires jurisdictions seeking federal funding for their forensic facilities to identify an independent, external government entity with an appropriate process to conduct investigations into allegations of negligence or misconduct affecting forensic

results. The U.S. Department of Justice's Office of Justice Programs administers the grants, and as of January 2009 it has not given applicants the information and guidance they need to comply with the oversight requirement. As a result, a number of states lack the independence and/or process necessary to ensure the integrity of analysis from crime labs and other forensic facilities. Many states have accepted the grants but have not complied with this requirement.

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Press Release

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National Academy of Sciences Urges Comprehensive Reform of U.S. Forensic Sciences

In a groundbreaking report, nation's leading scientists and legal experts call for national oversight and research to ensure reliability in solving crimes

Contact: Eric Ferrero; eferrero@innocenceproject.org; 212-364-5346

(WASHINGTON, DC; February 18, 2009) - In a watershed development that could transform forensic science nationwide, the National Academy of Sciences today released a comprehensive report finding that the forensic sciences need significantly strengthened oversight, research and support in order to play a more reliable role in identifying perpetrators of crime, protecting the wrongly accused and ensuring public safety.

The report, released by a diverse committee of scientific and legal experts who have spent two years studying these issues and holding public hearings at Congress' request, recommends the creation of an independent, science-based federal entity that would direct comprehensive research and evaluation in the forensic sciences, establish scientifically validated standards and oversee their consistent application nationwide.

"This unprecedented report shows that many forensic techniques which are relied on in courtrooms every day lack scientific support. This report is a major breakthrough toward ensuring that so-called scientific evidence in criminal cases is solid, validated and reliable," said Peter Neufeld, Co-Director of the Innocence Project. "For too long, forensic science professionals have not had the support or management needed to identify the real strengths and weaknesses of different assays and techniques. "This report provides the roadmap for rectifying that problem, and we look forward to working with Congress and other key stakeholders to implement the report's recommendations."

Starting in the late 1980s, DNA analysis has helped identify the guilty and exonerate the innocent nationwide. While DNA testing was developed through extensive scientific research at top academic centers, many other forensic techniques – such as hair microscopy, bite mark comparisons, fingerprint analysis, firearms, tool marks and shoe print analysis – have never been subjected to rigorous scientific evaluation. Since experts agree that only 5-10% of a crime lab's work involves DNA testing and that overwhelmingly they rely on other forensic disciplines, it is all the more imperative that these other disciplines be subjected to rigorous evaluation to ensure their reliability.

Neufeld testified at two of the NAS's five public hearings, and the Innocence Project shared extensive data and background with the committee. The Innocence Project, which was founded in 1992 and is affiliated with Cardozo School of Law, assists prisoners who can be proven innocent through DNA testing and works to reform the criminal justice system to prevent wrongful convictions. To date, 232 people nationwide have been exonerated through post-conviction DNA testing. In approximately half of those cases, unvalidated or improper forensic science contributed to the wrongful conviction, according to the Innocence Project.

In one of more than 100 such cases nationwide, Innocence Project client Roy Brown was convicted of murder near Syracuse, New York. His conviction was based largely on evidence from the prosecution's forensic dentist that bite marks on the victim's body were "entirely consistent" with Brown's teeth. Brown served 15 years in prison before DNA testing on the saliva from those bite marks proved his innocence – and identified the actual perpetrator of the crime – in 2007. "I can still remember looking at the jury in my trial when they heard the

scientist testify. That's when I knew it was all over and I was going to prison, probably for the rest of my life. Junk science sent me to prison, but real science proved my innocence," Brown said. "We have to make sure that this doesn't keep happening to other people, that our system relies on solid science. I hope this report can lead to real change." Bite mark analysis is not rooted in science and was singled out in the NAS commission's hearings as one of the disciplines that should not be relied on without substantial research showing its validity or reliability.

"Post-conviction DNA evidence has assisted in the case-by-case exoneration of many individuals who have been wrongfully convicted, but we really need the framework and tools to fix the problems upstream and avoid so many wrongful convictions in the first place," said Innocence Project Co-Director Barry Scheck. "Comprehensive improvement and strengthening of the forensic sciences in this country will provide that framework."

In today's report, the NAS committee proposes the creation of a federal entity to stimulate basic and applied research, set national standards for forensic sciences and enforce those standards – a recommendation that is already garnering strong support from policymakers, legal experts and forensic professionals. "As policymakers and scientific advisors implement these recommendations, it will be critical to establish a federal entity to oversee the research, development, funding, and application of the forensic sciences; and to set the standards, regulations, and reporting requirements that will strengthen the ongoing validity of the forensic sciences," said Dr. Donald Kennedy, co-chair of the National Academies' Project on Science, Technology and Law and emeritus editor-in-chief of Science, the journal of the American Association for the Advancement of Science.

"To ensure that the assessments made and the standards enacted are based on rigorous and objective scientific methods, this oversight entity should be housed within a scientific agency of the federal government," he continued.

Released at a particularly volatile time in our nation's economic history, the NAS committee's recommendations also offer an opportunity for improved efficiency in government operations and strategic support for new technologies and leadership in the private sector. In the last decade, the forensics community benefited from an extraordinary collaboration between the academic and private sectors in the development of DNA technology – which, in turn, provided a boon for American private companies and a scientifically rigorous technology.

Michael Bromwich, former Inspector General of the U.S. Department of Justice, who has conducted detailed reviews of two forensic science labs, including the FBI Lab, said:

"These recommendations will be extraordinarily important in shaping the future direction of forensic science in this country. For too long, the work of forensic labs has been neglected and the science practiced in some of these labs has lacked the rigor and professionalism that are critical to ensuring fair and just results in our criminal justice system. If properly implemented, these recommendations will lead to greater investments in forensic science and in forensic labs, including in the training and certification of forensic scientists. In turn, this will lead to a higher quality of justice."

Read more reactions to today's report from lawmakers, scientists, exonerees and crime victims.

For more information about the NAS committee reviewing this topic and the committee's charge, please visit the NAS project website.

Learn more about the Innocence Project and its work on forensic science policy.

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New and Pending Legislation

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TIM COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS

- **Recommendations for Legislature**
  - Eyewitness Identification Procedures
  - Recording Custodial Interrogations
  - Mandatory Discovery Procedures
  - Amend Chapter 11 Writs of Habeas Corpus to Include Writs Based on Changing Scientific Evidence
  - Amend Chapter 64 to Broaden Post-Conviction DNA Testing

EYEWITNESS IDENTIFICATION

- **House Bill 215/ Senate Bill 121**
  - Requires written policy regarding photograph and live lineup identification procedures
  - Bill Blackwood Institute to draft model identification policy
  - Law enforcement Agencies may adopt the model policy or draft it's own policy
  - Identification procedure policies must be:
    1. Based on scientific research on eyewitness memory; AND
    2. Based on relevant policies, guidelines, and best practices designed to reduce erroneous eyewitness identifications and to enhance the reliability and objectivity of eyewitness identifications

IDENTIFICATION POLICY

- **Identifications Policies MUST address the following:**
  1. The selection of photos of participants
  2. Instructions given to the witness before conducting the identification procedure
  3. The documentation and preservation of the results of the identification procedure
  4. Procedure for administering an identification procedure to an illiterate person or non-English speaker
  5. Blind Administrator- Officer who does not know who the suspect is
  6. Any other procedures or best practices that will reduce erroneous identifications

RECORDING CUSTODIAL INTERROGATIONS

- **House Bill 219/ Senate Bill 123**
  - Requires complete, contemporaneous, audio or audiovisual electronic recording of any custodial interrogation that occurs in a place of detention and is of a person suspected of committing or charged with:
    - Murder, Capital Murder, Kidnapping, Aggravated Kidnapping, Continuous Sexual Abuse, Indecency with a Child, Improper Relationship between Educator and Student, Sexual Assault, Aggravated Sexual Assault, Sexual Performance by a Child
  - Recording must begin before the person receives Art. 38.22 warnings and continues, uninterrupted, until the interrogation ceases
  - Can be waived with good cause**

**Good Cause Includes:: Refusal by Subject to respond to a taped interrogation, Statement by Defendant was made spontaneously, Recording equipment malfunction, Exigent public safety concerns made it infeasible to make recording, Officer reasonably believed the person was not in custody for covered offense

DISCOVERY IN A CRIMINAL CASE

- **House Bill 1647**
  - Provides Mandatory discovery of:
    1. Exculpatory and impeachment evidence
    2. Written or recorded statements
    3. Record of any oral statement
    4. Defendant's prior record
    5. Any criminal record of State's witnesses
    6. Search warrants and affidavits
    7. Physical or documentary evidence to be used at trial
    8. Expert witnesses and reports
    9. Witnesses that the State will call
    10. Any plea agreement or grant of immunity or other agreement given by the State in exchange for testimony

DISCOVERY IN A CRIMINAL CASE

- **House Bill 1647**
  - Provides for reciprocal Discovery. Defense must produce:
    1. Written or recorded statement by a defense witness, other than defendant
    2. Criminal records of defense witnesses
    3. Physical or documentary evidence to be used at trial
    4. Expert witnesses and reports
    5. Witnesses the defense will call

WRITS BASED ON NEW SCIENTIFIC EVIDENCE

- **House Bill 220/ Senate Bill 317**
  - Court may grant writ relief under 11.07, 11.071 or 11.072 based on new scientific evidence
  - New Scientific Evidence is that which:
    1. Was not available to be offered by the convicted person at trial; or
    2. Discredits scientific evidence relied on by the State at trial
  - Writ relief is to be granted if:
    1. Relevant scientific evidence is now available but was not previously available
    2. The evidence would be admissible
    3. Had the scientific evidence been presented at trial, it is reasonably probable that the person would not have been convicted

MODIFICATION OF DNA STATUTE

- **State Bill 122**
  - Defendants may request DNA testing of evidence that is the basis of the challenged conviction so long as it was in the possession of the State during trial and it was:
    1. Not previously subjected to DNA testing; or
    2. Although previously tested there are newer techniques that are more accurate and probative than the previous test