

SUBJECT: Photograph and live lineup identification procedures in criminal cases

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Gallego, Hodge, Kent, Miklos, Moody, Pierson, Vaught, Vo

2 nays — Fletcher, Riddle

1 absent — Christian

SENATE VOTE: On final passage, April 16 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — Marc Chavez, Lubbock County District Attorney's Office; Edwin Colfax, The Justice Project; Scott Henson, Innocence Project of Texas; Cory Session, on behalf of Tim Cole, Innocence Project of Texas; Michael Ware, Dallas County District Attorney's Office; (*Registered, but did not testify*: Jason Kreag, The Innocence Project; Amanda Marzullo, Texas Fair Defense Project; Matt Simpson, ACLU of Texas; Erica Surprenant, Texas Criminal Justice Coalition)

Against — Keith Hampton, Texas Criminal Defense Lawyers Association

DIGEST: SB 117 would amend Code of Criminal Procedure, ch. 38 to add art. 38.20, which would require each law enforcement agency to adopt, implement, and amend, as necessary, a detailed written policy regarding the administration of photograph and live lineup identification procedures.

A law enforcement agency could adopt the model policy developed by the Bill Blackwood Law Enforcement Management Institute of Texas at Sam Houston State University or its own policy that conformed to the requirements of the Institute's model policy.

Evidence of compliance or noncompliance with the model policy would be relevant and admissible in a criminal case but would not be necessary for an out-of-court eyewitness identification to be admissible. A failure to comply substantially with the model policy would not bar the admission of eyewitness identification testimony in court.

The Institute would be required to develop and disseminate to all law

enforcement agencies a model policy and associated training materials regarding the administration of photo and live lineup identification procedures no later than June 1, 2010.

The model policy would have to be based on scientific research on eyewitness memory and relevant policies and guidelines developed by the federal government, other states, other law enforcement organizations, and other relevant information, and would have to address the following:

- the selection of photo and live lineup filler photos or participants;
- instructions given to a witness before conducting a photo or live lineup;
- the documentation and preservation of results of a photo or live lineup, including the documentation of witness statements, regardless of the outcome;
- procedures for administering a photo or live lineup to an illiterate person or person with limited English proficiency;
- procedures for assigning an administrator who was unaware of which member of the live lineup was the suspect in the case, and was capable of administering a photo array in a blind manner, or alternative procedures designed to prevent opportunities to influence the witness; 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.

The Institute would be required to complete an annual review of the model policy and training materials, and modify them as necessary.

Art. 38.20 would apply only to a law enforcement agency or a county, municipality, or other political subdivision that employed peace officers who conducted photograph or live lineup identification procedures in the routine performance of official duties.

The bill would take effect September 1, 2009, and would apply only to a photograph or live lineup identification procedure conducted on or after September 1, 2010.

**SUPPORTERS
SAY:**

By requiring the implementation of identification procedures based on best practices, SB 117 would produce more reliable evidence and help

prevent innocent people from being wrongfully convicted. Eighty percent of DNA exonerations in the state have involved faulty eyewitness identifications. The photo or live lineup is a critical piece of evidence that should be carefully collected. Poor procedures can taint the evidence, undermine its validity, and in the worst cases, lead to misidentified persons being wrongfully convicted. A wrongful conviction is devastating to the convicted person, the person's family, and future. It is also detrimental to public safety, as a wrongful conviction allows the real perpetrator to remain free to commit more crimes.

Best practices would not be difficult to implement, nor would they impede prosecution. Identifications resulting from noncompliant lineups still would be allowed into evidence at trial. An officer could be cross-examined regarding a noncompliant procedure and would have the chance to explain the reason for using a different procedure.

**OPPONENTS
SAY:**

The Legislature should not mandate law enforcement's use of specific identification procedures. Allowing an identification to be attacked based on noncompliance could hurt the prosecution. If legislated policies proved ineffective, they would be more difficult to change.

**OTHER
OPPONENTS
SAY:**

While law enforcement agencies should adopt and implement best practices for photo and live lineups, SB 117 has no enforcement mechanism to ensure compliance with these practices. Identifications made from noncompliant lineups still would be admissible in court. The bill would provide no incentive for law enforcement to comply with the model policy, and would not help prevent the wrongful convictions of innocent but misidentified people.

NOTES:

The House companion bill, HB 3583 by Gallego, was heard and left pending by the Criminal Jurisprudence Committee on April 1.