

- SUBJECT:** Requirements for photograph and live lineup identification policies
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 8 ayes — Gallego, Hartnett, Aliseda, Burkett, Carter, Y. Davis, Rodriguez, Zedler
- 0 nays
- 1 absent — Christian
- WITNESSES:** For — Charles Chatman, Scott Henson, Cory Session, Billy Smith, Innocence Project of Texas; David Gonzalez, Texas Criminal Defense Lawyers Association; Kathryn Kase, Timothy Cole Advisory Panel on Wrongful Convictions and Texas Defender Service; Travis Leete, Texas Criminal Justice Coalition; Mike Ware, Dallas County District Attorney’s Office; Johnnie Lindsey; Thomas McGowan; Christopher Scott; Sandra Thompson; Dorothy Budd; Cornelius Dupree; James Giles; (*Registered, but did not testify*: William Allison, Texas Center for Actual Innocence; John Chancellor, James McLaughlin, Texas Police Chiefs Association; Scott Cobb, Alison A. Dieter, Texas Moratorium Network; Jodyann Dawson, Texans Care for Children; Hooman Hedayati, Witness to Innocence; Stefanie Collins)
- Against — None
- On — Edwin Colfax, Texas Task Force on Indigent Defense; Barbara Hervey; (*Registered, but did not testify*: Lon Craft, Texas Municipal Police Association)
- DIGEST:** CSHB 215 would require law enforcement agencies to adopt a detailed written policy for photograph and live lineup identification procedures. The written policy could be based on one developed by the Bill Blackwood Law Enforcement Management Institute of Texas at Sam Houston State University or developed independently if it conformed to the minimum requirements in the bill.
- The written policy would have to be based on credible field, academic, or laboratory research on eyewitness memory and on relevant policies,

guidelines, and best practices designed to reduce erroneous eyewitness identifications and to enhance eyewitness identification reliability. The policy would have to address the following topics:

- the selection of photo and live lineup “filler” photos or participants (persons that police knew did not commit the crime but were included in the lineup);
- instructions given to a witness before a photo or live lineup;
- the documentation and preservation of a photo or live lineup’s results, 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 or, if that was not practicable, alternative procedures to prevent opportunities to influence the witness, or
  - was capable of administering a photo array in a blind manner or consistent with best practices designed to prevent opportunities to influence the witness; and
- any other research-supported procedures or best practices designed to reduce erroneous identifications and enhance the objectivity and reliability of eyewitness identifications.

The Blackwood Institute would have to develop its model policy and training materials in consultation with large, medium, and small law enforcement agencies as well as law enforcement associations, scientific experts in eyewitness memory research, and other appropriate organizations no later than December 31, 2011. A period of public comment would have to be provided before the institute’s adoption of the policy. Law enforcement agencies then would have until September 1, 2012, to adopt a policy.

By December 31 of each odd-numbered year, the Blackwood Institute would have to review the model policy and training materials and modify them as appropriate. By September 1 of each even-numbered year, each law enforcement agency would have to review its policy and modify it as appropriate.

Evidence of compliance or noncompliance with the policy would be relevant and admissible in a criminal case, but compliance would not be

necessary for an out-of-court eyewitness identification to be admissible. A failure to comply substantially with the policy would not bar the admission of eyewitness identification testimony in court.

The bill would take effect September 1, 2011, and would apply only to a photo or live lineup identification procedure conducted on or after September 1, 2012, regardless of when the crime was committed.

**SUPPORTERS  
SAY:**

CSHB 215 would produce more reliable evidence and help prevent innocent people from being wrongfully convicted. According to the Innocence Project of Texas, Texas leads the nation in the number of wrongful convictions exposed by DNA evidence, and more than 80 percent of them were caused by mistaken eyewitness identification. Yet only 12 percent of law enforcement agencies in the state have a written policy on how best to conduct eyewitness identification procedures. Other states such as North Carolina, New Jersey, and Wisconsin have enacted legislation similar to CSHB 215.

This bill is based on recommendations from the Timothy Cole Advisory Panel on Wrongful Convictions — which was named for the first Texan to be posthumously exonerated by DNA testing — and has collaborative support from law enforcement, prosecutors, judges, the Governor's Office, and inmates' advocates. As a result of that collaborative process, the bill would ensure that large, medium, and small law enforcement agencies were consulted in the development of the model policy and that modifications would be made every few years as new research emerged and agencies learned what procedures were or were not effective. The bill would preserve flexibility by not dictating any actual procedures but by requiring only that certain aspects of the identification procedure be addressed when policies were adopted.

The photo or live lineup is a critical piece of evidence that should be carefully collected. Poor procedures can taint the evidence and undermine its validity, leading in the worst cases to misidentified persons being wrongfully convicted. Blind administration procedures, during which the administrator of the eyewitness identification procedure does not know who the suspect is, would prevent the administrator from influencing the witness. Alternative procedures to prevent opportunities to influence the witness also could be adopted when blind administration was not practicable, such as for a very small law enforcement agency. If the adopted policy was not used, the defense could assert why the

identification procedure was inadequate and how it could have resulted in mistaken identification.

A wrongful conviction is devastating to the convicted person and to his or her family. It also jeopardizes public safety, since a wrongful conviction lets the real perpetrator remain free to commit more crimes. The best practices proposed by this bill would not be difficult to implement, nor would they impede prosecution. Prosecutions that relied on best-practice identifications would produce more reliable evidence and strengthen each legal case. Identifications resulting from noncompliant lineups still would be allowed into evidence at trial. During cross-examination, an officer could explain the reason for using a procedure that did not comply with the model policy.

OPPONENTS  
SAY:

Improvements made in the past two decades have resulted in a just and fair criminal justice system that protects the public. It would be better to let law enforcement agencies develop their own identification procedures depending on their resources and individual circumstances.

Once a model policy was developed and adopted by the Blackwood Institute, it could take a few years to change procedures that were not working, during which time outdated procedures would continue to be used. If law enforcement agencies could update procedures based on their own circumstances and experiences, with no state standards, the procedures would be updated more frequently.

OTHER  
OPPONENTS  
SAY:

While law enforcement agencies should adopt and implement best practices for photo and live lineups, CSHB 215 has no enforcement mechanism to ensure compliance with these practices. Since research has shown how unreliable eyewitness identifications can be, identifications made from noncompliant lineups should not be admissible as evidence in court.

If the noncompliant identification is allowed to be admissible in court, then the jury at least should be instructed that witness identification evidence is not foolproof and is subject to the limitations of human memory. In addition to the jury instruction, or as an alternative, the bill should require corroborative evidence to admit the noncompliant identification in court.

Research suggests that witnesses become more certain of their identifications as time progresses, even though scientific evidence shows the fallibility of human memory. For this reason, each witness should be required to submit a statement of certainty about his or her identification. The statement of certainty would remind the jury of the imperfect reality of human memory.

NOTES:

The Senate companion bill, SB 121 by Ellis, passed the Senate by 30-0 on March 16 and has been referred to the House Criminal Jurisprudence Committee.

The committee substitute differs from the original version of the bill by specifying that the Blackwood Institute would have to consult with small, medium, and large law enforcement agencies in the development of its model policy. The substituted version also changed what the model policy would be based on, from scientific research on eyewitness memory to credible field, academic, or laboratory research on eyewitness memory.

Under the original bill, the Blackwood Institute would have to review its policy annually. Under the substitute, the institute would have to review its policy every odd-numbered year, and each law enforcement agency would have to review its policy every even-numbered year. The substitute also differs by requiring a period of public comment before the institute's adoption of the model policy, and by changing the date by which the model policy must be disseminated from June 1, 2012, to December 31, 2011.

During the 2009 regular session, SB 117 by Ellis, a similar bill, passed the Senate and was placed on the House General State Calendar, but no further action was taken.