

SECOND REGULAR SESSION

HOUSE BILL NO. 1407

97TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE ELLINGTON.

4519L.01I

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To amend chapter 491, RSMo, by adding thereto four new sections relating to eyewitness identification procedures.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Chapter 491, RSMo, is amended by adding thereto four new sections, to be known as sections 491.525, 491.530, 491.535, and 491.540, to read as follows:

491.525. As used in sections 491.525 to 491.540, the following terms shall mean:

(1) "Administrator", the person conducting the photo or live lineup;

(2) "Blind", the administrator does not know the identity of the suspect;

(3) "Blinded", the administrator may know who the suspect is, but by virtue of the use of procedures or technology to accomplish such purpose does not know which lineup member is being viewed by the eyewitness;

(4) "Contamination", occurs when an eyewitness's memory of a person or event becomes altered, replaced, or otherwise impaired as a result of exposure to extrinsic information related to such person or event;

(5) "Eyewitness", a person who observes another person at or near the scene of an offense;

(6) "Filler", either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure;

(7) "Identification procedure", a live lineup, photo lineup, or showup;

(8) "Live lineup", an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

19 offense, is displayed to an eyewitness for the purpose of determining whether the
20 eyewitness identifies the suspect as the perpetrator;

21 (9) "Photo lineup", an identification procedure in which an array of photographs,
22 including a photograph of the suspected perpetrator of an offense and additional
23 photographs of other persons not suspected of the offense, is displayed to an eyewitness
24 either in hard copy form or via computer for the purpose of determining whether the
25 eyewitness identifies the suspect as the perpetrator;

26 (10) "Showup", an identification procedure in which an eyewitness is presented
27 with a single suspect for the purpose of determining whether the eyewitness identifies such
28 individual as the perpetrator;

29 (11) "Suspect", the person believed by law enforcement to be the possible
30 perpetrator of the crime.

491.530. Any criminal justice entity conducting eyewitness identification
2 procedures shall adopt specific procedures for conducting photo and live lineups that
3 comply with the following requirements:

4 (1) Prior to a photo or live lineup, law enforcement shall record as complete a
5 description as possible of the perpetrator provided by the eyewitness in the eyewitness's
6 own words. Such statement shall also include information regarding the conditions under
7 which the eyewitness observed the perpetrator to include location, time, distance,
8 obstructions, lighting, weather conditions, and other impairments, including but not
9 limited to alcohol, drugs, stress, and visual or auditory disabilities. The eyewitness shall
10 also be asked if he or she needs glasses or contact lenses and whether he or she was wearing
11 glasses or contact lenses at the time of the offense. The administrator shall note whether
12 the eyewitness was wearing glasses or contact lenses at the time of the identification
13 procedure;

14 (2) All live and photographic displays shall be conducted blind unless to do so
15 would place an undue burden on law enforcement or the investigation. If such
16 circumstances are properly documented under subdivisions (19), (20), and (21) of this
17 section, investigators may administer a photographic display blinded;

18 (3) The eyewitness shall be instructed, without other eyewitnesses present, prior to
19 any live or photo lineup that:

20 (a) The perpetrator may or may not be among the persons in the identification
21 procedure or, in the case of a showup, may or may not be the person who is presented to
22 the eyewitness;

23 (b) The administrator does not know who the perpetrator is;

24 (c) The eyewitness should not feel compelled to make an identification;

- 25 (d) The investigation shall continue whether or not an identification is made;
- 26 (e) The procedure requires the administrator to ask the eyewitness to state, in his
27 or her own words, how certain he or she is of any identification; and
- 28 (f) The eyewitness is not to discuss the identification procedure or its results with
29 other eyewitnesses involved in the case and should not speak with the media;
- 30 (4) In a photo lineup, the photograph of the suspect shall be contemporary and
31 shall resemble his or her appearance at the time of the offense;
- 32 (5) In a photo lineup, there shall be no characteristics of the photographs
33 themselves or the background context in which they are placed which shall make any of
34 the photographs unduly stand out;
- 35 (6) A photo or live lineup shall be composed so that the fillers generally resemble
36 the eyewitness's description of the perpetrator, which ensuring that the suspect does not
37 unduly stand out from the fillers;
- 38 (7) In a photo or live lineup, fillers shall possess the following characteristics:
- 39 (a) All fillers selected shall resemble the eyewitness's description of the perpetrator
40 in significant features, such as face, weight, build, and skin tone, including any unique or
41 unusual features, such as scars or tattoos;
- 42 (b) At least five fillers shall be included in a photo lineup in addition to the suspect;
- 43 (c) At least four fillers shall be included in a live lineup in addition to the suspect;
44 and
- 45 (d) If the eyewitness has previously viewed a photo lineup or live lineup in
46 connection with the identification of another person suspected of involvement in the
47 offense, the fillers in the lineup in which the instant suspect participates shall be different
48 from the fillers used in any prior lineups;
- 49 (8) If there are multiple eyewitnesses:
- 50 (a) Each eyewitness shall view photo or live lineups separately;
- 51 (b) The suspect shall be placed in a different position in the live lineup or photo
52 lineup for each eyewitness; and
- 53 (c) The eyewitnesses shall not be permitted to communicate with each other until
54 all identification procedures have been completed;
- 55 (9) In an identification procedure, no writings or information concerning the
56 instant or any previous arrest, indictment, or conviction of the suspect shall be visible or
57 made known to the eyewitness;
- 58 (10) In a live lineup, any identifying actions, such as speech, gestures, or other
59 movements, shall be performed by all lineup participants;

60 (11) In a live lineup, all lineup participants shall be out of view of the eyewitness
61 prior to the identification procedure;

62 (12) When there are multiple suspects, each identification procedure shall include
63 only one suspect;

64 (13) Nothing shall be communicated to the eyewitness regarding the suspect's
65 position in the photo or live lineup;

66 (14) Nothing shall be communicated to the eyewitness which may influence the
67 eyewitness's identification of any particular lineup member;

68 (15) If the eyewitness makes an identification, the administrator shall seek and
69 document a clear statement from the eyewitness at the time of the identification and in the
70 eyewitness's own words as to the eyewitness's confidence level that the person identified
71 in a given identification procedure is the perpetrator;

72 (16) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not
73 be provided any information concerning such person before the administrator obtains the
74 eyewitness's confidence statement about the selection;

75 (17) A record of the identification procedure shall be made which includes all
76 identification and nonidentification results obtained during the identification procedure
77 and signed by the eyewitness;

78 (18) (a) Efforts shall be made to perform a live or photo lineup instead of a
79 showup.

80 (b) Showups shall only be performed using a live suspect and only in exigent
81 circumstances which require the immediate display of a suspect to an eyewitness.

82 (c) Investigators shall not conduct a showup with a single photograph. If
83 investigators wish to determine if an eyewitness is able to make an identification using a
84 photograph, a photographic display shall be used.

85 (d) For the administration of a showup procedure:

86 a. A full and detailed description of the perpetrator shall be provided by the
87 eyewitness before the eyewitness observes the suspect. Such statement shall also include
88 information regarding the conditions under which the eyewitness observed the perpetrator
89 to include location, time, distance, obstructions, lighting, weather conditions, and other
90 impairments, including but not limited to alcohol, drugs, stress, and visual or auditory
91 disabilities. The eyewitness shall be asked if he or she needs glasses or contact lenses and
92 whether he or she was wearing glasses or contact lenses at the time of the offense. The
93 administrator shall note whether the eyewitness was wearing glasses or contact lenses at
94 the time of the identification procedure;

b. The eyewitness shall be transported to a neutral nonlaw enforcement location where the suspect is being detained for the purposes of a showup procedure;

c. The eyewitness shall be provided with instructions prior to the showup, including:

(i) The perpetrator may or may not be the person who is presented to the eyewitness;

(ii) The eyewitness should not feel compelled to make an identification;

(iii) The investigation shall continue whether or not an identification is made;

(iv) The procedure requires the administrator to ask the eyewitness to state in his or her own words how certain he or she is of any identification; and

(v) The eyewitness is not to discuss the identification procedure or its results with other eyewitnesses involved in the case and should not speak to the media;

d. Measures shall be taken by investigators at the showup, including the administrator of the showup, to reduce potentially damaging or prejudicial inferences which may be drawn by the eyewitness, including:

(i) Refraining from suggesting through statements or nonverbal conduct that the suspect is or may be the perpetrator of the offense;

(ii) Removing the suspect from a squad car; and

(iii) When practicable, removing handcuffs from the suspect;

e. If there are multiple eyewitnesses:

(i) Only one eyewitness at a time shall participate in the showup procedure;

(ii) Only one of the eyewitnesses shall be present at the location or the showup procedure; and

(iii) If a positive identification is made and an arrest is justified, additional eyewitnesses shall be shown live or photo lineups;

f. If there are multiple suspects, such suspects shall be separated and subjected to separate showup procedures;

g. If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness at the time of the identification and in the eyewitness's own words as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator; and

h. Investigators shall photograph a suspect at the time and place of the showup to preserve a record of the appearance of the suspect at the time of the showup procedure;

(19) Unless impracticable, a video record of the identification procedure shall be made which includes the following information:

(a) All identification and nonidentification results obtained during the identification procedures, signed by the eyewitnesses, including the eyewitness's confidence statements;

(b) The names of all persons present at the identification procedure, including the name of the lineup administrator and whether the administrator was blind, blinded, or nonblind;

(c) When it is impracticable for a blind administrator to conduct the eyewitness identification procedure, the investigator shall state in writing the reason therefor;

(d) The date and time of the identification procedure;

(e) In a photo or live lineup, any eyewitness identification or identifications of a filler or fillers; and

(f) In a photo or live lineup, the names of the lineup members and the relevant identifying information, and the sources of all photographs or persons used in the lineup;

(20) If a video record of the lineup is impracticable, the officer conducting the lineup shall document the reason therefor, and an audio record of the identification procedure shall be made which includes the items specified in subdivision (19) of this section. The audio record shall be supplemented by all of the photographs used in a photo lineup, and photographs of all of the individuals used in a live lineup or showup; and

(21) If both a video and audio record of the lineup are impracticable, the officer conducting the lineup shall document in writing the reason therefor, and a written record of the lineup shall be made which includes the items specified in subdivision (19) of this section. The written record shall be supplemented by all of the photographs used in a photo lineup, and photographs of all individuals used in a live lineup or showup.

491.535. For any photo or live lineup or showup procedure which is administered after the effective date of this act:

(1) Whenever the prosecution intends to offer eyewitness identification evidence at trial, the defendant is entitled to a pretrial evidentiary hearing as to the reliability of such evidence. At the hearing, the court shall examine whether law enforcement failed to substantially comply with any requirement of section 491.530, whether any other suggestive identification procedures were employed, whether the eyewitness identification evidence may have been otherwise contaminated by state or nonstate actors, and any other factors bearing upon the reliability of the identification evidence, including but not limited to characteristics of the witness, perpetrator, or event;

(2) If at the pretrial reliability hearing required under subdivision (1) of this section the court finds evidence of a failure of law enforcement officials or prosecuting agencies to comply with any of the provisions of section 491.530, of the use of any other suggestive

14 identification procedures, or of any other contamination of identification evidence by state
15 or nonstate actors, the court shall:

16 (a) Consider such evidence in determining the admissibility of the eyewitness
17 identification; and

18 (b) Suppress any such evidence when there is a substantial probability of
19 eyewitness misidentification; or

20 (c) When such evidence is admissible, instruct the jury both when admitting such
21 evidence and prior to jury deliberations, where applicable, that:

22 a. The provisions of section 491.530 were designed to reduce the risk of
23 misidentification and that the jury may consider credible evidence of noncompliance when
24 assessing the reliability of the eyewitness identification evidence;

25 b. The contamination of the eyewitness identification evidence by factors other than
26 state noncompliance with any of the provisions of section 491.530, including but not limited
27 to the use of any other suggestive identification procedures or suggestive actions of
28 nonstate actors which increased the risk of misidentification;

29 c. The jury should view the identification evidence with distrust if the court has
30 determined that its confidence in the reliability of the eyewitness identification has been
31 sufficiently undermined.

491.540. 1. The department of public safety shall create, administer, and conduct
2 training programs for law enforcement officers and recruits regarding the methods,
3 technical aspects, and scientific findings regarding the basis of the eyewitness identification
4 practices and procedures referenced in sections 491.525 to 491.540.

5 2. The department may promulgate rules to implement the provisions of this
6 section. Any rule or portion of a rule, as that term is defined in section 536.010, that is
7 created under the authority delegated in this section shall become effective only if it
8 complies with and is subject to all of the provisions of chapter 536 and, if applicable,
9 section 536.028. This section and chapter 536 are nonseverable and if any of the powers
10 vested with the general assembly pursuant to chapter 536 to review, to delay the effective
11 date, or to disapprove and annul a rule are subsequently held unconstitutional, then the
12 grant of rulemaking authority and any rule proposed or adopted after August 28, 2014,
13 shall be invalid and void.

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