

HB 1407 -- EYEWITNESS IDENTIFICATION PROCEDURES

SPONSOR: Ellington

This bill requires any criminal justice entity conducting eyewitness identifications to adopt specific procedures for conducting photo and live lineups that meet specified requirements. In its main provisions, the bill:

(1) Requires, prior to a photo or live lineup, law enforcement to record as complete a description as possible of the perpetrator provided by the eyewitness in his or her own words. The statement must also include specified information regarding the conditions under which the eyewitness observed the perpetrator. The eyewitness must be asked if he or she needs glasses or contact lenses and whether he or she was wearing them at the time of the offense. The person conducting the lineup must note whether the eyewitness was wearing glasses or contact lenses at the time of the identification procedure;

(2) Requires all live and photo displays to be conducted blind unless to do so would place an undue burden on law enforcement or the investigation;

(3) Requires the eyewitness to be instructed, without other eyewitnesses present, prior to any photo or live lineup that the perpetrator may or may not be among the persons in the identification procedure or, in the case of a showup, may or may not be the person who is presented to the eyewitness; the administrator does not know who the perpetrator is; the eyewitness should not feel compelled to make an identification; the investigation will continue whether or not an identification is made; the procedure requires the person conducting the lineup to ask the eyewitness to state, in his or her own words, how certain he or she is of any identification; and that the eyewitness is not to discuss the identification procedure or its results with other eyewitnesses involved in the case and should not speak with the media;

(4) Requires, in a photo lineup, the suspect's photograph to be contemporary and resemble his or her appearance at the time of the offense. There must be no characteristics of the photographs themselves or the background context that will make any of the photographs unduly stand out;

(5) Requires, in a live lineup, any identifying actions, such as speech, gestures, or other movements, to be performed by all lineup participants, and all must be out of view of the eyewitness prior to the identification procedure;

(6) Requires a photo or live lineup to be composed so that the fillers generally resemble the eyewitness's description of the perpetrator ensuring that the suspect does not unduly stand out and the fillers must possess specified characteristics, including that all fillers must resemble the eyewitness's description of the perpetrator in significant features, at least five fillers must be included in a photo lineup and four fillers must be included in a live lineup in addition to the suspect, and if the eyewitness has previously viewed a lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the instant suspect participates must be different from those used in any prior lineups;

(7) Specifies that if there are multiple eyewitnesses, each eyewitness must view photo or live lineups separately, the suspect must be placed in a different position in the lineup for each eyewitness, and the eyewitnesses must not be permitted to communicate with each other until all identification procedures have been completed;

(8) Specifies that no writings or information concerning the instant or any previous arrest, indictment, or conviction of the suspect can be visible or made known to the eyewitness;

(9) Requires when there are multiple suspects, each identification procedure to include only one suspect;

(10) Specifies that nothing must be communicated to the eyewitness regarding the suspect's position in the lineup or that may influence the eyewitness's identification of any particular lineup member;

(11) Requires, if the eyewitness makes an identification, the person administering the lineup to seek and document a clear statement from the eyewitness at that time and in the eyewitness's own words as to his or her confidence level that the person identified in a given identification procedure is the perpetrator and prohibits the eyewitness from being provided with any information concerning the person identified before the person administering obtains the confidence statement;

(12) Requires a record of the identification procedure to be made that includes all identification and nonidentification results obtained during the identification procedure and the record to be signed by the eyewitness;

(13) Specifies that efforts must be made to perform a live or photo lineup instead of a showup and requires that showups only be

performed using a live suspect and only in exigent circumstances that require the immediate display of a suspect to an eyewitness. Investigators cannot conduct a showup with a single photograph. If investigators wish to determine if an eyewitness is able to make an identification using a photograph, a photographic display must be used. The bill specifies the procedure to be followed for the administration of a showup; and

(14) Requires, unless it is impracticable, a video record of the identification procedure to be made that includes specified information. If it is impracticable, the officer conducting the lineup must document the reason why it is impracticable and an audio record of the identification procedure must be made that includes specified information. The audio record must be supplemented by all of the photographs used in a photo lineup and photographs of all the individuals used in a live lineup or showup. If both a video and audio record of the lineup are impracticable, the officer conducting the lineup must document in writing the reason and a written record of the lineup must be made that includes the specified information. The written record must be supplemented by all of the photographs used in a photo lineup and photographs of all individuals used in a live lineup or showup.

The bill specifies that when the prosecution intends to offer eyewitness identification evidence at trial, the defendant is entitled to a pretrial evidentiary hearing as to the reliability of the evidence. At the hearing, the court must examine whether law enforcement failed to substantially comply with these requirements, whether any other suggestive identification procedures were employed, whether the eyewitness identification evidence may have been otherwise contaminated, and any other factors bearing upon the reliability of the identification evidence. If the court finds evidence of a failure by law enforcement officials or prosecuting agencies to comply with the specified procedures, the court must consider the evidence in determining the admissibility of the eyewitness identification and suppress any evidence when there is a substantial probability of eyewitness misidentification or when the evidence is admissible, instruct the jury both when admitting the evidence and prior to jury deliberations, where applicable, that these provisions were designed to reduce the risk of misidentification and that the jury may consider credible evidence of noncompliance when assessing the reliability of the eyewitness identification evidence; the contamination of the eyewitness identification evidence, including the use of suggestive identification procedures or actions that increased the risk of misidentification; and the jury should view the identification evidence with distrust if the court has determined that its confidence in the reliability of the eyewitness identification has been sufficiently undermined.

The Department of Public Safety must create, administer, and conduct training programs for law enforcement officers and recruits regarding the method, technical aspects, and scientific findings regarding the basis of the eyewitness identification practices and procedures in the bill.