

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

Senate Bill 986 (Senator Gladden)
Judicial Proceedings

Public Safety - Eyewitness Identification - Procedures

This bill establishes that, by October 1, 2012, each law enforcement agency in the State must (1) adopt and implement a written policy relating to identification procedures that complies with specified requirements; and (2) file a copy of the written policy with the Department of State Police (DSP). DSP must compile the written policies by October 1, 2012.

Fiscal Summary

State Effect: The bill does not materially affect State finances.

Local Effect: The bill does not materially affect local finances.

Small Business Effect: None.

Analysis

Bill Summary: An “identification procedure” is a procedure in which an array of photographs, including a photograph of the suspected perpetrator and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness in hard copy form or by computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

An “identification statement” is a statement as to whether the eyewitness believes that the perpetrator has been identified during the identification procedure (1) from the eyewitness in his/her own words; (2) at the time the eyewitness viewed the photographs during the identification procedure; and (3) before the eyewitness is given feedback.

Instructions to Eyewitness

Before an identification procedure is conducted, an eyewitness must be instructed that (1) the perpetrator may or may not be among the persons in the identification procedure; (2) the administrator does not know who the perpetrator is; (3) the eyewitness should not feel compelled to make an identification; (4) the investigation will continue whether or not an identification is made; (5) it is as important to exclude innocent persons as it is to identify the perpetrator; and (6) the eyewitness is not to discuss the identification procedure or the results of the procedure with other eyewitnesses involved in the case and should not speak to the media. The instructions must be given without other eyewitnesses present.

Conducting an Identification Procedure

An eyewitness identification procedure may be conducted by displaying hard copy photographs to an eyewitness or by computer, but must be conducted by a person (the administrator) who does not know the identity of the suspect (“blind”) or who knows the identity of the suspect but does not know which lineup member is being viewed by the eyewitness (“blinded”). The administrator may be blinded through the use of (1) an automated computer program that prevents the administrator from seeing which photos are being viewed by the eyewitness until after the identification procedure is completed; or (2) a method in compliance with the bill’s requirements that is conducted by placing photographs in randomly numbered folders that are shuffled and then presented sequentially to the eyewitness so that the administrator cannot see or track which photograph is being viewed by the eyewitness until after the identification procedure is completed (“folder shuffle method”).

Photos must be presented to an eyewitness sequentially and in a previously determined order. Each photo must be presented separately and removed before the next photo is presented to the eyewitness. As the photos are presented to the eyewitness, the administrator must document in writing all identification statements made by the eyewitness. An eyewitness may not be given positive or negative feedback as to the accuracy or inaccuracy of an identification by the eyewitness to the fullest extent practicable.

Documentation of the Identification Procedure

The administrator must make a written record of the identification procedure that includes: (1) all identification and nonidentification results obtained during the identification procedure, including the signed identification statement of the eyewitness; (2) the names of all persons present at the identification procedure; (3) the date and time of the identification procedure; (4) any eyewitness identification of a photograph of a

person who is not suspected of an offense, but is included in the lineup; and (5) all photographs used in the identification procedure. An administrator is not required to make a written record if there is a video or audio recording of the identification procedure that contains all of the information that must be included in the written report.

Evidence of Failure to Comply with Identification Procedure Requirements

Evidence of a failure to comply with the bill's requirements for identification procedures must be considered by the court that adjudicates a motion to suppress the eyewitness identification and is admissible in support of a claim of eyewitness misidentification if the evidence is otherwise admissible. When evidence of a failure to comply with the identification procedure requirements is presented at trial, the jury must be instructed that they may consider credible evidence of noncompliance in determining the reliability of an eyewitness identification.

Current Law: Eyewitness identification testimony and in-court identification of a criminal defendant are generally admissible.

Lineups and other extrajudicial identifications that are “unnecessarily suggestive and conducive to irreparable mistaken identification” violate a criminal defendant’s due process rights. *See Stovall v. Deno*, 388 U.S. 293, 302 (1967). When confronting due process challenges to identification procedures, courts evaluate whether the identification was reliable in spite of the suggestive procedures under a totality of the circumstances.

Chapter 590 of 2007 required each law enforcement agency in the State to adopt a written policy relating to eyewitness identification by December 1, 2007. The policies must comply with the U.S. Department of Justice (DOJ) standards on obtaining accurate eyewitness identification. Law enforcement agencies were required to file copies of these policies with DSP by January 1, 2008. DSP was required to compile the policy of each law enforcement agency by February 1, 2008 and allow public inspection of each policy compiled.

Background: The reliability of eyewitness identifications is a recurring theme in criminal justice discourse. In 1999, DOJ released a report titled *Eyewitness Evidence: A Guide for Law Enforcement*, detailing recommended procedures for obtaining reliable eyewitness evidence through line-ups, field identifications, mug shot books, and other methods. Since the release of this document, Wisconsin, Illinois, and Virginia are among the states that have passed eyewitness identification reform laws adopting some or all of these recommendations. The DOJ guidelines do not include double-blind or sequential presentation of photographs.

The Mid-Atlantic Innocence Project (MAIP) identified 12 key recommendations in the DOJ report that pertain to photo arrays and analyzed the written policies submitted by law enforcement agencies to DSP pursuant to Chapter 590 of 2007. According to MAIP, of all State law enforcement agencies:

- 17% do not have a written policy;
- 30% do not comply with any of the 12 key DOJ recommendations;
- 26% partially comply with the 12 key DOJ recommendations; and
- 27% comply with all 12 of the key DOJ recommendations.

The Innocence Project recommends the following model protocols for eyewitness identifications: (1) blind administrations of identification procedures; (2) instructions to eyewitnesses that deter the eyewitness from feeling compelled to make a choice or seek clues from the administrator; (3) using “filler” photographs of individuals who resemble the description provided by the witness, but do not unduly stand out from the suspect; (4) presenting lineup members sequentially; (5) obtaining statements from eyewitnesses immediately upon identification and before any feedback is provided about the level of confidence the eyewitness has in his/her identification; and (6) recording lineup procedures using audio recordings, video recordings, or written documentation.

In August 2011, the New Jersey Supreme Court issued sweeping new rules that make it easier for criminal defendants to challenge eyewitness identification. Under the rules, whenever a defendant presents evidence that a witness’s identification of a suspect was influenced in any way, a judge must hold a hearing to consider a range of issues related to the validity of the identification.

In January 2012, the U.S. Supreme Court held that the Due Process Clause of the U.S. Constitution does not require a judge to conduct a preliminary inquiry into the reliability of an eyewitness’s identification when law enforcement did not use unnecessarily suggestive circumstances to procure the identification. *See Perry v. New Hampshire*, No. 10-8974.

State Expenditures: DSP advises that the bill’s impact is procedural. The Judiciary can handle operational changes to evidentiary hearings and rulings as a result of the bill with existing budgeted resources.

Local Expenditures: Garrett County and Montgomery County advise that the bill will not have a fiscal impact on their respective jurisdictions. Baltimore County advises that the county uses a multi-million dollar computer system to generate photographs for lineups using randomly selected photos over which the investigating officer has no control. The county further advises that the bill will require the county to use printed photographs in folders, thus rendering its investment in the multi-million dollar computer

system useless. However, assuming that the computer system allows an administrator to present photographs to a witness sequentially without knowing which photograph is being viewed by the witness, Baltimore County can continue to use its current computer system for eyewitness identifications.

Additional Information

Prior Introductions: None.

Cross File: HB 1324 (Delegate Anderson) - Judiciary.

Information Source(s): Baltimore, Garrett, and Montgomery counties; Office of the Public Defender; Maryland Department of Transportation; Judiciary (Administrative Office of the Courts); Department of Natural Resources; Department of Health and Mental Hygiene; Department of General Services; Department of State Police; State's Attorneys' Association; University System of Maryland; American Psychological Association; *The New York Times*; United States Supreme Court; Department of Legislative Services

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