

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

Senate Bill 752 (Senator Pugh)
Judicial Proceedings

Public Safety - Eyewitness Identification - Procedures

This bill requires, by August 1, 2014, each law enforcement agency in the State to (1) adopt the Police Training Commission's (PTC) Eyewitness Identification Model Policy of 2012 or 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 December 31, 2014, and allow public inspection of each policy.

The bill takes effect July 1, 2014.

Fiscal Summary

State Effect: None. The bill's changes are procedural in nature and can be accommodated with the existing budgeted resources of State law enforcement agencies.

Local Effect: Minimal. While the bill's requirements are procedural in nature, some local law enforcement units may need to upgrade existing equipment or software.

Small Business Effect: None.

Analysis

Bill Summary:

Instructions to Eyewitness

Before an "identification procedure" is conducted, an eyewitness must be instructed that the perpetrator may or may not be among the persons in the identification procedure.

The instructions must be given without other eyewitnesses present. An “identification procedure” is a procedure in which a live lineup is conducted or 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. A “live lineup” is a procedure in which a perpetrator is placed among a group of other persons whose general appearance resembles the perpetrator.

Conducting an Identification Procedure

An eyewitness identification procedure 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”).

A “filler” is a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure. Each filler must resemble the description of the perpetrator given by the eyewitness in significant physical features, including any unique or unusual features. At least five fillers, in addition to the perpetrator, must be included when an array of photographs is displayed to an eyewitness. At least four fillers, in addition to the perpetrator, must be included in a live lineup. If an eyewitness has previously participated in an identification procedure in connection with the identification of another person suspected of involvement in the offense, the fillers in the identification procedure must be different from the fillers used in any prior identification procedure.

If there are multiple eyewitnesses, the identification procedure must be conducted separately for each eyewitness, and the suspect must be placed in a different position for each identification procedure conducted for each eyewitness. The eyewitnesses may not be allowed to communicate with each other until all identification procedures have been completed.

Recording and Documentation of the Identification Procedure

When an identification is made in a live lineup or photo array, the administrator must document in writing all “identification statements” made by the eyewitness. The administrator must make a written record of the identification procedure that includes (1) all identification and nonidentification results obtained during the identification procedure; (2) the signed identification statement of the eyewitness; (3) the names of all persons present at the identification procedure; (4) the date and time of the identification procedure; (5) any eyewitness identification of a filler; and (6) all photographs used in the identification procedure. However, the 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.

An “identification statement” is a documented statement that is sought by the person conducting an identification procedure when an identification is made (1) from the eyewitness in his/her own words, describing his/her confidence level that the person identified is the perpetrator of the crime; (2) at the time the eyewitness viewed the photographs during the identification procedure; and (3) before the eyewitness is given feedback.

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.

MAIP 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: PTC reports that, while the commission has posted suggestions for law enforcement agencies to generally follow for eyewitness identification purposes, those suggestions should not be regarded as a "model policy" of the commission. A PTC model policy on this subject matter does not currently exist, *per se*.

DSP, the Department of General Services, the Department of Natural Resources, the Maryland Department of Transportation (MDOT), the University System of Maryland, and the Comptroller advise that the bill's changes are procedural and can be handled with existing budgeted resources. However, MDOT notes that if the Maryland Transportation Authority Police were to adopt a visual photo line-up model, the cost is estimated to be about \$2,000 per software package. A maximum of five such packages could be needed.

The Judiciary can handle operational changes to evidentiary hearings and rulings as a result of the bill with existing budgeted resources. The Administrative Office of the Courts also advises that, because a defendant will be able to challenge an identification for statutory reasons (not just for due process reasons), additional hearings may result. Eventually, fewer hearings might be requested because the reasons for making most challenges will have been already addressed. The Office of the Public Defender also advises that the bill has no impact on the workload of the agency.

Local Expenditures: The Maryland Association of Counties and most local jurisdictions surveyed by the Department of Legislative Services report that the bill's procedural changes can be accommodated with existing budgeted resources. However, Frederick County reports that the bill requires upgrades to the current record system software at a one-time cost in fiscal 2015 of \$10,000.

Additional Information

Prior Introductions: SB 986 of 2012, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. It's cross file, HB 1324, received a hearing in the House Judiciary Committee, but no further action was taken.

Cross File: HB 1200 (Delegate Pena-Melnyk, *et al.*) - Judiciary.

Information Source(s): Maryland Association of Counties; Charles, Frederick, and Montgomery counties; cities of Frederick and Havre de Grace; Department of Natural Resources; Department of General Services; Comptroller's Office; Judiciary (Administrative Office of the Courts); Department of State Police; Office of the Public Defender; Department of Public Safety and Correctional Services; State's Attorneys' Association; Maryland Department of Transportation; University System of Maryland; Department of Legislative Services

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