

SENATE BILL No. 428

By Senator Haley

2-9

1 AN ACT concerning crimes, punishment and criminal procedure; relating
2 to eyewitness identifications.

3
4 WHEREAS, The legislature finds that the goal of a police investigation
5 is to apprehend the person or persons responsible for the commission of a
6 crime; and

7 WHEREAS, Mistaken eyewitness identification has been shown to
8 have contributed to the wrongful conviction in approximately 75% of the
9 nation's 289 exonerations; and

10 WHEREAS, Over the past 30 years, a large body of peer-reviewed,
11 scientific research and practice has emerged showing that simple systemic
12 changes in administering eyewitness identification procedures can greatly
13 improve the accuracy of those identifications; and

14 WHEREAS, Policies and procedures to improve the accuracy of
15 eyewitness identifications such as those recommended by the U.S.
16 National Institute of Justice, the American Bar Association, the New
17 Jersey Office of the Attorney General, the Wisconsin Office of the
18 Attorney General, the California Commission on the Fair Administration
19 of Justice, and the North Carolina Actual Innocence Commission are
20 readily available; and

21 WHEREAS, More accurate eyewitness identifications increase the
22 ability of police and prosecutors to convict the guilty and protect the
23 innocent; and

24 WHEREAS, The integrity of Kansas' criminal justice process is
25 enhanced by adherence to best practices in evidence gathering; and

26 WHEREAS, Kansas will benefit from the improvement of the accuracy
27 of eyewitness identifications: Now, therefore,

28 *Be it enacted by the Legislature of the State of Kansas:*

29 Section 1. (a) As used in this section:

30 (1) "Administrator" means the person conducting the photo or live
31 lineup.

32 (2) "Blind" means the administrator does not know the identity of the
33 suspect.

34 (3) "Blinded" means the administrator may know who the suspect is,
35 but by virtue of the use of procedures or technology to accomplish this
36 purpose, does not know which lineup member is being viewed by the

1 eyewitness.

2 (4) "Contamination" means an occurrence when an eyewitness
3 memory of a person or event becomes altered, replaced or otherwise
4 impaired as a result of exposure to extrinsic information related to that
5 person or event.

6 (5) "Eyewitness" means a person who observes another person at or
7 near the scene of an offense.

8 (6) "Filler" means either a person or a photograph of a person who is
9 not suspected of an offense and is included in an identification procedure.

10 (7) "Identification procedure" means a live lineup, a photo lineup or a
11 showup.

12 (8) "Live lineup" means an identification procedure in which a group
13 of persons, including the suspected perpetrator of an offense and other
14 persons not suspected of the offense, is displayed to an eyewitness for the
15 purpose of determining whether the eyewitness identifies the suspect as
16 the perpetrator.

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

23 (10) "Showup" means an identification procedure in which an
24 eyewitness is presented with a single suspect for the purpose of
25 determining whether the eyewitness identifies this individual as the
26 perpetrator.

27 (11) "Suspect" means the person believed by law enforcement to be
28 the possible perpetrator of the crime.

29 (b) Any law enforcement agency conducting eyewitness
30 identification procedures shall adopt specific procedures for conducting
31 photo and live lineups that comply with the following requirements:

32 (1) Prior to a photo or live lineup, law enforcement shall record as
33 complete a description as possible of the perpetrator provided by the
34 eyewitness, in the eyewitness' own words. This statement shall also
35 include information regarding the conditions under which the eyewitness
36 observed the perpetrator including location, time, distance, obstructions,
37 lighting, weather conditions and other impairments, including, but not
38 limited to, alcohol, drugs, stress and visual or auditory disabilities. The
39 eyewitness shall also be asked if such eyewitness needs glasses or contact
40 lenses and whether such eyewitness was wearing them at the time of the
41 offense. The administrator shall note whether the eyewitness was wearing
42 glasses or contact lenses at the time of the identification procedure;

43 (2) all live and photographic displays shall be conducted blind unless

1 to do so would place an undue burden on law enforcement or the
2 investigation. If such circumstances are properly documented pursuant to
3 this section, investigators may administer a photographic display blinded;

4 (3) the eyewitness shall be instructed, without other eyewitnesses
5 present, prior to any live or photo lineup that:

6 (A) The perpetrator may or may not be among the persons in the
7 identification procedure, or in the case of a showup, may or may not be the
8 person who is presented to the eyewitness;

9 (B) the administrator does not know who the perpetrator is;

10 (C) the eyewitness should not feel compelled to make an
11 identification;

12 (D) the investigation will continue whether or not an identification is
13 made;

14 (E) the procedure requires the administrator to ask the eyewitness to
15 state, in such eyewitness' own words, how certain such eyewitness is of
16 any identification; and

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

20 (4) in a photo lineup, the photograph of the suspect shall be
21 contemporary and shall resemble such suspect's appearance at the time of
22 the offense;

23 (5) in a photo lineup, there shall be no characteristics of the
24 photographs themselves or the background context in which they are
25 placed that shall make any of the photographs unduly stand out;

26 (6) a photo or live lineup shall be composed so that the fillers
27 generally resemble the eyewitness' description of the perpetrator, while
28 ensuring that the suspect does not unduly stand out from the fillers;

29 (7) in a photo or live lineup, fillers shall possess the following
30 characteristics:

31 (A) All fillers selected shall resemble the eyewitness' description of
32 the perpetrator in significant features, including, but not limited to, face,
33 weight, build and skin tone or any unique or unusual features such as a
34 scar or tattoo;

35 (B) at least five fillers shall be included in a photo lineup, in addition
36 to the suspect;

37 (C) at least four fillers shall be included in a live lineup, in addition to
38 the suspect; and

39 (D) if the eyewitness has previously viewed a photo lineup or live
40 lineup in connection with the identification of another person suspected of
41 involvement in the offense, the fillers in the lineup in which the suspect
42 participates shall be different from the fillers used in any prior lineups;

43 (8) if there are multiple eyewitnesses:

- 1 (A) Each eyewitness shall view photo or live lineups separately;
- 2 (B) the suspect shall be placed in a different position in the live
3 lineup or photo lineup for each eyewitness; and
- 4 (C) the eyewitnesses shall not be permitted to communicate with each
5 other until all identification procedures have been completed;
- 6 (9) in an identification procedure, no writings or information
7 concerning any previous arrest, indictment or conviction of the suspect
8 shall be visible or made known to the eyewitness;
- 9 (10) in a live lineup, any identifying actions, such as speech, gestures
10 or other movements, shall be performed by all lineup participants;
- 11 (11) in a live lineup, all lineup participants must be out of view of the
12 eyewitness prior to the identification procedure;
- 13 (12) when there are multiple suspects, each identification procedure
14 shall include only one suspect;
- 15 (13) nothing shall be said to the eyewitness regarding the suspect's
16 position in the photo or live lineup;
- 17 (14) nothing shall be said to the eyewitness that might influence the
18 eyewitness' identification of any particular lineup member;
- 19 (15) if the eyewitness makes an identification, the administrator shall
20 seek and document a clear statement from the eyewitness, at the time of
21 the identification and in the eyewitness' own words, as to the eyewitness'
22 confidence level that the person identified in a given identification
23 procedure is the perpetrator;
- 24 (16) if the eyewitness identifies a person as the perpetrator, the
25 eyewitness shall not be provided any information concerning such person
26 before the administrator obtains the eyewitness' confidence statement
27 about the selection;
- 28 (17) a record of the identification procedure shall be made that
29 includes all identification and non-identification results obtained during
30 the identification procedure, signed by the eyewitness;
- 31 (18) efforts shall be made to perform a live or photo lineup instead of
32 a showup. Showups shall only be performed using a live suspect and only
33 in exigent circumstances that require the immediate display of a suspect to
34 an eyewitness. Investigators shall not conduct a showup with a single
35 photograph; if investigators wish to determine if an eyewitness can make
36 an identification using a photograph, a photographic display must be used.
37 In the event of the administration of a showup procedure:
- 38 (A) A full and detailed description of the perpetrator shall be
39 provided by the eyewitness before the eyewitness observes the suspect.
40 This statement shall also include information regarding the conditions
41 under which the eyewitness observed the perpetrator including location,
42 time, distance, obstructions, lighting, weather conditions and other
43 impairments, including, but not limited to, alcohol, drugs, stress, and

1 visual and auditory disabilities. The eyewitness shall also be asked if such
2 eyewitness needs glasses or contact lenses and whether such eyewitness
3 was wearing them at the time of the offense. The administrator shall note
4 whether the eyewitness was wearing glasses or contact lenses at the time
5 of the identification procedure;

6 (B) the eyewitness shall be transported to a neutral, non-law
7 enforcement location where the suspect is being detained for the purposes
8 of a showup procedure;

9 (C) the eyewitness shall be provided with instructions prior to the
10 showup, including:

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

13 (ii) the eyewitness should not feel compelled to make an
14 identification;

15 (iii) the investigation will continue whether or not an identification is
16 made;

17 (iv) the procedure requires the administrator to ask the eyewitness to
18 state, in such eyewitness' own words, how certain such eyewitness is of
19 any identification; and

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

23 (D) measures shall be taken by investigators at the showup, including
24 the administrator of the showup, to reduce potentially damaging or
25 prejudicial inferences that may be drawn by the eyewitness, including:

26 (i) Refraining from suggesting, through statements or non-verbal
27 conduct, that the suspect is or may be the perpetrator of the crime;

28 (ii) removing the suspect from a squad car; and

29 (iii) when practicable, removing handcuffs from the suspect;

30 (E) if there are multiple eyewitnesses, only one eyewitness at a time
31 shall participate in the showup procedure:

32 (i) Only one of the eyewitnesses shall be present at the location of the
33 showup procedure; and

34 (ii) if a positive identification is made, and an arrest is justified,
35 additional eyewitnesses shall be shown live or photo lineups;

36 (F) if there are multiple suspects, these suspects shall be separated
37 and subjected to separate showup procedures;

38 (G) if the eyewitness makes an identification, the administrator shall
39 seek and document a clear statement from the eyewitness, at the time of
40 the identification and in the eyewitness' own words, as to the eyewitness'
41 confidence level that the person identified in a given identification
42 procedure is the perpetrator; and

43 (H) investigators shall photograph a suspect at the time and place of

1 the showup to preserve a record of the appearance of the suspect at the
2 time of the showup procedure.

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

5 (A) All identification and non-identification results obtained during
6 the identification procedure, signed by the eyewitness, including the
7 eyewitness' confidence statement;

8 (B) the names of all persons present at the identification procedure,
9 including the name of the lineup administrator and whether the
10 administrator was blind, blinded or non-blind;

11 (C) when it is impracticable for a blind administrator to conduct the
12 eyewitness identification procedure, the investigator shall state in writing
13 the reason therefor;

14 (D) the date and time of the identification procedure;

15 (E) in a photo or live lineup, any eyewitness identification of a filler;
16 and

17 (F) in a photo or live lineup, the names of the lineup members and
18 other relevant identifying information, and the sources of all photographs
19 or persons used in the lineup;

20 (20) if a video record of the lineup is impracticable, the officer
21 conducting the lineup shall document the reason therefor, and an audio
22 record of the identification procedure shall be made which includes the
23 items specified in subsection (b)(19). The audio record shall be
24 supplemented by all of the photographs used in a photo lineup, and
25 photographs of all of the individuals used in a live lineup or showup; and

26 (21) if both a video and audio record of the lineup are impracticable,
27 the officer conducting the lineup shall document in writing the reason
28 therefor, and a written record of the lineup shall be made which includes
29 the items specified in subsection (b)(19). The written record shall be
30 supplemented by all of the photographs used in a photo lineup, and
31 photographs of all of the individuals used in a live lineup or showup.

32 (c) For any photo or live lineup, or showup procedure that was
33 administered on and after July 1, 2016, whenever the prosecution intends
34 to offer eyewitness identification evidence at trial, the defendant is entitled
35 to a pretrial evidentiary hearing as to the reliability of such evidence. At
36 the hearing, the court shall examine whether law enforcement failed to
37 substantially comply with any requirement contained in this section,
38 whether any other suggestive identification procedures were employed,
39 whether the eyewitness identification evidence may have been otherwise
40 contaminated by state or non-state actors, and any other factors bearing
41 upon the reliability of the identification evidence, including, but not
42 limited to, characteristics of the witness, perpetrator or event.

43 (d) If, at the pretrial reliability hearing required by subsection (c), the

1 trial court finds evidence of a failure of law enforcement officials or
2 prosecuting agencies to comply with any of the provisions of subsection
3 (b), of the use of any other suggestive identification procedures or of any
4 other contamination of identification evidence by state or non-state actors,
5 the trial court shall:

6 (1) Consider such evidence in determining the admissibility of the
7 eyewitness identification and suppress such evidence when there is a
8 substantial probability of eyewitness misidentification; or

9 (2) instruct the jury, when such evidence is admissible, both when
10 admitting such evidence and prior to the jury's deliberation, where
11 applicable:

12 (A) That the provisions of subsection (b) were designed to reduce the
13 risk of misidentification and that it may consider credible evidence of
14 noncompliance when assessing the reliability of the eyewitness
15 identification evidence;

16 (B) that the contamination of the eyewitness identification evidence
17 by factors other than state noncompliance with any of the provisions of the
18 statute, including, but not limited to, the use of any other suggestive
19 identification procedures or suggestive actions of non-state actors who
20 increased the risk of misidentification; and

21 (C) that it should view the identification evidence with distrust, if the
22 court has determined that its confidence in the reliability of the eyewitness
23 identification has been sufficiently undermined.

24 (e) The director of police training at the law enforcement training
25 center shall create, administer and conduct training programs for law
26 enforcement officers and recruits regarding the methods, technical aspects
27 and scientific findings regarding the basis of the eyewitness identification
28 practices and procedures referenced in this section.

29 (f) This section shall be part of and supplemental to the Kansas code
30 of criminal procedure.

31 Sec. 2. This act shall take effect and be in force from and after its
32 publication in the statute book.