

**SENATE BILL No. 190**

By Senator Haley

2-13

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.

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

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

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

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

35 (3) "Blinded" means the administrator may know who the suspect is,  
36 but by virtue of the use of procedures or technology to accomplish this

1 purpose, does not know which lineup member is being viewed by the  
2 eyewitness.

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

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

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

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

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

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

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

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

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

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

1 (2) all live and photographic displays shall be conducted blind unless  
2 to do so would place an undue burden on law enforcement or the  
3 investigation. If such circumstances are properly documented pursuant to  
4 this section, investigators may administer a photographic display blinded;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (8) if there are multiple eyewitnesses:

2 (A) Each eyewitness shall view photo or live lineups separately;

3 (B) the suspect shall be placed in a different position in the live  
4 lineup or photo lineup for each eyewitness; and

5 (C) the eyewitnesses shall not be permitted to communicate with each  
6 other until all identification procedures have been completed;

7 (9) in an identification procedure, no writings or information  
8 concerning any previous arrest, indictment or conviction of the suspect  
9 shall be visible or made known to the eyewitness;

10 (10) in a live lineup, any identifying actions, such as speech, gestures  
11 or other movements, shall be performed by all lineup participants;

12 (11) in a live lineup, all lineup participants must be out of view of the  
13 eyewitness prior to the identification procedure;

14 (12) when there are multiple suspects, each identification procedure  
15 shall include only one suspect;

16 (13) nothing shall be said to the eyewitness regarding the suspect's  
17 position in the photo or live lineup;

18 (14) nothing shall be said to the eyewitness that might influence the  
19 eyewitness's identification of any particular lineup member;

20 (15) if the eyewitness makes an identification, the administrator shall  
21 seek and document a clear statement from the eyewitness, at the time of  
22 the identification and in the eyewitness's own words, as to the eyewitness's  
23 confidence level that the person identified in a given identification  
24 procedure is the perpetrator;

25 (16) if the eyewitness identifies a person as the perpetrator, the  
26 eyewitness shall not be provided any information concerning such person  
27 before the administrator obtains the eyewitness's confidence statement  
28 about the selection;

29 (17) a record of the identification procedure shall be made that  
30 includes all identification and non-identification results obtained during  
31 the identification procedures, signed by the eyewitnesses;

32 (18) efforts shall be made to perform a live or photo lineup instead of  
33 a showup. Showups shall only be performed using a live suspect and only  
34 in exigent circumstances that require the immediate display of a suspect to  
35 an eyewitness. Investigators shall not conduct a showup with a single  
36 photograph; if investigators wish to determine if an eyewitness can make  
37 an identification using a photograph, a photographic display must be used.  
38 In the event of the administration of a showup procedure:

39 (A) A full and detailed description of the perpetrator shall be  
40 provided by the eyewitness before the eyewitness observes the suspect.  
41 This statement shall also include information regarding the conditions  
42 under which the eyewitness observed the perpetrator including location,  
43 time, distance, obstructions, lighting, weather conditions, and other

1 impairments, including, but not limited to, alcohol, drugs, stress, and  
2 visual and auditory disabilities. The eyewitness shall also be asked if such  
3 eyewitness needs glasses or contact lenses and whether such eyewitness  
4 was wearing them at the time of the offense. The administrator shall note  
5 whether the eyewitness was wearing glasses or contact lenses at the time  
6 of the identification procedure;

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

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

12 (i) the perpetrator may or may not be the person that is presented to  
13 the eyewitness;

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (H) investigators shall photograph a suspect at the time and place of  
2 the showup to preserve a record of the appearance of the suspect at the  
3 time of the show-up procedure.

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

6 (A) All identification and non-identification results obtained during  
7 the identification procedures, signed by the eyewitnesses, including the  
8 eyewitnesses' confidence statements;

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

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

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

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

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

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

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

33 (c) For any photo or live lineup, or showup procedure that was  
34 administered on and after July 1, 2013, whenever the prosecution intends  
35 to offer eyewitness identification evidence at trial, the defendant is entitled  
36 to a pretrial evidentiary hearing as to the reliability of such evidence. At  
37 the hearing, the court shall examine whether law enforcement failed to  
38 substantially comply with any requirement contained in this section,  
39 whether any other suggestive identification procedures were employed,  
40 whether the eyewitness identification evidence may have been otherwise  
41 contaminated by state or non-state actors, and any other factors bearing  
42 upon the reliability of the identification evidence, including, but not  
43 limited to, characteristics of the witness, perpetrator or event.

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

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

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

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

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

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

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

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

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