

A BILL

IN THE COUNCIL IN THE DISTRICT OF COLUMBIA

Councilmember Phil Mendelson introduced the following bill, which was referred to the Committee on _____.

To create and mandate an eyewitness identification process; to codify best practices in identification procedures; to mandate training of law enforcement in these best practices; to require that identification procedures be documented and recorded and to authorize discovery of these materials; and to create a rebuttable presumption that an identification procedure not in accordance with this law is unreliable.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, that this Act may be cited as the “Eyewitness Identification Procedures Act of 2008.”

Section 1. Definitions

For the purposes of this act:

1. “Double-blind” means that an investigator conducting or present for the lineup or photographic display is unaware which (if any) of the participants in the identification procedure is suspected of committing the offense, and the witness viewing the lineup or photographic display is not informed, by express or implied means, of the identity of any suspect.

2. **“Electronic recording” means an audio and video recording or a digital equivalent.**

3. **“Fillers” means persons placed in a lineup or photographic display who are not suspects.**

4. **“Identification” means any indication by the witness that the person viewed in the identification procedure is or may be the perpetrator.**

5. **“Identification procedure” means a lineup, photographic display or a showup.**

6. **“Investigator” means any person employed by the District of Columbia who, in the course of his/her duties, participates in any capacity other than as a filler in the production of eyewitness identification evidence.**

7. **“Lineup” means a procedure conducted by an investigator in which a witness views a number of live persons in order to determine if the witness can make an identification.**

8. **“Modified nonblind” means that an investigator conducting or present for a photographic display, because of procedural precautions taken, is unable to discern at any time during the identification procedure the identity of the person the witness is viewing.**

9. **“Non-identification” is any indication by the witness that the person viewed in the identification procedure is not or may not be the perpetrator, any indication that the witness is unable to determine if the person viewed is the perpetrator, or any indication that someone else is the perpetrator.**

10. “Photographic display” means a procedure conducted by an investigator in which a witness views a number of photographs of persons to determine if the witness can make an identification.

11. “Second sighting” is when a witness believes that he or she sees the perpetrator to a crime out in the community, some time after the event. Persons who did not witness the event may not have second sightings.

12. “Sequential” lineup or photographic display means that the witness viewing the identification procedure is only shown one person or photograph at a time and is asked to indicate whether he/she can make an identification at that time, before viewing the next person or photograph, and may not view the persons in the lineup or photographs in the array more than twice.

13. “Showup” means a procedure conducted by an investigator in which a witness views only one person to determine if the witness can make an identification.

Section 2. Procedures for Investigators Conducting Lineups and Photographic Displays:

(a) As a matter of standard practice, District of Columbia law enforcement agencies must administer all lineups and photographic displays double-blind, or, where appropriate pursuant to subsection (f), modified nonblind, and must electronically record the entirety of these identification procedures as specified in subsection (o).

(b) A lineup or photographic display may include only one suspect and must have at least six (6) participants for lineups and nine (9) participants for

photographic displays.

(c) Prior to the lineup or photographic display, the investigator must ask the witness for the most complete description of the perpetrator the witness is able to give, if he/she has not already provided one. The investigator must ask the witnesses about the conditions under which he/she observed the perpetrator including location, time, distance, weather, lighting, obstructions, or other impairments (alcohol, drugs, stress, distractors, visual or auditory disabilities). The investigator must also ask whether the witness needs glasses or contact lenses. If so, the investigator must ask whether the witness was wearing them at the time of the offense and must note if the witness is wearing them at the time of the identification procedure.

(d) The investigator(s) responsible for composing the lineup or photographic display must ensure that:

(1) fillers generally fit the witness's description of the perpetrator;

(2) a suspect does not stand out significantly from the fillers; all persons in the photographic display or lineup resemble the suspect in significant physical and facial features; and, in the case of photographs, nothing about the appearance or context of any photograph makes it stand out from the others;

(3) measures are taken to create a reasonably consistent appearance between a suspect and fillers with respect to unique, remarkable, or unusual features.

(e) All lineups must be conducted double-blind.

(f) All photographic displays must be conducted double-blind unless to do so would place an undue burden on law enforcement or the investigation. If such circumstances are properly documented pursuant to subsection (p), investigators may administer a photographic display modified nonblind, for example, by allowing a witness to view photographs in manila folders or on a laptop computer. If at any time the modified nonblind nature of the photographic display is compromised, the investigator must immediately stop the identification procedure, and a blind administrator must be located to conduct a new identification procedure.

(g) A witness participating in an identification procedure must do so out of the presence, view, or earshot of any other witnesses for the entirety of the identification procedure (including preliminary instructions discussed in subsection (h). At the conclusion of the procedure each witness must be instructed not to discuss his/her memory of the perpetrator's appearance or the identification procedure with any other witnesses.

(h) Prior to the identification procedure, investigators must give a witness an explanation of the procedure to be followed. The explanation must be given orally (video instruction is permitted) and in writing. For written instructions, investigators must use a standard form, which must be signed by the witness pursuant to Section 3. Investigators must inform the witness that:

- (1) the actual perpetrator may or may not be present;**
- (2) it is just as important to clear innocent individuals as it is to implicate a possible suspect;**

(3) the witness is not required to make an identification, and the police will continue to investigate the incident whether or not the witness identifies anyone;

(4) the investigator does not know which person in the identification procedure, if any, is a suspect in the case;

(5) the identification procedure is being conducted sequentially, if that is the case;

(6) the witness may take as much time as he/she needs to view the photographic display or lineup;

(7) the investigator will ask how certain the witness is if an identification is made and will record this response;

(8) the identification procedure will be electronically recorded;

(9) the witness must not discuss his/her memory of the perpetrator's appearance or the identification procedure with any other witness.

(I) Participants in a lineup must be presented in a previously determined random order unless defense counsel makes a request for the participants to be displayed in a particular order; photographs in photographic display must be presented in a previously determined random order.

(j) In a lineup, if any one participant is directed to perform some action such as speaking or moving, all participants in that lineup must also be directed to perform the same action.

(k) If an identification procedure is conducted sequentially, a witness must

never be permitted to look at more than one lineup participant or photograph at the same time, even if the witness so requests. Investigators may not raise the possibility of a second viewing of the identification procedure with the witness; however, a witness may, on his/her own initiative, request a second viewing. After a second viewing of the lineup or photographic display, the identification procedure must be concluded; a third viewing is prohibited. If a witness makes an identification before the witness has viewed all of the persons in any viewing of the identification procedure, the witness must still view the remaining persons in the lineup or photographic display.

(l) If a witness makes an identification, the investigator must immediately ask the witness to describe in his/her own words how certain the witness is of that identification and must record that response verbatim.

(m) Investigators must not take any action to influence a witness's identification or non-identification decision and must not respond or react – by, for example, making any comment, gesture, facial expression, noise or other response – either to a witness's identification or non-identification other than to:

(1) ask the witness to give a statement of confidence in any identification as required by subsection (l);

(2) display the next lineup participant or photograph to the witness, if the lineup or photographic display is conducted sequentially, or if the witness has viewed all the live lineup participants or photographs; or

(3) inform the witness that the identification procedure is concluded.

(n) After an identification procedure is concluded, investigators must refrain from giving the witness any feedback about any identification or non-identification and disclosing to the witness any other information the police or prosecution has that may link the individual identified or the police suspect to the crime.

(o) Investigators must electronically record in their entirety all lineups and photographic displays, including all preliminary statements by an investigator, the witness' responses to the investigator's inquiries pursuant to subsection (c), any other comments by the witness, any identifications or non-identifications, and the witness' stated level of confidence. When the cautionary instructions specified in subsection (h) are given orally in person, these cautionary instructions must also be electronically recorded. If the cautionary instructions specified in subsection (h) are given orally via recording, a copy of that recording must be preserved, and the investigator administering the identification procedure must either certify in writing that no additional cautionary instructions were given or must electronically record the additional cautionary instructions.

(p) Investigators must photograph all participants in any lineup viewed by a witness. Investigators must preserve all photographs of a live lineup and copies of all photographic displays viewed by a witness. Investigators must also record the names of the individuals displayed in a lineup or photographic display, the order in which the individuals were presented, the method and sources used to select each filler (*e.g.*, computer program, intra-office canvass, etc.), if presented sequentially the number of times the lineup or photographic display was viewed, and the names

of all persons present at the time of the viewing of any identification procedure. If a photographic display is administered modified nonblind pursuant to subsection (f), the investigator conducting the procedure must also document why double-blind administration was unduly burdensome.

Section 3. Procedures For Witnesses Viewing Lineups and Photographic Displays

(a) Every witness viewing a lineup or photographic display must review and sign a form that explains the procedure for the identification procedure containing all the elements set forth in Section 2(f). Any oral departure from these cautionary instructions must be noted by the investigator and initialed by the witness.

(b) At the conclusion of the form the witness must acknowledge that “by signing this form I agree that I have read and understand the above information.”

Section 4. Procedures for Investigators Conducting a Showup:

(a) Investigators must make best efforts to use lineups or photographic displays instead of showups.

(b) Showups must only be used in exigent circumstances requiring the prompt display of a live suspect to a witness and when the suspect is located in close proximity both in time (within 60 minutes) and place to the alleged offense or second sighting.

(c) Investigators are prohibited from conducting a showup:

(1) with a single photograph; if investigators wish to determine if a witness can make an identification using a photograph, a photographic display must

be used; or

(2) with more than one suspect. If investigators apprehend multiple suspects and if the requirements of subsection (b) are met justifying a showup of each suspect, each suspect must be individually displayed to the witness following the procedures set forth in this section.

(3) if one witness has already positively identified a suspect in a showup, and there are multiple witnesses from whom the investigators wish to obtain identification evidence. Investigators must use a live lineup or photographic display to obtain identification evidence from the remaining witnesses.

(4) as the result of a second sighting, where the witness viewing the showup is not the witness who viewed the suspect in the second sighting.

(d) For each witness viewing the showup, an investigator must document a description by the witness of the perpetrator prior to the showup; this description must be elicited out of the presence, view or earshot of any other witnesses.

(e) If necessary and practical, investigators should transport a witness viewing a showup to the location of the detained suspect. During transport, investigators must avoid any words or conduct that might influence the witness's ability to make an identification and must make all reasonable efforts to prevent the witness from being exposed to information that might so influence the witness.

(f) Investigators conducting a showup with a witness must keep that witness out of the presence, view or earshot of other witnesses.

(g) Witnesses must be given cautionary instructions prior to the showup that

the individual may not be the perpetrator, that the offense will continue to be investigated whether or not an identification is made, and that is it just as important to clear the innocent as it is to implicate a possible suspect.

(h) Investigators present at the showup must not suggest to the witness either through words or conduct that an individual is or may be the perpetrator.

(I) If a witness makes an identification, the investigator must immediately ask the witness to describe in his/her own words how certain the witness is of that identification and must record that response verbatim.

(j) Investigators must photograph a suspect at the time and place of the showup. Investigators must also document the time and place of the showup, the exigent circumstances justifying a showup instead of a lineup or photographic display, all persons present for the showup, the manner in which the suspect was displayed (including clothing, physical positioning, the presence or absence of restraints), the cautionary instructions given the witnesses, and the precise comments made by the witness viewing the showup.

Section 5. Discovery of Identification Procedure Documents and Records

(a) Counsel for a person accused of a criminal offense or delinquency in the Superior Court of the District of Columbia is entitled to discovery of all materials created pursuant to this act, related either to the viewing of the accused by a witness; or a witness's identification of someone other than the accused as the perpetrator of the alleged offense or delinquent conduct.

(b) The materials described in subsection (a) shall be disclosed

(1) within 10 days of presentment in a misdemeanor case, or an initial hearing in a delinquency matter;

(2) at arraignment in a felony case; or

(3) twenty-four hours in advance of any earlier proceeding at which an identification is at issue where the identification is a product of a procedure governed by this Act;

(c) if generated after any of the above proceedings, within a week of its generation, unless more rapid disclosure is necessary to permit effective litigation of suppression or other pre-trial issues.

(d) This provision shall not effect the court's authority to regulate discovery pursuant to its discretion under Superior Court Criminal Rule 16(d).

Section 6. Remedies For Failure to Follow the Eyewitness Identification Procedure Act of 2008

(a) Any identification of a person accused of a criminal offense in the Superior Court of the District of Columbia which is made by a witness during an identification procedure which was conducted after the passage of this act but not conducted in accordance with the procedures required by this Act shall be subject to a rebuttable presumption that the identification by that witness is unreliable. In order to overcome this presumption, the government must prove by clear and convincing evidence that identification or any subsequent identification by that witness upon which the government intends to rely is reliable. If the government fails to meet its burden, the tainted identifications by that witness will be suppressed

and inadmissible in the government's case-in-chief.

(b) If suppression of an identification described in subsection (a) of this section is not ordered:

(1) the existence of the statutory procedures and the failure of investigators to comply with those procedures shall be admissible in evidence to challenge the reliability of the identification at trial; and

(2) properly qualified expert testimony about the failure to comply with statutory procedures and the importance of the statutory procedures to ensuring reliability shall be admissible in evidence along with the identification.

(3) whether or not expert testimony is presented, the jury may be instructed at the defendant's request about the risks of misidentification that attend a departure from the procedures required by this Act.

Section 7. Training

All investigators must be trained on the procedures set forth by this Act and the scientific findings on which these procedures are based. In developing this training, law enforcement agencies are required to collaborate with the criminal defense bar, including the Public Defender Service, and the Mid-Atlantic Innocence Project, and the District of Columbia Association of Criminal Defense Lawyers.

Section 8. Field Studies

The Metropolitan Police Department shall submit a report to the Council on any field studies – current or future – in the District of Columbia regarding procedures for collecting eyewitness identification evidence. For any study

currently planned or in operation, the report shall be due within sixty (60) days of the effective date of this legislation; for future studies, the report shall be due within sixty (60) days of the execution of any Memorandum of Understanding or final document that commits D.C. to participate in such a study. The Metropolitan Police Department shall also submit a followup report to the Council within sixty (60 days) of the conclusion of any such study detailing the data collected.

Section 9. Purpose and Construction of the Eyewitness Identification Procedures Act of 2008

(a) This Act is passed to ensure that identification procedures will be conducted in a manner that promotes fairness, accuracy, reliability, objectivity, and furthers the overall interests of justice. This Act shall be construed in light of its purpose.

(b) Nothing in this Act shall be construed to limit the admissibility of properly qualified expert witnesses on matters relating to the reliability and accuracy of eyewitness identifications.

Section 10. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1974 (87 Stat. 813, D.C. Official Code § 1-206.02(c)(3)).

Section 11. Effective Date

This Act shall take effect following approval by the Mayor (or in the event of veto

by the Mayor, action by the Council to override the veto), a 60-day period of Congressional review as provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(2)), and publication in the District of Columbia Register.