



Illinois Enacts Eyewitness Identification Reforms

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On Aug. 25, 2014, Illinois Gov. Pat Quinn signed a law that sets forth procedures to be followed when an eyewitness to a crime is called upon to attempt to identify the perpetrator, whether through an in-person or photographic identification procedure (725 ILCS 107A-0.1). The statute does not apply to a “showup,” in which a suspected perpetrator is presented to the eyewitness at or near a crime scene for the purpose of obtaining an immediate identification. This statute, effective Jan. 1, 2015, represents a major step forward in the effort to avoid mistaken eyewitness identifications, which has been shown to be the cause of many wrongful convictions in Illinois and elsewhere. Special credit for attaining enactment of this statute is owing to Illinois lawyers, State Representative Scott R. Drury, and Gov. Quinn.

BY THOMAS P. SULLIVAN

The Principal Provisions

One. When practicable, witnesses shall be separated to prevent them from conferring with one another before, during, and after the identification procedure. If not practicable, the lineup administrator shall ensure that all witnesses are monitored and do not confer with one another. Par. (f)(1).

Two. Before a lineup is conducted, each witness shall be given the following instructions outside the presence of the others:

- ❖ If recording the lineup is practical, an audio and video recording of the lineup will be made of the persons in the lineup and the witness, for the purpose of accurately documenting all statements made by the witness. A recording will not be made if the witness refuses to be recorded;
- ❖ The perpetrator may or may not be in the lineup;
- ❖ If an independent administrator is conducting the procedure, he or she does not know the suspect’s identity;
- ❖ It is as important to exclude innocent persons as it is to identify a perpetrator. The witness should not feel compelled to make an identification; and
- ❖ The investigation will continue whether or not an identification is made.

Par. (e)(1)(A)-(F).

Three. The lineup procedure shall be conducted by one of the following methods:

- ❖ Using an independent administrator, that is, a person who is not participating in the investigation and is not aware of which person is the suspected perpetrator; or
- ❖ Using an automated computer program or device that displays photos to the witness but prevents the administrator from seeing which photographs the witness is viewing; or
- ❖ Using photographs placed in folders, randomly numbered, shuffled, and then presented to the witness in a manner that prevents the administrator from seeing which photographs the witness is viewing; or
- ❖ Using any other method that prevents the administrator from knowing the identity of the suspect, or from seeing or knowing which photographs are

being presented to or viewed by the witness.

Par. (a)(1)-(4).

Four. Each law enforcement agency shall adopt written regulations setting forth when the lineup is to be conducted by showing the witnesses the persons or photographs simultaneously (all at the same time), or sequentially (one by one). Par. (b). No preference is expressed for either method. Par. (c). When a sequential procedure is used, if the witness identifies a person as the perpetrator, the witness must continue to view all of the remaining persons or photographs. Par. (d)(1). The witness may request and be given a second viewing of each person or photograph after first viewing each of them. Par. (d)(2).

Five. Each lineup shall include only one suspect, who does not unduly stand out from the nonsuspect "fillers." Fillers shall resemble as much as practicable the witness's description of the perpetrator's significant features. In all photo lineups, at least five fillers shall be included. In live lineups, five fillers shall be included when practicable, but in no event less than three. If a witness views more than one lineup, different fillers shall be used in each. Par. (f)(3).

Six. If there are multiple witnesses, the suspect shall be in a different position in the lineup or photo array for each witness. Nothing shall be conveyed to witnesses regarding the suspect's position in the lineup, or regarding anything that may influence an identification. In photo lineups, the suspect's photo shall be contemporary, and to the extent practicable shall resemble the suspect's appearance at the time of the offense. No information concerning any previous arrest, indictment, or conviction shall be made known to the witnesses. In live lineups, any identifying movements shall be performed by all participants. If the witness identifies a person as the perpetrator, the witness shall not be provided any information concerning the person until after the lineup is completed. No one shall be present during a lineup who knows the identity of the suspect, except as provided in paragraph (a), or the witness and the suspect's lawyer. Par. f (4)-(9), (11)-(12).

Seven. The administrator shall obtain and document all statements made by the witness as to the perpetra-

tor's identity. When practicable, an audio or video recording of the statements shall be made. (Par. (f)(10). The administrator shall make an official report of all lineups, signed by the witness, including all identification and nonidentification results obtained, and all statements made by the witness during the lineup as to the perpetrator's identity. Par. (g).

Eight. Unless it is not practical or the witness refuses, a video record of all lineup procedures shall be made. If the witness refuses, the reasons for the refusal shall be documented in the official report and, if practical, an audio record shall be made. If an audio record is not practical, the reasons shall be disclosed in the official report. If a live lineup, the lineup shall be photographed. Par. (h).

Nine. The photographs shown to the witness, recordings and official report of the lineups shall be disclosed to counsel for the accused, pursuant to the Illinois Supreme Court rules on discovery. Par. (i).

Ten. Failure to comply with any of these requirements shall be a factor to be considered by the court in adjudicating a motion to suppress or bar identification. When warranted by the evidence presented at trial, the jury shall be instructed that it may consider compliance or noncompliance with this section to assist in its weighing of the identification testimony of an eyewitness. Par. (j).

Eleven. Recordings made pursuant to this statute shall be confidential. Par. (k). They are exempt from the Illinois Eavesdropping Act, and may be made surreptitiously. 720 ILCS 5/14-3(r).

Other states have laws similar to the Illinois eyewitness identification procedures.

Connecticut

Gen. Stat. Title 54, Ch. 959,
Part 1, § 54-1p

Maryland

Public Safety Code, Ch. 201,
§ 3-506

New Jersey

Atty. General Guidelines,
April 18, 2001

North Carolina

Gen. Stat., § 15A-284.52

Ohio

Rev. Code § 2933.83

Vermont

13 V.S.A., Ch. 182, Subch. 3, § 5581

West Virginia

W. VA. Code Ann. § 62-1E-2

Wisconsin

W.S.A., Ch. 175, § 175.50

The movement to strengthen eyewitness identification practices has been bolstered by the recent decisions in *State v. Lawson*¹ and *State v. Henderson*.² These laws and rulings should encourage the law enforcement community to support enactment of legislation — applicable statewide — containing reforms to eyewitness identification procedures. In states that have not yet done so, defense lawyers should be prepared to cross-examine police witnesses about their failures to follow these improved methods.

Notes

1. *State v. Lawson*, 291 P.3d 673 (Or. 2012).

2. *State v. Henderson*, 27 A.2d 872 (N.J. 2011). ■

About the Author

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