

By: Ellis

S.B. No. 799

A BILL TO BE ENTITLED

AN ACT

relating to photograph and live lineup identification procedures in criminal cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 38, Code of Criminal Procedure, is amended by adding Article 38.20 to read as follows:

Art. 38.20. PHOTOGRAPH AND LIVE LINEUP IDENTIFICATION PROCEDURES

Sec. 1. (a) The office of the attorney general, in consultation with state and local law enforcement agencies and scientific experts in witness memory, shall develop, adopt, and disseminate to all state and local law enforcement agencies in this state comprehensive written policies and procedures and associated training materials regarding the administration of photograph and live lineup identification procedures in accordance with Section 2.

(b) The policies and procedures adopted under Subsection (a) must address the manner in which a photograph or live lineup identification procedure should be administered to an illiterate person or a person of limited English proficiency.

(c) A law enforcement agency conducting a photograph or live lineup identification procedure must comply with the policies and procedures adopted by the office of the attorney general under Subsection (a).

Sec. 2. (a) Before a photograph or live lineup

1 identification procedure, the person administering the procedure  
2 shall:

3 (1) instruct the witness that:

4 (A) the procedure is intended to enable the  
5 identification of the offender as well as to clear innocent  
6 suspects;

7 (B) the witness should not guess or feel  
8 compelled to make an identification, as the offender may not be  
9 among the members of the procedure;

10 (C) the person administering the procedure may  
11 not be aware of which member of the photograph array or live lineup  
12 is the suspect;

13 (D) for a photograph identification procedure, a  
14 member of the photograph array may not appear exactly as the person  
15 may have appeared on the date of the offense because features such  
16 as head and facial hair are subject to change; and

17 (E) the investigation of the case will continue  
18 regardless of whether the witness makes an identification; and

19 (2) provide to the witness a written summary of the  
20 instructions required by Subdivision (1) and obtain the witness's  
21 signature on the form.

22 (b) If practicable, the person administering a photograph  
23 or live lineup identification procedure may not be made aware of  
24 which member of the photograph array or live lineup is the suspect  
25 in the case.

26 (c) If the person administering the procedure is aware of  
27 the identity of the suspect:

1           (1) the person investigating the case shall document  
2 in writing the reason the photograph array or live lineup was  
3 conducted by a person who was aware of the identity of the suspect;  
4 and

5           (2) the procedure shall be administered:

6                 (A) under an alternative method that is adopted  
7 by the office of the attorney general and designed to achieve a  
8 neutral administration of the procedure; and

9                 (B) for a photograph identification procedure,  
10 in a manner that prevents the person administering the procedure  
11 from viewing the photograph array simultaneously with the witness  
12 and from knowing the order of presentation of the photographs.

13           (d) An alternative method adopted by the office of the  
14 attorney general under Subsection (c) may include:

15                 (1) a computer program that automatically administers  
16 the procedure directly to a witness so that the person  
17 administering the procedure will not see or know which photographs  
18 the witness is viewing until after the procedure is completed;

19                 (2) a procedure under which photographs are placed in  
20 folders, randomly numbered and shuffled, and presented to a witness  
21 so that the person administering the procedure will not see or know  
22 the order of the photographs until after the procedure is  
23 completed; or

24                 (3) another method designed to achieve a neutral  
25 administration of the procedure.

26           (e) During a photograph or live lineup identification  
27 procedure, the person administering the procedure and any other

1 person present at the procedure may not offer commentary or  
2 feedback to the witness regarding any member of the photograph  
3 array or live lineup. Writings or other information concerning a  
4 previous arrest, indictment, or conviction of a suspect may not be  
5 made visible or known to a witness.

6 (f) A person familiar with the identity of the suspect may  
7 not be present at the procedure.

8 (g) If a witness identifies an individual as the offender,  
9 the person administering the photograph or live lineup  
10 identification procedure shall immediately require the witness to  
11 characterize in writing in the witness's own words the degree of  
12 certainty of the witness that the individual identified is the  
13 offender. The person administering the procedure shall include the  
14 witness's statement as a part of the record certified under  
15 Subsection (o).

16 (h) Only one member of a photograph array or live lineup may  
17 be a suspect in the case. The remaining members of the array or  
18 lineup must be individuals who are not suspects or otherwise of  
19 interest in the investigation but who resemble the witness's  
20 previous description of the offender. The suspect may not differ  
21 significantly in appearance from the remaining members of the array  
22 or lineup. If the witness has provided a limited or inadequate  
23 description of the offender or a description of the offender that  
24 differs significantly from the appearance of the suspect, the  
25 remaining members of the array or lineup must share with the suspect  
26 the same significant features, such as facial features, profile,  
27 height, weight, age, build, posture, and the presence of hair or

1 facial hair. Five or more individuals who are not suspects must be  
2 included in a photograph array, and four or more individuals who are  
3 not suspects must be included in a live lineup.

4 (i) To the extent practicable, the person administering a  
5 photograph identification procedure shall create, by artificially  
6 adding or concealing the unusual features in the photographs, a  
7 consistent appearance between the members of the photograph array  
8 with respect to any unusual features, such as scars or tattoos,  
9 specified by the witness in describing the offender. In the array,  
10 the photograph of the suspect must resemble the suspect's  
11 appearance at the time the offense was committed and may not depict  
12 the suspect in a manner that differs significantly from the  
13 photographs of the other members of the array.

14 (j) In a live lineup, each lineup member shall perform  
15 identifying actions, such as speech, gestures, or movements,  
16 specified by the witness in describing the offender.

17 (k) If a witness previously viewed a photograph array or  
18 live lineup to identify another person suspected of involvement in  
19 the offense, the members of the subsequent photograph array or live  
20 lineup for the offense must be different from the members used in  
21 the previous array or lineup.

22 (l) If multiple witnesses will view a photograph array or  
23 live lineup, the suspect must be placed in a different position in  
24 the array or lineup for each witness.

25 (m) All participants in a live lineup must be kept from the  
26 view of a witness before the lineup begins.

27 (n) A law enforcement agency may seek the identification of

1 a particular suspect through a photograph or live lineup  
2 identification procedure only once from any particular witness.

3 (o) Regardless of whether an identification is made,  
4 information related to a photograph or live lineup identification  
5 procedure must be documented in a record certified with the  
6 signature of the witness. The record of the procedure must be made  
7 a part of the case record and, if applicable, provided to the  
8 attorney representing the state. The record must include:

9 (1) the time, date, and location of the procedure and  
10 the names of all persons present at the procedure;

11 (2) the form summarizing the witness instructions  
12 provided to the witness under Subsection (a);

13 (3) in a live lineup, a photograph of the lineup as  
14 presented to a witness and, in a photograph array, the photographs  
15 preserved in the condition in which they were presented to the  
16 witness;

17 (4) a description of the order of the presentation of  
18 individuals in a live lineup and photographs in a photograph array;

19 (5) if applicable, the videotape or audiotape of the  
20 procedure as provided by Subsection (p); and

21 (6) if the procedure is not videotaped or audiotaped,  
22 all written commentary and exchanges as provided by Subsection (p)  
23 and, if applicable, the written identification statement provided  
24 by the witness under Subsection (g).

25 (p) If practicable, a photograph or live lineup  
26 identification procedure must be videotaped or audiotaped. If the  
27 procedure is not videotaped or audiotaped, comments and exchanges

1 among persons present at the procedure must be documented in  
2 writing and an explanation of why the procedure was not videotaped  
3 or audiotaped must be included in the record certified under  
4 Subsection (o). The videotaped, audiotaped, or written  
5 documentation required under this subsection must include, without  
6 reference to the perceived importance of the information:

7 (1) all witness comments, in the witness's own words,  
8 regarding the participants in the live lineup or the photographs in  
9 the photograph array;

10 (2) any identification made by the witness of a member  
11 of the live lineup or photograph array who is not a suspect; and

12 (3) all questions asked or commentary made by the  
13 person administering the procedure or any other person present at  
14 the procedure.

15 SECTION 2. Article 38.20, Code of Criminal Procedure, as  
16 added by this Act, applies to any photograph or live lineup  
17 identification procedure that is conducted on or after the  
18 effective date of this Act.

19 SECTION 3. This Act takes effect September 1, 2007.