SECOND REGULAR SESSION

[C O R R E C T E D**]**

SENATE BILL NO. 732

97TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR KEAVENY.

Read 1st time January 16, 2014, and ordered printed.

TERRY L. SPIELER, Secretary.

4170S.06I

AN ACT

To repeal sections 590.700 and 650.056, RSMo, and to enact in lieu thereof six new sections relating to criminal procedure.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 590.700 and 650.056, RSMo, are repealed and six new sections enacted in lieu thereof, to be known as sections 491.500, 545.275, 590.700, 650.056, 650.070, and 650.075, to read as follows:

491.500. 1. As used in this section, the following terms mean:

(1) "Administrator", the person conducting the photograph or live lineup;

(2) "Blind administrator", an administrator who does not know the identity of the suspect;

(3) "Blinded administrator", an administrator who may know which lineup member is the suspect but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system;

(4) "Eyewitness", a person who observes another person at or near the scene of an offense;

(5) "Filler", a person, or photograph of a person, who is not suspected of an offense and is included in an identification procedure;

(6) "Folder system", a system for conducting a photo lineup that

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

satisfies all of the following:

(a) The investigating officer uses one suspect photograph that resembles the description of the suspected perpetrator of the offense provided by the eyewitness, five filler photographs, four blank photographs that contain no images of any person, and ten empty folders;

(b) The investigating officer places one filler photograph into one of the empty folders and numbers it as folder 1;

(c) The administrator places the suspect photograph and the other four filler photographs into five other empty folders, shuffles the five folders so that the administrator is unaware of which folder contains the suspect photograph, and numbers the five shuffled folders as folders 2 to 6;

(d) The administrator places the four blank photographs in the four remaining empty folders and numbers these folders as folders 7 to 10, and these folders serve as dummy folders;

(e) The administrator shall instruct the eyewitness that the administrator does not want to view any of the photographs and will not view any of the photographs and that the eyewitness may not show the administrator any of the photographs. The administrator shall inform the eyewitness that, if the eyewitness identifies a photograph as being the person the eyewitness saw, the eyewitness shall identify the photograph only by the number of the photograph's corresponding folder;

(f) The administrator hands each of the ten folders to the eyewitness individually without looking at the photograph in the folder. Each time the eyewitness has viewed a folder, the eyewitness indicates whether the photograph is of the person the eyewitness saw, indicates the degree of the eyewitness's confidence in this identification, and returns the folder and the photograph it contains to the administrator;

(g) The administrator follows the procedures specified in this subdivision for a second viewing if the eyewitness requests to view each of the folders a second time, handing them to the eyewitness in the same order as during the first viewing; the eyewitness is not permitted to have more than two viewings of the folders; and the administrator preserves the order of the folders and the photographs they contain in a facedown position. The administrator documents and records the results of the procedure described in paragraphs (a) to (f) of this subdivision before the eyewitness views each of the folders a second time and before the

administrator views any photograph that the eyewitness identifies as being of the person the eyewitness saw;

(7) "Live lineup", an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator;

(8) "Photo lineup", an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator;

(9) "Showup", an identification procedure in which an eyewitness is presented with a single suspect for the purpose of determining whether the eyewitness identifies such individual as the perpetrator;

(10) "Suspect", the person believed by law enforcement to be the possible perpetrator of the crime.

2. By January 1, 2015, any law enforcement agency conducting one or more of the identification procedures listed in subsection 1 of this section shall adopt written policies governing the procedures. Each agency shall provide a copy of its written policies to the director of the department of public safety by February 1, 2015. Each agency shall thereafter complete a review of its policies every two years to determine whether new evidence in identification procedures has emerged that would support revising the policies. The agency shall resubmit its policies after completing its biennial review no later than February first of each odd-numbered year.

3. In developing and revising policies under this section, a law enforcement agency shall adopt practices shown by reliable evidence to enhance the accuracy of identification procedures and minimize mistaken identifications.

4. The written policies may include the following:

(1) A requirement that only a blind or blinded administrator shall perform a live or photo lineup;

(2) A list of instructions to be given to the eyewitness to minimize the likelihood of an inaccurate identification. The instructions may include that the suspect may not be in the lineup, that the administrator does not

know if the suspect is in the lineup, that the eyewitness does not need to identify anyone, and that if the eyewitness does make an identification during the procedure, the eyewitness will be required to give a recorded statement regarding his or her confidence level in the identification;

(3) A requirement for a minimum of five fillers to appear in each photo or live lineup and a requirement that all fillers generally resemble the suspect, so the suspect does not unduly stand out;

(4) A requirement that each individual or photo in a lineup procedure be presented to the eyewitness individually in a sequential order that is previously determined, with no two individuals or photos appearing before the eyewitness at the same time;

(5) Prohibitions on reusing fillers in lineups viewed by the same eyewitness and allowing an eyewitness to participate in multiple lineups that include the same suspect;

(6) A prohibition on allowing more than one suspect to be present, or have his or her photograph present, at a lineup;

(7) A requirement, where practicable, to video or digitally record the entirety of a photo or live lineup procedure. If videotaping or digital video recording is not practicable, a photograph may be taken of each lineup and a detailed record made as soon as possible and without undue delay that describes, with specificity, how the entire procedure was administered, the appearance of the fillers and the suspect, and that details the identities of everyone present;

(8) A requirement that the eyewitness, at the time of the lineup and in the eyewitness's own words, give a video or audio recorded statement to the administrator regarding the eyewitness's confidence level that the person identified is the person who committed the crime;

(9) Steps to minimize factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect, including verbal or nonverbal reactions of the administrator;

(10) A prohibition on the administrator providing any feedback about an eyewitness's identification at any time;

(11) A list of the circumstances under which a showup is warranted that are limited to circumstances in which the police could not conduct a photo or live lineup because the police lacked probable cause to make an arrest or as a result of other exigent circumstances; and

(12) Requirements for showup procedures to ensure that the procedure is not conducted in a location or manner that implicitly conveys to the eyewitness that the suspect is guilty.

5. All written eyewitness identification policies shall be made available to the public upon request.

6. The provisions of this section shall not prohibit a law enforcement agency from adopting other scientifically accepted procedures for conducting identification procedures that the scientific community considers to be reliable.

7. All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section or with the policies adopted by the law enforcement agency pursuant to this section:

(1) Failure to comply with any of the requirements of this section or the policies adopted by the law enforcement agency shall be considered by the court in adjudicating motions to suppress an eyewitness identification pursuant to section 545.275;

(2) Failure to comply with any of the requirements of this section or the policies adopted by the law enforcement agency shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible;

(3) When evidence of compliance or noncompliance with the requirements of this section or the policies adopted by the law enforcement agency has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

545.275. 1. In order to obtain a pretrial hearing on a motion to suppress evidence obtained during a live or photo lineup or showup procedure, the defendant shall produce evidence of suggestiveness within the procedure that could lead to a mistaken identification. The burden then shifts to the state to prove that the identification is reliable.

2. To evaluate whether there is evidence of suggestiveness in order to hold a hearing, the judge shall consider the following:

(1) Whether the law enforcement agency complied with written eyewitness identification procedures adopted pursuant to section 491.500;

(2) Whether the eyewitness spoke to anyone besides the law

enforcement agency about the identification;

(3) Whether the eyewitness made no choice or chose a different suspect or filler during an identification procedure; and

(4) Any other evidence of suggestiveness.

3. The court may dismiss the motion at any time it concludes that the defendant's initial claim of suggestiveness is not supported by the evidence.

4. Additional factors the judge shall consider during the suppression hearing include, but shall not be limited to, the following:

(1) The length of time the eyewitness had to observe the event;

(2) The distance between the eyewitness and the perpetrator;

(3) The lighting conditions at the time of the event;

(4) Whether the eyewitness was under the influence of alcohol or drugs;

(5) The age of the eyewitness;

(6) Whether the perpetrator was wearing a disguise;

(7) Whether the suspect had different facial features at the time of the identification;

(8) The length of time that elapsed between the crime and the identification;

(9) Whether the identification was by a eyewitness who is a different race than the suspect;

(10) The degree of attention the eyewitness paid to the perpetrator during the event; and

(11) The accuracy of any descriptions of the suspect provided by the eyewitness before the identification procedure occurred.

5. The judge shall approve the motion to suppress the identification evidence if he or she finds, from the totality of the circumstances, that a substantial likelihood of irreparable misidentification exists.

6. Expert testimony shall be admissible on eyewitness identifications at the hearing on a motion to suppress identification evidence and at the trial.

7. If eyewitness identification evidence is admitted at trial, the court shall instruct the jury, in addition to any instructions admissible under subsection 7 of section 491.500, on how to assess the reliability of the identification. The court shall also instruct the jury on any factors that

may raise the risk of misidentifications based on the particular facts of the case, including, but not limited to, the factors listed in subsection 4 of this section.

590.700. 1. As used in this section, the following terms shall mean:

(1) "Custodial interrogation", the questioning of a person under arrest, who is no longer at the scene of the crime, by a member of a law enforcement agency along with the answers and other statements of the person questioned. "Custodial interrogation" shall not include:

(a) A situation in which a person voluntarily agrees to meet with a member of a law enforcement agency;

(b) A detention by a law enforcement agency that has not risen to the level of an arrest;

(c) Questioning that is routinely asked during the processing of the arrest of the suspect;

(d) Questioning pursuant to an alcohol influence report;

(e) Questioning during the transportation of a suspect;

(2) "Recorded" and "recording", any form of audiotape, videotape, motion picture, or digital recording.

2. All custodial interrogations of persons suspected of committing or attempting to commit murder in the first degree, murder in the second degree, assault in the first degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, arson in the first degree, rape in the first degree, forcible rape, sodomy in the first degree, forcible sodomy, kidnapping, statutory rape in the first degree, statutory sodomy in the first degree, child abuse, or child kidnapping shall be recorded **[**when feasible**]**.

3. Law enforcement agencies may record an interrogation in any circumstance with or without the knowledge or consent of a suspect, but they shall not be required to record an interrogation under subsection 2 of this section:

(1) **[**If the suspect requests that the interrogation not be recorded;

(2)**]** If the interrogation occurs outside the state of Missouri;

[(3)**]** **(2)** If exigent public safety circumstances prevent recording; **or**

[(4)**]** **(3)** To the extent the suspect makes spontaneous statements**[**;**].**

[(5)**]** **4.** If the recording equipment fails**[**;**]** or

[(6) If**]** **the** recording equipment is not available at the location where the interrogation takes place**, the law enforcement agency shall demonstrate a**

good faith effort to maintain recording equipment for interrogations in order to comply with this section.

[4.**]** **5.** Each law enforcement agency shall adopt a written policy to record custodial interrogations of persons suspected of committing or attempting to commit the felony crimes described in subsection 2 of this section.

[5. If a law enforcement agency fails to comply with the provisions of this section, the governor may withhold any state funds appropriated to the noncompliant law enforcement agency if the governor finds that the agency did not act in good faith in attempting to comply with the provisions of this section.

6. Nothing in this section shall be construed as a ground to exclude evidence, and a violation of this section shall not have impact other than that provided for in subsection 5 of this section. Compliance or noncompliance with this section shall not be admitted as evidence, argued, referenced, considered or questioned during a criminal trial.**]**

6. An oral, written, or sign language statement of an accused made as a result of a custodial interrogation shall be presumed to be inadmissible as evidence in any criminal proceeding brought for any of the crimes listed in subsection 2 of this section if the interrogation was not recorded as required under this section unless one of the exceptions listed in subsection 3 or 4 of this section applies or the statement is used for the purposes of impeachment. The state shall bear the burden of proving the applicability of an exception.

7. The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances.

8. When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable.

9. Nothing contained in this section shall be construed to authorize, create, or imply a private cause of action.

10. Every electronic recording required under this section shall be preserved until judgement for any offense relating to the statement is final and all direct and habeas corpus appeals are exhausted, or the prosecution

of such offense is barred by law.

650.056. **1.** Any **biological** evidence **[**leading to a conviction of a felony described in subsection 1 of section 650.055 which has been or can be tested for DNA**]** **gathered during an investigation of murder in the second degree, assault in the first degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, arson in the first degree, forcible rape, forcible sodomy, kidnapping, statutory rape in the first degree, statutory sodomy in the first degree, child abuse, or child kidnapping** shall be preserved by the investigating law enforcement agency **until any offender who was convicted of a felony and sentenced to a term of imprisonment as a result of such investigation has been released from prison**.

2. Any biological evidence gathered during an investigation of first degree murder shall be preserved by the investigating law enforcement agency until:

(1) Twenty years after any offender who was convicted of first degree murder as a result of the investigation has been executed; or

(2) Such person has been released from prison as a result of a pardon or finding of innocence.

3. The evidence gathered during an investigation of any offense listed under subsection 1 or 2 of this section shall be retained in a manner that preserves any possible DNA evidence for future testing. If retention of a particular piece of property containing DNA evidence is impractical, the agency shall take reasonable care to retain representative samples of portions of the property that contain DNA evidence.

4. If an offense listed under subsection 1 or 2 of this section remains unsolved, any biological evidence collected during the investigation shall be properly preserved until the prosecuting or circuit attorney provides written authorization to the agency to destroy or discard the evidence.

650.070. 1. Each law enforcement agency that collects biological evidence for use in criminal investigations shall develop written guidelines, that are open to public inspection, for the identification, collection, and preservation of biological evidence. Such guidelines shall include, but not be limited to, the following provisions:

(1) Biological evidence believed to be relevant to a criminal investigation shall be collected as soon as practicable;

(2) Only licensed peace officers or personnel of the law enforcement agency who have received training on the agency's written guidelines for the identification, collection, and preservation of biological evidence shall identify, collect, and preserve biological evidence;

(3) Reasonable efforts shall be made to collect representative samples of all evidence believed to be relevant to the felony being investigated that is present at the crime scene; and

(4) The evidence shall be properly handled, packaged, labeled, and the following information shall be documented:

(a) The location where it was collected;

(b) The person, place, or thing from which the evidence was collected;

(c) The date and time it was collected;

(d) The person who collected it; and

(e) The manner in which it was collected and preserved.

2. Every crime laboratory accredited under section 650.060 shall develop written regulations that are open to public inspection.

650.075. 1. In investigations of the types of felonies listed under subsection 1 of section 650.056, a portion of any piece of biological evidence tested shall be preserved when possible for further testing.

2. Whenever testing may entirely consume a DNA sample in an investigation of any felony listed under subsection 1 of section 650.056, the crime laboratory shall notify, when feasible, the prosecuting or circuit attorney handling the case. The prosecuting or circuit attorney shall immediately notify the defense attorney unless a person has not been arrested, indicted, or otherwise formally charged in relation to the criminal investigation. If, after a period of two business days, the crime laboratory has not received a court order prohibiting the testing of the sample or a cancellation of the request, the crime laboratory may proceed with the testing.

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