

CHAPTER 312

CRIMINAL LAW AND PROCEDURE

HOUSE BILL 21-1142

BY REPRESENTATIVE(S) Bacon, Amabile, Benavidez, Bennett, Bird, Boesenecker, Caraveo, Cutter, Daugherty, Duran, Esgar, Froelich, Gonzales-Gutierrez, Gray, Herod, Hooton, Jackson, Jodeh, Kennedy, Kipp, Lontine, McCluskie, McCormick, Michaelson Jenet, Mullica, Ortiz, Ricks, Sirota, Snyder, Sullivan, Titone, Valdez A., Weissman, Garnett; also SENATOR(S) Gonzales, Bridges, Buckner, Hansen, Lee, Moreno, Rodriguez, Zenzinger.

AN ACT

CONCERNING MEASURES RELATED TO EYEWITNESS IDENTIFICATION TECHNIQUES, AND, IN CONNECTION THEREWITH, REQUIRING REPORTING DATA RELATED TO EYEWITNESS TECHNIQUES AND REGULATING THE USE OF SHOWUP IDENTIFICATIONS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. The general assembly finds that showup identifications are disfavored as inherently suggestive because, when compared to properly conducted lineups and photo arrays, showups are more likely to yield false identifications. Because of the high likelihood of misidentification during a showup, the general assembly deems showups to be admissible only when the prosecution can demonstrate law enforcement's strict compliance with showup requirements.

SECTION 2. In Colorado Revised Statutes, 16-1-109, **amend** (2)(h), (3)(a) introductory portion, (4), and (5); **repeal** (3)(b); and **add** (6) as follows:

16-1-109. Eyewitness identification procedures - policies and procedures - training - admissibility - report - legislative declaration - definitions. (2) As used in this section, unless the context otherwise requires:

(h) "Showup" means an identification procedure in which an eyewitness is presented with a single ~~suspect~~ SUBJECT in person for the purpose of determining whether the eyewitness identifies the individual as the ~~perpetrator~~ SUSPECT.

(3) (a) On or before ~~July 1, 2016~~ NOVEMBER 15, 2021, any Colorado law enforcement agency THAT EMPLOYS A PEACE OFFICER REQUIRED TO BE P.O.S.T.-CERTIFIED PURSUANT TO SECTION 16-2.5-102, THAT IS charged with

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

enforcing the criminal laws of Colorado, and that, as part of any criminal investigation, uses or might use any eyewitness identification procedure shall adopt written policies and procedures concerning law-enforcement-conducted eyewitness identifications. The policies and procedures adopted and implemented by a law enforcement agency must be consistent with eyewitness identification procedures of nationally recognized peer-reviewed research ~~or the policies and procedures developed, agreed upon, and recommended by the Colorado attorney general's office and the Colorado district attorneys' council~~ AND MUST BE CONSISTENT WITH THE REQUIREMENTS OF SECTION 16-1-110 FOR ADMISSIBILITY OF EVIDENCE OF EYEWITNESS IDENTIFICATION. THE ATTORNEY GENERAL, THE COLORADO DISTRICT ATTORNEYS' COUNCIL, REPRESENTATIVES OF LAW ENFORCEMENT, AND REPRESENTATIVES OF THE STATE PUBLIC DEFENDER OFFICE, IN CONSULTATION WITH AN ORGANIZATION THAT IS FAMILIAR WITH THE RESEARCH REGARDING EYEWITNESS IDENTIFICATION AND SUPPORTS THE EXONERATION OF PERSONS WHO HAVE BEEN WRONGFULLY CONVICTED, SHALL DEVELOP AND RECOMMEND A SET OF MODEL POLICIES AND PROCEDURES THAT ARE CONSISTENT WITH THE REQUIREMENTS OF THIS SECTION AND SECTION 16-1-110 AND UPDATE THE POLICIES AND PROCEDURES AS NECESSARY. The policies and procedures must include, but need not be limited to, the following:

~~(b) On or before July 1, 2016, all Colorado law enforcement agencies that conduct eyewitness identifications shall adopt and implement the written policies and procedures required by paragraph (a) of this subsection (3). If a law enforcement agency does not complete or adopt its own written policies and procedures relating to eyewitness identifications, the law enforcement agency must on or before July 1, 2016, adopt and implement the model policies and procedures as developed and approved in 2015 by the Colorado attorney general and the Colorado district attorneys' council.~~

(4) Policies and procedures adopted and implemented by a law enforcement agency pursuant to this section ~~shall~~ MUST be reviewed by the agency at least every five years to ensure ~~consistency with~~ THE POLICIES AND PROCEDURES ARE UPDATED TO INCLUDE BEST PRACTICES RECOGNIZED BY nationally recognized peer-reviewed research.

(5) Compliance or failure to comply with any of the requirements of this section AND THE REQUIREMENTS OF SECTION 16-1-110 is considered relevant evidence in any case involving eyewitness identification, as long as such evidence is otherwise admissible.

(6) BEGINNING JANUARY 1, 2022, EACH LAW ENFORCEMENT AGENCY THAT USES A SHOWUP SHALL COLLECT THE FOLLOWING DATA RELATED TO THOSE IDENTIFICATION TECHNIQUES:

(a) THE DATE, TIME, AND LOCATION OF THE SHOWUP;

(b) THE GENDER, AGE, AND RACE OF THE SUBJECT AND EYEWITNESS IN THE SHOWUP, AS DETERMINED BY THE LAW ENFORCEMENT OFFICER'S PERCEPTION OR THE SUBJECT'S IDENTIFICATION OR RETRIEVED FROM A DATABASE ACCESSIBLE BY LAW ENFORCEMENT;

- (c) THE ALLEGED CRIME; AND
- (d) THE OUTCOME OF THE SHOWUP.

SECTION 3. In Colorado Revised Statutes, **add** 16-1-110 as follows:

16-1-110. Regulation of showup identification procedures - definitions - repeal. (1) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "P.O.S.T.-CERTIFIED" MEANS CERTIFIED BY THE PEACE OFFICERS STANDARDS AND TRAINING BOARD CREATED IN SECTION 24-31-302.

(b) "SHOWUP" MEANS AN IDENTIFICATION PROCEDURE IN WHICH AN EYEWITNESS IS PRESENTED WITH A SINGLE SUBJECT IN PERSON FOR THE PURPOSE OF DETERMINING WHETHER THE EYEWITNESS IDENTIFIES THE INDIVIDUAL AS THE SUSPECT.

(2) (a) A PEACE OFFICER MAY UTILIZE A SHOWUP ONLY PURSUANT TO THE FOLLOWING CONDITIONS:

(I) (A) FOLLOWING THE REPORT OF A CRIME, A PEACE OFFICER, ACTING ON REASONABLE SUSPICION, HAS DETAINED A SUBJECT IN THE CRIME WITHIN MINUTES OF THE COMMISSION OF THE CRIME AND NEAR THE LOCATION OF THE CRIME;

(B) GIVEN THE CIRCUMSTANCES, NEITHER A LIVE LINEUP NOR A PHOTO ARRAY ARE AVAILABLE AS A MEANS OF IDENTIFICATION; AND

(C) THE EYEWITNESS REASONABLY BELIEVES HE OR SHE CAN IDENTIFY THE SUBJECT.

(II) TO VERIFY THE IDENTITY OF AN INTIMATE RELATIONSHIP, AS DEFINED IN SECTION 18-6-800.3 (2), IN A DOMESTIC VIOLENCE CASE; OR

(III) TO CONFIRM THE IDENTITY OF A FAMILIAL SUBJECT, INCLUDING A PARENT, CHILD, OR SIBLING KNOWN TO THE EYEWITNESS.

(3) (a) BEGINNING JANUARY 1, 2022, FOR SHOWUPS CONDUCTED ON OR AFTER THIS DATE, WHEN A LAW ENFORCEMENT AGENCY THAT EMPLOYS PEACE OFFICERS REQUIRED TO BE P.O.S.T.-CERTIFIED PURSUANT TO SECTION 16-2.5-102 OR A P.O.S.T.-CERTIFIED PEACE OFFICER CONDUCTS A SHOWUP, THE PEACE OFFICER SHALL COMPLY WITH THE FOLLOWING PROVISIONS:

(I) A PEACE OFFICER SHALL TRANSPORT THE EYEWITNESSES SEPARATELY TO THE LOCATION OF THE PERSON SUBJECT TO THE SHOWUP;

(II) THE SHOWUP LOCATION MUST BE AS WELL-LIT AS PRACTICABLE WITH AN UNOBSTRUCTED VIEW OF THE PERSON SUBJECT TO THE SHOWUP;

(III) A PEACE OFFICER SHALL AVOID EXTERNAL FACTORS THAT CAN BE SUGGESTIVE TO THE EYEWITNESS, SUCH AS VERBAL COMMENTS, COMPUTER SCREEN DATA, OR ANY OTHER INFORMATION CONCERNING THE PERSON SUBJECT TO THE SHOWUP;

(IV) A PEACE OFFICER SHALL NOT REQUIRE THE PERSON SUBJECT TO THE SHOWUP TO PUT ON DESCRIBED CLOTHING WORN BY THE SUSPECT, SPEAK SPECIFIC WORDS UTTERED BY THE SUSPECT, OR PERFORM ANY SPECIFIC ACTIONS MIMICKING THOSE OF THE SUSPECT THAT OCCURRED DURING THE COMMISSION OF THE REPORTED CRIME;

(V) A PEACE OFFICER SHALL NOT SHOW THE PERSON SUBJECT TO THE SHOWUP TO THE EYEWITNESS WHILE THE PERSON WAS IN HANDCUFFS OR IN THE BACK OF A PATROL VEHICLE, EXCEPT IN CIRCUMSTANCES TO PREVENT AN IMMINENT THREAT OF PHYSICAL HARM TO A PEACE OFFICER OR ANOTHER PERSON OR THE ESCAPE OF THE SUBJECT;

(VI) WHEN MULTIPLE EYEWITNESSES EXIST, A PEACE OFFICER SHALL PERMIT ONLY ONE EYEWITNESS AT A TIME TO VIEW THE PERSON SUBJECT TO THE SHOWUP;

(VII) WHEN MULTIPLE SUBJECTS EXIST, A PEACE OFFICER SHALL SEPARATE THE SUBJECTS AND CONDUCT SEPARATE SHOWUPS WITH EACH SUBJECT;

(VIII) A PEACE OFFICER SHALL SEPARATE THE EYEWITNESSES FROM ONE ANOTHER;

(IX) WHEN CONDUCTING A SHOWUP WITH AN EYEWITNESS WHO HAS LIMITED ENGLISH PROFICIENCY OR WHO IS HEARING IMPAIRED OR DEAF, A PEACE OFFICER, IF FEASIBLE, SHALL OBTAIN AN INTERPRETER BEFORE PROCEEDING WITH THE SHOWUP. THE LACK OF AN INTERPRETER DOES NOT PRECLUDE USE OF EVIDENCE DERIVED FROM THE SHOWUP PROCEDURE IF A COURT FINDS THE IDENTIFICATION IS SUFFICIENTLY OR NEVERTHELESS RELIABLE.

(X) A PEACE OFFICER SHALL GIVE THE ADMONITION REQUIRED BY SUBSECTION (3)(d) OF THIS SECTION PRIOR TO CONDUCTING THE SHOWUP;

(XI) (A) IF A PEACE OFFICER IS NOT REQUIRED TO WEAR A BODY-WORN CAMERA, PRIOR TO THE SHOWUP, A PEACE OFFICER OR ANOTHER PERSON AUTHORIZED BY THE PEACE OFFICER SHALL PHOTOGRAPH OR USE A BODY-WORN CAMERA TO CAPTURE VIDEO THAT SHOWS CLEARLY AND WITHOUT OBSTRUCTION EACH SUBJECT AT THE PLACE OF THE SHOWUP TO PRESERVE A RECORD OF THE APPEARANCE OF THE SUBJECT AT THE TIME OF THE SHOWUP. THIS SUBSECTION (3)(a)(XI)(A) IS REPEALED, EFFECTIVE JANUARY 1, 2023.

(B) NO LATER THAN JANUARY 1, 2023, USING A BODY-WORN CAMERA, A PEACE OFFICER SHALL RECORD A VIDEO OF THE ENTIRETY OF THE SHOWUP PROCEDURE INCLUDING EACH SUBJECT TO PRESERVE A RECORD OF THE APPEARANCE OF THE SUBJECT AT THE TIME OF THE SHOWUP AND THE LOCATION AND CONDITIONS OF THE SHOWUP, THE ADMONITION A PEACE OFFICER IS REQUIRED TO PROVIDE TO AN EYEWITNESS AS REQUIRED BY SUBSECTION (3)(d) OF THIS SECTION, AND THE EYEWITNESS CONFIDENCE STATEMENT REQUIRED BY SUBSECTION (3)(a)(XII) OF THIS SECTION.

(XII) IF AN EYEWITNESS MAKES AN IDENTIFICATION DURING A SHOWUP, A PEACE OFFICER SHALL ASK THE EYEWITNESS WHETHER THE EYEWITNESS IS CONFIDENT, SOMEWHAT CONFIDENT, OR NOT CONFIDENT ABOUT THE IDENTIFICATION. IF AN

EYEWITNESS MAKES AN IDENTIFICATION, A PEACE OFFICER, AT THE TIME OF THE IDENTIFICATION, SHALL TAKE A CLEAR STATEMENT FROM THE EYEWITNESS AND DOCUMENT THE STATEMENT IN THE EYEWITNESS'S OWN WORDS. IF AN EYEWITNESS MAKES AN IDENTIFICATION AND AN ARREST OCCURS, ANY FURTHER ACTS TO OBTAIN AN ADDITIONAL IDENTIFICATION BY SUBSEQUENT EYEWITNESSES MUST BE THROUGH A LIVE LINEUP OR PHOTO ARRAY.

(b) THE COURT SHALL CONSIDER ANY FAILURE BY LAW ENFORCEMENT TO COMPLY WITH THE REQUIREMENTS OF THIS SECTION WITH RESPECT TO ANY CHALLENGE TO A SHOWUP IDENTIFICATION.

(c) A P.O.S.T.-CERTIFIED PEACE OFFICER SHALL DOCUMENT THE TIME AND LOCATION OF THE SHOWUP AND READ THE SHOWUP ADVISEMENT REQUIRED BY SUBSECTION (3)(d) OF THIS SECTION TO EACH EYEWITNESS. THE OFFICER SHALL DOCUMENT THE PROCEDURE IN THE OFFICER'S WRITTEN STATEMENT AND, BEGINNING JULY 1, 2023, RECORD THE SHOWUP IN ITS ENTIRETY WITH THE OFFICER'S BODY-WORN CAMERA.

(d) (I) WHEN CONDUCTING A SHOWUP, A P.O.S.T.-CERTIFIED PEACE OFFICER SHALL VERBALLY COMMUNICATE TO THE EYEWITNESS THE SUBSTANCE OF THE FOLLOWING STATEMENTS:

(A) YOU SHOULD NOT ASSUME THE PERSON YOU ARE ABOUT TO SEE HAS COMMITTED A CRIME;

(B) WE COULD BE SHOWING YOU A PERSON FOR MANY REASONS, INCLUDING TO CLEAR THE PERSON FROM INVESTIGATION;

(C) ELIMINATING A PERSON FROM AN INVESTIGATION SERVES AN EQUALLY IMPORTANT PURPOSE AS IDENTIFYING A PERSON WHO MIGHT HAVE BEEN INVOLVED IN THE CRIMINAL ACTIVITY;

(D) THE INVESTIGATION OF THIS MATTER WILL CONTINUE WHETHER OR NOT YOU IDENTIFY A PERSON;

(E) APART FROM INDIVIDUAL ASSISTANCE AND COOPERATION WITH LAW ENFORCEMENT, WE CANNOT DISCUSS THE INVESTIGATION WITH YOU; AND

(F) PLEASE DO NOT DISCUSS WHAT YOU SAW, SAID, OR DID DURING THIS PROCEDURE WITH ANY OTHER EYEWITNESS.

(II) THE P.O.S.T.-CERTIFIED PEACE OFFICER SHALL ASK THE EYEWITNESS IF THEY UNDERSTAND THE INSTRUCTIONS, IF THEY AGREE TO COMPLY WITH THE INSTRUCTIONS, AND IF THEY HAVE ANY QUESTIONS BEFORE THE IDENTIFICATION PROCEDURES BEGINS. THE EYEWITNESS MUST RESPOND AFFIRMATIVELY IN ORDER FOR THE SHOWUP TO PROCEED.

SECTION 4. In Colorado Revised Statutes, 24-31-903, **amend** (3); and **add** (2)(c)(II.5) and (2)(c)(VII)(E) as follows:

24-31-903. Division of criminal justice report. (2) Beginning January 1, 2023,

the Colorado state patrol and each local law enforcement agency that employs peace officers shall report to the division of criminal justice:

(c) All data relating to contacts conducted by its peace officers, including:

(II.5) WHETHER THE CONTACT WAS A SHOWUP, AS DEFINED IN SECTION 16-1-110 (1)(b);

(VII) The result of the contact, such as:

(E) IF THE CONTACT WAS A SHOWUP, THE INFORMATION COLLECTED PURSUANT TO SECTION 16-1-109 (6) FOR THE EYEWITNESS AND THE SUBJECT.

(3) The Colorado state patrol and local law enforcement agencies shall not report the name, address, social security number, or other unique personal identifying information of the subject of the use of force, victim of the official misconduct, EYEWITNESS OR SUBJECT IN A SHOWUP, or persons contacted, searched, or subjected to a property seizure. Notwithstanding any provision of law to the contrary, the data reported pursuant to this section is available to the public pursuant to subsection (4) of this section.

SECTION 5. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2022 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to showups conducted on or after January 1, 2022.

Approved: June 24, 2021