A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Mendelson and Councilmember Cheh 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 to authorize discovery of these materials, and to provide remedies for when an identification procedure is not in accordance with this law.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, that this act may be cited as the “Eyewitness Identification Procedures Act of 2013”.

Sec. 2. Definitions.

For the purposes of this act, the term:

(1) “Delinquent act” shall have the same meaning as provided in D.C. Official Code § 16-2301(7).

(2) “Double-blind” means a method for conducting a lineup or photographic display in which an investigator conducting or present for the lineup or photographic display is unaware
which of the participants in the lineup or photographic display, if any, is suspected of committing
the criminal offense or delinquent act, and the witness viewing the lineup or photographic
display is not informed, by express or implied means, of the identity of any person suspected of
having committed the criminal offense or delinquent act.

(3) “Fillers” means persons placed in a lineup or photographic display who are not
suspected of having committed the criminal offense or delinquent act.

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

(5) “Identification procedure” means a lineup or photographic display.

(6) “Investigator” means any person employed by the District of Columbia who, in the
course of his or 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 persons firsthand 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” means any failure by a witness to identify a person viewed in
the identification procedure.

(10) “Perpetrator” means the person who committed the criminal offense or delinquent
act.
(11) "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.

(12) "Suspect" means the person suspected of having committed the criminal offense or
delinquent act.

Sec. 3. Purpose and construction.

(a) The purpose of this act is to ensure that identification procedures will be conducted in
a manner that promotes fairness, accuracy, reliability, objectivity, and furthers the overall
interests of justice.

(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.

Sec. 4. Procedures for investigators conducting lineups and photographic displays.

(a) The Metropolitan Police Department shall administer all lineups double-blind and all
photographic displays double-blind or modified nonblind.

(b) A lineup or photographic display may include only one suspect and shall include at
least 6 participants for lineups and 8 participants for photographic displays.

(c)(1) Prior to the lineup or photographic display, the investigator shall ask the witness
for the following:

(A) The most complete description of the perpetrator the witness is able
to provide, if the witness has not already provided one;
(B) The conditions under which the witness observed the perpetrator,

including location, time, distance, weather, lighting, obstructions, or other impairments (alcohol,

drugs, stress, distractors, or visual or auditory disabilities); and

(C) Whether the witness needs to wear glasses or contact lenses.

(2) If the witness does need to wear glasses or contact lenses, the investigator

shall ask the witness whether the witness was wearing the glasses or contact lenses at the time of

the offense and shall note if the witness is wearing the glasses or contact lenses at the time of the

identification procedure.

(d) The investigator responsible for composing the lineup or photographic display shall

ensure that:

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

(2) A suspect does not stand out significantly from the fillers;

(3) All fillers in the photographic display or lineup resemble the suspect in

significant physical and facial features;

(4) Nothing about the appearance or context of any photograph makes it stand out

from the others;

(5) The use of fillers that so closely resemble the suspect that a person familiar

with the suspect might find it difficult to distinguish the suspect from the fillers is avoided; and

(6) Measures are taken to create a reasonably consistent appearance between a

suspect and fillers with respect to unique, remarkable, or unusual features.

(e)(1) All photographic displays shall be conducted double-blind or modified nonblind.
(2) If at any time the modified nonblind nature of the photographic display is compromised, the investigator shall immediately stop the identification procedure and, if appropriate, a new investigator shall be located to administer a new procedure.

(f)(1) A witness participating in an identification procedure shall do so out of the presence, view, or earshot of any other witness for the entirety of the identification procedure, including preliminary instructions discussed in subsection (g) of this section.

(2) At the conclusion of the identification procedure, a witness shall be instructed not to discuss his or her memory of the perpetrator's appearance or the identification procedure with any other witness.

(g) Prior to the identification procedure, investigators shall give a witness an explanation of the procedure to be followed. The explanation shall be given orally (video instruction is permitted) and in writing. For written instructions, investigators shall use a standard form, which shall be signed by the witness pursuant to section 5 of this act. Investigators shall 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 witness may take as much time as he or she needs to view the photographic display or lineup;

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

(7) The witness shall not discuss his or her memory of the perpetrator's appearance or the identification procedure with any other witness.

(h) If any one participant in a lineup 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.

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

(j) Investigators shall not:

(1) Take any action to influence a witness's identification or non-identification decision; and

(2) Respond or react to an identification or non-identification by making any comment, gesture, facial expression, noise, or other response, other than to:

(A) Ask the witness to give a statement of confidence in any identification as required by subsection (i) of this section; or

(B) Inform the witness that the identification procedure is concluded.

(k) After an identification procedure is concluded, investigators shall refrain from:

(1) Giving the witness any feedback about any identification or non-identification; and
(2) 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.

(1) Investigators shall:

(1) Photograph all participants in any lineup viewed by a witness;

(2) Preserve all photographs of a live lineup and copies of all photographic
displays viewed by a witness;

(3) Record:

(A) The names of the individuals displayed in a lineup or photographic
display;

(B) The order in which the individuals were presented;

(C) The method and sources used to select each filler (e.g., computer
program, intra-office, canvass, etc.);

(D) The number of times the lineup or photographic display was viewed a
witness;

(E) The names of all persons present at the time of the viewing of any
identification procedure; and

(F) Any statements made or questions asked by a witness during the
identification procedure.

Sec. 5. Procedures for witnesses viewing lineups and photographic displays.

(a) Every witness viewing a lineup or photographic display shall review and sign a form
that explains the procedure for the identification procedure containing all the elements set forth
in section 4(g) of this act. Any oral departure from these cautionary instructions shall be noted
by the investigator and initialed by the witness.

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

Sec. 6. Discovery of identification procedure documents and records.

(a) Counsel for a person accused of a criminal offense or delinquent act 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.

(b) The materials described in subsection (a) of this section shall be disclosed pursuant to
the court’s authority to regulate discovery pursuant to its discretion under Superior Court
Criminal Rule 16(d).

Sec. 7. Remedies.

(a) Failure to comply with any of the requirements of this act shall be:

(1) Considered by the court in adjudicating motions to suppress eyewitness
identification; and.

(2) Admissible in support of claims of eyewitness misidentification, as long as
such evidence is otherwise admissible.

(b) 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 the reliability of eyewitness
identifications.
Sec. 8. Training.

All investigators shall be trained on the procedures set forth by this act and the scientific findings on which the procedures are based.

Sec. 9. 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, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(3)).

Sec. 10. Effective date.

This act shall take effect following approval by the Mayor (or in the event veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602( c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-206.02( c)(1)), and publication in the District of Columbia Register.