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2 COMMITTEE SUBSTITUTE

3 FOR

4 **Senate Bill No. 200**

5 (By Senator Laird)

6 _____
7 [Originating in the Committee on the Judiciary;
8 reported March 8, 2013.]
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12 A BILL to amend and reenact §62-1E-1, §62-1E-2 and §62-1E-3 of the
13 Code of West Virginia, 1931, as amended, all relating to
14 eyewitness identification, lineups and showups; defining terms
15 and updating definitions; establishing certain recommended
16 procedures before a lineup or showup; setting forth additional
17 instructions to be given prior to a lineup or showup;
18 expanding eyewitness identification procedures; recommending
19 all lineups to be conducted in a sequential and blind manner;
20 expressing a legislative preference for lineups over showups;
21 prohibiting photographic showups; eliminating a task force
22 that is no longer active; and requiring each law-enforcement
23 agency performing lineups or showups to create specific
24 procedures for conducting lineups and showups.

25 *Be it enacted by the Legislature of West Virginia:*

26 That §62-1E-1, §62-1E-2 and §62-1E-3 of the Code of West

1 Virginia, 1931, as amended, be amended and reenacted, all to read
2 as follows:

3 **ARTICLE 1E. EYEWITNESS IDENTIFICATION ACT.**

4 **§62-1E-1. Definitions.**

5 For the purposes of this article:

6 (1) "Administrator" means the person conducting the live
7 lineup, photo lineup or showup.

8 (2) "Suspect" means the person believed by law enforcement to
9 be the possible perpetrator of the crime.

10 (3) "Blind" means the administrator does not know the identity
11 of the suspect.

12 (4) "Blinded" means the administrator may know who the suspect
13 is, but does not know which lineup member is being viewed by the
14 eyewitness.

15 ~~(1)~~ (5) "Eyewitness" means a person whose identification of
16 another person may be relevant in a criminal proceeding.

17 (6) "Filler" means either a person or a photograph of a person
18 who is not suspected of an offense and is included in an
19 identification procedure.

20 (7) "Folder shuffle method" means a procedure for displaying
21 a photo lineup with the following steps:

22 (A) Photos used in a photo lineup are placed in their own
23 respective folder, and the folders are shuffled, numbered and then
24 presented to an eyewitness such that the administrator cannot see
25 or track which photo is being presented to the witness until after
26 the procedure is completed;

1 (B) The procedure is completed only when the eyewitness has
2 viewed the entire array of numbered folders, even if an affirmative
3 identification is made prior to the eyewitness viewing all of the
4 numbered folders;

5 (C) If an eyewitness requests a second viewing, the eyewitness
6 must be shown all of the lineup members again, even if the
7 eyewitness makes an identification during this second showing; and

8 (D) The eyewitness shall be allowed to review the folders only
9 once after the initial viewing is complete.

10 ~~(2) (8) "Lineup" means a live lineup or photographic array of~~
11 ~~persons of similar appearance. photo lineup of persons or~~
12 ~~photographs of persons matching as close as possible the~~
13 ~~eyewitness' description of the perpetrator.~~

14 ~~(3) "Lineup administrator" means the person who conducts a~~
15 ~~lineup.~~

16 ~~(4) (9) "Live lineup" means a procedure in which a group of~~
17 ~~people is displayed to an eyewitness for the purpose of determining~~
18 ~~if the eyewitness is able to identify the perpetrator of a crime.~~

19 ~~(5) (10) "Photo lineup" means a procedure in which an array of~~
20 ~~photographs is displayed to an eyewitness for the purpose of~~
21 ~~determining if the eyewitness is able to identify the perpetrator~~
22 ~~of a crime.~~

23 (11) "Sequential presentation" means presenting live or photo
24 lineup persons to the eyewitness one-by-one rather than all at
25 once.

26 (12) "Showup" means an identification procedure in which an

1 eyewitness is presented with a single suspect for the purpose of
2 determining whether the eyewitness identifies this individual as
3 the perpetrator.

4 **§62-1E-2. Eyewitness identification procedures.**

5 (a) Prior to a lineup or showup, law enforcement should record
6 as complete a description as possible of the perpetrator provided
7 by the eyewitness, in the eyewitness's own words. This statement
8 should also include information regarding the conditions under
9 which the eyewitness observed the perpetrator including location,
10 time, distance, obstructions, lighting and weather conditions. The
11 eyewitness should also be asked if he or she wears or has been
12 prescribed glasses or contact lenses and whether he or she was
13 wearing them at the time of the witnessed event. The administrator
14 should record whether or not the eyewitness was wearing glasses or
15 contact lenses at the time of the lineup or showup.

16 ~~(a)~~ (b) After completing the requirements of subsection (a) of
17 this section, but before a lineup or showup, the eyewitness should
18 be given the following ~~three~~ instructions:

19 (1) That the perpetrator ~~might or might~~ may or may not be
20 present in the lineup, or, in the case of a showup, may or may not
21 be the person that is presented to the eyewitness;

22 (2) That the eyewitness is not required to make an
23 identification; ~~and~~

24 (3) That it is as important to exclude innocent persons as it
25 is to identify the perpetrator;

26 (4) That the investigation will continue whether or not an

1 identification is made; and

2 (5) That the administrator does not know the identity of the
3 perpetrator.

4 (c) Nothing should be said, shown or otherwise suggested to
5 the eyewitness that might influence the eyewitness's identification
6 of any particular lineup or showup member, at any time prior to,
7 during or following a lineup or showup.

8 (d) All lineups should be conducted blind unless to do so
9 would place an undue burden on law enforcement or the
10 investigation. If conducting a blind lineup would place an undue
11 burden on law enforcement or the investigation, then the
12 administrator shall use the folder shuffle method.

13 (e) All lineups should be conducted in a sequential
14 presentation. When there are multiple suspects, each identification
15 procedure shall include only one suspect.

16 (f) At least four fillers should be used in all lineups. The
17 fillers shall resemble the description of the suspect as much as
18 practicable and shall not unduly stand out.

19 (g) In a photo lineup, there should be no characteristics of
20 the photos themselves or the background context in which they are
21 placed which shall make any of the photos unduly stand out.

22 (h) In a live lineup, all lineup participants must be out of
23 view of the eyewitness prior to the identification procedure.

24 (i) If there are multiple eyewitnesses for the same lineup:

25 (1) Each eyewitness should view the lineup or lineups
26 separately;

1 (2) The suspect should be placed in a different position in
2 the lineup for each eyewitness; and

3 (3) The eyewitnesses should not be permitted to communicate
4 with each other until all identification procedures have been
5 completed.

6 (j) Showups should only be performed using a live suspect and
7 only in exigent circumstances that require the immediate display of
8 a suspect to an eyewitness. A law-enforcement official shall not
9 conduct a showup with a single photo; rather a photo lineup must be
10 used.

11 ~~(b)~~ (k) Law-enforcement officers should make a written or
12 video record of a lineup including which shall be provided to the
13 prosecuting attorney in the event that any person is charged with
14 the offense under investigation. The written record shall include
15 all steps taken to comply with this article which shall include the
16 following information:

17 (1) The date, time and location of the lineup;

18 (2) The names of every person in the lineup, if known, and all
19 other persons present at the lineup;

20 (3) The words used by the eyewitness in any identification,
21 including words that describe the eyewitness' certainty or
22 uncertainty in the identification at the time the identification is
23 made;

24 (4) Whether it was a photo lineup or live lineup;

25 (5) The number of photos or individuals that were presented in
26 the lineup;

1 (6) Whether the lineup administrator knew which person in the
2 lineup was the suspect;

3 (7) Whether, before the lineup, the eyewitness was instructed
4 that the perpetrator might or might not be presented in the lineup;

5 (8) Whether the lineup was simultaneous or sequential;

6 (9) The signature, or initials, of the eyewitness, or notation
7 if the eyewitness declines or is unable to sign; and

8 (10) A video of the lineup and the eyewitness' response may be
9 included.

10 ~~(c) There is hereby created a task force to study and identify~~
11 ~~best practices for eyewitness identification. The task force~~
12 ~~consists of the following members:~~

13 ~~(1) The Director of Criminal Justice Services, or his or her~~
14 ~~designee, who shall chair, without voting, the task force;~~

15 ~~(2) The Superintendent of the State Police, or his or her~~
16 ~~designee;~~

17 ~~(3) A victim advocate to be designated by the Director of~~
18 ~~Criminal Justice Services;~~

19 ~~(4) The Director of Public Defender Services, or his or her~~
20 ~~designee;~~

21 ~~(5) The Executive Director of the West Virginia prosecuting~~
22 ~~attorneys Institute, or his or her designee;~~

23 ~~(6) A circuit judge designated by the Chief Justice of the~~
24 ~~West Virginia Supreme Court of Appeals;~~

25 ~~(7) Two professionals in the field of forensic sciences, one~~
26 ~~to be designated by the Executive Director of the West Virginia~~

1 ~~prosecuting attorneys Institute and the other to be designated by~~
2 ~~the Director of Public Defender Services;~~

3 ~~(8) The President of the West Virginia Fraternal Order of~~
4 ~~Police, or his or her designee;~~

5 ~~(9) A representative of the Innocence Project of the West~~
6 ~~Virginia University College of Law;~~

7 ~~(10) Two licensed practitioners of criminal law, one to be~~
8 ~~designated by the Executive Director of the West Virginia~~
9 ~~prosecuting attorneys Institute and the other to be designated by~~
10 ~~the Director of Public Defender Services;~~

11 ~~(11) The President of the West Virginia Sheriff's Association,~~
12 ~~or his or her designee.~~

13 ~~(d) The task force, or their assigned designees, shall serve~~
14 ~~without compensation, and in consultation with eyewitness~~
15 ~~identification practitioners and experts, shall develop recommended~~
16 ~~guidelines for policies, procedures and training with respect to~~
17 ~~the collection and handling of eyewitness evidence in criminal~~
18 ~~investigations by law-enforcement agencies that are consistent with~~
19 ~~the reliable evidence supporting best practices. The purpose of~~
20 ~~the guidelines is to provide law-enforcement agencies with~~
21 ~~information regarding eyewitness identification policies and~~
22 ~~procedures to increase the accuracy of the crime investigation~~
23 ~~process.~~

24 ~~(e) Such guidelines shall include procedures for the~~
25 ~~administration of live and photographic lineups and instructions~~
26 ~~that will increase the accuracy of eyewitness identifications. The~~

1 ~~task force, in developing these guidelines, shall consider:~~

2 ~~(1) The use of blind administration of live and photo lineups;~~

3 ~~(2) The issuance of specific instructions to the eyewitness~~
4 ~~before and during the identification procedure;~~

5 ~~(3) The number and selection of fillers to be used in live and~~
6 ~~photo lineups;~~

7 ~~(4) Sequential versus simultaneous presentation of lineup~~
8 ~~members;~~

9 ~~(5) Whether only one suspect should be included in any live or~~
10 ~~photo lineup;~~

11 ~~(6) The timing of when the administrator should request and~~
12 ~~record the eyewitness's statement of his confidence in his~~
13 ~~selection;~~

14 ~~(7) Whether to refrain from providing of any confirmatory~~
15 ~~information to the eyewitness;~~

16 ~~(8) The visual recording of the lineup and its administration;~~

17 ~~(9) The video or audio recording of the lineup procedure;~~

18 ~~(10) Any other policies or procedures the task force~~
19 ~~determines to be relevant; and~~

20 ~~(11) What training, if any, should be made available to law-~~
21 ~~enforcement personnel in the use of these procedures.~~

22 ~~(f) Not later than December 15, 2008, the task force shall~~
23 ~~submit a report on the guidelines developed and recommendations~~
24 ~~concerning their use to the standing committees of the Legislature~~
25 ~~having cognizance of matters relating to criminal law and~~
26 ~~procedure. Minority reports may also be issued. The task force~~

1 ~~shall terminate on December 15, 2009, unless earlier terminated by~~
2 ~~legislative action.~~

3 **§62-1E-3. Training of law-enforcement officers.**

4 The Superintendent of State Police may create educational
5 materials and conduct training programs to instruct law-enforcement
6 officers and recruits how to conduct lineups in compliance with
7 this section. Any West Virginia law-enforcement agency, as defined
8 in section 1, article 29, chapter 30 of this code, conducting
9 eyewitness identification procedures shall adopt specific written
10 procedures for conducting photo lineups, live lineups and showups
11 that comply with this article on or before January 1, 2014.