

COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 200**

(By Senator Laird)

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[Originating in the Committee on the Judiciary;  
reported March 8, 2013.]

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A BILL to amend and reenact §62-1E-1, §62-1E-2 and §62-1E-3 of the Code of West Virginia, 1931, as amended, all relating to eyewitness identification, lineups and showups; defining terms and updating definitions; establishing certain recommended procedures before a lineup or showup; setting forth additional instructions to be given prior to a lineup or showup; expanding eyewitness identification procedures; recommending all lineups to be conducted in a sequential and blind manner; expressing a legislative preference for lineups over showups; prohibiting photographic showups; eliminating a task force that is no

longer active; and requiring each law-enforcement agency performing lineups or showups to create specific procedures for conducting lineups and showups.

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

That §62-1E-1, §62-1E-2 and §62-1E-3 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

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

**§62-1E-1. Definitions.**

1 For the purposes of this article:

2 (1) “Administrator” means the person conducting the live  
3 lineup, photo lineup or showup.

4 (2) “Suspect” means the person believed by law  
5 enforcement to be the possible perpetrator of the crime.

6 (3) “Blind” means the administrator does not know the  
7 identity of the suspect.

8 (4) “Blinded” means the administrator may know who the  
9 suspect is, but does not know which lineup member is being  
10 viewed by the eyewitness.

11 ~~(4)~~ (5) “Eyewitness” means a person whose identification  
12 of another person may be relevant in a criminal proceeding.

13 (6) “Filler” means either a person or a photograph of a  
14 person who is not suspected of an offense and is included in  
15 an identification procedure.

16 (7) “Folder shuffle method” means a procedure for  
17 displaying a photo lineup with the following steps:

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

23 (B) The procedure is completed only when the  
24 eyewitness has viewed the entire array of numbered folders,  
25 even if an affirmative identification is made prior to the  
26 eyewitness viewing all of the numbered folders;

27 (C) If an eyewitness requests a second viewing, the  
28 eyewitness must be shown all of the lineup members again,

29 even if the eyewitness makes an identification during this  
30 second showing; and

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

33 ~~(2)~~ (8) “Lineup” means a live lineup or photographic  
34 ~~array of persons of similar appearance.~~ photo lineup of  
35 persons or photographs of persons matching as close as  
36 possible the eyewitness’ description of the perpetrator.

37 ~~(3) “Lineup administrator” means the person who~~  
38 ~~conducts a lineup.~~

39 ~~(4)~~ (9) “Live lineup” means a procedure in which a group  
40 of people is displayed to an eyewitness for the purpose of  
41 determining if the eyewitness is able to identify the  
42 perpetrator of a crime.

43 ~~(5)~~ (10) “Photo lineup” means a procedure in which an  
44 array of photographs is displayed to an eyewitness for the  
45 purpose of determining if the eyewitness is able to identify  
46 the perpetrator of a crime.

47 (11) “Sequential presentation” means presenting live or  
48 photo lineup persons to the eyewitness one-by-one rather  
49 than all at once.

50 (12) “Showup” means an identification procedure in  
51 which an eyewitness is presented with a single suspect for the  
52 purpose of determining whether the eyewitness identifies this  
53 individual as the perpetrator.

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

1 (a) Prior to a lineup or showup, law enforcement should  
2 record as complete a description as possible of the perpetrator  
3 provided by the eyewitness, in the eyewitness's own words.  
4 This statement should also include information regarding the  
5 conditions under which the eyewitness observed the  
6 perpetrator including location, time, distance, obstructions,  
7 lighting and weather conditions. The eyewitness should also  
8 be asked if he or she wears or has been prescribed glasses or  
9 contact lenses and whether he or she was wearing them at the  
10 time of the witnessed event. The administrator should record

11 whether or not the eyewitness was wearing glasses or contact  
12 lenses at the time of the lineup or showup.

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

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

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

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

23 (4) That the investigation will continue whether or not an  
24 identification is made; and

25 (5) That the administrator does not know the identity of  
26 the perpetrator.

27 (c) Nothing should be said, shown or otherwise suggested  
28 to the eyewitness that might influence the eyewitness's

29 identification of any particular lineup or showup member, at  
30 any time prior to, during or following a lineup or showup.

31 (d) All lineups should be conducted blind unless to do so  
32 would place an undue burden on law enforcement or the  
33 investigation. If conducting a blind lineup would place an  
34 undue burden on law enforcement or the investigation, then  
35 the administrator shall use the folder shuffle method.

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

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

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

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

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

49 (1) Each eyewitness should view the lineup or lineups  
50 separately;

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

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

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

61 (b) (k) Law-enforcement officers should make a written  
62 or video record of a lineup including which shall be provided  
63 to the prosecuting attorney in the event that any person is  
64 charged with the offense under investigation. The written  
65 record shall include all steps taken to comply with this article  
66 which shall include the following information:



- 67 (1) The date, time and location of the lineup;
- 68 (2) The names of every person in the lineup, if known,  
69 and all other persons present at the lineup;
- 70 (3) The words used by the eyewitness in any  
71 identification, including words that describe the eyewitness'  
72 certainty or uncertainty in the identification at the time the  
73 identification is made;
- 74 (4) Whether it was a photo lineup or live lineup;
- 75 (5) The number of photos or individuals that were  
76 presented in the lineup;
- 77 (6) Whether the lineup administrator knew which person  
78 in the lineup was the suspect;
- 79 (7) Whether, before the lineup, the eyewitness was  
80 instructed that the perpetrator might or might not be  
81 presented in the lineup;
- 82 (8) Whether the lineup was simultaneous or sequential;
- 83 (9) The signature, or initials, of the eyewitness, or  
84 notation if the eyewitness declines or is unable to sign; and

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

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

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

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

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

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

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

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

102 ~~(7) Two professionals in the field of forensic sciences;~~  
103 ~~one to be designated by the Executive Director of the West~~

104 ~~Virginia prosecuting attorneys Institute and the other to be~~  
105 ~~designated by the Director of Public Defender Services;~~

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

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

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

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

116 (d) ~~The task force, or their assigned designees, shall serve~~  
117 ~~without compensation, and in consultation with eyewitness~~  
118 ~~identification practitioners and experts, shall develop~~  
119 ~~recommended guidelines for policies, procedures and training~~  
120 ~~with respect to the collection and handling of eyewitness~~  
121 ~~evidence in criminal investigations by law-enforcement~~  
122 ~~agencies that are consistent with the reliable evidence~~

123 ~~supporting best practices. The purpose of the guidelines is to~~  
124 ~~provide law-enforcement agencies with information~~  
125 ~~regarding eyewitness identification policies and procedures~~  
126 ~~to increase the accuracy of the crime investigation process.~~

127 ~~(e) Such guidelines shall include procedures for the~~  
128 ~~administration of live and photographic lineups and~~  
129 ~~instructions that will increase the accuracy of eyewitness~~  
130 ~~identifications. The task force, in developing these~~  
131 ~~guidelines, shall consider:~~

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

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

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

138 ~~(4) Sequential versus simultaneous presentation of lineup~~  
139 ~~members;~~

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

142 ~~(6) The timing of when the administrator should request~~  
143 ~~and record the eyewitness's statement of his confidence in his~~  
144 ~~selection;~~

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

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

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

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

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

154 ~~(f) Not later than December 15, 2008, the task force shall~~  
155 ~~submit a report on the guidelines developed and~~  
156 ~~recommendations concerning their use to the standing~~  
157 ~~committees of the Legislature having cognizance of matters~~  
158 ~~relating to criminal law and procedure. Minority reports may~~  
159 ~~also be issued. The task force shall terminate on December~~  
160 ~~15, 2009, unless earlier terminated by legislative action.~~

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

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