

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 200

(By Senator Laird)

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

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.