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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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HOUSE BILL

No. 889 Session of  
2015

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INTRODUCED BY MATZIE, DeLUCA, J. HARRIS, SCHLOSSBERG, THOMAS,  
BROWNLEE, STURLA, BISHOP, MURT, C. PARKER, V. BROWN, COHEN  
AND ROZZI, APRIL 6, 2015

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REFERRED TO COMMITTEE ON JUDICIARY, APRIL 6, 2015

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AN ACT

1 Providing for procedures in police lineups and for powers and  
2 duties of the Attorney General.

3 The General Assembly of the Commonwealth of Pennsylvania  
4 hereby enacts as follows:

5 Section 1. Short title.

6 This act shall be known and may be cited as the Police Lineup  
7 Procedure Act.

8 Section 2. Definitions.

9 The following words and phrases when used in this act shall  
10 have the meanings given to them in this section unless the  
11 context clearly indicates otherwise:

12 "Eyewitness." A person who observes another person at or  
13 near the scene of an offense.

14 "Filler." Either a person or a photograph of a person who is  
15 not suspected of an offense and is included in an identification  
16 procedure. The prosecutor, and defense counsel where applicable,  
17 shall participate in the selection of fillers. Volunteers,

1 inmates and other persons shall be equally available to both the  
2 prosecution and the defense.

3 "Identification procedure." A lineup, whether a photo lineup  
4 or a live lineup.

5 "Independent investigator." An investigator who is unaware  
6 of which person in a lineup is suspected as the perpetrator of  
7 the offense.

8 "Investigator." The person who conducts a live or photo  
9 lineup.

10 "Law enforcement agency." A government entity whose  
11 responsibilities include enforcement of criminal laws or the  
12 investigation of suspected criminal activity.

13 "Lineup." A procedure in which a group of persons is  
14 displayed to an eyewitness for the purpose of determining  
15 whether the eyewitness is able to identify the suspect as the  
16 perpetrator of the offense.

17 "Lineup members." Any person, whether a suspect or filler,  
18 who is used for a lineup.

19 "Live lineup." A lineup using actual persons.

20 "Photo lineup." A lineup using technology, such as an array  
21 of photographs.

22 "Sequential." A lineup in which each individual or photo is  
23 presented separately to a witness and removed after it is  
24 viewed, and in which lineup the prosecutor and defense counsel  
25 set the order of the presentation before the lineup commences.

26 "Show-up." A suspect who voluntarily surrenders or one who  
27 the police have reason to believe participated in an offense and  
28 is detained in the immediate aftermath of an offense.

29 "Simultaneous." A lineup in which all individuals or photos  
30 are presented to the witness at the same time.

1 Section 3. Lineup procedure.

2 (a) Requirements for lineup procedures.--Law enforcement  
3 agencies shall adopt procedures for conducting lineups that  
4 comply with the following requirements:

5 (1) (i) Video cameras, using current technology, shall  
6 be permanently installed in all rooms where lineups are  
7 to be conducted.

8 (ii) These cameras shall be oriented to record both  
9 the behavior of the lineup members and of the  
10 investigator and witness.

11 (iii) The videotape shall be of a quality that  
12 represents the lineup clearly and fairly.

13 (iv) The videotape may show the lineup members as a  
14 group or individually, but it shall preserve the  
15 presentation order of the lineup.

16 (2) Individuals or photos should be presented to  
17 witnesses sequentially rather than simultaneously.

18 (3) Independent investigators shall be used when  
19 practicable.

20 (4) When it is impracticable to use an independent  
21 investigator:

22 (i) The lineup shall be presented sequentially  
23 rather than simultaneously.

24 (ii) The investigator will state, in writing, why an  
25 independent investigator was not used.

26 (5) The lineup may not be conducted with more than one  
27 witness present at a time.

28 (6) Witnesses shall be separated so they are not aware  
29 of the other witnesses' responses.

30 (7) No one who knows the suspect's identity, other than

1 counsel, may be present during the lineup procedure.

2 (8) Nothing shall be said to the eyewitness regarding  
3 the position in the lineup of the person suspected as the  
4 perpetrator except as otherwise provided in section 4.

5 (9) Nothing shall be said or done that might influence  
6 the eyewitness's selection of the suspect. Investigators and  
7 all other persons shall avoid making any comments during the  
8 selection procedure.

9 (10) The investigator shall ensure that the witness does  
10 not write or mark any materials used in identification  
11 procedures.

12 (11) No materials indicating previous identifications  
13 may be visible to the witness.

14 (12) Witnesses may not know how many individuals or  
15 photos will be shown.

16 (13) (i) As each lineup member is presented, the  
17 investigator shall ask the witness: "Is this the person  
18 you saw (insert description of act here)? Yes or no?"

19 (ii) The witness's response to the question shall be  
20 documented in both the video and the written record with  
21 a reference to the number of the individual or photo  
22 being presented and the exact response given.

23 (iii) If the witness answers "no" to the question,  
24 the next individual shall be presented.

25 (iv) If the witness answers "yes," the investigator  
26 shall ask, "Can you describe how sure you are?" No  
27 witness may be compelled to give an answer to this  
28 question. The witness's exact statement shall be  
29 documented in both the video and the written record.

30 (v) The response shall be recorded instantly.

1           (14) If the eyewitness identifies a person as the  
2 perpetrator, the eyewitness may not be provided any  
3 information concerning the person prior to obtaining the  
4 eyewitness's statement that the eyewitness is certain of the  
5 selection.

6           (15) All fillers or photos will be shown, even if an  
7 identification is made in the course of the procedure.

8           (16) If the witness is unable to make an identification  
9 after all individuals or photos are shown, the investigator  
10 shall ask, "Would you like to view the lineup again?" The  
11 fact that the witness was unable to make an identification  
12 the first time through, and that the investigator asked the  
13 witness if the witness would like to view the lineup again  
14 shall be documented in both the video and the written record.  
15 The outcome of the second display shall also be documented in  
16 the video and written record.

17           (17) No witness may be told prior to the complete lineup  
18 presentation that the witness will be allowed to view the  
19 lineup a second time if the witness wishes.

20           (18) If a witness asks to see just one specific  
21 individual or photo a second time, the request shall be  
22 documented in both the video and written record.

23           (19) If a witness asks to see more than one specific  
24 individual or photo a second time, the entire array must be  
25 shown, and the fact that there was a second presentation  
26 shall be documented in the video and written record.

27       (b) Duty of courts.--Courts shall:

28           (1) Permit, in appropriate cases, the introduction of  
29 expert testimony on the issue of human memory as it relates  
30 to the identification process and on the issue of best

1 practices for eyewitness identification procedures.

2 (2) Provide a standardized jury instruction to acquaint  
3 juries with factors that may contribute to unreliable  
4 eyewitness identifications. This instruction shall enumerate  
5 factors for the jury to consider and include a final sentence  
6 which states as follows: "Eyewitness testimony should be  
7 carefully examined in light of other evidence in the case."

8 (3) Provide a standardized jury instruction that  
9 eyewitness identification should be evaluated in light of  
10 current scientific research regarding cross-racial  
11 identifications and the relevance of the degree of certainty  
12 expressed by witnesses in court.

13 Section 4. Witness instructions.

14 (a) General rule.--Witnesses shall be instructed as follows  
15 prior to a lineup:

16 (1) For a sequential presentation:

17 "In a moment, I am going to show you a series of photos  
18 (or individuals). The person who committed the crime may or  
19 may not be included. I do not know whether the person being  
20 investigated is included.

21 "It is just as important to clear an innocent person of  
22 wrongdoing as it is to identify the perpetrator.

23 "Even if you identify someone during this procedure, I  
24 will continue to show you all photos (or individuals) in the  
25 series.

26 "Keep in mind that things like hair styles, beards and  
27 mustaches can be easily changed. (In photo line-ups witnesses  
28 shall also be instructed that complexion colors may look  
29 slightly different in photographs).

30 "You should not feel like you have to make an

1 identification. This procedure is important to the  
2 investigation whether or not you identify someone.

3 "The photos (or individuals) will be shown to you one at  
4 a time and are not in any particular order. Take as much time  
5 as you need to look at each one. After each photo (or  
6 individual), I will ask you 'Is this the person you saw  
7 (insert crime here)...yes or no?' Take your time answering  
8 the question. If you answer 'yes,' I will then ask you, 'Can  
9 you describe how sure you are?'

10 "This is an ongoing investigation. In order to prevent  
11 damaging the investigation, you should avoid discussing this  
12 identification procedure or its results especially with other  
13 witnesses or the media.

14 "Do you understand the way the lineup procedure will be  
15 conducted and the other instructions I have given you?"

16 (2) For a simultaneous presentation:

17 "In a moment, I am going to show you a series of photos  
18 (or individuals). The person who committed the crime may or  
19 may not be included. I do not know whether the person being  
20 investigated is included.

21 "Keep in mind that things like hair styles, beards and  
22 mustaches can be easily changed. (In photo lineups witnesses  
23 shall also be instructed that complexion colors may look  
24 slightly different in photographs).

25 "You should not feel like you have to make an  
26 identification. This procedure is important to the  
27 investigation whether or not you identify someone.

28 "Take as much time as you need to look at the photo (or  
29 individual) lineup and then tell me whether you see the  
30 person who (insert crime here). If you identify anyone in the

1 lineup, I will then ask you, 'Can you describe how sure you  
2 are?'

3 "This is an ongoing investigation. In order to prevent  
4 damaging the investigation, you should avoid discussing this  
5 identification procedure or its results, especially with  
6 other witnesses or the media.

7 "Do you understand the way the lineup procedure will be  
8 conducted and the other instructions I have given you?"

9 (b) Copy of instructions to be provided.--

10 (1) Witnesses shall be provided with a written copy of  
11 the instructions required by subsection (a).

12 (2) A copy of the instructions shall be signed and dated  
13 by the witness with the following statement: "I have read  
14 these instructions or they have been read to me and I  
15 understand the instructions. I am prepared to review the  
16 photographs (or individuals) which will be presented to me  
17 and I will follow the instructions provided on this form."

18 (3) The signed copy of the instructions shall be filed  
19 in the investigative file.

20 Section 5. Written record.

21 (a) Duty to make.--A written record of the identification  
22 procedure shall be made by an investigator that includes the  
23 following information:

24 (1) The complete videotapes.

25 (2) The signed instructions given to the witness.

26 (3) All identification and no-identification results.

27 (4) The names of all persons present at the  
28 identification procedure.

29 (5) The date, time and location of the identification  
30 procedure.

1           (6) The order in which the photographs or individuals  
2       were presented.

3           (7) The number of times the lineup was viewed and the  
4       results of the procedure.

5           (8) The witness's own words regarding their degree of  
6       certainty of any identification.

7           (9) In a photo lineup, the photographs themselves.

8           (10) The written record shall be signed by the  
9       eyewitness, along with the eyewitness's own words describing  
10      the eyewitness's degree of certainty in the selection.

11          (11) The names of all fillers used in the lineup.

12          (12) The procedure employed.

13          (13) The number of photos or individuals displayed.

14          (14) The sources of all photos used.

15          (15) Any specific words, conduct or gestures required of  
16      lineup participants.

17      (b) Standard form to be developed.--The Pennsylvania State  
18      Police, in consultation with other law enforcement agencies in  
19      this Commonwealth shall develop a standard form for recording  
20      lineup results in this Commonwealth. Law enforcement agencies  
21      may modify the standard form for their own needs.

22      Section 6. Detailed procedures.

23      (a) Fillers.--The following provisions shall apply to  
24      fillers presented in a lineup:

25          (1) There shall be a minimum of seven fillers per  
26      suspect in a photo identification procedure and a minimum of  
27      five fillers per suspect in a live lineup.

28          (2) There may be more than one suspect in the lineup, if  
29      more than one suspect fits the description of the  
30      perpetrator. In such an instance, the number of fillers shall

1 be increased to a minimum of seven per suspect in photo  
2 lineups and five per suspect for live lineups.

3 (3) The suspect may not unreasonably stand out in any  
4 lineup.

5 (4) Fillers shall resemble the witness's description of  
6 the perpetrator in significant features such as face,  
7 profile, height, weight, build, posture, gait, voice and  
8 specific articles of clothing. Any identification actions,  
9 such as speaking or moving, shall be performed by all members  
10 of a lineup.

11 (5) If the perpetrator was described as having an  
12 unusual identifying mark, all fillers shall have similar  
13 markings or all lineup members shall have similar coverings  
14 over the described area.

15 (6) If a composite is used, the fillers shall resemble  
16 the witness's description based on their resemblance to the  
17 composite.

18 (7) When there is an inadequate description of the  
19 perpetrator or when there is a suspect whose appearance  
20 differs from the description of the perpetrator, fillers  
21 shall resemble the suspect in significant features.

22 (8) The first individual or photo presented shall be a  
23 filler.

24 (9) All lineup participants shall be out of the view of  
25 the eyewitness at all times prior to the lineup procedure.  
26 The eyewitness may not see the suspect in the hall or station  
27 in advance of the lineup.

28 (10) When presenting a new suspect, the investigator  
29 shall avoid reusing the same fillers in lineups shown to the  
30 same witness.

1           (11) Except as required by paragraph (8), all members of  
2 the lineup shall be presented in a random order.

3           (12) Suspects shall be presented in different positions  
4 in each lineup when there are multiple witnesses in the same  
5 case.

6           (13) If the eyewitness has previously viewed a lineup in  
7 connection with the identification of another person  
8 suspected of involvement in the offense, the fillers in the  
9 lineup in which the person suspected as the perpetrator  
10 participates shall be different from the fillers used in any  
11 prior lineup.

12           (14) When a new suspect is presented, the investigator  
13 shall avoid reusing the same fillers in lineups shown to the  
14 same witness.

15       (b) Photographs.--The following provisions shall apply to  
16 photographs presented in a lineup:

17           (1) Photographs shall be presented one at a time.

18           (2) Photographs shall be presented in random order.

19           (3) No writings or information concerning previous  
20 arrests or previous identification results shall be visible  
21 to the witness.

22           (4) After the photographs have been viewed, they shall  
23 be marked denoting the order that they were presented to the  
24 witnesses and shall be retained in the written record for  
25 later use in court.

26 Section 7. Show-up procedures.

27       (a) General rule.--Show-ups shall:

28           (1) Only be presented to the witnesses when  
29 circumstances require their prompt display. Such  
30 circumstances shall include, but not be limited to:

1           (i) situations in which there is insufficient  
2           probable cause to detain the suspect long enough to  
3           construct a proper lineup;  
4           (ii) concerns about public safety; or  
5           (iii) concerns regarding the health or survival of  
6           either the suspect or the witnesses.

7           (2) Be encouraged to consent to voluntary detainment  
8           until a proper lineup may be conducted.

9           (3) Sign and date a written consent that the show-up is  
10          a willing participant in the lineup without promises,  
11          threats, pressure or coercion.

12          (b) When lineup with show-up permitted.--

13          (1) A lineup with show-ups may be conducted only when  
14          the suspect matching the description of the perpetrator is  
15          located in close proximity in time and place to the crime.

16          (2) A description of the perpetrator shall be documented  
17          prior to the lineup with show-ups.

18          (3) If practical, the witness shall be transported to  
19          the location of the detained suspect to limit the legal  
20          impact of the suspect's detention.

21          (4) Witnesses shall be given a cautionary instruction  
22          that the individual may not be the perpetrator.

23          (5) If there are multiple witnesses and one witness  
24          makes an identification during a lineup with show-ups, the  
25          remaining witnesses shall be reserved for a subsequent  
26          lineup.

27 Section 8. Remedies for noncompliance.

28          (a) Suppression.--A trial court shall consider evidence of  
29          any failure to comply with the provision of this act when  
30          adjudicating a motion to suppress eyewitness identification.

1 (b) Evidence.--Evidence of a failure to comply with a  
2 provision of this act shall be admissible in support of claims  
3 of eyewitness misidentification, provided that the evidence is  
4 otherwise admissible.

5 (c) Jury instruction.--When evidence of a failure to comply  
6 with a provision of this act has been presented at trial, the  
7 jury shall be instructed that it may consider credible evidence  
8 of noncompliance in determining the reliability of eyewitness  
9 identifications.

10 Section 9. Duties of Attorney General.

11 The Attorney General shall:

12 (1) Create, administer and conduct training programs for  
13 law enforcement officers and recruits on the methods and  
14 technical aspects of the eyewitness identification practices  
15 and procedures required by this act.

16 (2) Provide training for judges, prosecutors and defense  
17 lawyers to acquaint them with:

18 (i) The particular risks of cross-racial  
19 identifications.

20 (ii) Unreliable identification procedures.

21 (iii) The use of expert testimony to explain such  
22 risks to juries.

23 Section 10. Effective date.

24 This act shall take effect in 60 days.