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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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HOUSE BILL

No. 1129 Session of  
2017

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INTRODUCED BY MATZIE, KINSEY, SCHLOSSBERG AND V. BROWN,  
APRIL 10, 2017

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REFERRED TO COMMITTEE ON JUDICIARY, APRIL 10, 2017

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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,  
18 inmates and other persons shall be equally available to both the

1 prosecution and the defense.

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

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

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

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

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

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

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

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

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

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

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

30 Section 3. Lineup procedure.

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

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

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

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

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

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

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

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

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

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

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

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

29 (7) No one who knows the suspect's identity, other than  
30 counsel, may be present during the lineup procedure.

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

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

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

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

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

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

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

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

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

29           (v) The response shall be recorded instantly.

30           (14) If the eyewitness identifies a person as the

1 perpetrator, the eyewitness may not be provided any  
2 information concerning the person prior to obtaining the  
3 eyewitness's statement that the eyewitness is certain of the  
4 selection.

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

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

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

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

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

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

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

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

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

12 Section 4. Witness instructions.

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

15           (1) For a sequential presentation:

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

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

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

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

29           "You should not feel like you have to make an  
30 identification. This procedure is important to the

1 investigation whether or not you identify someone."

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

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

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

15 (2) For a simultaneous presentation:

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

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

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

27 "Take as much time as you need to look at the photo (or  
28 individual) lineup and then tell me whether you see the  
29 person who (insert crime here). If you identify anyone in the  
30 lineup, I will then ask you, 'Can you describe how sure you

1 are?'"

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

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

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

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

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

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

19 Section 5. Written record.

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

23 (1) The complete videotapes.

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

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

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

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

30 (6) The order in which the photographs or individuals

1 were presented.

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

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

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

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

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

11 (12) The procedure employed.

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

13 (14) The sources of all photos used.

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

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

21 Section 6. Detailed procedures.

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

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

27 (2) There may be more than one suspect in the lineup, if  
28 more than one suspect fits the description of the  
29 perpetrator. In such an instance, the number of fillers shall  
30 be increased to a minimum of seven per suspect in photo

1 lineups and five per suspect for live lineups.

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

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

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

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

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

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

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

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

30 (11) Except as required by paragraph (8), all members of

1 the lineup shall be presented in a random order.

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

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

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

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

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

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

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

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

25 Section 7. Show-up procedures.

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

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

30 (i) situations in which there is insufficient

1           probable cause to detain the suspect long enough to  
2           construct a proper lineup;

3           (ii) concerns about public safety; or

4           (iii) concerns regarding the health or survival of  
5           either the suspect or the witnesses.

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

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

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

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

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

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

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

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

26 Section 8. Remedies for noncompliance.

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

30          (b) Evidence.--Evidence of a failure to comply with a

1 provision of this act shall be admissible in support of claims  
2 of eyewitness misidentification, provided that the evidence is  
3 otherwise admissible.

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

9 Section 9. Duties of Attorney General.

10 The Attorney General shall:

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

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

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

19 (ii) Unreliable identification procedures.

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

22 Section 10. Effective date.

23 This act shall take effect in 60 days.