
THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 328 Session of
2021

INTRODUCED BY HUGHES, KEARNEY, FONTANA, STREET AND MUTH,
MARCH 10, 2021

REFERRED TO JUDICIARY, MARCH 10, 2021

AN ACT

1 Amending Title 44 (Law and Justice) of the Pennsylvania
2 Consolidated Statutes, providing for investigations.

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

5 Section 1. Title 44 of the Pennsylvania Consolidated
6 Statutes is amended by adding a chapter to read:

7 CHAPTER 83

8 INVESTIGATIONS

9 Subchapter

10 A. Recording of Interrogations

11 B. Eyewitness Identifications

12 SUBCHAPTER A

13 RECORDING OF INTERROGATIONS

14 Sec.

15 8301. Definitions.

16 8302. Recording.

17 8303. Applicability.

18 8304. Wiretap exception to recording.

1 8305. Jury instructions.

2 8306. Handling and preservation of electronic recordings.

3 § 8301. Definitions.

4 The following words and phrases when used in this subchapter
5 shall have the meanings given to them in this section unless the
6 context clearly indicates otherwise:

7 "Commission." The Municipal Police Officers' Education and
8 Training Commission established under 53 Pa.C.S. Ch. 21 Subch. D
9 (relating to municipal police education and training).

10 "Custodial interrogation." An interview in which a question,
11 statement or other conduct is reasonably likely to elicit an
12 incriminating response and which occurs while the individual
13 interviewed is in custody.

14 "Custody." A circumstance under which the individual who is
15 interviewed by a law enforcement officer is physically deprived
16 of the individual's freedom in a significant way or is placed in
17 a situation in which the individual reasonably believes that the
18 individual's freedom of action or movement is restricted.

19 "Electronic recording." An audiovisual or audio recording of
20 a statement that is authentic, accurate and unaltered.

21 "Interview." A conversation between a law enforcement
22 officer and another individual that takes place in the course of
23 a criminal investigation.

24 "Law enforcement agency." A government entity whose
25 responsibilities include enforcement of criminal laws or the
26 investigation of suspected criminal activity.

27 "Law enforcement officer." An officer or other employee of a
28 law enforcement agency whose personal responsibilities include
29 enforcement of criminal laws or the investigation of suspected
30 criminal activity.

1 "Place of detention." A police station or other building
2 where a law enforcement agency operates, including a municipal
3 police department or county sheriff's department, and is owned
4 and operated for the purpose of detaining individuals in
5 connection with the suspected violation of a criminal offense.
6 The term does not include a courthouse.

7 "Statement." An oral, written, sign language or nonverbal
8 communication that takes place during a custodial interrogation.
9 § 8302. Recording.

10 (a) Requirement.--A law enforcement agency shall make a
11 complete and contemporaneous electronic recording of each
12 custodial interrogation that occurs in a place of detention
13 relating to the investigation of the following offenses:

14 (1) An offense under 18 Pa.C.S. Ch. 25 (relating to
15 criminal homicide).

16 (2) An offense under 18 Pa.C.S. Ch. 31 (relating to
17 sexual offenses).

18 (3) An offense under 18 Pa.C.S. Ch. 37 (relating to
19 robbery).

20 (4) An offense classified as a felony under the laws of
21 this Commonwealth.

22 (5) An attempt under 18 Pa.C.S. § 901 (relating to
23 criminal attempt) or a conspiracy under 18 Pa.C.S. § 903
24 (relating to criminal conspiracy) to commit an offense
25 referred to under paragraph (1), (2), (3) or (4).

26 (b) Type.--A recording under subsection (a) shall be
27 complete only if the recording is an authentic, accurate,
28 uninterrupted and unaltered record of the interview, beginning
29 at or before the time the individual enters the place of
30 detention in which the law enforcement officer will conduct the

1 custodial interrogation, and ending when the interview has
2 completely finished.

3 (c) Visual recording.--If a visual recording is made, each
4 camera shall be simultaneously focused on both the law
5 enforcement interviewer and the suspect.

6 § 8303. Applicability.

7 (a) Exceptions.--Section 8302 (relating to recording) shall
8 not apply if the court finds each of the following:

9 (1) That a law enforcement officer made a
10 contemporaneous record of the reason for not making an
11 electronic recording of the statement or that it has been
12 proven by a preponderance of the evidence that it was not
13 feasible to make the record. The reason provided must be
14 consistent with paragraph (2).

15 (2) That it has been proven by a preponderance of the
16 evidence that at least one of the following circumstances
17 existed at the time of the custodial interrogation:

18 (i) The statement was made spontaneously and was not
19 made in response to a question.

20 (ii) The statement was made spontaneously in the
21 course of the routine intake processing of the
22 individual.

23 (iii) The law enforcement officer in good faith
24 failed to make an electronic recording of the custodial
25 interrogation because the officer inadvertently failed to
26 operate the recording equipment properly, or without the
27 officer's knowledge, the recording equipment
28 malfunctioned or stopped operating.

29 (iv) The custodial interrogation took place in
30 another jurisdiction and was conducted by an official of

1 that jurisdiction in compliance with the law of that
2 jurisdiction.

3 (v) The law enforcement officers conducting or
4 contemporaneously observing the custodial interrogation
5 reasonably believed that the making of an electronic
6 recording would jeopardize the safety of the individual,
7 a law enforcement officer, a confidential informant or
8 another individual.

9 (vi) The law enforcement officer conducting or
10 contemporaneously observing the custodial interrogation
11 reasonably believed that the crime for which the
12 individual was subjected to custodial interrogation was
13 not among those listed under section 8302.

14 (vii) Exigent circumstances existed which prevented
15 or made infeasible the making of an electronic recording
16 of the custodial interrogation.

17 (viii) Before the custodial interrogation, the
18 individual to be interrogated indicated that the
19 individual would participate only if the custodial
20 interrogation was not electronically recorded and, if
21 feasible, the agreement to participate without recording
22 was electronically recorded.

23 (b) Exclusions.--Section 8302 shall not apply to a statement
24 if any of the following apply:

25 (1) The statement is offered as evidence solely to
26 impeach or rebut the testimony of the individual interrogated
27 and not as substantive evidence.

28 (2) The custodial interrogation takes place before a
29 grand jury or court of record.

30 § 8304. Wiretap exception to recording.

1 Notwithstanding 18 Pa.C.S. Ch. 57 (relating to wiretapping
2 and electronic surveillance), a law enforcement officer engaged
3 in custodial interrogation under section 8302 (relating to
4 recording) may record the custodial interrogation without
5 consent or knowledge of the individual being held or
6 interrogated. Notwithstanding this section, a law enforcement
7 officer may obtain an individual's consent to recording or
8 inform the individual that the custodial interrogation will be
9 recorded.

10 § 8305. Jury instructions.

11 (a) General rule.--If the prosecution offers an unrecorded
12 statement into evidence that was required to be electronically
13 recorded under this subchapter and the prosecution has not
14 established by a preponderance of the evidence that an exception
15 under section 8303 (relating to applicability) applies, the
16 trial court shall provide the jury with the following cautionary
17 instructions with any changes necessary to be consistent with
18 the evidence:

19 "The law of this Commonwealth required that the interview
20 of the defendant by law enforcement officers, which took
21 place on {insert date} at {insert place}, was to be
22 electronically recorded from beginning to end. The
23 purpose of this requirement is to ensure that you jurors
24 will have before you a complete, unaltered and precise
25 record of the circumstances under which the interview was
26 conducted and what was said and done by each of the
27 individuals present.

28 In this case, the interviewing law enforcement officers
29 failed to comply with that law by not making an
30 electronic recording of the interview of the defendant.

1 Instead you have been presented with the testimony as to
2 what took place, based upon the recollections of law
3 enforcement officers and the defendant.

4 No justification for their failure to make an electronic
5 recording has been presented to the court. Therefore, I
6 must give you the following special instructions about
7 your consideration of the evidence concerning that
8 interview.

9 Because the interview was not electronically recorded as
10 required by our law, you have not been provided the most
11 reliable evidence as to what was said and done by the
12 participants. You cannot hear the exact words used by the
13 participants, nor the tone or the inflection of their
14 voices.

15 As you go about determining what occurred during the
16 interview, you should give special attention to whether
17 you are satisfied that what was said and done has been
18 accurately reported by the participants, including
19 testimony by law enforcement witnesses as to the
20 statements attributed to the defendant. Accordingly,
21 because law enforcement officers failed to make an
22 electronic recording, you may take this into account when
23 determining what weight to attribute to the statements
24 attributed to the defendant and the accuracy and
25 credibility of the testimony of the witnesses."

26 (b) Additional instructions.--In addition to the
27 instructions outlined under subsection (a), the trial court may
28 provide any other instructions as may be requested by the
29 prosecution or defense.

30 § 8306. Handling and preservation of electronic recordings.

1 (a) Handling.--The law enforcement agency shall clearly
2 identify and catalog each electronic recording.

3 (b) Preservation.--

4 (1) If a juvenile or criminal proceeding is brought
5 against an individual interrogated in an electronically
6 recorded custodial interrogation, law enforcement personnel
7 shall preserve the electronic recording until all appeal,
8 postconviction and habeas corpus proceedings by the
9 individual interrogated are concluded or the time within
10 which the proceeding must be brought has expired.

11 (2) If a juvenile or criminal proceeding is not brought
12 against an individual interrogated in an electronically
13 recorded custodial interrogation, law enforcement personnel
14 shall preserve the electronic recording until all applicable
15 Federal and State statutes of limitations bar prosecution of
16 the individual.

17 SUBCHAPTER B

18 EYEWITNESS IDENTIFICATIONS

19 Sec.

20 8311. Scope of subchapter.

21 8312. Legislative purpose.

22 8313. Definitions.

23 8314. Eyewitness identification procedures.

24 8315. Jury instructions.

25 8316. Education and training program.

26 § 8311. Scope of subchapter.

27 This subchapter relates to eyewitness identification
28 improvement.

29 § 8312. Legislative purpose.

30 The purpose of this subchapter is to help solve crime,

1 convict the guilty and protect the innocent in criminal
2 proceedings by improving procedures for eyewitness
3 identification of suspected perpetrators while ensuring that
4 police can promptly, safely and effectively investigate crimes.

5 § 8313. Definitions.

6 The following words and phrases when used in this subchapter
7 shall have the meanings given to them in this section unless the
8 context clearly indicates otherwise:

9 "Administrator." The individual who conducts a live lineup
10 or photo lineup.

11 "Blind lineup." A lineup where either of the following
12 occurs:

13 (1) For a live lineup or photo lineup, the administrator
14 does not know the identity of the suspect.

15 (2) For a photo lineup in which the administrator knows
16 the identity of the suspect, the administrator does not know
17 which photograph the eyewitness is viewing at a given time.

18 "Eyewitness." An individual who observes another individual
19 at or near the scene of a criminal offense.

20 "Filler." An individual who is not suspected of an offense
21 and is included in an identification procedure.

22 "Identification procedure." An investigative procedure in
23 which a law enforcement official requests an eyewitness to
24 attempt to identify an individual who perpetrated a criminal
25 offense. The term includes a live lineup, a photo lineup or a
26 show-up.

27 "Law enforcement agency." A governmental entity whose
28 responsibilities include enforcement of criminal laws or the
29 investigation of suspected criminal activity.

30 "Law enforcement officer." An officer or other employee of a

1 law enforcement agency whose personal responsibilities include
2 enforcement of criminal laws or the investigation of suspected
3 criminal activity.

4 "Live lineup." An identification procedure in which several
5 individuals, including the suspect and fillers, are displayed to
6 an eyewitness for the purpose of determining whether the
7 eyewitness identifies the suspect as the perpetrator.

8 "Photo lineup." An identification procedure in which an
9 array of photographs, comprising a photograph of the suspect and
10 photographs of fillers, is displayed to an eyewitness either in
11 hard copy form or via computer for the purpose of determining
12 whether the eyewitness identifies the suspect as the
13 perpetrator.

14 "Show-up." An identification procedure in which an
15 eyewitness is presented with a suspect for the purpose of
16 determining whether the eyewitness identifies the individual as
17 the perpetrator.

18 "Suspect." The individual believed by law enforcement
19 investigators to be the possible perpetrator of the crime.

20 § 8314. Eyewitness identification procedures.

21 (a) General rule.--An eyewitness identification procedure
22 conducted by a law enforcement agency must comply with this
23 section.

24 (b) Description of the perpetrator.--Except as provided
25 under subsection (h)(1), the eyewitness's description of the
26 perpetrator and the circumstances under which the eyewitness
27 observed the perpetrator, in the eyewitness's own words, shall
28 be obtained and documented immediately prior to a live lineup or
29 photo lineup, unless a description was recorded or otherwise
30 documented by law enforcement personnel before the commencement

1 of the identification procedure. An eyewitness description shall
2 be preserved and provided as part of discovery.

3 (c) Blind lineup administration.--Subject to the exceptions
4 in this subsection, a blind lineup shall be conducted. If the
5 lineup is not blind, the administrator shall state in writing
6 the reason that a blind lineup was not used. A blind lineup
7 shall not be required to be conducted if any of the following
8 apply:

9 (1) A blind lineup is not practicable under the
10 circumstances. The administrator shall state in writing the
11 reasons that a blind lineup is not practicable.

12 (2) The law enforcement agency employs a single lineup
13 administrator who conducts each of its lineups, counsel for
14 the suspect is present at the lineup and the identification
15 procedure complies with subsections (d), (e), (f), (g), (i)
16 and (j).

17 (3) The law enforcement agency audiovisually records the
18 identification process and the identification procedure
19 complies with subsections (d), (e), (f), (g), (i) and (j).

20 (d) Preliminary instructions.--Prior to a live lineup or photo
21 lineup, the administrator shall apprise the eyewitness of all of
22 the following:

23 (1) That the perpetrator may or may not be among the
24 individuals presented in the identification procedure and
25 that the eyewitness shall not assume that the administrator
26 knows who the perpetrator is.

27 (2) That an individual's appearance can change based on
28 facial hair, weight or hair color.

29 (3) That it is just as important to eliminate innocent
30 individuals as it is to identify potential suspects.

1 (4) That the eyewitness should not feel compelled to
2 make an identification.

3 (5) That the investigation will continue whether or not
4 an identification is made.

5 (6) That if an identification is made, the administrator
6 will ask the eyewitness to state, in the eyewitness's own
7 words, how confident the eyewitness is of the identification.

8 (e) Contact among eyewitnesses.--If more than one eyewitness
9 views a live lineup or photo lineup in a session, the
10 administrator may not permit the eyewitnesses to communicate
11 with each other until all identification procedures in the
12 session have been completed. Reasonable efforts shall be made so
13 that an eyewitness does not see or hear the identification or
14 nonidentification made by any other eyewitness.

15 (f) Lineup composition.--The administrator shall conduct the
16 lineup in a manner that:

17 (1) Only one suspect is included in a live lineup or
18 photo lineup.

19 (2) In a live lineup, the following apply:

20 (i) Each lineup participant is out of view of the
21 eyewitness prior to the identification procedure.

22 (ii) At least five fillers are used.

23 (iii) If a lineup participant is requested to speak,
24 move, gesture or change clothing, then all lineup
25 participants shall be asked to do the same.

26 (3) In a photo lineup, the following apply:

27 (i) The photograph of the suspect is placed in a
28 different position in the lineup for each eyewitness.

29 (ii) At least five fillers are used.

30 (iii) The photo lineup shall be preserved in the

1 original form the photo lineup was shown to each
2 eyewitness.

3 (g) Comment after lineup.--An administrator or law
4 enforcement officer may not comment or otherwise indicate
5 whether an identification has identified a suspect.

6 (h) Show-ups.--The following apply to show-ups:

7 (1) If practicable and safe for the eyewitness and law
8 enforcement officers, the individual conducting the show-up
9 shall obtain the eyewitness's description of the perpetrator
10 and shall record or otherwise document the description before
11 commencing the show-up, which shall be preserved and provided
12 as part of discovery. If compliance with this paragraph is
13 not practicable or safe, the individual conducting the show-
14 up shall state in writing the reasons for the failure to
15 comply, which shall be provided as part of discovery.

16 (2) If practicable and safe for the eyewitness and the
17 law enforcement officers, the individual conducting the show
18 up shall apprise the eyewitness of each of the following
19 before commencing the show-up:

20 (i) That the perpetrator may or may not be the
21 individual presented to the eyewitness.

22 (ii) That the eyewitness should not feel compelled
23 to make an identification.

24 (iii) That the investigation will continue whether
25 or not an identification is made.

26 (iv) That if an identification is made, the
27 administrator will ask the eyewitness to state, in the
28 eyewitness's own words, how certain the eyewitness is of
29 the identification.

30 (3) When performing a show-up, law enforcement personnel

1 shall take reasonable measures to preclude the eyewitness
2 from drawing inferences prejudicial to the suspect, including
3 the following:

4 (i) Refraining from suggesting through statements or
5 nonverbal conduct that the suspect is or may be the
6 perpetrator of the crime.

7 (ii) If practicable and safe for the eyewitness and
8 the law enforcement officers, removing handcuffs from the
9 suspect and having the show-up take place at some
10 distance from a squad car.

11 (4) If there are multiple eyewitnesses to a criminal
12 offense under investigation, police shall make reasonable
13 efforts to prevent an eyewitness from seeing or hearing the
14 identification or nonidentification made by any other
15 eyewitness.

16 (5) If an eyewitness is requested to make an
17 identification of more than one suspect at a show-up, the
18 suspects shall be separated and the individual conducting the
19 show-up shall perform a separate show-up for each suspect
20 when practicable and safe for the eyewitness and the law
21 enforcement officers.

22 (i) Confidence statement.--If an eyewitness identifies an
23 individual as the perpetrator at an identification procedure,
24 the administrator shall immediately request a statement from the
25 eyewitness, in the eyewitness's own words, as to the
26 eyewitness's confidence level that the individual identified is
27 the perpetrator. The eyewitness must not be permitted to see or
28 hear any information concerning the identified individual until
29 after the administrator obtains the eyewitness's confidence
30 statement.

1 (j) Record.--The administrator shall make an audiovisual or
2 audio recording of the identification procedure. In addition to
3 the recording, the administrator shall document and include each
4 identification and any nonidentification result obtained during
5 the identification procedure as well as any confidence
6 statement, which shall be preserved and provided as part of
7 discovery.

8 § 8315. Jury instructions.

9 (a) Requirements of subchapter.--At the request of either
10 party, the trial court may instruct the jury as to the
11 requirements of this subchapter and how compliance or failure to
12 comply with the requirements may affect the reliability of the
13 identification.

14 (b) Failure to comply with subchapter.--If sufficient
15 evidence of failure to comply with this subchapter is presented
16 at trial, the trial court shall instruct the jury that the jury
17 may consider the evidence of noncompliance as a reason to view
18 the identification evidence with caution.

19 § 8316. Education and training program.

20 (a) Establishment.--The Pennsylvania State Police and the
21 Municipal Police Officers' Education and Training Commission, in
22 conjunction with the Pennsylvania District Attorneys
23 Association, the Pennsylvania Innocence Project, the
24 Pennsylvania Association of Criminal Defense Lawyers, the Public
25 Defender Association of Pennsylvania and the Juvenile Defenders
26 Association of Pennsylvania, shall establish a comprehensive
27 education and training program on eyewitness identification,
28 including, but not limited to, the procedures under section 8314
29 (relating to eyewitness identification procedures). As
30 scientific findings regarding variables that affect a witness's

1 vision and memory, practices for minimizing contamination and
2 effective eyewitness identification protocols change and
3 advance, the education and training shall be updated
4 accordingly.

5 (b) Administration.--The Pennsylvania State Police and the
6 Municipal Police Officers' Education and Training Commission
7 shall administer to law enforcement officers and recruits the
8 education and training program established under subsection (a).

9 (c) Requirement.--Each law enforcement agency shall require
10 each law enforcement officer who is employed by the law
11 enforcement agency and who performs eyewitness identification
12 procedures to complete the education and training program
13 established under subsection (a).

14 Section 2. This act shall take effect in 60 days.