

# SENATE . . . . . No. 689

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## The Commonwealth of Massachusetts

PRESENTED BY:

*Cynthia S. Creem*

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act improving the accuracy of eyewitness identification procedures.

PETITION OF:

NAME:

*Cynthia S. Creem*

DISTRICT/ADDRESS:

# SENATE . . . . . No. 689

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By Ms. Creem, a petition (accompanied by bill, Senate, No. 689) of Cynthia S. Creem for legislation to improve the accuracy of eyewitness identification procedures. The Judiciary.

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[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE SENATE, NO. 1680 OF 2009-2010.]

## The Commonwealth of Massachusetts

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In the Year Two Thousand Eleven  
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An Act improving the accuracy of eyewitness identification procedures.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Legislative Findings

2                   The General Court hereby finds that a substantial number of convictions of  
3 innocent persons result from erroneous eyewitness identifications. The General Court further  
4 finds that adoption by law enforcement of more careful and uniform procedures for conducting  
5 and documenting eyewitness identifications is likely to reduce the frequency of  
6 misidentification. Avoiding erroneous eyewitness identifications not only serves to avoid  
7 convicting the innocent, but also allows law enforcement to continue its pursuit of the guilty.  
8 To promote these ends, the Legislature enacts the following statute.

9                   SECTION 2. The General Laws are hereby amended by inserting after Chapter  
10 276A, the following new chapter: –

Chapter 276B

Eyewitness Identification Procedures

Section 1. Definitions.

As used in this chapter, the following words shall have the following meanings, unless the context clearly requires otherwise:--

“Filler” shall mean a person or photograph of a person included in a live or a photo lineup who is not a suspect in a criminal investigation.

“Leading Question” shall mean a question fashioned in such a manner as to suggest a particular answer.

“Lineup” shall describe the displaying of a group of individuals including a suspect to an eyewitness so that the eyewitness may determine whether she or he believes the suspect to be the perpetrator of the crime.

“Live lineup” shall refer to a lineup that consists of persons.

“Photo lineup” shall refer to a lineup that consists of photographs.

“Sequential lineup” shall refer to a lineup where the persons or photographs are displayed to the witness one at a time, rather than displayed simultaneously.

“Showup” shall refer to a field identification procedure in which a suspect is displayed to an eyewitness so that the eyewitness may determine whether she or he believes the suspect is the perpetrator of the crime.

30                   Section 2. Answering Emergency Calls

31                   An emergency call-taker or dispatcher must obtain and disseminate, in a nonsuggestive  
32 manner, complete and accurate information from the caller. An emergency call-taker should  
33 avoid asking suggestive or leading questions.

34                   Section 3. Investigation of the Scene of an Incident

35                   A preliminary investigating officer shall obtain, preserve, and use the maximum amount  
36 of accurate information from the scene. The preliminary investigating officer shall reduce to  
37 writing the names and addresses of all persons present at the scene of the crime.

38                   Section 4. Questioning of Witnesses at the Scene of the Incident

39                   Witnesses present at the scene of the incident should be separated prior to being  
40 questioned. The area should be canvassed for other witnesses. All witnesses should be  
41 instructed to avoid discussing details of the incident with other witnesses. The preliminary  
42 investigating officer should:

43                   (i) establish rapport with the witness;

44                   (ii) inquire about the witness's condition;

45                   (iii) avoid leading questions;

46                   (iv) if necessary clarify information received from the witness;

47                   (v) document information obtained from the witness, including the witness'  
48 identity, in a written report;

- 49 (vi) record witness statements as close to verbatim as possible;
- 50 (vii) encourage the witness to contact investigators with any further
- 51 information;
- 52 (viii) instruct the witness to avoid discussing details of the incident with other
- 53 potential witnesses.

54 The original notes of all responding and investigating officers should be

55 preserved, in addition to their formal reports.

## 56 Section 5. Preparation and Use of Books of Photographs of Potential Suspects

57 Display of photographs of previously arrested persons, arranged in a book format, is

58 permitted only when a suspect has not been determined and other reliable sources have been

59 exhausted.

### 60 A. Photographs included in books of potential suspects should:

- 61 (i) be grouped by format to ensure that no photograph unduly stands
- 62 out;
- 63 (ii) be selected so that photographs are uniform with regard to general
- 64 physical characteristics, including, but not limited to, race, age and gender;
- 65 (iii) as a general matter, be grouped by specific crime;
- 66 (iv) be included only when positive identifying information exists for
- 67 all individuals whose photographs are included;

68 (v) be reasonably contemporary;  
69 (vi) be selected so that no individual's photograph is included more  
70 than once.

71 B. The person conducting the procedure should:

72 (i) instruct each witness in the absence of any other witnesses;

73 (ii) describe the book to the witness only as a “collection of  
74 photographs”;

75 (iii) instruct the witness that the person who committed the crime  
76 may or may not be present in the book;

77 (iv) suggest that the witness think back to the event and her or his  
78 frame of mind at the time;

79 (v) instruct the witness to select a photograph if the witness is able  
80 and to state, if possible, the basis on which she or he has made the identification;

81 (vi) assure the witness that regardless of whether the witness makes  
82 an identification the police will continue to investigate the case;

83 (vii) instruct the witness that the person conducting the procedure is  
84 required to ask the witness to state in her or his own words the level of certainty of any  
85 identification.

86 C. The person conducting the procedure should:

(i) document the results of the procedure in writing, including the witness' own words regarding her or his level of certainty of any identification made;

(ii) document and preserve the photographs shown to the witness whether or not an identification is made.

## Section 6. Developing and Using Composite Images

### A. A person preparing a composite image of a perpetrator should:

(i) assess the ability of the witness to provide a description of the perpetrator;

(ii) select the procedure to be used from those available, including, but not limited to, identikit-type, artist, or computer-generated image;

(iii) avoid showing the witness any photographs immediately prior to development of the composite;

(iv) select an environment for conducting the procedure that minimizes distractions

(v) conduct the procedure with each witness separately.

### B. A person preparing a composite image of a perpetrator should:

(i) explain to each witness, in the absence of any other witness, the composite technique to be used and how the composite will be used in the investigation;

105 (ii) instruct the witness to think back to the event and her or his frame  
106 of mind at the time;

107 (iii) determine with the witness whether the composite is a reasonable  
108 representation of the perpetrator.

109 C. A person preparing a composite image of a perpetrator should:

110 (i) document in writing the procedure employed and whether a  
111 satisfactory composite was developed;

112 (ii) preserve all composites generated.

113 Section 7. Interviewing of Eyewitnesses by the Follow-up Investigator

114 A. Prior to conducting the interview, the investigator should:

115 (i) review available information;

116 (ii) plan to conduct the interview as soon as the witness is physically  
117 and emotionally capable;

118 (iii) select an environment that minimizes distractions while  
119 maintaining the comfort level of the witness;

120 (iv) ensure that resources such as an interview room, notepad, tape  
121 recorder, camcorder and/or other useful resources are available;

122 (v) separate the witnesses;



123 (vi) determine the nature of the witness' prior law enforcement  
124 contact, including whether the witness has a prior arrest record or record of convictions.

125 B. Prior to beginning the interview, the investigator should:

126 (i) develop a rapport with the witness;

127 (ii) inquire about the nature of the witness' prior law enforcement  
128 contact related to the incident;

129 (iii) volunteer no specific information about the suspect or the case.

130 C. During the interview, the investigator should:

131 (i) encourage the witness to volunteer information without  
132 prompting;

133 (ii) encourage the witness to report all details even if they seem  
134 trivial;

135 (iii) ask open-ended, general questions (e.g., "what can you tell me  
136 about the car?") and augment with close-ended, specific questions (e.g., "what color was the  
137 car?");

138 (iv) avoid leading questions;

139 (v) caution the witness not to guess;

140 (vi) ask the witness to mentally recreate the circumstances of the  
141 event;

- 142 (vii) encourage nonverbal communication such as drawings, gestures,  
143 and use of objects;
- 144 (viii) avoid interrupting the witness;
- 145 (ix) encourage the witness to contact investigators when additional  
146 information is recalled;
- 147 (x) instruct the witness to avoid discussing details of the incident with  
148 other potential witnesses;
- 149 (xi) encourage the witness to avoid contact with the media or  
150 exposure to media accounts concerning the incident;
- 151 (xii) thank the witness for her or his cooperation.

152 D. Recording Witness Recollections

153 1. The investigator should:

- 154 (i) after informing the witness that the interview will be videotaped,  
155 record the entire contents of the interview by videotape;
- 156 (ii) in circumstances in which videotaping cannot reasonably be  
157 accomplished, and after informing the witness that the interview will be audiotaped, record the  
158 entire contents of the interview by audiotape;
- 159 (iii) record by videotape or audiotape the conversation in which the  
160 witness is informed that the interview will be videotaped or audio taped.

2. In the event that video or audiotaping cannot reasonably be accomplished, the investigator should record the witness' statement in writing as close to verbatim as possible and request that the witness correct any errors in the written transcription and sign the written notes.

3. The investigator should review any written documentation and inquire of the witness whether there is anything she or he wishes to change, add, or emphasize. Any changes should be signed by the witness.

#### E. Assessing the Accuracy of Individual Elements of a Witness' Statement

After conducting the interview, the investigator should:

(i) consider each individual component of the witness' statement separately;

(ii) review each element of the witness' statement in the context of the entire statement and look for inconsistencies within the statement;

(iii) review each element of the statement in the context of evidence known to the investigator from other sources, including but not limited to, other witnesses' statements and physical evidence.

#### F. Maintaining Contact with the Witness

During any post interview contact with the witness, the investigator should:

(i) reestablish rapport with the witness;

- 180 (ii) inquire whether the witness has recalled any additional  
181 information;
- 182 (iii) follow interviewing and documentation procedures in Section 7  
183 A-D;
- 184 (iv) provide no information from any other sources.

185 Section 8. Field Identification Procedures: Show-ups

186 A. When conducting a show-up, the investigator should:

- 187 (i) determine and document a description of the perpetrator prior to  
188 the show-up;
- 189 (ii) when possible transport the witness to the location of the detained  
190 suspect;
- 191 (iii) when multiple witnesses are involved;
- 192 a. separate the witnesses and instruct them not to discuss  
193 the incident with other witnesses
- 194 b. consider using other identification procedures such as a  
195 lineup or photo array
- 196 for the remaining witnesses when a witness has made a positive identification
- 197 (iv) caution the witness that the person she or he is viewing may or  
198 may not be the perpetrator;

199 (v) obtain and document a statement of the degree of certainty for  
200 both identifications and nonidentifications.

201 B. When conducting a show-up, the investigator should:

202 (i) document the time and location of the procedure;

203 (ii) record both identification and nonidentification results in writing,  
204 including the witness' own words regarding her or his level of certainty.

205 Section 9. Procedures for Eyewitness Identification of Suspects: Live

206 Lineup

207 A. In composing a live lineup, the investigator should

208 (i) include only one suspect in each identification procedure;

209 (ii) select fillers who generally fit the witness' description of the  
210 perpetrator;

211 (iii) when there is a limited or inadequate description of the  
212 perpetrator provided by the witness or when the witness' description of the perpetrator differs  
213 significantly from the appearance of the suspect, choose fillers who resemble the suspect in  
214 significant features;

215 (iv) place suspects in different positions in each lineup both across  
216 cases and with multiple witnesses in the same case;

217 (v) position the suspect randomly unless the suspect's attorney  
218 requests a particular position;

219 (vi) include a minimum of four fillers per identification procedure;

220 (vii) when showing a new suspect, avoid reusing fillers in lineups  
221 shown to the same witness;

222 (vii) be aware that complete uniformity of features between suspects  
223 and fillers is not required;

224 (viii) avoid using fillers who so closely resemble the suspect that a  
225 person familiar with the suspect might find it difficult to distinguish the suspect from the fillers;

226 (ix) create a consistent appearance between the suspect and fillers  
227 with respect to any unique feature, such as scars or tattoos, used to describe the perpetrator by  
228 artificially adding or concealing that feature.

229 B. Instructing the Witness Prior to Viewing a Lineup

230 Prior to presenting a live lineup, the investigator should:

231 (i) instruct the witness that she or he will be asked to view a group of  
232 individuals;

233 (ii) instruct the witness that it is just as important to clear the innocent  
234 from suspicion as to identify the guilty;

235 (iii) instruct the witness that individuals in the lineup may not appear  
236 exactly as they did on the date of the incident because features such as head and facial hair are  
237 subject to change;

238 (iv) instruct the witness that the person who committed the crime  
239 may or may not be present in the group;

240 (v) assure the witness that the police will continue to investigate the  
241 incident regardless of whether an identification is made;

242 (vi) instruct the witness that the procedure requires the investigator to  
243 ask the witness to state in her or his own words the level of certainty of any identification.

#### 244 C. Conducting the Live Lineup

245 1. In order to ensure that inadvertent verbal cues or body language  
246 do not influence a witness, whenever practical, considering the time of day, day of the week, and  
247 other personnel conditions within the agency or department, the person conducting the live  
248 lineup identification procedure should be someone other than the primary investigator assigned  
249 to the case. In those cases where the primary investigating officer conducts the live lineup  
250 identification procedure, she or he should be careful to avoid inadvertent signaling to the witness  
251 of the "correct" response.

252 2. Live lineup identification procedures should be conducted  
253 sequentially.

254 3. When presenting a live lineup, the lineup administrator should  
255 provide the viewing instructions to the witness set forth at Section 9B.

256 4. When presenting a live lineup, the lineup administrator should  
257 also provide the following instructions to the witness:

258 (i) individuals will be viewed one at a time;

259 (ii) individuals will be presented in random order;

260 (iii) take as much time as is needed in making a decision  
261 about each individual before moving to the next one;

262 (iv) if the person who committed the crime is present,  
263 identify her or him;

264 (v) all individuals will be presented, even if an  
265 identification is made or the procedure will be stopped at the point of an identification  
266 (consistent with jurisdictional/departamental procedures).

267 5. Begin with all lineup participants out of the view of the witness.

268 6. Instruct all those present at the lineup not to suggest in any way the  
269 position or identity of the suspect in the lineup.

270 7. Present each individual to the witness separately, in a previously  
271 determined order, removing those previously shown.

272 8. Ensure that any identification actions such as speaking or moving  
273 are performed by all members of the lineup.

274 9. Avoid saying anything to the witness that may influence the  
275 witness' selection.



276 10. If an identification is made, avoid reporting to the witness any  
277 information regarding the individual she or he has selected prior to obtaining the witness'  
278 statement of certainty.

279 11. After notifying the witness that his or her statements will be  
280 recorded, document any identification results and witness' statement of certainty by video  
281 recording. When video recording cannot reasonably be accomplished, document any  
282 identification results and witness' statement of certainty by audio recording

283 12. Document the lineup procedures and content in writing,  
284 including:

285 (i) identification information of lineup participants;

286 (ii) names of all persons present at the lineup;

287 (iii) date and time the identification procedure was  
288 conducted.

289 13. Document the lineup by video. This documentation should be of  
290 a quality that represents the lineup clearly and fairly. If video documentation cannot reasonably  
291 be accomplished, document the lineup by photo. Photo documentation can be of either the group  
292 or each individual.

293 14. Instruct the witness not to discuss the identification procedure or  
294 its results with other witnesses involved in the case and discourage contact with the media.

295 Section 10. Procedures for Eyewitness Identification of Suspects: Photographic  
296 Array

297                   A. In composing a photo lineup, the investigator should:

298                   (i) include only one suspect in each identification procedure;

299                   (ii) select fillers who generally fit the witness' description of the

300 perpetrator;

301                   (iii) when there is a limited or inadequate description of the

302 perpetrator provided by the witness, or when the witness' description of the perpetrator differs

303 significantly from the appearance of the suspect, select fillers who resemble the suspect in

304 significant features;

305                   (iv) if multiple photos of the suspect are reasonably available to the

306 investigator, select a photo that resembles the suspect description or appearance at the time of the

307 incident;

308                   (v) include a minimum of five fillers per identification procedure;

309                   (vi) be aware that complete uniformity of features between suspects

310 and fillers is not required;

311                   (vii) avoid using fillers who so closely resemble the suspect that a

312 person familiar with the suspect might find it difficult to distinguish the suspect from the fillers;

313                   (viii) create a consistent appearance between the suspect and fillers

314 with respect to any unique feature, such as scars or tattoos, used to describe the perpetrator by

315 artificially adding or concealing that feature;

316 (ix) place suspects in different positions in each photo array both  
317 across cases and with multiple witnesses in the same case;

318 (x) position the photo of the suspect randomly unless the suspect's  
319 attorney requests a particular position;

320 (xi) when showing a new suspect, avoid reusing fillers in photo  
321 arrays already shown to the same witness;

322 (xii) ensure that no writings or information concerning previous  
323 arrests will be visible to the witness;

324 (xiii) view the completed spread to ensure that the suspect does not  
325 unduly stand out;

326 (xiv) preserve the presentation order of the photo array;

327 (xv) preserve the photos in their original condition.

328 B. Instructing the Witness Prior to Viewing a Photo Lineup

329 Prior to presenting a photo lineup, the investigator should:

330 (i) instruct the witness that she or he will be asked to view a set of  
331 photographs;

332 (ii) instruct the witness that it is just as important to clear the innocent  
333 from suspicion as to identify the guilty;

334 (iii) instruct the witness that individuals in the photo lineup may not  
335 appear exactly as they did on the date of the incident because features such as head and facial  
336 hair are subject to change;

337 (iv) instruct the witness that the person who committed the crime  
338 may or may not be present in the photographs presented;

339 (v) assure the witness that the police will continue to investigate the  
340 incident regardless of whether an identification is made;

341 (vi) instruct the witness that the procedure requires the investigator to  
342 ask the witness to state in her or his own words the level of certainty of any identification.

343 C. Conducting the Photo Lineup

344 1. In order to ensure that inadvertent verbal cues or body language do  
345 not influence a witness, whenever practical, considering the time of day, day of the week, and  
346 other personnel conditions within the agency or department, the person conducting the photo  
347 identification procedure should be someone other than the primary investigator assigned to the  
348 case. In those cases where the primary investigating officer conducts the photo identification  
349 procedure, she or he should be careful to avoid inadvertent signaling to the witness of the  
350 "correct" response.

351 2. Photo identification procedures should be conducted sequentially.

352 3. When presenting the photo lineup, the lineup administrator should  
353 provide the viewing instructions to the witness set forth above at Section 10B.

354 4. When presenting a photo lineup, the lineup administrator should  
355 also provide the following instructions to the witness:

356 (i) individual photographs will be viewed one at a time;

357 (ii) the photos will be presented in random order;

358 (iii) take as much time as is needed in making a decision  
359 about each photo before moving to the next one;

360 (iv) all photos will be shown, even if an identification is  
361 made; or the procedure will be stopped at the point of an identification (consistent with  
362 jurisdictional/departmental procedures).

363 5. The photo lineup administrator should confirm that the witness  
364 understands the nature of the sequential procedure.

365 6. The photo lineup administrator should present each photo to the  
366 witness separately, in a previously determined order, removing those previously shown.

367 7. The photo lineup administrator should avoid saying anything to the  
368 witness that may influence the witness's selection.

369 8. Once identification is made, the photo lineup administrator should  
370 avoid reporting to the witness any information regarding the individual she or he has selected  
371 prior to obtaining the witness' statement of certainty.

372                               9. After informing the witness that her or his statements will be  
373 recorded, the photo lineup administrator should record any identification results and witness'  
374 statement of certainty either by video or audio recording. When video or audio recording cannot  
375 reasonably be accomplished, the identification results and a verbatim statement of  
376 certainty should be documented in writing and signed by the witness.

377                               10. The photo lineup administrator should document in writing the  
378 photo  
379 lineup procedures, including:

380   (i) identification information and sources of all photos  
381 used;

382   (ii) names of all persons present at the photo lineup;

383   (iii) date and time of the identification procedure.

384                               11. The photo lineup administrator should instruct the witness not to  
385 discuss the identification procedure or its results with other witnesses involved in the case and  
386 should discourage contact with the media.

## 387                               Section 11. Remedies for Noncompliance

388                               A. Evidence of a failure to comply with any of the provisions of this statute  
389 shall be considered by the trial courts in adjudicating motions to suppress eyewitness  
390 identification.

391                   B. Evidence of a failure to comply with any of the provisions of this statute  
392 shall be admissible in support of claims of eyewitness misidentification so long as such evidence  
393 is otherwise admissible.

394                   C. When evidence of a failure to comply with any of the provisions of this  
395 statute has been presented at trial, the jury shall be instructed that it may consider credible  
396 evidence of noncompliance in determining the reliability of eyewitness identifications.