SENATE DOCKET, NO. 494 FILED ON: 1/19/2011

SENATE . . . . . No. 689

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:	DISTRICT/ADDRESS:
Cynthia S. Creem	

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SENATE . . . . . No. 689

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.

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

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

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:

SECTION 1. Legislative Findings

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

SECTION 2. The General Laws are hereby amended by inserting after Chapter 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.

Section 2. Answering Emergency Calls

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

Section 3. Investigation of the Scene of an Incident

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

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

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

(i) establish rapport with the witness;

(ii) inquire about the witness's condition;

(iii) avoid leading questions;

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

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

(vi) record witness statements as close to verbatim as possible;

(vii) encourage the witness to contact investigators with any further information;

(viii) instruct the witness to avoid discussing details of the incident with other potential witnesses.

The original notes of all responding and investigating officers should be preserved, in addition to their formal reports.

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

Display of photographs of previously arrested persons, arranged in a book format, is permitted only when a suspect has not been determined and other reliable sources have been exhausted.

A. Photographs included in books of potential suspects should:

(i) be grouped by format to ensure that no photograph unduly stands out;

(ii) be selected so that photographs are uniform with regard to general physical characteristics, including, but not limited to, race, age and gender;

(iii) as a general matter, be grouped by specific crime;

(iv) be included only when positive identifying information exists for all individuals whose photographs are included;

(v) be reasonably contemporary;

(vi) be selected so that no individual's photograph is included more than once.

B. The person conducting the procedure should:

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

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

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

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

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

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

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

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;

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

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

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

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

(ii) preserve all composites generated.

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

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

(i) review available information;

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

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

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

(v) separate the witnesses;

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

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

(i) develop a rapport with the witness;

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

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

C. During the interview, the investigator should:

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

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

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

(iv) avoid leading questions;

(v) caution the witness not to guess;

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

(vii) encourage nonverbal communication such as drawings, gestures, and use of objects;

(viii) avoid interrupting the witness;

(ix) encourage the witness to contact investigators when additional information is recalled;

(x) instruct the witness to avoid discussing details of the incident with other potential witnesses;

(xi) encourage the witness to avoid contact with the media or exposure to media accounts concerning the incident;

(xii) thank the witness for her or his cooperation.

D. Recording Witness Recollections

1. The investigator should:

(i) after informing the witness that the interview will be videotaped, record the entire contents of the interview by videotape;

(ii) in circumstances in which videotaping cannot reasonably be accomplished, and after informing the witness that the interview will be audiotaped, record the entire contents of the interview by audiotape;

(iii) record by videotape or audiotape the conversation in which the 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;

(ii) inquire whether the witness has recalled any additional information;

(iii) follow interviewing and documentation procedures in Section 7 A-D;

(iv) provide no information from any other sources.

Section 8. Field Identification Procedures: Show-ups

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

(i) determine and document a description of the perpetrator prior to the show-up;

(ii) when possible transport the witness to the location of the detained suspect;

(iii) when multiple witnesses are involved;

a. separate the witnesses and instruct them not to discuss the incident with other witnesses

b. consider using other identification procedures such as a lineup or photo array

for the remaining witnesses when a witness has made a positive identification

(iv) caution the witness that the person she or he is viewing may or may not be the perpetrator;

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

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

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

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

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

A. In composing a live lineup, the investigator should

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

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

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

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

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

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

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

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

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

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

B. Instructing the Witness Prior to Viewing a Lineup

Prior to presenting a live lineup, the investigator should:

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

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

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

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

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

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

C. Conducting the Live Lineup

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

2. Live lineup identification procedures should be conducted sequentially.

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

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

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

(ii) individuals will be presented in random order;

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

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

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

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

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

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

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

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

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

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

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

(i) identification information of lineup participants;

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

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

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

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

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

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

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

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

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

(iv) if multiple photos of the suspect are reasonably available to the investigator, select a photo that resembles the suspect description or appearance at the time of the incident;

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

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

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

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

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

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

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

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

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

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

(xv) preserve the photos in their original condition.

B. Instructing the Witness Prior to Viewing a Photo Lineup

Prior to presenting a photo lineup, the investigator should:

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

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

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

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

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

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

C. Conducting the Photo Lineup

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

2. Photo identification procedures should be conducted sequentially.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) date and time of the identification procedure.

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

Section 11. Remedies for Noncompliance

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

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

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