

SENATE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Ms. 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 passage of the accompanying bill:

An Act to improve the accuracy of eyewitness identification procedures.

PETITION OF:

NAME:

Ms. Creem

DISTRICT/ADDRESS:

First Middlesex and Norfolk

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. S00908 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT TO IMPROVE 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 innocent persons
3 result from erroneous eyewitness identifications. The General Court further finds that adoption
4 by law enforcement of more careful and uniform procedures for conducting and documenting
5 eyewitness identifications is likely to reduce the frequency of misidentification. Avoiding
6 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 276A, the
10 following new chapter: –

11

Chapter 276B

12

Eyewitness Identification Procedures

13 Section 1. Definitions.

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

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

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

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

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

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

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

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

30 Section 2. Answering Emergency Calls

31 An emergency call-taker or dispatcher must obtain and disseminate, in a nonsuggestive manner,
32 complete and accurate information from the caller. An emergency call-taker should avoid asking
33 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 of
36 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 questioned. The
40 area should be canvassed for other witnesses. All witnesses should be instructed to avoid
41 discussing details of the incident with other witnesses. The preliminary investigating officer
42 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' identity, in a written
48 report;
- 49 (vi) record witness statements as close to verbatim as possible;
- 50 (vii) encourage the witness to contact investigators with any further information;
- 51 (viii) instruct the witness to avoid discussing details of the incident with other potential
52 witnesses.

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

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

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

58 A. Photographs included in books of potential suspects should:

- 59 (i) be grouped by format to ensure that no photograph unduly stands out;
- 60 (ii) be selected so that photographs are uniform with regard to general physical characteristics,
61 including, but not limited to, race, age and gender;
- 62 (iii) as a general matter, be grouped by specific crime;

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

65 (v) be reasonably contemporary;

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

67 B. The person conducting the procedure should:

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

69 (ii) describe the book to the witness only as a "collection of photographs";

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

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

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

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

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

79 C. The person conducting the procedure should:

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

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

84 Section 6. Developing and Using Composite Images

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

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

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

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

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

92 (v) conduct the procedure with each witness separately.

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

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

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

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

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

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

102 (ii) preserve all composites generated.

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

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

105 (i) review available information;

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

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

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

111 (v) separate the witnesses;

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

- 114 B. Prior to beginning the interview, the investigator should:
- 115 (i) develop a rapport with the witness;
- 116 (ii) inquire about the nature of the witness' prior law enforcement contact related to the incident;
- 117 (iii) volunteer no specific information about the suspect or the case.
- 118 C. During the interview, the investigator should:
- 119 (i) encourage the witness to volunteer information without prompting;
- 120 (ii) encourage the witness to report all details even if they seem trivial;
- 121 (iii) ask open-ended, general questions (e.g., "what can you tell me about the car?") and augment
122 with close-ended, specific questions (e.g., "what color was the car?");
- 123 (iv) avoid leading questions;
- 124 (v) caution the witness not to guess;
- 125 (vi) ask the witness to mentally recreate the circumstances of the event;
- 126 (vii) encourage nonverbal communication such as drawings, gestures, and use of objects;
- 127 (viii) avoid interrupting the witness;
- 128 (ix) encourage the witness to contact investigators when additional information is recalled;
- 129 (x) instruct the witness to avoid discussing details of the incident with other potential witnesses;

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

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

133 D. Recording Witness Recollections

134 1. The investigator should:

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

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

140 (iii) record by videotape or audiotape the conversation in which the witness is informed that the
141 interview will be videotaped or audio taped.

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

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

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

149 After conducting the interview, the investigator should:

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

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

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

156 F. Maintaining Contact with the Witness

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

158 (i) reestablish rapport with the witness;

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

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

161 (iv) provide no information from any other sources.

162 Section 8. Field Identification Procedures: Show-ups

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

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

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

- 166 (iii) when multiple witnesses are involved;
- 167 a. separate the witnesses and instruct them not to discuss the incident with other witnesses
- 168 b. consider using other identification procedures such as a lineup or photo array
- 169 for the remaining witnesses when a witness has made a positive identification
- 170 (iv) caution the witness that the person she or he is viewing may or may not be the perpetrator;
- 171 (v) obtain and document a statement of the degree of certainty for both identifications and
- 172 nonidentifications.

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

- 174 (i) document the time and location of the procedure;
- 175 (ii) record both identification and nonidentification results in writing, including the witness' own
- 176 words regarding her or his level of certainty.

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

178 Lineup

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

- 180 (i) include only one suspect in each identification procedure;
- 181 (ii) select fillers who generally fit the witness' description of the perpetrator;

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

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

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

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

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

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

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

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

196 B. Instructing the Witness Prior to Viewing a Lineup

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

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

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

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

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

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

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

209 C. Conducting the Live Lineup

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

216 2. Live lineup identification procedures should be conducted sequentially.

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

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

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

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

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

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

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

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

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

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

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

- 235 9. Avoid saying anything to the witness that may influence the witness' selection.
- 236 10. If an identification is made, avoid reporting to the witness any information regarding the
237 individual she or he has selected prior to obtaining the witness' statement of certainty.
- 238 11. After notifying the witness that his or her statements will be recorded, document any
239 identification results and witness' statement of certainty by video recording. When video
240 recording cannot reasonably be accomplished, document any identification results and witness'
241 statement of certainty by audio recording
- 242 12. Document the lineup procedures and content in writing, including:
- 243 (i) identification information of lineup participants;
- 244 (ii) names of all persons present at the lineup;
- 245 (iii) date and time the identification procedure was conducted.
- 246 13. Document the lineup by video. This documentation should be of a quality that represents
247 the lineup clearly and fairly. If video documentation cannot reasonably be accomplished,
248 document the lineup by photo. Photo documentation can be of either the group or each
249 individual.
- 250 14. Instruct the witness not to discuss the identification procedure or its results with other
251 witnesses involved in the case and discourage contact with the media.
- 252 Section 10. Procedures for Eyewitness Identification of Suspects: Photographic Array

- 253 A. In composing a photo lineup, the investigator should:
- 254 (i) include only one suspect in each identification procedure;
- 255 (ii) select fillers who generally fit the witness' description of the perpetrator;
- 256 (iii) when there is a limited or inadequate description of the perpetrator provided by the witness,
257 or when the witness' description of the perpetrator differs significantly from the appearance of
258 the suspect, select fillers who resemble the suspect in significant features;
- 259 (iv) if multiple photos of the suspect are reasonably available to the investigator, select a photo
260 that resembles the suspect description or appearance at the time of the incident;
- 261 (v) include a minimum of five fillers per identification procedure;
- 262 (vi) be aware that complete uniformity of features between suspects and fillers is not required;
- 263 (vii) avoid using fillers who so closely resemble the suspect that a person familiar with the
264 suspect might find it difficult to distinguish the suspect from the fillers;
- 265 (viii) create a consistent appearance between the suspect and fillers with respect to any unique
266 feature, such as scars or tattoos, used to describe the perpetrator by artificially adding or
267 concealing that feature;
- 268 (ix) place suspects in different positions in each photo array both across cases and with multiple
269 witnesses in the same case;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

292 C. Conducting the Photo Lineup

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

299 2. Photo identification procedures should be conducted sequentially.

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

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

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

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

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

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

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

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

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

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

319 9. After informing the witness that her or his statements will be recorded, the photo lineup
320 administrator should record any identification results and witness' statement of certainty either
321 by video or audio recording. When video or audio recording cannot

322 reasonably be accomplished, the identification results and a verbatim statement of certainty
323 should be documented in writing and signed by the witness.

324 10. The photo lineup administrator should document in writing the photo

325 lineup procedures, including:

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

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

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

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

332 Section 11. Remedies for Noncompliance

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

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

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