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MODEL LEGISLATION, 2011 STATE LEGISLATIVE SESSIONS

**AN ACT TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATIONS**

SECTION 1. LEGISLATIVE INTENT

The legislature finds that:

- A. The goal of a police investigation is to apprehend the person or persons responsible for the commission of a crime;
- B. Mistaken eyewitness identification has been shown to have contributed to the wrongful conviction in approximately 75% of the nation's 275 exonerations;
- C. Over the past 30 years, a large body of peer-reviewed, scientific research and practice has emerged showing that simple systemic changes in administering eyewitness identification procedures can greatly improve the accuracy of those identifications;
- D. Policies and procedures to improve the accuracy of eyewitness identifications such as those recommended by the U.S. National Institute of Justice, the American Bar Association, the New Jersey Office of the Attorney General, the Wisconsin Office of the Attorney General, the California Commission on the Fair Administration of Justice, and the North Carolina Actual Innocence Commission are readily available;
- E. More accurate eyewitness identifications increase the ability of police and prosecutors to convict the guilty and protect the innocent;
- F. The integrity of [State's] criminal justice process is enhanced by adherence to best practices in evidence gathering; and



G. [State] will benefit from the improvement of the accuracy of eyewitness identifications.

## SECTION 2: DEFINITIONS

For the purposes of this Act:

- A. “Administrator” means the person conducting the photo or live lineup;
- B. “Suspect” means the person believed by law enforcement to be the possible perpetrator of the crime;
- C. “Blind” means the administrator does not know the identity of the suspect;
- D. “Blinded” means the administrator may know who the suspect is, but by virtue of the use of procedures and/or technology to accomplish this purpose, does not know which lineup member is being viewed by the eyewitness;
- E. “Contamination” occurs when an eyewitness’s memory of a person or event becomes altered, replaced, or otherwise impaired as a result of exposure to extrinsic information related to that person or event.
- F. “Eyewitness” means a person who observes another person at or near the scene of an offense;
- G. “Filler” means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure;
- H. “Identification procedure” means a live lineup, a photo lineup, or a showup.
- I. “Live lineup” means an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the

perpetrator;

J. “Photo lineup” means an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator; and

K. “Showup” means an identification procedure in which an eyewitness is presented with a single suspect for the purpose of determining whether the eyewitness identifies this individual as the perpetrator.

### SECTION 3. EYEWITNESS IDENTIFICATION PROCEDURES

Any criminal justice entity conducting eyewitness identification procedures shall adopt specific procedures for conducting photo and live lineups that comply with the following requirements:

A. Prior to a photo or live lineup, law enforcement shall record as complete a description as possible of the perpetrator provided by the eyewitness, in the eyewitness’s own words. This statement shall also include information regarding the conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting, weather conditions, and other impairments, including but not limited to alcohol, drugs, stress, and visual/auditory disabilities. The eyewitness shall also be asked if he needs glasses or contact lenses and whether he was wearing them at the time of the offense. The administrator shall note

whether the eyewitness was wearing glasses or contact lenses at the time of the identification procedure.

B. All live and photographic displays shall be conducted blind unless to do so would place an undue burden on law enforcement or the investigation. If such circumstances are properly documented pursuant to subsections S, T and U of this Section, investigators may administer a photographic display blinded;

C. The eyewitness shall be instructed, without other eyewitnesses present, prior to any live or photo lineup that:

1. The perpetrator may or may not be among the persons in the identification procedure or, in the case of a showup, may or may not be the person that is presented to the eyewitness;
2. The administrator does not know who the perpetrator is;
3. The eyewitness should not feel compelled to make an identification;
4. The investigation will continue whether or not an identification is made;
5. The procedure requires the administrator to ask the eyewitness to state, in his own words, how certain he is of any identification; and
6. The eyewitness is not to discuss the identification procedure or its results with other eyewitnesses involved in the case and should not speak with the media;

D. In a photo lineup, the photograph of the suspect shall be contemporary and shall resemble his or her appearance at the time of the offense;

E. In a photo lineup, there shall be no characteristics of the photographs themselves or the background context in which they are placed which shall make any of the photographs unduly stand out;

F. A photo or live lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers;

G. In a photo or live lineup, fillers shall possess the following characteristics:

1. All fillers selected shall resemble the eyewitness's description of the perpetrator in significant features (i.e., face, weight, build, skin tone, etc.), including any unique or unusual features (i.e., scar, tattoo, etc.);
2. At least five fillers shall be included in a photo lineup, in addition to the suspect;
3. At least four fillers shall be included in a live lineup, in addition to the suspect; and
4. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the instant suspect participates shall be different from the fillers used in any prior lineups;

H. If there are multiple eyewitnesses:

1. Each eyewitness shall view photo or live lineups separately;
2. The suspect shall be placed in a different position in the live lineup and/or photo lineup for each eyewitness; and

3. The eyewitnesses shall not be permitted to communicate with each other until all identification procedures have been completed;
  - I. In an identification procedure, no writings or information concerning the instant or any previous arrest, indictment or conviction of the suspect shall be visible or made known to the eyewitness;
  - J. In a live lineup, any identifying actions, such as speech, gestures or other movements, shall be performed by all lineup participants;
  - K. In a live lineup, all lineup participants must be out of view of the eyewitness prior to the identification procedure;
  - L. When there are multiple suspects, each identification procedure shall include only one suspect;
  - M. Nothing shall be said to the eyewitness regarding the suspect's position in the photo or live lineup;
  - N. Nothing shall be said to the eyewitness that might influence the eyewitness's identification of any particular lineup member;
  - O. If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator;

P. If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person before the administrator obtains the eyewitness's confidence statement about the selection;

Q. A record of the identification procedure shall be made that includes all identification and non-identification results obtained during the identification procedures, signed by the eyewitnesses;

R. Efforts shall be made to perform a live or photo lineup instead of a showup.

1. Showups shall only be performed using a live suspect and only in exigent circumstances that require the immediate display of a suspect to an eyewitness.
2. Investigators shall not conduct a showup with a single photograph; if investigators wish to determine if an eyewitness can make an identification using a photograph, a photographic display must be used.
3. In the event of the administration of a showup procedure:
  - a. A full and detailed description of the perpetrator shall be provided by the eyewitness before the eyewitness observes the suspect. This statement shall also include information regarding the conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting, weather conditions, and other impairments, including but not limited to alcohol, drugs, stress, and visual/auditory disabilities. The eyewitness shall be also be asked if he needs glasses or contact lenses and whether he was wearing them at

the time of the offense. The administrator shall note whether the eyewitness was wearing glasses or contact lenses at the time of the identification procedure.

b. The eyewitness shall be transported to a neutral, non-law enforcement location where the suspect is being detained for the purposes of a showup procedure.

c. The eyewitness shall be provided with instructions prior to the showup, including:

i. The perpetrator may or may not be the person that is presented to the eyewitness;

ii. The eyewitness should not feel compelled to make an identification;

iii. The investigation will continue whether or not an identification is made;

iv. The procedure requires the administrator to ask the eyewitness to state, in his own words, how certain he is of any identification; and

v. The eyewitness is not to discuss the identification procedure or its results with other eyewitnesses involved in the case and should not speak with the media;

d. Measures shall be taken by investigators at the showup, including the administrator of the showup, to reduce potentially damaging or prejudicial inferences that may be drawn by the eyewitness, including:

i. Refraining from suggesting, through statements or non-verbal conduct, that the suspect is or may be the perpetrator of the crime;

- ii. Removing the suspect from a squad car; and
    - iii. When practicable, removing handcuffs from the suspect;
  - e. If there are multiple eyewitnesses, only one eyewitness at a time shall participate in the showup procedure:
    - i. Only one of the eyewitnesses shall be present at the location of the showup procedure;
    - ii. If a positive identification is made, and an arrest is justified, additional eyewitnesses shall be shown live or photo lineups; and
  - f. If there are multiple suspects, these suspects shall be separated and subjected to separate showup procedures.
  - g. If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator.
  - h. Investigators shall photograph a suspect at the time and place of the showup to preserve a record of the appearance of the suspect at the time of the show-up procedure.
- S. Unless impracticable, a video record of the identification procedure shall be made that includes the following information:



1. All identification and non-identification results obtained during the identification procedures, signed by the eyewitnesses, including the eyewitnesses' confidence statements;
2. The names of all persons present at the identification procedure, including the name of the lineup administrator and whether the administrator was blind, blinded or non-blind;
3. When it is impracticable for a blind administrator to conduct the eyewitness identification procedure, the investigator shall state in writing the reason therefor;
4. The date and time of the identification procedure;
5. In a photo or live lineup, any eyewitness identification(s) of (a) filler(s); and
6. In a photo or live lineup, the names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup;

T. If a video record of the lineup is impracticable, the officer conducting the lineup shall document the reason therefor, and an audio record of the identification procedure shall be made which includes the items specified in Section 3, clause S, subclauses 1-6 of this Act. The audio record shall be supplemented by the all of the photographs used in a photo lineup, and photographs of all of the individuals used in a live lineup or showup; and

U. If both a video and audio record of the lineup are impracticable, the officer conducting the lineup shall document in writing the reason therefor, and a written record of the lineup shall be made which includes the items specified in Section 3, clause S, subclauses 1-6 of this Act. The written record shall be supplemented by the all of the photographs used in a photo lineup, and photographs of all of the individuals used in a live lineup or showup.

#### SECTION 4. REMEDIES FOR NONCOMPLIANCE OR OTHER CONTAMINATION

For any photo or live lineup, or showup procedure that was administered after the date upon which Section 3 of this Act took effect:

##### A. PRETRIAL RELIABILITY HEARING

Whenever the prosecution intends to offer eyewitness identification evidence at trial, the defendant is entitled to a pretrial evidentiary hearing as to the reliability of such evidence. At the hearing, the court shall examine whether law enforcement failed to substantially comply with any requirement contained in Section 3 of this statute, whether any other suggestive identification procedures were employed, whether the eyewitness identification evidence may have been otherwise contaminated by state or non-state actors, and any other factors bearing upon the reliability of the identification evidence, including but not limited to characteristics of the witness, perpetrator, and/or event.

##### B. EVIDENCE OF FAILURE TO COMPLY OR OTHER CONTAMINATION

If, at the pretrial reliability hearing required by Section 4, subsection A of this Act, the trial court finds evidence of a failure of law enforcement officials or prosecuting agencies to comply with any of the provisions of Section 3 of this Act, of the use of any other suggestive identification procedures, or of any other contamination of identification evidence by state or non-state actors, it shall:

1. consider such evidence in determining the admissibility of the eyewitness identification; and



2. suppress such evidence when there is a substantial probability of eyewitness misidentification; or
3. instruct the jury, when such evidence is admissible, both when admitting such evidence and prior to the jury's deliberation, where applicable:
  - a. that the provisions of Section 3 were designed to reduce the risk of misidentification and that it may consider credible evidence of noncompliance when assessing the reliability of the eyewitness identification evidence;
  - b. that the contamination of the eyewitness identification evidence by factors other than state noncompliance with any of the provisions of the statute, including but not limited to the use of any other suggestive identification procedures, and/or suggestive actions of non-state actors that increased the risk of misidentification.
  - c. that it should view the identification evidence with distrust, if the court has determined that its confidence in the reliability of the eyewitness identification has been sufficiently undermined.

#### SECTION 5. TRAINING OF LAW ENFORCEMENT OFFICERS

The Department of Public Safety shall create, administer and conduct training programs for law enforcement officers and recruits regarding the methods, technical aspects and scientific findings regarding the basis of the eyewitness identification practices and procedures referenced in this Act.



SECTION 6. EFFECTIVE DATE

This Act shall take effect on [date].