

SENATE No. 00689

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 passage of the accompanying bill:

An Act improving the accuracy of eyewitness identification procedures
.

PETITION OF:

NAME:
Cynthia S. Creem

DISTRICT/ADDRESS:
First Middlesex and Norfolk

SENATE No. 00689

By Ms. Creem, petition (accompanied by bill, Senate, No. 689) of Creem for legislation to improve the accuracy of eyewitness identification procedures [Joint Committee on 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:

1 SECTION 1. Legislative Findings

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

9 SECTION 2. The General Laws are hereby amended by inserting after Chapter 276A,
10 the 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
15 the 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
48 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 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
54 addition to 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
61 physical characteristics, 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
64 individuals whose photographs are included;

65 (v) be reasonably contemporary;

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

68 B. The person conducting the procedure should:

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

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

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

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

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

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

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

81 C. The person conducting the procedure should:

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

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

86 Section 6. Developing and Using Composite Images

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

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

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

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

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

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

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

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

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

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

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

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

106 (ii) preserve all composites generated.

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

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

109 (i) review available information;

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

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

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

116 (v) separate the witnesses;

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

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

120 (i) develop a rapport with the witness;

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

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

124 C. During the interview, the investigator should:

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

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

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

129 (iv) avoid leading questions;

130 (v) caution the witness not to guess;

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

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

134 (viii) avoid interrupting the witness;

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

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

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

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

142 D. Recording Witness Recollections

143 1. The investigator should:

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

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

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

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

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

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

159 After conducting the interview, the investigator should:

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

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

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

166 F. Maintaining Contact with the Witness

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

168 (i) reestablish rapport with the witness;

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

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

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

172 Section 8. Field Identification Procedures: Show-ups

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

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

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

- 178 (iii) when multiple witnesses are involved;
- 179 a. separate the witnesses and instruct them not to discuss the
180 incident with other witnesses
- 181 b. consider using other identification procedures such as a lineup
182 or photo array
- 183 for the remaining witnesses when a witness has made a positive identification
- 184 (iv) caution the witness that the person she or he is viewing may or may not
185 be the perpetrator;
- 186 (v) obtain and document a statement of the degree of certainty for both
187 identifications and nonidentifications.

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

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

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

193 Lineup

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

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

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

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

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

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

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

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

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

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

215 B. Instructing the Witness Prior to Viewing a Lineup

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

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

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

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

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

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

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

230 C. Conducting the Live Lineup

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

269 (i) identification information of lineup participants;

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

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

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

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

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

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

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

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

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

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

284 from the appearance of the suspect, select fillers who resemble the suspect in significant features;

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

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

287 incident;

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

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

290 fillers is not required;

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

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

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

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

295 artificially adding or concealing that feature;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

323 C. Conducting the Photo Lineup

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

331 2. Photo identification procedures should be conducted sequentially.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

365 Section 11. Remedies for Noncompliance

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

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

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