

**H. B. 2758**

(By Delegates Ellem, Poore, Fleischauer, Miley, Skinner, Sponaugle, Hunt, Manchin, Hamilton, Manypenny and Marcum)

[Introduced February 27, 2013; referred to the Committee on the Judiciary.]

A BILL to amend and reenact §62-1E-1, §62-1E-2 and §62-1E-3 of the Code of West Virginia, 1931, as amended, all relating to eyewitness identification; defining terms; increasing requirements for performing an eyewitness identification; authorizing mandatory legislative rule-making authority for creating additional requirements and expanding upon current requirements in all aspects of eyewitness identification; requiring the legislative rules to include consequences for noncompliance, training requirements, policy requirements and the creation of a model policy; stating that the rules shall be created by the Governor's committee on crime, delinquency and correction in consultation with certain eyewitness identification practitioners and experts; and requiring the State Police to create certain educational materials associated with eyewitness identification.

*Be it enacted by the Legislature of West Virginia:*

1 That §62-1E-1, §62-1E-2 and §62-1E-3 of the Code of West  
2 Virginia, 1931, as amended, be amended and reenacted, all to read  
3 as follows:

4 **ARTICLE 1E. EYEWITNESS IDENTIFICATION ACT.**

5 **§62-1E-1. Definitions.**

6 For the purposes of this article:

7 (1) "Blind" means the administrator does not know the identity  
8 of the suspect.

9 (2) "Blinded" means the lineup administrator may know the  
10 identity of the suspect, but does not know which lineup member is  
11 being viewed by the eyewitness.

12 ~~(1)~~ (3) "Eyewitness" means a person whose identification of  
13 another person may be relevant in a criminal proceeding.

14 (4) "Filler" means a person in a lineup who is not a suspect,  
15 but whose appearance resemble the eyewitness's description of the  
16 suspect.

17 ~~(2)~~ (5) "Lineup" means a live lineup or ~~photographic array of~~  
18 ~~persons of similar appearance~~ photo lineup.

19 ~~(3)~~ (6) "Lineup administrator" means the person who conducts  
20 a lineup.

21 ~~(4)~~ (7) "Live lineup" means a procedure in which a group of  
22 people is displayed to an eye witness for the purpose of  
23 determining if the eyewitness ~~is able to identify~~ identifies the  
24 suspect as the perpetrator of a crime.

1       ~~(5)~~ (8) "Photo lineup" means a procedure in which an array of  
2 photographs is displayed to an eyewitness for the purpose of  
3 determining if the eyewitness ~~is able to identify~~ identifies the  
4 suspect as the perpetrator of a crime.

5       (9) "Showup" means an identification procedure in which an  
6 eyewitness is presented with a single suspect for the purpose of  
7 determining whether the eyewitness identifies this individual as  
8 the perpetrator.

9 **§62-1E-2. Eyewitness identification procedures.**

10       (a) Before a lineup, at a minimum, the eyewitness should be  
11 given the following ~~three~~ instructions:

12       (1) That the perpetrator might or might not be present in the  
13 lineup;

14       (2) That the eyewitness is not required to make an  
15 identification; ~~and~~

16       (3) That it is as important to exclude innocent persons as it  
17 is to identify the perpetrator; and

18       (4) Any other instructions required by the legislative rules  
19 authorized in subsection (c) of this section.

20       (b) Law-enforcement officers should make a written record of  
21 a lineup, including, at a minimum, the following information:

22       (1) The date, time and location of the lineup.

23       (2) The names of every person in the lineup, if known, and all  
24 other persons present at the lineup.

1 (3) The words used by the eyewitness in any identification,  
2 including words that describe the eyewitness' certainty or  
3 uncertainty in the identification at the time the identification is  
4 made.

5 (4) Whether it was a photo lineup or live lineup.

6 (5) The number of photos or individuals that were presented in  
7 the lineup.

8 (6) Whether the lineup administrator knew which person in the  
9 lineup was the suspect.

10 (7) Whether, before the lineup, the eyewitness was instructed  
11 that the perpetrator might or might not be presented in the lineup.

12 (8) Whether the lineup was simultaneous or sequential.

13 (9) The signature, or initials, of the eyewitness, or notation  
14 if the eyewitness declines or is unable to sign.

15 (10) A video of the lineup and the eyewitness' response may be  
16 included.

17 (11) Any other information required by the legislative rules  
18 authorized in subsection (c) of this section.

19 (c) The Governor's committee on crime, delinquency and  
20 correction shall propose rules for legislative approval in  
21 accordance with the provisions of article three, chapter twenty-  
22 nine-a of this code to further detail and expand upon the required  
23 process for eyewitness identification contained in this section.  
24 The rules shall address the following, at a minimum:

1       (1) Any requirements for an officer to follow prior to  
2 performing a lineup or showup;

3       (2) Any instructions that an officer shall give to the  
4 eyewitness prior to conducting a lineup or showup;

5       (3) Any requirements for an officer to follow during the  
6 performance of a lineup or showup, including, but not limited to,  
7 requirements to effectuate sequential presentation, blind or  
8 blinded lineups, and the number of required fillers to be used;

9       (4) Any requirements for an officer to follow when there are  
10 multiple eyewitnesses or multiple suspects;

11       (5) Any requirements specific to photo lineups or showups;

12       (6) Any requirements for what information an officer should  
13 make a written record of before, during and after a lineup or  
14 showup;

15       (7) Any consequences of compliance or noncompliance with this  
16 article and the legislative rules authorized by this section;

17       (8) Training requirements for eyewitness identification  
18 through both the curriculum at the State Police Academy, or its  
19 equivalent, and required in-service training hours for law-  
20 enforcement officers;

21       (9) A requirement that all West Virginia law-enforcement  
22 agencies, as defined in section 1, article 29, chapter 30 of this  
23 code, conducting eyewitness identification procedures shall adopt  
24 a specific written policy for conducting photo lineups, live

1 lineups and showups that comply with this article and the  
2 legislative rules authorized by this section; and

3 (10) A model policy that will serve as an example of what will  
4 satisfy the policy requirement stated in subdivision (8) of this  
5 subsection.

6 ~~There is hereby created a task force to study and identify best~~  
7 ~~practices for eyewitness identification. The task force consists~~  
8 ~~of the following members:~~

9 ~~—— (1) The Director of Criminal Justice Services, or his or her~~  
10 ~~designee, who shall chair, without voting, the task force;~~

11 ~~—— (2) The Superintendent of the State Police, or his or her~~  
12 ~~designee;~~

13 ~~—— (3) A victim advocate to be designated by the Director of~~  
14 ~~Criminal Justice Services;~~

15 ~~—— (4) The Director of Public Defender Services, or his or her~~  
16 ~~designee;~~

17 ~~—— (5) The Executive Director of the West Virginia Prosecuting~~  
18 ~~Attorneys Institute, or his or her designee;~~

19 ~~—— (6) A circuit judge designated by the Chief Justice of the~~  
20 ~~West Virginia Supreme Court of Appeals;~~

21 ~~—— (7) Two professionals in the field of forensic sciences, one~~  
22 ~~to be designated by the Executive Director of the West Virginia~~  
23 ~~Prosecuting Attorneys Institute and the other to be designated by~~  
24 ~~the Director of Public Defender Services;~~

1 ~~—— (8) The President of the West Virginia Fraternal Order of~~  
2 ~~Police, or his or her designee;~~

3 ~~—— (9) A representative of the Innocence Project of the West~~  
4 ~~Virginia University College of Law;~~

5 ~~—— (10) Two licensed practitioners of criminal law, one to be~~  
6 ~~designated by the Executive Director of the West Virginia~~  
7 ~~Prosecuting Attorneys Institute and the other to be designated by~~  
8 ~~the Director of Public Defender Services;~~

9 ~~—— (11) The President of the West Virginia Sheriff's Association,~~  
10 ~~or his or her designee.~~

11 (d) ~~The task force, or their assigned designees, shall serve~~  
12 ~~without compensation, and~~ Governor's committee on crime,  
13 delinquency and correction's law-enforcement training subcommittee  
14 shall develop the legislative rules authorized in subsection (c) of  
15 this section in consultation with eyewitness identification  
16 practitioners and experts, including, but not limited to,  
17 representatives of the West Virginia Prosecuting Attorneys  
18 Institute, the West Virginia Public Defender Service, the West  
19 Virginia Judiciary and the West Virginia Innocence Project of the  
20 West Virginia University College of Law. ~~shall develop recommended~~  
21 ~~guidelines for policies, procedures and training with respect to~~  
22 ~~the collection and handling of eyewitness evidence in criminal~~  
23 ~~investigations by law-enforcement agencies that are consistent with~~  
24 ~~the reliable evidence supporting best practices. The purpose of~~

1 ~~the guidelines is to provide law enforcement agencies with~~  
2 ~~information regarding eyewitness identification policies and~~  
3 ~~procedures to increase the accuracy of the crime investigation~~  
4 ~~process.~~

5 ~~— (e) Such guidelines shall include procedures for the~~  
6 ~~administration of live and photographic lineups and instructions~~  
7 ~~that will increase the accuracy of eyewitness identifications. The~~  
8 ~~task force, in developing these guidelines, shall consider:~~

9 ~~— (1) The use of blind administration of live and photo lineups;~~

10 ~~— (2) The issuance of specific instructions to the eyewitness~~  
11 ~~before and during the identification procedure;~~

12 ~~— (3) The number and selection of fillers to be used in live and~~  
13 ~~photo lineups;~~

14 ~~— (4) Sequential versus simultaneous presentation of lineup~~  
15 ~~members;~~

16 ~~— (5) Whether only one suspect should be included in any live or~~  
17 ~~photo lineup;~~

18 ~~— (6) The timing of when the administrator should request and~~  
19 ~~record the eyewitness's statement of his or her confidence in his~~  
20 ~~or her selection;~~

21 ~~— (7) Whether to refrain from providing of any confirmatory~~  
22 ~~information to the eyewitness;~~

23 ~~— (8) The visual recording of the lineup and its administration;~~

24 ~~— (9) The video or audio recording of the lineup procedure;~~



1 ~~(10) Any other policies or procedures the task force~~  
2 ~~determines to be relevant; and~~

3 ~~(11) What training, if any, should be made available to law~~  
4 ~~enforcement personnel in the use of these procedures.~~

5 ~~(f) Not later than December 15, 2008, the task force shall~~  
6 ~~submit a report on the guidelines developed and recommendations~~  
7 ~~concerning their use to the standing committees of the Legislature~~  
8 ~~having cognizance of matters relating to criminal law and~~  
9 ~~procedure. Minority reports may also be issued. The task force~~  
10 ~~shall terminate on December 15, 2009, unless earlier terminated by~~  
11 ~~legislative action.~~

12 **§62-1E-3. Training of law-enforcement officers.**

13 The Superintendent of State Police, along with the Governor's  
14 committee on crime, delinquency and correction's law-enforcement  
15 training subcommittee, may shall create educational materials and  
16 may conduct training programs to instruct law-enforcement officers  
17 and recruits how to conduct lineups in compliance with this ~~section~~  
18 article and the legislative rules authorized by subsection (c) of  
19 section two of this article.

NOTE: The purpose of this bill is to update the eyewitness identification act by authorizing legislative rules for the creation of a more detailed and successful eyewitness identification process.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would

be added.