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SENATE BILL 489

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Cisco McSorley

AN ACT

RELATING TO CRIMINAL PROCEDURE; ENACTING THE ACCURACY OF
EYEWITNESS IDENTIFICATIONS ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the
"Accuracy of Eyewitness Identifications Act".

SECTION 2. 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 wrongful conviction in
approximately seventy-five percent of the nation's two hundred
eighty-nine exonerations;

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1 C. over the past thirty years, a large body of
2 peer-reviewed, scientific research and practice has emerged
3 showing that simple systemic changes in administering
4 eyewitness identification procedures can greatly improve the
5 accuracy of those identifications;

6 D. policies and procedures to improve the accuracy
7 of eyewitness identifications such as those recommended by the
8 United States national institute of justice, the American bar
9 association, the New Jersey office of the attorney general, the
10 Wisconsin office of the attorney general, the California
11 commission on the fair administration of justice and the North
12 Carolina actual innocence commission are readily available;

13 E. more accurate eyewitness identifications
14 increase the ability of police and prosecutors to convict the
15 guilty and protect the innocent;

16 F. the integrity of New Mexico's criminal justice
17 process is enhanced by adherence to best practices in evidence
18 gathering; and

19 G. New Mexico will benefit from the improvement of
20 the accuracy of eyewitness identifications.

21 **SECTION 3. DEFINITIONS.--**For the purposes of the Accuracy
22 of Eyewitness Identifications Act:

23 A. "administrator" means a person conducting a
24 photo lineup or live lineup;

25 B. "blind" means the administrator does not know

1 the identity of the suspect;

2 C. "blinded" means the administrator may know who
3 the suspect is, but by virtue of the use of procedures or
4 technology to accomplish this purpose, does not know which
5 lineup member is being viewed by the eyewitness;

6 D. "contamination" means an eyewitness' memory of a
7 person or event has become altered, replaced or otherwise
8 impaired as a result of exposure to extrinsic information
9 related to that person or event;

10 E. "eyewitness" means a person who observes another
11 person at or near the scene of an offense;

12 F. "filler" means either a person or a photograph
13 of a person who is not suspected of an offense and is included
14 in an identification procedure;

15 G. "identification procedure" means a live lineup,
16 a photo lineup or a showup;

17 H. "live lineup" means an identification procedure
18 in which a group of persons, including the suspected
19 perpetrator of an offense and other persons not suspected of
20 the offense, is displayed to an eyewitness for the purpose of
21 determining whether the eyewitness identifies the suspect as
22 the perpetrator;

23 I. "photo lineup" means an identification procedure
24 in which an array of photographs, including a photograph of the
25 suspected perpetrator of an offense and additional photographs

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1 of other persons not suspected of the offense, is displayed to
2 an eyewitness either in hard copy form or via computer for the
3 purpose of determining whether the eyewitness identifies the
4 suspect as the perpetrator;

5 J. "showup" means an identification procedure in
6 which an eyewitness is presented with a single suspect for the
7 purpose of determining whether the eyewitness identifies the
8 individual as the perpetrator; and

9 K. "suspect" means a person believed by law
10 enforcement to be the possible perpetrator of the crime.

11 SECTION 4. EYEWITNESS IDENTIFICATION PROCEDURES.--A
12 criminal justice entity conducting eyewitness identification
13 procedures shall adopt specific procedures for conducting photo
14 lineups and live lineups that comply with the following
15 requirements:

16 A. prior to a photo lineup or live lineup, law
17 enforcement shall record as complete a description as possible
18 of the perpetrator provided by the eyewitness, in the
19 eyewitness's own words. This statement shall also include
20 information regarding the conditions under which the eyewitness
21 observed the perpetrator, including location, time, distance,
22 obstructions, lighting, weather conditions and other
23 impairments, including alcohol, drugs, stress and visual or
24 auditory disabilities. The eyewitness shall also be asked if
25 the eyewitness needs glasses or contact lenses and whether the

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1 eyewitness was wearing them at the time of the offense. The
2 administrator shall note whether the eyewitness was wearing
3 glasses or contact lenses at the time of the identification
4 procedure;

5 B. all live and photographic displays shall be
6 conducted blind, unless to do so would place an undue burden on
7 law enforcement or the investigation. If such circumstances
8 are properly documented pursuant to Subsections S through U of
9 this section, investigators may administer a photographic
10 display blinded;

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

14 (1) the perpetrator may or may not be among
15 the persons in the identification procedure or, in the case of
16 a showup, may or may not be the person that is presented to the
17 eyewitness;

18 (2) the administrator does not know who the
19 perpetrator is;

20 (3) the eyewitness should not feel compelled
21 to make an identification;

22 (4) the investigation will continue whether or
23 not an identification is made;

24 (5) the procedure requires the administrator
25 to ask the eyewitness to state, in the eyewitness' own words,

1 how certain the eyewitness is of any identification; and

2 (6) the eyewitness is not to discuss the
3 identification procedure or its results with other eyewitnesses
4 involved in the case and should not speak with the media;

5 D. in a photo lineup, the photograph of the suspect
6 shall be contemporary and shall resemble the suspect's
7 appearance at the time of the offense;

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

12 F. a photo lineup or live lineup shall be composed
13 so that the fillers generally resemble the eyewitness'
14 description of the perpetrator while ensuring that the suspect
15 does not unduly stand out from the fillers;

16 G. in a photo lineup or live lineup, fillers shall
17 possess the following characteristics:

18 (1) all fillers selected shall resemble the
19 eyewitness' description of the perpetrator in significant
20 features such as face, weight, build or skin tone, including
21 any unique or unusual features such as scars or tattoos;

22 (2) at least five fillers shall be included in
23 a photo lineup, in addition to the suspect;

24 (3) at least four fillers shall be included in
25 a live lineup, in addition to the suspect; and

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1 (4) if the eyewitness has previously viewed a
2 photo lineup or live lineup in connection with the
3 identification of another person suspected of involvement in
4 the offense, the fillers in the lineup in which the instant
5 suspect participates shall be different from the fillers used
6 in any prior lineups;

7 H. if there are multiple eyewitnesses:

8 (1) each eyewitness shall view photo lineups
9 or live lineups separately;

10 (2) the suspect shall be placed in a different
11 position in the live lineup or photo lineup for each
12 eyewitness; and

13 (3) the eyewitnesses shall not be permitted to
14 communicate with each other until all identification procedures
15 have been completed;

16 I. in an identification procedure, no writings or
17 information concerning the instant or any previous arrest,
18 indictment or conviction of the suspect shall be visible or
19 made known to the eyewitness;

20 J. in a live lineup, any identifying actions, such
21 as speech, gestures or other movements, shall be performed by
22 all lineup participants;

23 K. in a live lineup, all lineup participants must
24 be out of view of the eyewitness prior to the identification
25 procedure;

1 L. when there are multiple suspects, each
2 identification procedure shall include only one suspect;

3 M. nothing shall be said to the eyewitness
4 regarding the suspect's position in the photo lineup or live
5 lineup;

6 N. nothing shall be said to the eyewitness that
7 might influence the eyewitness' identification of any
8 particular lineup member;

9 O. if the eyewitness makes an identification, the
10 administrator shall seek and document a clear statement from
11 the eyewitness, at the time of the identification and in the
12 eyewitness' own words, as to the eyewitness' confidence level
13 that the person identified in a given identification procedure
14 is the perpetrator;

15 P. if the eyewitness identifies a person as the
16 perpetrator, the eyewitness shall not be provided any
17 information concerning the person before the administrator
18 obtains the eyewitness' confidence statement about the
19 selection;

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

24 R. efforts shall be made to perform a live lineup
25 or photo lineup instead of a showup:

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1 (1) showups shall only be performed using a
2 live suspect and only in exigent circumstances that require the
3 immediate display of a suspect to an eyewitness;

4 (2) investigators shall not conduct a showup
5 with a single photograph; if investigators wish to determine if
6 an eyewitness can make an identification using a photograph, a
7 photographic display must be used; and

8 (3) in the event of the administration of a
9 showup procedure:

10 (a) a full and detailed description of
11 the perpetrator shall be provided by the eyewitness before the
12 eyewitness observes the suspect. This statement shall also
13 include information regarding the conditions under which the
14 eyewitness observed the perpetrator, including location, time,
15 distance, obstructions, lighting, weather conditions and other
16 impairments, including alcohol, drugs, stress and visual or
17 auditory disabilities. The eyewitness shall be also be asked
18 if the eyewitness needs glasses or contact lenses and whether
19 the eyewitness was wearing them at the time of the offense.
20 The administrator shall note whether the eyewitness was wearing
21 glasses or contact lenses at the time of the identification
22 procedure;

23 (b) the eyewitness shall be transported
24 to a neutral, non-law enforcement location where the suspect is
25 being detained for the purposes of a showup procedure;

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1 (c) the eyewitness shall be provided
2 with instructions prior to the showup, including: 1) the
3 perpetrator may or may not be the person that is presented to
4 the eyewitness; 2) the eyewitness should not feel compelled to
5 make an identification; 3) the investigation will continue
6 whether or not an identification is made; 4) the procedure
7 requires the administrator to ask the eyewitness to state, in
8 the eyewitness' own words, how certain the eyewitness is of any
9 identification; and 5) the eyewitness is not to discuss the
10 identification procedure or its results with other eyewitnesses
11 involved in the case and should not speak with the media;

12 (d) measures shall be taken by
13 investigators at the showup, including the administrator of the
14 showup, to reduce potentially damaging or prejudicial
15 inferences that may be drawn by the eyewitness, including: 1)
16 refraining from suggesting, through statements or nonverbal
17 conduct, that the suspect is or may be the perpetrator of the
18 crime; 2) removing the suspect from a squad car; and 3) when
19 practicable, removing handcuffs from the suspect;

20 (e) if there are multiple eyewitnesses:
21 1) only one eyewitness at a time shall participate in the
22 showup procedure; 2) only one of the eyewitnesses shall be
23 present at the location of the showup procedure; and 3) if a
24 positive identification is made, and an arrest is justified,
25 additional eyewitnesses shall be shown live or photo lineups;

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1 (f) if there are multiple suspects,
2 these suspects shall be separated and subjected to separate
3 showup procedures;

4 (g) if the eyewitness makes an
5 identification, the administrator shall seek and document a
6 clear statement from the eyewitness, at the time of the
7 identification and in the eyewitness' own words, as to the
8 eyewitness' confidence level that the person identified in a
9 given identification procedure is the perpetrator; and

10 (h) investigators shall photograph a
11 suspect at the time and place of the showup to preserve a
12 record of the appearance of the suspect at the time of the
13 showup procedure;

14 S. unless impracticable, a video record of the
15 identification procedure shall be made that includes the
16 following information:

17 (1) all identification and non-identification
18 results obtained during the identification procedures, signed
19 by the eyewitnesses, including the eyewitnesses' confidence
20 statements;

21 (2) the names of all persons present at the
22 identification procedure, including the name of the lineup
23 administrator and whether the administrator was blind, blinded
24 or non-blind;

25 (3) when it is impracticable for a blind

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1 administrator to conduct the eyewitness identification
2 procedure, the investigator's statement in writing the reason
3 therefor;

4 (4) the date and time of the identification
5 procedure;

6 (5) in a photo lineup or live lineup, any
7 eyewitness identifications of a filler; and

8 (6) in a photo lineup or live lineup, the
9 names of the lineup members and other relevant identifying
10 information and the sources of all photographs or persons used
11 in the lineup;

12 T. if a video record of the lineup is
13 impracticable, the officer conducting the lineup shall document
14 the reason therefor, and an audio record of the identification
15 procedure shall be made that includes the items specified in
16 Paragraphs (1) through (6) of Subsection S of this section.

17 The audio record shall be supplemented by all of the
18 photographs used in a photo lineup and photographs of all of
19 the individuals used in a live lineup or showup; and

20 U. if both a video and audio record of the lineup
21 are impracticable, the officer conducting the lineup shall
22 document in writing the reason therefor, and a written record
23 of the lineup shall be made that includes the items specified
24 in Paragraphs (1) through (6) of Subsection S of this section.

25 The written record shall be supplemented by all of the

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1 photographs used in a photo lineup and photographs of all of
2 the individuals used in a live lineup or showup.

3 SECTION 5. REMEDIES FOR NONCOMPLIANCE OR OTHER
4 CONTAMINATION.--For any photo lineup or live lineup or for a
5 showup procedure that was administered after the effective date
6 of the Accuracy of Eyewitness Identifications Act:

7 A. whenever the prosecution intends to offer
8 eyewitness identification evidence at trial, the defendant is
9 entitled to a pretrial evidentiary hearing as to the
10 reliability of the evidence. At the hearing, the court shall
11 examine whether law enforcement failed to substantially comply
12 with any requirement contained in Section 4 of the Accuracy of
13 Eyewitness Identifications Act, whether any other suggestive
14 identification procedures were employed, whether the eyewitness
15 identification evidence may have been otherwise contaminated by
16 state or non-state actors; and any other factors bearing upon
17 the reliability of the identification evidence, including but
18 not limited to characteristics of the witness, suspect or
19 event; and

20 B. if at a pretrial reliability hearing required by
21 Subsection A of this section the trial court finds evidence of
22 a failure of law enforcement officials or prosecuting agencies
23 to comply with any of the provisions of Section 4 of the
24 Accuracy of Eyewitness Identifications Act, of the use of any
25 other suggestive identification procedures or of any other

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1 contamination of identification evidence by state or non-state
2 actors, the trial court shall:

3 (1) consider such evidence in determining the
4 admissibility of the eyewitness identification; and

5 (2) suppress such evidence when there is a
6 substantial probability of eyewitness misidentification; or

7 (3) instruct the jury, when such evidence is
8 admissible, both when admitting such evidence and prior to the
9 jury's deliberation, where applicable:

10 (a) that the provisions of Section 4 of
11 the Accuracy of Eyewitness Identifications Act are designed to
12 reduce the risk of misidentification and that it may consider
13 credible evidence of noncompliance when assessing the
14 reliability of the eyewitness identification evidence;

15 (b) that the contamination of the
16 eyewitness identification evidence by factors other than state
17 noncompliance with any of the provisions of the statute,
18 including the use of any other suggestive identification
19 procedures or suggestive actions of non-state actors, may have
20 increased the risk of misidentification; and

21 (c) that it should view the
22 identification evidence with distrust if the court has
23 determined that its confidence in the reliability of the
24 eyewitness identification has been sufficiently undermined.

25 SECTION 6. TRAINING OF LAW ENFORCEMENT OFFICERS.--The

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1 department of public safety shall create, administer and
2 conduct training programs for law enforcement officers and
3 recruits regarding the methods, technical aspects and
4 scientific findings regarding the basis of the eyewitness
5 identification practices and procedures referenced in the
6 Accuracy of Eyewitness Identifications Act.

7 SECTION 7. EFFECTIVE DATE.--The effective date of the
8 provisions of this act is July 1, 2013.

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