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HOUSE BILL NO. 207

Offered January 13, 2010

Prefiled January 8, 2010

A BILL to amend the Code of Virginia by adding a section numbered 19.2-269.3, relating to method for conduct of lineups for eyewitness identification of criminal suspects.

Patron—Alexander

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:**1. That the Code of Virginia is amended by adding a section numbered 19.2-269.3 as follows:**

§ 19.2-269.3. Method for conduct of lineups for eyewitness identification of criminal suspects.

A. The following definitions apply in this section.

"Eyewitness" means a person whose identification by sight of another person may be relevant in a criminal proceeding.

"Filler" means a person or a photograph of a person who is not suspected of the offense at issue and is included in a lineup.

"Independent administrator" means a lineup administrator who is not participating in the investigation of a criminal offense and who is unaware of which person in the lineup is the suspect.

"Lineup" means a photo lineup or live lineup.

"Lineup administrator" means the person who conducts a lineup.

"Live lineup" means a procedure in which a series of individuals, which may or may not include the suspect, is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

"Photo lineup" means a procedure in which an array of photographs, which may or may not include the suspect, is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

B. All lineups conducted by law-enforcement agencies of the Commonwealth shall meet the following requirements:

1. All lineups shall be conducted by an independent administrator, except that a photo lineup may be done by an alternative procedure, as provided in subsection C.

2. Before a lineup, the lineup administrator shall instruct the eyewitness that (i) the perpetrator may or may not be presented in the lineup, (ii) the lineup administrator does not know the suspect's identity, (iii) the eyewitness should not feel compelled to make an identification, (iv) it is as important to exclude innocent persons as it is to identify the perpetrator, and (v) the investigation will continue whether or not an identification is made. Each witness shall be given instructions regarding the identification procedures without other witnesses present.

The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall sign the acknowledgement.

3. Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in a previously determined order, and removed from view before the next individual or photo is presented.

4. In a photo lineup, the photograph of the suspect shall, to the extent practicable, resemble the suspect's appearance at the time of the offense.

5. The lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, including any unique or unusual features, while ensuring that the suspect does not unduly stand out from the fillers. In a lineup that includes the suspect, at least five fillers shall be included in the lineup, in addition to the suspect. If the eyewitness has previously viewed a lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect is included shall be different from the fillers used in any prior lineups.

6. If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.

7. In a live lineup, any actions that may help identify the perpetrator, such as speech, gestures, or other movements, shall be performed by all lineup participants.

8. When conducting a live lineup, the lineup administrator shall keep all lineup participants out of view of the eyewitness except when they are presented for identification.

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59 9. No more than one suspect shall be included in a lineup.

60 10. The lineup administrator shall say nothing to the eyewitness nor provide any information
61 concerning the suspect that might influence the eyewitness's identification. No writings or information
62 concerning any previous arrests, indictment, or conviction of the suspect shall be visible or made known
63 to the eyewitness. There shall not be anyone present during the live lineup or photo lineup who knows
64 the suspect's identity, except the eyewitness, and counsel as may be required by law. The lineup
65 administrator shall separate all witnesses so that witnesses may not confer with one another before or
66 during the procedure.

67 11. If the eyewitness identifies a person as the perpetrator, the lineup administrator shall seek and
68 document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's
69 own words, setting forth the eyewitness's confidence level that the person identified is the perpetrator.

70 12. If practical, the lineup administrator shall make a video record of a live lineup. If a video record
71 is not practical, the lineup administrator shall document the reasons why, and an audio record shall be
72 made. If neither a video nor audio record is practical, the lineup administrator shall document the
73 reasons why, and the lineup administrator shall make a written record of the lineup.

74 13. The lineup administrator shall include all of the following information in the record whether
75 video, audio, or in writing: (i) all identification and nonidentification results obtained during the
76 identification procedure, signed by the eyewitness, and if the eyewitness refuses to sign, the lineup
77 administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation,
78 (ii) the names and representative capacities of all persons present at the lineup, (iii) the date, time, and
79 location of the lineup, (iv) the words used by the eyewitness to identify the suspect, (v) how many photos
80 or individuals were presented in the lineup, (vi) the sources of all photographs or individuals used, (vii)
81 in a photo lineup, the photographs themselves, and (viii) in a live lineup, a photo or other visual
82 recording of the lineup that includes all persons who participated in the lineup.

83 C. In lieu of using an independent administrator and the procedures described in subsection B, a
84 photo lineup eyewitness identification procedure may be conducted by a lineup administrator who is
85 aware of the identity of the suspect, using an alternative method specified and approved by the
86 Department of Criminal Justice Services. Any alternative method shall be designed to achieve neutral
87 administration and to prevent the administrator from knowing which photograph is being presented to
88 the eyewitness during the procedure. Alternative methods may include any of the following:

89 1. Use of an automated computer program that automatically administers the photo lineup directly to
90 an eyewitness and prevents the administrator from viewing which photo the witness is viewing until after
91 the procedure is completed.

92 2. Use of a procedure in which photographs are placed in folders, randomly numbered, and shuffled
93 and then presented to an eyewitness such that the administrator cannot see or track which photograph
94 is being presented to the witness until after the procedure is completed.

95 3. Any other photo lineup procedure that achieves neutral administration.

96 D. The following remedies shall be available as consequences of compliance or noncompliance with
97 the requirements of this section:

98 1. Failure to comply with any of the requirements of this section shall be considered by the court in
99 adjudicating motions to suppress eyewitness identification.

100 2. Evidence of failure to comply with any of the requirements of this section shall be admissible in
101 support of claims of eyewitness misidentification, if otherwise admissible.

102 3. When evidence of compliance or noncompliance with the requirements of this section has been
103 presented at trial, the court shall instruct the jury that it may consider credible evidence of compliance
104 or noncompliance to determine the reliability of eyewitness identifications.