

April 7, 2010

STATE V. LARRY HENDERSON

2:6-11(D) SUPPLEMENT REGARDING RECENT CHANGE  
TO OHIO'S EYEWITNESS IDENTIFICATION LAWS

Submitted by the Defendant, Larry Henderson and the ACDL-NJ

New Ohio Statute - Sub. S. B. No. 77 128th G.A.

To amend sections 109.573, 2901.07, 2953.21, 2953.23, 2953.31, 2953.32, 2953.321, 2953.35, 2953.51, 2953.54 2953.55, 2953.71, 2953.72, 2953.73, 2953.74, 2953.75, 2953.76, 2953.77, 2953.78, 2953.79, 2953.81, 2953.83, and 2953.84, to enact sections 109.561, 2933.81, 2933.82, 2933.83, 2953.56, 2953.57, 2953.58, 2953.59, and 2953.60, and to repeal section 2953.82 of the Revised Code relative to the expansion of DNA testing for certain convicted felons, the elimination of the DNA testing mechanism for felons who pleaded guilty or no contest to the offense, the collection of DNA specimens from all persons eighteen years of age or older who are arrested for a felony offense, the sealing of the official records of persons who have their convictions vacated and set aside due to DNA testing, the preservation and accessibility of biological evidence in a criminal or delinquency investigation or proceeding, the improvement of eyewitness identification procedures, the electronic recording of custodial interrogations, and to provide that DNA records collected in the DNA database and fingerprints filed for record cannot be sealed unless certain circumstances apply.

Remedies for violations of new requirements (briefly summarized)

(1) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section **shall be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup.**

(2) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this

section shall be admissible in support of any claim of eyewitness misidentification resulting from or related to the lineup as long as that evidence otherwise is admissible.

(3) When evidence of a failure to comply with any of the provisions of this section, or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section, is presented at trial, **the jury shall be instructed that it may consider credible evidence of non compliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.**

Updated Language from Sub. S. B. No. 77 128th G.A.

Sec. 2933.83.

**(A) As used in this section:**

- (1) "Administrator" means the person conducting a photo lineup or live lineup.
- (2) "Blind administrator" means the administrator does not know the identity of the suspect. "Blind administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.
- (3) "Blinded administrator" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.
- (4) "Eyewitness" means a person who observes another person at or near the scene of an offense.
- (5) "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.
- (6) **"Folder system" means a system for conducting a photo lineup that satisfies all of the following:**
  - (a) *The investigating officer uses one "suspect photograph" that resembles the description of the suspected perpetrator of the offense provided by the eyewitness, five "filler photographs" of persons not suspected of the offense that match the description of the suspected perpetrator but do not cause the suspect photograph to unduly stand out, four*

- "blank photographs" that contain no images of any person, and ten empty folders.
- (b) The investigating officer places one "filler photograph" into one of the empty folders and numbers it as folder 1.
  - (c) The administrator places the "suspect photograph" and the other four "filler photographs" into five other empty folders, shuffles the five folders so that the administrator is unaware of which folder contains the "suspect photograph," and numbers the five shuffled folders as folders 2 through 6.
  - (d) The administrator places the four "blank photographs" in the four remaining empty folders and numbers these folders as folders 7 through 10, and these folders serve as "dummy folders."
  - (e) **The administrator provides instructions to the eyewitness as to the lineup procedure and informs the eyewitness that a photograph of the alleged perpetrator of the offense may or may not be included in the photographs the eyewitness is about to see and that the administrator does not know which, if any, of the folders contains the photograph of the alleged perpetrator. The administrator also shall instruct the eyewitness that the administrator does not want to view any of the photographs and will not view any of the photographs and that the eyewitness may not show the administrator any of the photographs. The administrator shall inform the eyewitness that if the eyewitness identifies a photograph as being the person the eyewitness saw the eyewitness shall identify the photograph only by the number of the photograph's corresponding folder.**
  - (f) The administrator hands each of the ten folders to the eyewitness individually without looking at the photograph in the folder. Each time the eyewitness has viewed a folder, the eyewitness indicates whether the photograph is of the person the eyewitness saw, indicates the degree of the eyewitness's confidence in this

identification, and returns the folder and the photograph it contains to the administrator.

- (g) The administrator follows the procedures specified in this division for a second viewing if the eyewitness requests to view each of the folders a second time, handing them to the eyewitness in the same order as during the first viewing; **the eyewitness is not permitted to have more than two viewings of the folders;** and the administrator preserves the order of the folders and the photographs they contain in a facedown position in order to document the steps specified in division (A)(6)(h) of this section.
- (h) The administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (f) of this section before the eyewitness views each of the folders a second time and before the administrator views any photograph that the eyewitness identifies as being of the person the eyewitness saw. The documentation and record includes the date, time, and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup the number of photographs shown to the eyewitness; copies of each photograph shown to the eyewitness; the order in which the folders were presented to the witness; the source of each photograph that was used in the procedure; **a statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of the photographs as being of the person the eyewitness saw that is taken immediately upon the reaction of the eyewitness to viewing the photograph; and any additional information the administrator considers pertinent to the lineup procedure.** If the eyewitness views each of the folders a second time, the administrator shall document and record the statement of the eyewitness's confidence in the

*eyewitness's own words as to the certainty of the eyewitness's identification of a photograph as being of the person the eyewitness saw and document that the identification was made during a second viewing of each of the folders by the eyewitness.*

*(i) The administrator shall not say anything to the eyewitness or give any oral or nonverbal cues as to whether or not the eyewitness identified the "suspect photograph" until the administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (g) of this section and the photo lineup has concluded.*

(7) "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 of the offense.

(8) "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 for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.

(9) "Perpetrator" means the person who committed the offense.

(10) "Suspect" means the person believed by law enforcement to be the possible perpetrator of the offense.

**(B) Prior to conducting any live lineup or photo lineup on or after the effective date of this section, any law enforcement agency or criminal justice entity in this state that conducts live lineups or photo lineups shall adopt specific procedures for conducting the lineups. The procedures, at a minimum, shall impose the following requirements:**

**(1) Unless impracticable, a blind or blinded administrator shall conduct the live lineup or photo lineup**

**(2) When it is impracticable for a blind administrator to conduct the live lineup or photo**

- (3) When it is impracticable for either a blind or blinded administrator to conduct the live lineup or photo lineup, the administrator shall state in writing the reason for that impracticability.
- (4) The administrator conducting the lineup shall make a written record that includes all of the following information:
- (a) All identification and nonidentification results obtained during the lineup, signed by the eyewitnesses, including the eyewitnesses' confidence statements made immediately at the time of the identification;
  - (b) The names of all persons present at the lineup;
  - (c) The date and time of the lineup;
  - (d) Any eyewitness identification of one or more fillers in the lineup;
  - (e) The names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup.
- (5) *If a blind administrator is conducting the live lineup or the photo lineup, the administrator shall inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know who the suspect is.*
- (C) For any photo lineup or live lineup that is administered on or after the effective date of this section, all of the following apply:
- (1) *Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup.*
  - (2) *Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be admissible in support of any claim of eyewitness*

(3) When evidence of a failure to comply with any of the provisions of this section, or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section, ***is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.***

(D) The requirements in this section regarding the procedures for live lineups or photo lineups conducted by a law enforcement agency or criminal justice entity do not prohibit a law enforcement agency or criminal justice entity from adopting other scientifically accepted procedures for conducting live lineups or photo lineups that the scientific community considers more effective.

### SECTION 3.

(A) The General Assembly hereby requests the Attorney General to adopt rules pursuant to Chapter 119. of the Revised Code prescribing specific procedures to be followed for the administration by law enforcement agencies and criminal justice entities in this state of photo lineups, live lineups, and showups. The General Assembly also requests that any rules adopted by the Attorney General be consistent with the requirements of divisions (B) and (C) of section 2933.83 of the Revised Code. If the Attorney General adopts rules of the type described in this division, on and after the date on which the rules take effect, law enforcement agencies and criminal justice entities in this state shall comply with the rules in conducting live lineups, photo lineups, and showups.

(B) The General Assembly hereby requests the Ohio Judicial Conference to review existing jury instructions regarding eyewitness identification for compliance with this act.