



Benjamin N. Cardozo School of Law, Yeshiva University

MODEL LEGISLATION, 2008 STATE LEGISLATIVE SESSIONS

AN ACT TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATIONS

SECTION 1. LEGISLATIVE INTENT

The legislature finds that:

1. The goal of a police investigation is to apprehend the person or persons responsible for the commission of a crime;
2. Mistaken eyewitness identification has been shown to have contributed to the wrongful conviction in more than 75% of the nation's 208 exonerations;
3. Over the past 30 years, a large body of peer-reviewed, scientific research and practice has emerged showing that simple systemic changes in administering eyewitness identification procedures can greatly improve the accuracy of those identifications;
4. Policies and procedures to improve the accuracy of eyewitness identifications such as those recommended by the U.S. National Institute of Justice, the American Bar Association, the New Jersey Office of the Attorney General, the Wisconsin Office of the Attorney General, the California Commission on the Fair Administration of Justice, and the North Carolina Actual Innocence Commission are readily available;
5. More accurate eyewitness identifications increase the ability of police and prosecutors to convict the guilty and protect the innocent;
6. The integrity of [State's] criminal justice process is enhanced by adherence to best practices in evidence gathering; and
7. [State] will benefit from the improvement of the accuracy of eyewitness identifications.

SECTION 2: DEFINITIONS

For the purposes of this Act:

- A. “Administrator” means the person conducting the photo or live lineup;
- B. “Suspect” means the person believed by law enforcement to be the possible perpetrator of the crime;
- C. “Blind” means the administrator does not know the identity of the suspect;
- D. “Blinded” means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness;
- E. “Eyewitness” means a person who observes another person at or near the scene of an offense;
- F. “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;
- G. “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;
- H. “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; and
- I. “Showup” means an identification procedure in which an eyewitness is presented with a single suspect for the purpose of determining whether the eyewitness identifies this individual as the perpetrator.

SECTION 3. EYEWITNESS IDENTIFICATION PROCEDURES

Any criminal justice entity conducting eyewitness identification procedures shall adopt specific procedures for conducting photo and live lineups and showups that comply with the following requirements:

A. Unless impracticable, a blind or blinded administrator shall conduct the live or photo lineup;

B. When it is impracticable for a blind administrator to conduct the eyewitness identification procedure, the investigator shall state in writing the reason therefor;

C. The eyewitness shall be instructed, without other eyewitnesses present, prior to any live or photo lineup, or showup that:

1. The perpetrator may or may not be among the persons in the identification procedure or, in the case of a showup, may or may not be the person that is presented to the eyewitness;
2. The administrator does not know who the perpetrator is;
3. The eyewitness should not feel compelled to make an identification;
4. The investigation will continue whether or not an identification is made;
5. The procedure requires the administrator to ask the eyewitness to state, in his own words, how certain he is of any identification; and
6. The eyewitness is not to discuss the identification procedure or its results with other eyewitnesses involved in the case and should not speak with the media;

D. In a photo lineup, the photograph of the suspect shall be contemporary and shall resemble his or her appearance at the time of the offense;

E. A photo or live lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers;

F. In a photo or live lineup, fillers shall possess the following characteristics:

1. All fillers selected shall resemble the eyewitness's description of the perpetrator in significant features (i.e., face, weight, build, etc.), including any unique or unusual features (i.e., scar, tattoo, etc.);
2. At least five fillers shall be included in a photo lineup, in addition to the suspect;
3. At least four fillers shall be included in a live lineup, in addition to the suspect; and
4. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the instant suspect participates shall be different from the fillers used in any prior lineups;

G. If there are multiple eyewitnesses:

1. Each eyewitness shall view photo or live lineups separately;
2. The suspect shall be placed in a different position in the live lineup and/or photo lineup for each eyewitness; and
3. The eyewitnesses shall not be permitted to communicate with each other until all identification procedures have been completed;

H. In an identification procedure, no writings or information concerning any previous arrest, indictment or conviction of the suspect shall be visible or made known to the eyewitness;

I. In a live lineup, any identifying actions, such as speech, gestures or other movements, shall be performed by all lineup participants;

J. In a live lineup, all lineup participants must be out of view of the eyewitness prior to the identification procedure;

K. When there are multiple suspects, each identification procedure shall include only one suspect;

- L. Nothing shall be said to the eyewitness regarding the suspect's position in the photo or live lineup;
- M. Nothing shall be said to the eyewitness that might influence the eyewitness's identification of any particular lineup member;
- N. The administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator;
- O. If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person before the administrator obtains the eyewitness's confidence statement about the selection;
- P. A record of the identification procedure shall be made that includes all identification and non-identification results obtained during the identification procedures, signed by the eyewitnesses;
- Q. In the event of the administration of a showup procedure:
 - 1. A full and detailed description of the perpetrator shall be provided by the eyewitness before the eyewitness observes the suspect;
 - 2. The eyewitness shall be transported to a neutral, non-law enforcement location where the suspect is being detained for the purposes of a showup procedure;
 - 3. Measures shall be taken to reduce potentially damaging or prejudicial inferences that may be drawn by the eyewitness, including:
 - a. Removing the suspect from a squad car; and
 - b. When practicable, removing handcuffs from the suspect;
 - 4. If there are multiple eyewitnesses, only one eyewitness at a time shall participate in the showup procedure:

- a. Only one of the eyewitnesses shall be present at the location of the showup procedure;
 - b. If a positive identification is made, and an arrest is justified, additional eyewitnesses shall be shown live or photo lineups; and
5. If there are multiple suspects, these suspects shall be separated and subjected to separate showup procedures;
- R. Unless impracticable, a video record of the identification procedure shall be made that includes the following information:
1. All identification and non-identification results obtained during the identification procedures, signed by the eyewitnesses, including the eyewitnesses' confidence statements;
 2. The names of all persons present at the identification procedure;
 3. The date and time of the identification procedure;
 4. In a photo or live lineup, any eyewitness identification(s) of (a) filler(s); and
 5. In a photo or live lineup, the names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup;
- S. If a video record of the lineup is impracticable, the officer conducting the lineup shall document the reason therefor, and an audio record of the identification procedure shall be made which includes the items specified in Section 3, clause R, subclauses 1-5 of this Act. The audio record shall be supplemented by the all of the photographs used in a photo lineup, and photographs of all of the individuals used in a live lineup; and
- T. If both a video and audio record of the lineup are impracticable, the officer conducting the lineup shall document in writing the reason therefor, and a written record of the lineup shall be made which includes the items specified in Section 3, clause R, subclauses 1-5 of this Act. The



written record shall be supplemented by the all of the photographs used in a photo lineup, and photographs of all of the individuals used in a live lineup.

SECTION 4. REMEDIES FOR NONCOMPLIANCE

For any photo or live lineup, or showup procedure that was administered after the date upon which Section 3 of this Act took effect:

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

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

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

SECTION 5. TRAINING OF LAW ENFORCEMENT OFFICERS

The Department of Public Safety shall create, administer and conduct training programs for law enforcement officers and recruits regarding the methods and technical aspects of the eyewitness identification practices and procedures referenced in this Act.

SECTION 6. EFFECTIVE DATE

Section 3 of this Act shall take effect on April 1, 2009. All other Sections shall take effect upon passage.