

2018 Regular Session

SENATE BILL NO. 397

BY SENATOR GARY SMITH

CRIMINAL PROCEDURE. Provides relative to eyewitness identification. (gov sig)

1 AN ACT

2 To enact Title V-A of the Code of Criminal Procedure, to be comprised of Art. 251 through
3 253, relative to eyewitness identifications; to provide procedures relative to law
4 enforcement investigative procedures relating to eyewitness identifications of
5 criminal suspects; to provide definitions; to provide relative to legislative intent; and
6 to provide for related matters.

7 Be it enacted by the Legislature of Louisiana:

8 Section 1. Title V-A of the Code of Criminal Procedure, comprised of Art. 251
9 through 253, is hereby enacted to read as follows:

10 TITLE V-A. EYEWITNESS IDENTIFICATION PROCEDURES

11 Art. 251. Legislative intent

12 A. The legislature finds that police investigations are strengthened by the
13 use of best practices for investigative procedures, which increase the ability of
14 law enforcement to keep communities safe and apprehend those suspected of
15 criminal activity, reduce erroneous eyewitness identifications, and enhance the
16 reliability and objectivity of eyewitness identification.

17 B. The legislature further finds that when an innocent person is

1 mistakenly identified as the perpetrator of crime, this increases the danger to
2 the public and derails investigations. Victims of crime experience either delayed
3 justice or no justice at all. Mistaken eyewitness identifications contributed to
4 the wrongful convictions in seventy percent of the nation's three hundred
5 fifty-three DNA-based exonerations and to thirteen out of fourteen wrongful
6 convictions in DNA-based exonerations in Louisiana. The multifaceted societal
7 costs of wrongful and erroneous convictions are burdensome and preventable.

8 C. The legislature further finds that policies and procedures to improve
9 the accuracy of eyewitness identifications, such as those recommended by the
10 International Association of Chiefs of Police ("IACP") and the Federal Bureau
11 of Investigation, would help to ensure that the integrity of Louisiana criminal
12 justice investigations is strengthened and enhanced so as to convict the guilty
13 and protect the innocent.

14 Art. 252. Definitions

15 For purposes of this Title:

16 (1) "Administrator" means the person conducting the photo or live
17 lineup.

18 (2) "Blind" means the administrator does not know the identity of the
19 suspect.

20 (3) "Blinded" means the administrator may know who the suspect is, but
21 does not know which lineup member is being viewed by the eyewitness.

22 (4) "Criminal justice entity" means any government agency or subunit
23 thereof, or private agency that, through statutory authorization or a legal
24 formal agreement with a governmental unit or agency, has the power of
25 investigation, arrest, detention, prosecution, adjudication, treatment,
26 supervision, rehabilitation, or release of persons suspected, charged, or
27 convicted of a crime.

28 (5) "Eyewitness" means a person who observes another person at or near
29 the scene of an offense.

1 (6) "Filler" means either a person, or a photograph of a person, who is
2 not suspected of an offense but is included in an identification procedure.

3 (7) "Folder shuffle method" means a procedure in which the suspect
4 photos and nonsuspect or filler photos are each placed in separate folders for
5 a total of six photographs and shuffled together along with four blank folders
6 and handed to the eyewitness one at a time so that the administrator cannot see
7 which photograph the eyewitness is viewing.

8 (8) "Live lineup" means an identification procedure in which a group of
9 persons, including the suspected perpetrator of an offense and other persons not
10 suspected of the offense, is displayed to an eyewitness for the purpose of
11 determining whether the eyewitness identifies the suspect as the perpetrator.

12 (9) "Photo lineup" means an identification procedure in which an array
13 of photographs, including a photograph of the suspected perpetrator of an
14 offense and additional photographs of other persons not suspected of the
15 offense, is displayed to an eyewitness either in hard copy form or via computer
16 or similar device for the purpose of determining whether the eyewitness
17 identifies the suspect as the perpetrator.

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

20 (11) "Showup" means an identification procedure in which an eyewitness
21 is presented with a single suspect for the purpose of determining whether the
22 eyewitness identifies this individual as the perpetrator.

23 Art. 253. Eyewitness identification procedures

24 A.(1) No later than January 1, 2019, any criminal justice entity
25 conducting eyewitness identifications shall adopt the International Association
26 of Chiefs of Police model policy on eyewitness identification procedures, or draft
27 its own policy that minimally comports to key best practices as outlined in this
28 Title.

29 (2) Each criminal justice entity that administers eyewitness identification

1 procedures shall provide a copy of its written policies to the attorney general
2 and the Department of Public Safety and Corrections no later than February 1,
3 2019.

4 B. For any criminal justice entity that elects to draft its own policy on
5 eyewitness identification procedures, these policies shall, at a minimum, include
6 the following best practices:

7 (1) Having a blind or blinded administrator perform the live or photo
8 lineup.

9 (2) Providing the eyewitness with instructions as outlined in the IACP
10 model policy that minimize the likelihood of an inaccurate identification.

11 (3) Composing the lineup so that the fillers generally resemble the
12 eyewitness's description of the perpetrator and so that the suspect does not
13 stand out from the fillers.

14 (4) Using the appropriate number of fillers in a live or photo lineup.

15 (5) Ensuring, when practicable, that a photograph of the suspect used in
16 a photo lineup is contemporary.

17 (6) Presenting separate live and photo lineups when there are multiple
18 eyewitnesses, ensuring the same suspect is placed in a different position for each
19 identification procedure.

20 (7) Having the administrator seek and document a clear statement from
21 the eyewitness, immediately after the eyewitness makes an identification in the
22 eyewitness's own words, relative to the eyewitness's level of confidence that the
23 person identified is the person who committed the crime.

24 (8) Adopting relevant practices that have been shown to enhance the
25 reliability of an eyewitness participating in a showup procedure, including:

26 (a) Identifying the circumstances under which a showup is warranted.

27 (b) Transporting the eyewitness to a neutral, nonlaw enforcement or
28 criminal justice entity location where the detained suspect is being held.

29 (c) Removing the suspect from any law enforcement vehicle.

1 (d) Removing restraints from the suspect when he is being observed by
2 the eyewitness.

3 (e) Administering the showup procedure as close in time as practicable
4 to the commission of the crime.

5 (9) Where practicable, electronically recording the entirety of the live or
6 photo lineup, or the showup procedure, either through video, or through audio
7 if video is not possible.

8 (10) Preserving photographic documentation of all live and photo lineup
9 members and showup suspects.

10 (11) Documenting verbatim the descriptions provided by the eyewitness
11 of the perpetrator as well as the confidence statement made by the eyewitness
12 during the identification procedure.

13 C. A video record of identification procedures shall be made or, if a video
14 record is not practicable, an audio record shall be made. If neither a video nor
15 audio record are practicable, the reasons shall be documented in writing, and
16 the lineup administrator shall make a full and complete written record of the
17 lineup.

18 D. The written eyewitness identification procedures of a criminal justice
19 entity shall be made available, in writing, to the public upon request.

20 E. Evidence of failure to comply with any of the provisions of this
21 Article:

22 (1) Shall be considered by the district court in adjudicating motions to
23 suppress an eyewitness identification.

24 (2) Shall be admissible in support of any claim of eyewitness
25 misidentification, as long as such evidence is otherwise admissible.

26 (3) If otherwise admissible, shall require the court to instruct the jury
27 that it may consider credible evidence of compliance or noncompliance with the
28 provisions of this Article in determining the reliability of eyewitness
29 identifications.

1 **(4) If otherwise admissible, shall serve as a basis for the admissibility of**
 2 **expert testimony by the state or the defendant on the subject of eyewitness**
 3 **identification, including the reliability thereof.**

4 Section 2. This Act shall become effective upon signature by the governor or, if not
 5 signed by the governor, upon expiration of the time for bills to become law without signature
 6 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
 7 vetoed by the governor and subsequently approved by the legislature, this Act shall become
 8 effective on the day following such approval.

The original instrument and the following digest, which constitutes no part
 of the legislative instrument, were prepared by Alden A. Clement Jr.

DIGEST

SB 397 Original 2018 Regular Session Gary Smith

Proposed law provides relative to eyewitness identification procedures.

Proposed law provides the following definitions:

- (1) "Administrator" means the person conducting the live or photo lineup.
- (2) "Blind" means the administrator does not know the identity of the suspect.
- (3) "Blinded" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness.
- (4) "Criminal justice entity" means any government agency or subunit thereof, or private agency that, through statutory authorization or a legal formal agreement with a governmental unit or agency, has the power of investigation, arrest, detention, prosecution, adjudication, treatment, supervision, rehabilitation, or release of persons suspected, charged, or convicted of a crime.
- (5) "Eyewitness" means a person who observes another person at or near the scene of an offense.
- (6) "Filler" means either a person, or a photograph of a person, who is not suspected of an offense but is included in an identification procedure.
- (7) "Folder shuffle method" means a procedure in which the suspect photo and nonsuspect or filler photos are placed in separate folders for a total of six photographs, and shuffled together along with four blank folders and handed to the eyewitness one at a time so that the administrator cannot see which photograph the eyewitness is viewing.
- (8) "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.
- (9) "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 either in hard copy form or via computer or similar device for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

- (10) "Suspect" means the person believed by law enforcement to be the possible perpetrator of the crime.
- (11) "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.

Proposed law provides that no later than 1/1/19, any criminal justice entity conducting eyewitness identifications must adopt the International Association of Chiefs of Police ("IACP") model policy on eyewitness identification procedures, or draft its own policy that minimally comports to key best practices as outlined in proposed law. Proposed law further provides that each criminal justice entity that administers eyewitness identification procedures must provide a copy of its written policies to the attorney general and the Dept. of Public Safety and Corrections no later than 1/1/19.

Proposed law provides that for any criminal justice entity that elects to draft its own policy on eyewitness identification procedures, these policies must, at a minimum, include the following best practices:

- (1) Having a blind or blinded administrator perform the live or photo lineup.
- (2) Providing the eyewitness with instructions as outlined in the IACP model policy that minimize the likelihood of an inaccurate identification.
- (3) Composing the lineup so that the fillers generally resemble the eyewitness's description of the perpetrator and so that the suspect does not stand out from the fillers.
- (4) Using the appropriate number of fillers in a live or photo lineup.
- (5) Ensuring, when practicable, that a photograph of the suspect used in a photo lineup is contemporary.
- (6) Presenting separate live and photo lineups when there are multiple eyewitnesses, ensuring the same suspect is placed in a different position for each identification procedure.
- (7) Having the administrator seek and document a clear statement from the eyewitness, immediately after the eyewitness makes an identification in the eyewitness's own words, relative to the eyewitness's level of confidence that the person identified is the person who committed the crime.
- (8) Adopting relevant practices that have been shown to enhance the reliability of an eyewitness participating in a showup procedure, including:
 - (a) Identifying the circumstances under which a showup is warranted.
 - (b) Transporting the eyewitness to a neutral, nonlaw enforcement or criminal justice entity location where the detained suspect is being held.
 - (c) Removing the suspect from any law enforcement vehicle.
 - (d) Removing restraints from the suspect when he is being observed by the

eyewitness.

- (e) Administering the showup procedure as close in time as practicable to the commission of the crime.
- (9) Where practicable, electronically recording the entirety of the live or photo lineup, or the showup procedure, either through video, or through audio if video is not possible.
- (10) Preserving photographic documentation of all live and photo lineup members and showup suspects.
- (11) Documenting verbatim the descriptions provided by the eyewitness of the perpetrator as well as the confidence statement made by the eyewitness during the identification procedure.

Proposed law provides that a video record of identification procedures is to be made or, if a video record is not practicable, an audio record is to be made. Proposed law further provides that if neither a video nor audio record are practicable, the reasons must be documented in writing, and the lineup administrator is to make a full and complete written record of the lineup.

Proposed law provides that the written eyewitness identification procedures of a criminal justice entity must be made available, in writing, to the public upon request.

Proposed law provides that evidence of failure to comply with any of the provisions of proposed law:

- (1) Must be considered by the district court in adjudicating motions to suppress an eyewitness identification.
- (2) Is admissible in support of any claim of eyewitness misidentification, as long as such evidence is otherwise admissible.
- (3) If otherwise admissible, requires the court to instruct the jury that it may consider credible evidence of compliance or noncompliance with the provisions of proposed law in determining the reliability of eyewitness identifications.
- (4) If otherwise admissible, serves as a basis for the admissibility of expert testimony by the state or the defendant on the subject of eyewitness identification.

Proposed law provides relative to legislative intent.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds C.Cr.P. Art. 251-253)