

2018 Regular Session

SENATE BILL NO. 38

BY SENATORS BISHOP, BARROW AND CARTER

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

1 AN ACT

2 To enact Title V-A of the Code of Criminal Procedure, to be comprised of Articles 251
3 through 253, relative to eyewitness identifications; to provide procedures relative to
4 law 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 Articles 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 policies and procedures to improve**

1 the accuracy of eyewitness identifications, such as those recommended by the
2 Louisiana Sheriff's Executive Management Institute (LSEMI) and the Federal
3 Bureau of Investigation, would help to ensure that the integrity of Louisiana
4 criminal justice investigations is strengthened and enhanced so as to convict the
5 guilty and protect the innocent.

6 Art. 252. Definitions

7 For purposes of this Title:

8 (1) "Administrator" means the person conducting the photo or live
9 lineup.

10 (2) "Blind" means conducted in such a way that the administrator does
11 not know the identity of the suspect.

12 (3) "Blinded" means conducted in such a way that the administrator
13 may know who the suspect is, but does not know which lineup member is being
14 viewed by the eyewitness.

15 (4) "Criminal justice entity" means any government agency or subunit
16 thereof, or private agency that, through statutory authorization or a legal
17 formal agreement with a governmental unit or agency, has the power of
18 investigation, arrest, detention, prosecution, adjudication, treatment,
19 supervision, rehabilitation, or release of persons suspected, charged, or
20 convicted of a crime.

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

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

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

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

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

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

13 Art. 253. Eyewitness identification procedures

14 A.(1) No later than January 30, 2019, any criminal justice entity
15 conducting eyewitness identifications shall either adopt the LSEMI model policy
16 or draft its own policy that minimally comports to key best practices as outlined
17 in this Article.

18 (2) Each criminal justice entity that administers eyewitness identification
19 procedures shall provide a copy of its written policies to the Louisiana
20 Commission on Law Enforcement and Administration of Criminal Justice no
21 later than March 1, 2019.

22 B. For any criminal justice entity that elects to draft its own policy on
23 eyewitness identification procedures, these policies shall:

24 (1) Be based on all of the following:

25 (a) Credible field, academic, or laboratory research on eyewitness
26 memory.

27 (b) Relevant policies, guidelines, and best practices designed to reduce
28 erroneous eyewitness identifications and to enhance the reliability and
29 objectivity of eyewitness identifications.

1 (c) Other relevant information as appropriate.

2 (2) Include the following information regarding evidence-based
3 practices:

4 (a) Procedures for selecting photograph and live lineup filler
5 photographs or participants to ensure that the photographs or participants:

6 (i) Are consistent in appearance with the description of the alleged
7 perpetrator.

8 (ii) Do not make the suspect noticeably stand out.

9 (b) Instructions given to a witness before conducting a photograph or live
10 lineup identification procedure shall include a statement that the person who
11 committed the offense may or may not be present in the procedure.

12 (c) Procedures for documenting and preserving the results of a
13 photograph or live lineup identification procedure, including the documentation
14 of witness statements, regardless of the outcome of the procedure.

15 (d) Procedures for administering a photograph or live lineup
16 identification procedure to an illiterate person or a person with limited English
17 language proficiency.

18 (e) For a live lineup identification procedure, if practicable, procedures
19 for assigning an administrator who is unaware of which member of the live
20 lineup is the suspect in the case or alternative procedures designed to prevent
21 opportunities to influence the witness.

22 (f) For a photograph identification procedure, procedures for assigning
23 an administrator who is capable of administering a photograph array in a blind
24 manner or in a blinded manner consistent with other proven or supported best
25 practices designed to prevent opportunities to influence the witness.

26 (g) Any other procedures or best practices supported by credible
27 research or commonly accepted as a means to reduce erroneous eyewitness
28 identifications and to enhance the objectivity and reliability of eyewitness
29 identifications.

1 **(3) Provide that a witness who makes an identification based on a**
2 **photograph or live lineup identification procedure be asked immediately after**
3 **the procedure to state, in the witness's own words, how confident the witness is**
4 **in making the identification. A law enforcement agency shall document in**
5 **accordance with Subsubparagraph (2)(c) of this Paragraph any statement made**
6 **under this Subparagraph.**

7 **C. Not later than December thirty-first of each odd-numbered year, the**
8 **institute shall review the model policy and training materials adopted under this**
9 **article and shall modify the policy and materials as appropriate while**
10 **maintaining the requirements outlined in Paragraph B of this Article.**

11 **D. Not later than December thirty-first of each even-numbered year,**
12 **each law enforcement agency shall review its policy adopted under this Article**
13 **and shall modify that policy as appropriate while maintaining the requirements**
14 **outlined in Paragraph B of this Article.**

15 **E. Failure to conduct a photograph or live lineup identification**
16 **procedure in substantial compliance with the model policy or any other policy**
17 **adopted under this Article shall not bar the admission of eyewitness**
18 **identification testimony.**

19 **F. A video record of identification procedures shall be made or, if a video**
20 **record is not practicable, an audio record shall be made. If neither a video nor**
21 **audio record are practicable, the reasons shall be documented in writing, and**
22 **the lineup administrator shall make a full and complete written record of the**
23 **lineup in accordance with Subsubparagraph (B)(2)(c) of this Article.**

24 **G. The written eyewitness identification procedures of a criminal justice**
25 **entity shall be made available, in writing, to the public upon request.**

26 **H. Evidence of failure to comply with any of the provisions of this**
27 **Article:**

28 **(1) May be considered by the district court in adjudicating motions to**
29 **suppress an eyewitness identification.**

1 (2) May be admissible in support of any claim of eyewitness
 2 misidentification, as long as the evidence is otherwise admissible.

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

The original instrument was prepared by Alden A. Clement, Jr. The following digest, which does not constitute a part of the legislative instrument, was prepared by Tammy Crain-Waldrop.

DIGEST

SB 38 Reengrossed 2018 Regular Session Bishop

Proposed law provides relative to eyewitness identification procedures.

Proposed law provides relative to legislative intent.

Proposed law provides the following definitions:

- (1) "Administrator" means the person conducting the live or photo lineup.
- (2) "Blind" means conducted in such a way that the administrator does not know the identity of the suspect.
- (3) "Blinded" means conducted in such a way that 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 photos and nonsuspect or filler photos are each 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.

Proposed law provides that no later than 1/30/19, any criminal justice entity conducting eyewitness identifications must adopt the La. Sheriff's Executive Management Institute ("LSEMI") 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 La. Commission on Law Enforcement and Administration of Criminal Justice no later than 3/1/19.

Proposed law provides that for any criminal justice entity that elects to draft its own policy on eyewitness identification procedures, these policies must:

- (1) Be based on all of the following:
- (a) Credible field, academic, or laboratory research on eyewitness memory.
 - (b) Relevant policies, guidelines, and best practices designed to reduce erroneous eyewitness identifications and to enhance the reliability and objectivity of eyewitness identifications.
 - (c) Other relevant information as appropriate.
- (2) Include the following information regarding evidence-based practices:
- (a) Procedures for selecting photograph and live lineup filler photographs or participants to ensure that the photographs or participants are consistent in appearance with the description of the alleged perpetrator and do not make the suspect noticeably stand out.
 - (b) Instructions given to a witness before conducting a photograph or live lineup identification procedure must include a statement that the person who committed the offense may or may not be present in the procedure.
 - (c) Procedures for documenting and preserving the results of a photograph or live lineup identification procedure, including the documentation of witness statements, regardless of the outcome of the procedure.
 - (d) Procedures for administering a photograph or live lineup identification procedure to an illiterate person or a person with limited English language proficiency.
 - (e) For a live lineup identification procedure, if practicable, procedures for assigning an administrator who is unaware of which member of the live lineup is the suspect in the case or alternative procedures designed to prevent opportunities to influence the witness.
 - (f) For a photograph identification procedure, procedures for assigning an administrator who is capable of administering a photograph array in a blind

manner or in a blinded manner consistent with other proven or supported best practices designed to prevent opportunities to influence the witness.

- (g) Any other procedures or best practices supported by credible research or commonly accepted as a means to reduce erroneous eyewitness identifications and to enhance the objectivity and reliability of eyewitness identifications.
- (3) Provide that a witness who makes an identification based on a photograph or live lineup identification procedure be asked immediately after the procedure to state, in the witness's own words, how confident the witness is in making the identification. A law enforcement agency is to document any statement made in accordance with proposed law.

Proposed law provides that by December 31st of each odd-numbered year, the institute is to review the model policy and training materials adopted under proposed law and modify the policy and materials as appropriate while maintaining the requirements outlined in proposed law.

Proposed law provides that by September first of each even-numbered year, each law enforcement agency is to review its policy adopted under proposed law and modify that policy as appropriate while maintaining the requirements outlined in proposed law.

Proposed law provides that failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under proposed law does not bar the admission of eyewitness identification testimony.

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) May be considered by the district court in adjudicating motions to suppress an eyewitness identification.
- (2) May be admissible in support of any claim of eyewitness misidentification, as long as the evidence is otherwise admissible.

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)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Judiciary C to the original bill

1. Changes certain dates for adopting and reporting relative to eyewitness identification procedures.

2. Changes eyewitness identification model policy references from those of the International Association of Chiefs of Police to those of the La. Sheriff's Executive Management Institute model policy on eyewitness identification procedures.
3. Requires certain eyewitness identification procedures be provided to the La. Commission on Law Enforcement and Administration of Criminal Justice instead of the attorney general and the Dept. of Public Safety and Corrections.
4. Changes requirements for eyewitness identification procedures for certain criminal justice entities.
5. Changes admissibility of certain evidence from mandatory to discretionary.
6. Deletes certain provisions of proposed law relative to admissibility of compliance or noncompliance with proposed law.
7. Deletes select provisions of proposed law relative to legislative intent.

Senate Floor Amendments to engrossed bill

1. Technical amendments.
2. Clarifies language.