

EYEWITNESS IDENTIFICATION PROCEDURES

As per 2018 Act #466, eff. 23 May 2018 * You are welcome to copy this.

We have **boldfaced** the name of each statute & some terms therein. Our comments are in *boldface and italics*.

Jean & Harmon Drew * 12.18.18 * harmonandjeandrew@gmail.com * www.drewlawbooks.com

La. C. Cr. P. Art. 251. Legislative intent

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

B. The legislature further finds that policies and procedures to improve the accuracy of eyewitness identifications, such as those recommended by the Louisiana Sheriff's Executive Management Institute (**LSEMI**) and the Federal Bureau of Investigation, would help to ensure that the integrity of Louisiana criminal justice investigations is strengthened and enhanced so as to **convict the guilty** and **protect the innocent**.

La. C. Cr. P. Art. 252. Definitions

For purposes of this Title:

- (1) "**Administrator**" means the person conducting the photo or live 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 blinded 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 a person believed by law enforcement to be the possible perpetrator of an offense.

La. C. Cr. P. Art. 253. Eyewitness identification procedures

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

NOTE: We predict that most agencies will undoubtedly adopt the LSEMI model policy. If so, this effectively moots Subsections B – D, following.

(2) Each criminal justice entity that administers eyewitness identification procedures shall provide a copy of its written policies to the Louisiana Commission on Law Enforcement and Administration of Criminal Justice no later than **March 1, 2019. To LCLE n/l/than 01 Mar 2019.**

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

- (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:
 - (i) Are consistent in appearance with the description of the alleged perpetrator.
 - (ii) Do not make the suspect noticeably stand out.
 - (b) Instructions given to a witness before conducting a photograph or live lineup identification procedure shall 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 shall document in accordance with Subparagraph (2)(c) of this Paragraph any statement made under this Subparagraph.

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

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

E. Failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under this Article shall **not** bar the admission of eyewitness identification testimony. ***Note: Will weaken the identification, and after contravention of policy, we predict suppressions may occur. See Subs. H (1), below?***

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

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

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

(1) May be considered by the district court in adjudicating motions to suppress an eyewitness identification. ***Conflict with Subsection E, above?***

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