



Improving Eyewitness Identification in Montana

The Problem: Eyewitness Misidentification

Mistaken eyewitness identifications contributed to 72% of the nation's 330 DNA exonerations, making it the leading contributing factor to wrongful convictions. In Montana, eyewitness misidentification contributed to two of the three DNA exonerations in the state. Jimmy Ray Bromgard was convicted of raping an 8-year-old girl in Billings, MT based on a faulty victim identification and invalid forensic testimony. Bromgard served 15 years in prison before DNA evidence proved his innocence in 2002.

The Solution: Evidence-Based Procedures

The National Academy of Sciences, the nation's premier independent scientific entity, the International Association of Chiefs of Police, the President's Task Force on 21st Century Policing, and many other organizations have recommended the following practices to improve the accuracy of witness identifications:

1. **Blind/Blinded Administration:** The officer administering the lineup is unaware of the suspect's identity, or if that is not practical, the administrator is "blinded" using a technique such as the folder shuffle method that prevents him or her from seeing which lineup member is being viewed by the witness. Blind/blinded administration prevents unintended cues or suggestiveness in the procedure.
2. **Instructions:** Prior to the procedure, witnesses should be instructed that the perpetrator may or may not be in the lineup and that the investigation will continue regardless of whether a witness makes an identification.
3. **Proper Use of "Non-Suspect" Fillers:** Non-suspect "fillers" used in the lineup should match the witness's description of the perpetrator.
4. **Confidence Statements:** Immediately following the lineup procedure, the eyewitness should provide a statement, in his or her own words that articulates the level of confidence in the identification.

National Picture on Eyewitness ID Reform

- 13 states have uniformly adopted best practices- Connecticut, Colorado, Georgia, Maryland, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, Texas, Wisconsin, West Virginia & Vermont.
- 12 states including Montana have statewide model policies with key reforms

Achieving Statewide Reform in Montana

The Montana Law Enforcement Academy (MLEA), the state's training entity for new recruits, developed an excellent eyewitness identification model policy in 2012 that includes all of the core best practices. However, while new recruits are being trained in evidence-based techniques veteran officers are likely still using outdated methods. Uniform, statewide adoption of best practices by local and state law enforcement agencies is critical to ensuring that justice is fairly administered throughout Montana. Uniform statewide adoption can be achieved through:

- **Option 1: Model Policy Legislation in 2017:** Similar to laws passed in CO and MD, the Law and Justice Interim Committee (LJIC) could recommend legislation that requires agencies to adopt the MLEA model policy, or their own written policy with key reforms articulated above. This would provide agencies with flexibility, while still ensuring adoption of uniform best practices throughout the state.
- **Option 2: Voluntary Compliance by October 2016 with Legislation as Backup:** Agencies can be given a year to adopt written policies with best practices voluntarily, in conjunction with training provided by the Innocence Project. The LJIC could be responsible for overseeing compliance (e.g. collecting policies). If a substantial number of agencies do not report compliance by October 2016, the LJIC could recommend legislation for the 2017 session.

Costs & Resources

Eleven states enacted statutes requiring the adoption of eyewitness identification reforms, and every fiscal note estimated costs to be "none" or "minimal." The Innocence Project can provide the following resources to assist with statewide implementation of best practices:

1. **Statewide Training Sessions:** Funding for statewide trainings presented by certified eyewitness identification trainer Chief William Brooks of the Norwood, MA Police Department.
2. **Implementation Toolkits:** Coordinating and funding mailings to every agency in the state of implementation tools including model policies, policywriting guides, checklists of key reforms and links to online training videos.
3. **Mailing & Assessing Compliance Surveys:** Funding and coordinating surveys to assess local and state agency compliance and whether a significant level of compliance has been met by a date certain.

Colorado Model Policy Law (2015)

§ 16-1-109. Eyewitness identification procedures--legislative..., CO ST § 16-1-109
West's Colorado Revised Statutes Annotated
Title 16. Criminal Proceedings
Code of Criminal Procedure
Article 1. General Provisions (Refs & Annos)
C.R.S.A. § 16-1-109

§ 16-1-109. Eyewitness identification procedures--legislative declaration--definitions--policies and procedures--training--admissibility
Effective: July 1, 2015

- (1) The general assembly finds and declares that:
- (a) Over the past forty years, a large body of peer-reviewed scientific research and practice has demonstrated that simple systematic changes in the administration of eyewitness identification procedures by all law enforcement agencies can greatly improve the accuracy of those identifications and strengthen public safety while protecting the innocent;
 - (b) The integrity of Colorado's criminal justice system benefits from adherence to peer-reviewed research-based practices in the investigation of criminal activity; and
 - (c) Colorado will benefit from the development and use of written law enforcement policies that are derived from peer-reviewed scientific research and research-based practices, which will ultimately improve the accuracy of eyewitness identification and strengthen the criminal justice system in Colorado.
- (2) As used in this section, unless the context otherwise requires:
- (a) "Blind" means the administrator of a live lineup, photo array, or showup does not know the identity of the suspect.
 - (b) "Blinded" means the administrator of a live lineup, photo array, or showup may know who the suspect is but does not know in which position the suspect is placed in the photo array when it is viewed by the eyewitness.
 - (c) "Eyewitness" means a person who observed another person at or near the scene of an offense.
 - (d) "Filler" means either a person or a photograph of a person who is not suspected of the offense in question and is included in an identification procedure.
 - (e) "Live lineup" means an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons who are not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.
 - (f) "Peace officers standards and training board" or "P.O.S.T. board" means the board created in section 24-31-302, C.R.S., for the certification of peace officers in Colorado.
 - (g) "Photo array" 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 who are not suspected of the offense, is displayed to an eyewitness either in hard copy form or via electronic means for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.
 - (h) "Showup" means an identification procedure in which an eyewitness is presented with a single suspect in person for the purpose of determining whether the eyewitness identifies the individual as the perpetrator.
- (3)(a) On or before July 1, 2016, any Colorado law enforcement agency charged with enforcing the criminal laws of Colorado and that, as part of any criminal investigation, uses or might use any eyewitness identification procedure shall adopt written policies and procedures concerning law enforcement-conducted eyewitness identifications. The policies and procedures adopted and implemented by a law enforcement agency must be consistent with eyewitness identification procedures of nationally recognized peer-reviewed research or the policies and procedures developed, agreed upon, and recommended by the Colorado attorney general's office and the Colorado district attorneys' council. The policies and procedures must include, but need not be limited to, the following:
- (I) Protocols guiding the use of a showup;
 - (II) Protocols guiding the recommended use of a blind administration of both photo arrays and live lineups or the recommended use of a blinded administration of the identification process when circumstances prevent the use of a blind administration;
 - (III) The development of a set of easily understood instructions for eyewitnesses that, at a minimum, advise the eyewitness that the alleged perpetrator may or may not be present in the photo array or live lineup and that the investigation will continue whether or not the eyewitness identifies anyone as the alleged perpetrator in the photo array or live lineup;
 - (IV) Instructions to the law enforcement agency regarding the appropriate choice and use of fillers in compiling a live lineup or photo array, including ensuring that fillers match the original description of the perpetrator; and
 - (V) Protocols regarding the documentation of the eyewitness' level of confidence as elicited at the time he or she first identifies an alleged perpetrator or other person and memorialized verbatim in

writing.

(b) On or before July 1, 2016, all Colorado law enforcement agencies that conduct eyewitness identifications shall adopt and implement the written policies and procedures required by paragraph (a) of this subsection (3). If a law enforcement agency does not complete or adopt its own written policies and procedures relating to eyewitness identifications, the law enforcement agency must, on or before July 1, 2016, adopt and implement the model policies and procedures as developed and approved in 2015 by the Colorado attorney general and the Colorado district attorneys' council.

(c) Local law enforcement policies and procedures relating to eyewitness identification are public documents. All such policies and procedures must be available, without cost, to the public upon request pursuant to the provisions of this section.

(d) Subject to available resources, law enforcement shall create, conduct, or facilitate professional training programs for law enforcement officers and other relevant personnel on methods and technical aspects of eyewitness identification policies and procedures. While these training programs shall be approved by the P.O.S.T. board, any programs may be created, provided, and conducted by any law enforcement agency, the office of the attorney general, the Colorado district attorneys' council, or any other P.O.S.T.-approved training entity.

(4) Policies and procedures adopted and implemented by a law enforcement agency pursuant to this section shall be reviewed by the agency at least every five years to ensure consistency with nationally recognized peer-reviewed research.

(5) Compliance or failure to comply with any of the requirements of this section is considered relevant evidence in any case involving eyewitness identification, as long as such evidence is otherwise admissible.

Credits

Added by Laws 2015, Ch. 110, § 1, eff. July 1, 2015.

C. R. S. A. § 16-1-109, CO ST § 16-1-109

Maryland Model Policy Law (2014)

MD Code, Public Safety, § 3-506

§ 3-506. Policy regarding eyewitness identifications required

Effective: October 1, 2014

Development of written policies

(a) On or before December 1, 2007, each law enforcement agency in the State shall adopt written policies relating to eyewitness identification that comply with the United States Department of Justice standards on obtaining accurate eyewitness identification.

Filing of written policies with Department of State Police

(b) On or before January 1, 2008, each law enforcement agency in the State shall file a copy of the written policy relating to eyewitness identification with the Department of State Police.

Compilation, inspection of written policies

(c)(1) On or before February 1, 2008, the Department of State Police shall compile the written policy relating to eyewitness identification of each law enforcement agency in the State.

(2) The Department of State Police shall allow public inspection of each policy compiled.

Adoption and implementation of identification procedures

(d)(1) On or before January 1, 2016, each law enforcement agency in the State shall:

(i) 1. adopt the Police Training Commission's Eyewitness Identification Model Policy; or
2. adopt and implement a written policy relating to identification procedures that complies with § 3-506.1 of this subtitle; and

(ii) file a copy of the written policy with the Department of State Police.

(2) On or before February 1, 2016, the Department of State Police shall compile the written policies relating to identification procedures of each law enforcement agency in the State.

(3) The Department of State Police shall allow public inspection of each policy compiled under this subsection.