



**OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT**

MARC BENNETT
District Attorney

KIM PARKER
Deputy District Attorney

February 18, 2016

**Testimony re SB 428
Submitted by Marc Bennett, District Attorney Eighteenth Judicial District
on behalf of the Kansas County & District Attorneys Association**

Honorable Chairman King and Members of the Senate Judiciary Committee, thank you for the opportunity to submit written testimony regarding SB 428. The KCDA would propose an amendment to the current version of SB 428 as set forth below:

The KCDA recognizes the legislature may desire to make clear that the public policy of the state of Kansas is that there is a strong preference for uniformity as to the procedures surrounding eyewitness identification. In other words, situations in which citizens are asked by law enforcement to identify another person during the course of a criminal investigation.

In 2015, the Kansas County and District Attorney's Association formed a "best practices" committee to tackle issues related to the changing landscape of law enforcement across the country. A sub group was formed with leaders in law enforcement across the state including KBI Director Thompson and his staff to identify and promulgate model policy with regard to several specific issues. The first issue we tackled happened to be eyewitness identification procedures. The group met several times, drafted proposed language and put the matter out for a 30 days comment session.

Attached, please find the model policy on the topic of eyewitness identification procedures now adopted by that group and endorsed by the KCDA. Our goal is that this policy will be available to all law enforcement agencies statewide to either adopt or use as a template for promulgation of their own policy.

The KCDA would propose that SB 428 be amended as follows:

All law enforcement agencies in this state shall adopt a detailed, written policy relating to the procedures to be employed when a citizen is asked to identify a person in the context of a criminal investigation.

(a) All law enforcement agencies in this state shall collaborate with the elected county or district attorney in their jurisdiction to adopt written policies regarding eyewitness procedures. These policies shall be made available to all officers of such agency.

(b) Policies adopted pursuant to this section shall be implemented by all Kansas law enforcement agencies within two years after the effective date of this act. The policies shall be available for public inspection during normal business hours.

(c) The policies adopted pursuant to this section shall include, but not be limited to identifying the procedures the law enforcement agency should adopt when asking a citizen to identify a person in the context of a criminal investigation."

We believed this amendment would accomplish the goals of SB 428 and add uniformity to the state on this important issue.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett, District Attorney
Eighteenth Judicial District

Contemporary Issues in Criminal Investigation and Prosecution Working Group EYEWITNESS IDENTIFICATION

Model Policy
February 2016

This policy is intended to allow for the individual needs of law enforcement agencies in the State of Kansas, regardless of size or resource limitations. Law enforcement agencies are encouraged to customize these protocols to meet their regional needs. This policy is non-binding upon agencies and is meant to serve as a guide to be used in developing a department's individual policy.

I. PURPOSE

- A. The purpose of this policy is to establish guidelines on how to conduct fair and reliable eyewitness identifications using photo line-ups, live line-ups and field show-ups.

II. POLICY

- A. Eyewitness identification is a valuable and frequently used investigative tool. It is anticipated that the use of eyewitness identification procedures will assist law enforcement in identifying potential suspects, help maximize the reliability of those identifications, and minimize erroneous identifications.

III. DEFINITIONS

- A. **Photo Line-up:** A collection of photographs shown to a witness for the purpose of identifying or eliminating suspects.
- B. **Live Line-up:** A collection of individuals who are shown to a witness for the purpose of identifying or eliminating suspects.
- C. **Field Show-up:** The presentation of a suspect to a witness in a short time frame following the commission of a crime for the purpose of identifying or eliminating suspects. Field show-ups are conducted in a time frame and setting contemporaneous with the crime.
- D. **Suspect:** Person sought to be identified or eliminated as the perpetrator of the crime.
- E. **Filler:** A person, other than the suspect, who is used in either a photo line-up or a live line-up.
- F. **Administrator:** The person who is conducting the identification procedure.
- G. **Blind (Independent) Administrator:** A term used when the administrator of the procedure does not know the identity of the suspect.
- H. **Blinded Procedure:** A procedure in which the administrator may know who the suspect is, but due to the procedure's administration, the administrator is unable to

provide cues to the witness. For example, the use of a folder to conceal a photo line-up from the administrator, blinds the procedure. Using this kind of procedure with a blind administrator makes the process "double blind."

- I. **Confidence Statement:** A statement from a witness, in their own words, immediately following an identification, as to their confidence or certainty of the accuracy of the identification.

IV. GENERAL PROCEDURES

- A. A minimum of five fillers should be used in any photo line-up or live line-up.
- B. Multiple witnesses shall not view a photo line-up, live line-up, or field show-up together. Efforts must be made to eliminate any communications between witnesses during the identification process.
- C. Fillers should be similar in appearance to the suspect. Similarities may include gender, race, age, and extraordinary physical features. Other factors to consider include clothing, facial hair, or other distinctive characteristics.
- D. A filler should not be used if the administrator is aware that the filler is known to the witness.
- E. Only one suspect will be included in each photo line-up or live line-up.
- F. If there is more than one suspect, then different fillers should be used in separate photo line-ups or live line-ups for each suspect.
- G. Photos should be as similar in layout and general appearance as possible. They must be free of any identifying information or other marks. Any identifying information contained on any photo must be covered and those areas of the other photos used should be similarly covered.
- H. Witnesses will be given instructions, preferably in writing, prior to viewing the photo line-up or live line-up covering the following points. Written instructions should be given to the witness prior to conducting the photo line-up or live line-up. The witness must acknowledge understanding the instructions prior to viewing the photo line-up or live line-up. If the instructions are provided in writing, the witness will be asked to sign the document as acknowledgement.
 1. As part of the ongoing investigation into a crime that occurred on (date) at (location) you are about to view a [photo line-up, live line-up].
 2. You will see [number] of people in the [photo line-up, live line-up]. There will be a number assigned to each person.
 3. Take whatever time you want to view the [photo line-up, live line-up].
 4. The suspect may or may not be present.
 5. Do not assume that I know who the suspect is.

6. I want you to focus on the persons you are shown and not look to me or anyone else in the room for guidance about making an identification during the procedure.
 7. Individuals presented in the [photo line-up, live line-up] may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
 8. Members of a live line-up can be requested to speak, move, or change clothing.
 9. If you do make an identification, I will ask you to describe your level of certainty about that identification using your own words.
- I. After the witness has had an opportunity to view the photo line-up or live line-up, the following questions will be asked and information provided to the witness. The exact wording below is not required. If the witness makes a response to any of these points prior to being asked, the details of that response will be noted.
1. Do you recognize anyone?
 2. What is the number of the person you recognize?
 3. From where do you recognize the person?
 4. In your own words, how certain are you?
 5. The investigation will continue regardless of whether or not you make an identification.
 6. Do not discuss with other witnesses what you have seen, said or done during this procedure.
- J. No comment should be made by the administrator as to the witness' selection or the outcome of the identification procedure.
- K. Ask the witness to provide a confidence statement in which the witness describes his or her certainty about any identification made. The witness should use their own words and not a numerical scale. The response should be recorded verbatim.
- L. Whenever reasonably possible, videotape or audiotape the identification procedure.

V. OPERATIONAL PROCEDURES

A. PHOTO LINE-UPS

1. When practicable, the photo line-up should be presented to the witness by an investigator or officer who is unaware of the identity of the suspect. A blind procedure should be used as well by placing the photo line-up into a folder before presenting it to the witness. The administrator should be positioned so they are not in the line of sight of the witness while viewing the photo line-up.
2. If the witness identifies one of the photos, they should be asked to mark the photo they are identifying and place their signature next to the photo.

3. Investigators should avoid addressing whether a person is in custody unless specifically asked. Witnesses should not be informed about any supporting evidence such as confessions, other ID's, or physical evidence that may have been obtained before presentation of the photo line-up.

B. LIVE LINE-UPS

1. The suspect should be allowed to pick his position in the live line-up.
2. The individuals in the live line-up should be numbered consecutively and referred to only by their assigned number.
3. The suspect should be in different positions if there is more than one live line-up.
4. Where practicable, an independent administrator should be used to conduct a live line-up. The administrator should stand, in a neutral manner, outside the witness' line of sight while the live line-up is being viewed.
5. Investigators should avoid addressing whether a person is in custody unless specifically asked. Witnesses should not be informed about any supporting evidence such as confessions, other ID's, or physical evidence that may have been obtained before the live line-up is conducted.
6. Defendant's Right to Counsel in a Live Line-up
 - a) There are circumstances where a suspect may have the right to have a defense attorney present during a live line-up. Investigators should consult with their prosecutor's office for guidance regarding a defendant's right to counsel.
 - b) If the suspect has a right to counsel, the investigator should ensure that the suspect is advised of these rights. If the suspect waives his or her right to counsel, a written waiver should be obtained.
 - c) When present, the defense attorney must be instructed not to speak in the viewing room when the witness is present.

C. FIELD SHOW-UPS

1. The use of field show-ups should be avoided whenever possible in preference to the use of a photo line-up or live line-up.
2. All General Procedures must be followed unless by their nature they do not apply to a field show-up process.
3. When circumstances require the prompt display of a suspect to a witness, these procedures should be used to minimize potential suggestiveness.
4. Document the witnesses' description of the perpetrator prior to conducting the field show-up.
5. Use field show-ups only when the suspect is detained within a reasonably short time frame following the offense.

6. Do not use single suspect field show-ups if probable cause to arrest the suspect has already been established.
7. Transport the witness to the location of the suspect whenever possible, rather than bringing the suspect to the witness.
8. Do not conduct field show-ups when the suspect(s) are in patrol cars, handcuffed, or physically restrained by police officers, unless necessary due to safety.
9. Caution the witness that the person he or she is about to see, may or may not be the perpetrator.
10. Separate witnesses and do not allow communication between them before or while conducting a field show-up.
11. If one witness identifies the suspect, use a photo line-up or live line-up for remaining witnesses.
12. Do not require field show-up suspects to put on clothing worn by, speak words uttered by, or perform other actions of the perpetrator.
13. Officers should scrupulously avoid words or conduct of any type that may suggest to the witness that the individual is or may be the perpetrator.
14. Ask the witness how certain he or she is of any identification that is made of a suspect. Document the exact words used by the victim without prompting the witness to elaborate.
15. Remind the witness not to talk about the field show-up to other witnesses until police or prosecutors deem it permissible.
16. Document the time and location of the field show-up, the officers present, and the outcome of the procedure.

VI. DOCUMENTING THE IDENTIFICATION PROCESS

- A. The entire identification procedure should be memorialized and documented in the most reliable way possible. Where practicable, preserve the identification using audio or video recording.
- B. If the photo line-up or live line-up procedure cannot be recorded, it should be preserved by photograph. The witness should sign the photograph to verify that it is the photo line-up or live line-up that he or she viewed.
- C. If the show-up cannot be recorded, the suspect should be photographed, if practicable, at the time, place, and conditions they are viewed by the witness.
- D. Any physical or verbal reaction to the photo line-up, live line-up, or field show-up should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.
- E. Document where the procedure took place, who was present, and the date and time it was administered.

- F. Anything the live line-up members are asked to do (speak, move, or change clothing) must be documented.
- G. Any and all photo line-ups created and viewed, whether identified or not identified, will be handled as provided in agency evidence handling policy.