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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** SB 923                      **Hearing Date:** April 10, 2018  
**Author:** Wiener  
**Version:** January 23, 2018  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** MK

**Subject:** *Criminal Investigations: Eyewitness Identification*

### HISTORY

**Source:** ACLU California  
California Innocence Project  
Loyola Law School Project for the Innocent  
Northern California Innocence Project

**Prior Legislation:** AB 308 (Ammiano) Held Sen Appropriations 2011  
SB 1591 (Ridley-Thomas) Held Senate Appropriations 2008  
SB 756 (Ridley-Thomas) Vetoed 2007  
SB 1544 (Migden) Vetoed 2006

**Support:** California Public Defenders Association; Conference of California Bar Association; Legal Services for Prisoners with Children; Root and Rebound; San Francisco Public Defender

**Opposition:** California Police Chiefs Association

### PURPOSE

*The purpose of this bill is to require all law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses.*

*Existing law* sets forth various aspects of criminal procedure.

*This bill* provides that all law enforcement agencies and prosecutorial entities shall adopt regulations for conducting photo lineups and live lineups with eyewitnesses.

*This bill* provides that the regulations shall be developed to ensure reliability and accuracy suspect identifications.

*This bill* provides that in order to ensure reliability and accuracy, the regulations created pursuant to this bill shall comply with the following requirements at a minimum:

- Prior to conducting the identification procedure, and as close in time to the incident as possible, the eyewitness shall complete a standardized form describing the perpetrator of the offense.

- The investigator conducting the identification procedure shall use blind administration or blinded administration during the identification procedure.
- The investigator shall state in writing the reason that the presentation of the lineup was not made by a person who was not aware of which person in the identification procedure was suspected as the perpetrator.
- An eyewitness shall be instructed of the following, prior to any identification procedure:
  - The perpetrator may not be among the persons in the identification procedure.
  - The eyewitness should not feel compelled to make an identification.
  - An identification or failure to make an identification will not end the investigation.
- An identification procedure shall be composed so that all fillers generally fit the description of the person suspected as the perpetrator, and, in the case of a photo lineup, the photograph of the person suspected as the perpetrator should resemble his or her appearance at the time of the offense and does not unduly stand out.
- In a photo lineup, no writings or information concerning any previous arrest of the person suspected as the perpetrator shall be visible to the eyewitness.
- Only one suspected perpetrator shall be included in any identification procedure.
- All witnesses shall be separated when viewing an identification procedure.
- Nothing shall be said to the eyewitness that might influence the eyewitness's selection of the person suspected as the perpetrator.
- If the eyewitness identifies a person he or she believes to be the perpetrator, all of the following shall apply:
  - The investigator shall immediately inquire as to the eyewitness' confidence level in the accuracy of the identification.
  - Information concerning the identified person shall not be given to the eyewitness prior to obtaining the eyewitness's statement of confidence level and documenting the exact words of the eyewitness.
  - The officer shall not at any time, validate the eyewitness'
- An electronic recording shall be made that includes both audio and visual representations of the identification procedure, the reactions of the witnesses, and the statements of the investigator.

*This bill* defines specified terms as follows:

- **Blind:** the administrator of an eyewitness identification procedure does not know the identity of the suspect.

- **Blinded:** the administrator of an eyewitness identification procedure may know who the suspect is, but does not know where the suspect, or his or her photo, as applicable, has been placed or positioned in the identification procedure.
- **Eyewitness:** a person whose identification of another person may be relevant in a criminal investigation.
- **Photo lineup:** a procedure in which an array of photographs, including a photograph of the person suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.
- **Live lineup:** a procedure in which a group of persons, including the person suspected as the perpetrator of an offense and other persons not suspected of the offense, are displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.
- **Investigator:** the person conducting the live or photo lineup.
- **Identification procedure:** either a photo lineup or a live lineup.
- **Filler:** either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.
- **Photo lineup:** a procedure in which an array of photographs, including a photograph of the person suspected as the perpetrator of an offense and additional photographs of other persons not suspected of the offense, are displayed to an eyewitness for the purpose of determining whether the eyewitnesses is able to identify the suspect as the perpetrator.

*This bill* makes a number of uncodified findings and declarations.

## COMMENTS

### 1. Need for This Bill

According to the author:

Compliance with best practices improves the reliability of valid eyewitness identification. Eyewitness misidentification is the leading contributor to wrongful convictions proven with DNA evidence nationally. In California eyewitness misidentification contributed to 66 wrongful convictions, including 12 out of the 13 DNA-based exonerations. Wrongful convictions involving eyewitness misidentification threatens public safety because when an innocent person is convicted the real perpetrator remains undetected and could harm others. The actual culprits in California's DNA exoneration cases went on to be convicted of 9 additional violent crimes including 6 murders and 2 rapes.

There is currently no statewide standard requiring law enforcement to use best practices. Although law enforcement agencies in San Francisco, Alameda, Contra Costa, and Santa Clara Counties are amongst some of the California jurisdictions that follow some of the recommended procedures. Nationally, 19 states have adopted state requirements for eyewitness identification procedures including Georgia, Nebraska, North Carolina, Ohio, Texas, and West Virginia. These evidence-based procedures have been endorsed by the California Commission on

the Fair Administration of Justice, the National Academy of the Sciences, the U.S. Department of Justice, the American Bar Association, and the International Association of Chiefs of Police.

## **2. Identification Procedures**

This bill will require all law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses. The bill sets forth minimum requirements for these policies

According to the Innocence Projects sponsors:

SB 923 would put California in line with 19 other states that have already adopted best practices state-wide to improve eyewitness identification procedures. The bill mandates consistency between all law enforcement agencies in our state to follow these practices: 1) that the administrator of the eyewitness procedure is blind or blinded to the identity of the suspect to ensure a witness is not inadvertently cued to select that person; 2) that appropriate fillers are used to make sure the suspect does not stand out in any way; 3) that the eyewitness is properly admonished prior to the procedure informing them the perpetrator may or may not be in the photo array; 4) that the eyewitness provides a statement of confidence following their identification, and 5) that the entire procedure is video recorded.

## **3. Recommendations of the Commission on the Fair Administration of Justice**

The Commission on the Fair Administration of Justice was created by SR 44 (Burton) in 2004. Chaired by former Attorney General John Van de Kamp, it was a bi-partisan Commission; its members were appointed by the Senate.

The Commission was formed to study and review the administration of criminal justice in California, determine the extent to which that process has failed in the past, to examine ways of providing safeguards and making improvements in the way the criminal justice system functions and to make recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair and accurate.

The first Report and Recommendations of the Commission, released on April 13, 2006, was on the subject of eyewitness identification procedures. In order to reach their recommendations, the Commission looked at reports from other commissions; available research; guidelines adopted by the U.S. Department of Justice, other states and Santa Clara County, California; and took testimony at a public hearing on March 15, 2006. Ten of the twelve recommendations were adopted unanimously with dissent by three members to the two remaining recommendations. The Commission's recommendations are as follows:<sup>1</sup>

- Double-blind identification procedures should be utilized whenever practicable, so the person displaying photos in a photo spread or operating a lineup is not aware of the identity of the actual suspect. When double-blind administration is not practicable, other double-blind alternatives should be considered.

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<sup>1</sup> For a complete copy of the Commission's report, the dissent, and the response to the dissent, please see the Commission's Web site: <http://www.ccfaj.org/index.html>.

- When double-blind procedures are utilized, the use of sequential presentation of photos and lineup participants is preferred, so the witness is only presented with one person at a time. Photos or subjects should be presented in random order, and witnesses should be instructed to say yes, no, or unsure as to each photo or participant. Sequential procedures should not be used where double-blind administration is not available. (Members Lockyer, Fox and Totten dissented to this recommendation, see below.)
- A single subject show-up should not be used if there is probable cause to arrest the suspect. The suggestiveness of show-ups should be minimized by documenting a description of the perpetrator prior to the show-up, transporting the witness to the location of the suspect, and where there are multiple witnesses they should be separated, and lineups or photo spreads should be used for remaining witnesses after an identification is obtained from one witness.
- All witnesses should be instructed that a suspect may or may not be in a photo spread, lineup or show-up, and they should be assured that an identification or failure to make an identification will not end the investigation.
- Live lineup procedures and photo displays should be preserved on videotape, or audiotape when video is not practicable. When videotaping is not practicable, a still photo should be taken of a live lineup. Police acquisition of necessary video equipment should be supported by legislative appropriations.
- At the conclusion of a lineup, photo presentation, or show-up, a witness who has made identification should describe his or her level of certainty, and that statement should be recorded or otherwise documented, and preserved. Witnesses should not be given feedback confirming the accuracy of their identification until a statement describing level of certainty has been documented.
- A minimum of six photos should be presented in a photo spread, and a minimum of six persons should be presented in a lineup. The fillers or foils in photo spreads and lineups should resemble the description of the suspect given at the time of the initial interview of the witness unless this method would result in an unreliable or suggestive presentation.
- Photo spreads and lineups should be presented to only one witness at a time, or where separate presentation is not practicable, witnesses should be separated so they are not aware of the responses of other witnesses.
- Training programs should be provided and required to train police in the use of recommended procedures for photo spreads, show-ups and lineups. The Legislature should provide adequate funding for any training necessitated by the recommendations of this Commission.
- Training programs should be provided and required for judges, prosecutors and defense lawyers, to acquaint them with the particular risks of cross-racial identifications, as well as unreliable identification procedures, and the use of expert testimony to explain these risks to juries. The Legislature should provide adequate funding for any training necessitated by the recommendations of this Commission.

- The standardized jury instructions utilized in eyewitness identification cases to acquaint juries with factors that may contribute to unreliable identifications should be evaluated in light of current scientific research regarding cross-racial identifications and the relevance of the degree of certainty expressed by witnesses in court. (Members Lockyer, Fox and Totten dissented to this recommendation, see below.)
- The Commission recognizes that criminal justice procedures, including eyewitness identification protocols, greatly benefit from ongoing research and evaluation. Thus, the Commission recommends the continued study of the causes of mistaken eyewitness identification and the consideration of new or modified protocols.

Then Attorney General Lockyer and District Attorneys Fox and Totten did not agree that sequential lineups should be designated as the preferred method and filed a dissent to that recommendation. They believed that a recent Illinois study called into question the accuracy of these types of lineups. In response to the dissent, the Chair noted that the debate over simultaneous vs. sequential lineups is not over. The Illinois study was considered by the Commission but instead of relying on one study, they relied on other studies and recommendations adopted in other jurisdictions that were consistent. The Chair noted that the recommendation “is simply at the present time, based upon our analysis of the available research, sequential identification procedures are preferred.”

Then Attorney General Lockyer and District Attorneys Fox and Totten also did not agree with the recommendation that the jury instruction be evaluated in light of current scientific evidence. They noted that they “do not believe that this Commission should be interjecting itself into the development of jury instructions” which has been delegated to the Judicial Council by the Chief Justice. In response, Chair Van de Kamp notes that the Advisory Committee invites suggestions and the Judicial Council regularly seeks comment.

#### 4. The science on eyewitness ID

At the time of the Commission’s hearing on eyewitness identification, the Illinois study that the dissenters to the Commission’s recommendations relied in part for their dissent had only been recently released and had not been peer reviewed. Since that time it has been found that the study was scientifically flawed, for example:

Gary Wells, one of the leading authorities on eyewitness identification, and other noted social scientists note that the experiment was not conducted according to fundamental scientific principles, and therefore fails to provide any scientific validity or reliability. Specifically, the “experiment” compared the sequential procedure using double-blind administration to the simultaneous procedure *absent* double-blind administration. This lack of controls in the study’s design is a fatal scientific flaw, and “precludes any meaningful conclusions about the results.”<sup>2</sup>

The Chief of Police of Norwood, Massachusetts police department in discussing why they changed their eyewitness ID policies when he was in Wellesley, MA noted in an article in

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<sup>2</sup> Gary Wells’ website:

[http://www.psychology.iastate.edu/FACULTY/gwells/Illinois\\_Pilot\\_Program\\_on\\_Sequential\\_Double-Blind\\_Identification\\_Procedures\\_reactions.pdf](http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Pilot_Program_on_Sequential_Double-Blind_Identification_Procedures_reactions.pdf)

December 2014 that “[i]n October [2014], the National Academy of Sciences (NAS) released the first ever comprehensive report on the science of eyewitness identification practices in the United States. The report, *Identifying the Culprit*, to which I had the privilege to contribute as a committee member, recommended that law enforcement adopt the following practices:

- **train all law enforcement officers in eyewitness identification**
- **conduct lineups and photo arrays blindly**
- **establish standardized witness instructions**
- **immediately ask the witness about his or her level of confidence in the identification**
- **videotape the entire eyewitness identification procedure**

The reasons for these reforms are articulated substantively in the report, but can be boiled down to the following explanations:

- The NAS stressed the importance of providing both recruit and refresher training to law enforcement on vision, memory, and the practices the police can employ to minimize contamination and enhance the accuracy of the identifications they obtain.
- Live and photo lineups should be conducted by a blind administrator. In the case of double-blind lineups, neither the administrator nor the witness knows the identity of the suspect. In instances where a smaller police agency lacks personnel to conduct a double-blind lineup, the NAS recommends a “blinded” procedure where the officer knows the identity of the suspect but performs what is known as a “folder shuffle” to prevent him or her from seeing which photo the eyewitness is viewing. With both methods, because the administrator is effectively “blinded,” he or she cannot unintentionally convey any gestures or clues which might prompt an eyewitness to make a selection.
- Law enforcement should develop standardized witness instructions informing the eyewitness that the perpetrator may or may not be in the lineup and that the investigation will continue regardless of whether a selection is made. This will reduce the chance of the eyewitness feeling pressure to make a selection out of fear that the investigation will not otherwise continue.
- After a selection is made, officers should immediately take down a verbatim confidence statement in which the eyewitness articulates how certain he or she is. This is important because an eyewitness’s confidence can become inflated between the time of an identification and a possible trial. Having the witness describe his or her level of confidence at the time an identification is made will provide juries with a useful tool for judging the true level of confidence articulated by the eyewitness at the time of an identification.
- Identification procedures should be video-recorded from start to finish to preserve a permanent record of the procedure.”

The article concluded stating:

This means that there is no longer any reason for chiefs or heads of law enforcement departments to be skeptical about the usefulness of these practices, a sentiment I can absolutely relate to. The scientific debate around these practices is over, and this report provides law enforcement agencies across the country an opportunity to update their eyewitness identification policies with the strong, scientifically supported practices.

(Brook, William G. III, “ When it Comes to ID Best Practices the Science is Settled”  
*Community Policing Dispatch* Vol. 7, Issue 12 December 2014  
[https://cops.usdoj.gov/html/dispatch/12-2014/eyewitness\\_id\\_best\\_practices.asp](https://cops.usdoj.gov/html/dispatch/12-2014/eyewitness_id_best_practices.asp)

## 5. Santa Clara and Other Jurisdictions

In 2002, Santa Clara County, California adopted lineup protocol using double-blind and sequential identification procedures similar to the ones in this bill. According to testimony at the hearing held by the Commission on the Fair Administration of Justice, “all law enforcement agencies within Santa Clara County agreed to the protocol without dissent, and the protocol has been successfully implemented for nearly four years without complaint.”<sup>3 4</sup>

The US Department of Justice January 6, 2017 updated their recommendations on Eyewitness Identification Procedures for Conducting Photo Arrays and included many of provisions of this bill including: using a blind or blinded procedure; making sure the fillers meet the basic description of the perpetrator; and taking a confidence statement as soon as the identification is made.

19 states have required eyewitness identification reform among these are West Virginia; North Carolina; Texas, Ohio, Nevada, Nebraska and Montana.

## 6. Argument in Support

Root and Rebound support this bill stating:

Since 1989, 186 men and women in our state have been found to have been wrongfully convicted, and in over a third of these cases, mistaken eyewitness identification was the basis for conviction. Mistaken identification by eyewitnesses is a problem throughout the U.S., providing the basis of nearly seventy percent of convictions later overturned by DNA nationwide. For the past three decades, the problem has been studied by stakeholders in the criminal justice system and social scientists. The result has been recommendations of evidence-proven practices that reduce the risk of wrongful identifications and wrongful convictions based on those identifications, while making it less likely that rightful identifications will be successfully challenged in court.

## 7. Argument in Opposition

The California Police Chiefs Association opposes this bill stating:

In a study conducted by the University of Aberdeen, Professors Amina Memon and Fiona Gabbert found that “sequential testing lowers the choosing rates of both younger and older adults such that they are more likely to miss the target when present.” Professors Memon and Gabbert went on to say there was a “tendency for sequential testing to increase false identifications among older adults.”

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<sup>3</sup> “California Commission on the Fair Administration of Justice Report and Recommendations Regarding Eye Witness Identification Procedures,” p. 3.

<sup>4</sup> It is interesting to note that testimony at the March 15, 2006, Commission hearing indicated that in the experience of both Santa Clara County and the State of New Jersey, there was essentially no cost involved in the adoption of the protocol.

Furthermore, the study *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, reported that Hennepin County investigators "perceived no drop in number of quality of achieved suspect identifications."

The added requirements from SB 923 would require additional staff, which may not be feasible for some departments. Specifically, if they are required to conduct blind administration of procedures it would require additional officers to conduct parts of the investigation which could prove to be difficult for our smaller agencies. The bill would also require audio and visual recordings of the reactions of the victims when conducting the lineups. The cost of implementing and maintain the necessary equipment would put a strain on budgets which could potentially affect day to day operations.

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