

## Senate Bill No. 923

### CHAPTER 977

An act to add Section 859.7 to the Penal Code, relating to criminal procedure.

[Approved by Governor September 30, 2018. Filed with  
Secretary of State September 30, 2018.]

#### LEGISLATIVE COUNSEL'S DIGEST

SB 923, Wiener. Criminal investigations: eyewitness identification.

Existing law generally regulates the collection and admissibility of evidence for purposes of criminal prosecutions.

This bill would, commencing January 1, 2020, require all law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses, as those terms would be defined by the bill, to ensure reliable and accurate suspect identifications. The bill would require the regulations to comply with specified requirements, including that prior to conducting the identification procedure, and as close in time to the incident as possible, the eyewitness provide the description of the perpetrator of the offense. By imposing a higher level of service on local law enforcement and prosecutorial entities, the bill would impose a state-mandated local program. The bill would also include a statement of legislative findings and declarations.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature finds and declares the following:

(a) Valid eyewitness identifications are an important piece of evidence for solving crimes and securing rightful convictions. Compliance with best practices improves the reliability of the identification, whereas failing to comply with these recommendations increases the risk of a misidentification and also will make even positive identifications more likely to be rejected in court.

(b) Eyewitness misidentification is the leading contributor to wrongful convictions proven with DNA evidence nationally. In California, eyewitness

misidentification played a role in 12 out of 13 DNA-based exonerations in the state.

(c) Wrongful convictions involving eyewitness misidentification threaten public safety because, when an innocent person is convicted, the real perpetrator remains undetected and could harm others.

(d) Over the past 30 years, a large body of peer-reviewed research has demonstrated that simple systematic changes in the administration of eyewitness identification procedures by law enforcement agencies can greatly improve the accuracy of identifications. These evidence-based practices include blind or blinded administration of identification; instructing the eyewitness that the perpetrator may or may not be present in the procedure; selecting fillers that match the eyewitness' description of the perpetrator and do not make the suspect noticeably stand out; eliciting a statement of confidence from the eyewitness, in his or her own words, immediately after an identification is made; and recording the eyewitness identification procedure.

(e) Evidence-based procedures have been endorsed by the California Commission on the Fair Administration of Justice, the National Academy of Sciences, the United States Department of Justice, and the International Association of Chiefs of Police.

(f) In 2008, the California Commission on the Fair Administration of Justice issued recommendations for law enforcement to adopt evidence-based eyewitness identification practices. While some individual jurisdictions have implemented these procedures, there is currently no uniform statewide use of best practices. Without consistent policies throughout the state, justice will vary by jurisdiction.

SEC. 2. Section 859.7 is added to the Penal Code, to read:

859.7. (a) All law enforcement agencies and prosecutorial entities shall adopt regulations for conducting photo lineups and live lineups with eyewitnesses. The regulations shall be developed to ensure reliable and accurate suspect identifications. In order to ensure reliability and accuracy, the regulations shall comply with, at a minimum, the following requirements:

(1) Prior to conducting the identification procedure, and as close in time to the incident as possible, the eyewitness shall provide the description of the perpetrator of the offense.

(2) The investigator conducting the identification procedure shall use blind administration or blinded administration during the identification procedure.

(3) The investigator shall state in writing the reason that the presentation of the lineup was not conducted using blind administration, if applicable.

(4) An eyewitness shall be instructed of the following, prior to any identification procedure:

(A) The perpetrator may or may not be among the persons in the identification procedure.

(B) The eyewitness should not feel compelled to make an identification.

(C) An identification or failure to make an identification will not end the investigation.

(5) An identification procedure shall be composed so that the fillers generally fit the eyewitness' description of the perpetrator. In the case of a photo lineup, the photograph of the person suspected as the perpetrator should, if practicable, resemble his or her appearance at the time of the offense and not unduly stand out.

(6) In a photo lineup, writings or information concerning any previous arrest of the person suspected as the perpetrator shall not be visible to the eyewitness.

(7) Only one suspected perpetrator shall be included in any identification procedure.

(8) All eyewitnesses shall be separated when viewing an identification procedure.

(9) Nothing shall be said to the eyewitness that might influence the eyewitness' identification of the person suspected as the perpetrator.

(10) If the eyewitness identifies a person he or she believes to be the perpetrator, all of the following shall apply:

(A) The investigator shall immediately inquire as to the eyewitness' confidence level in the accuracy of the identification and record in writing, verbatim, what the eyewitness says.

(B) Information concerning the identified person shall not be given to the eyewitness prior to obtaining the eyewitness' statement of confidence level and documenting the exact words of the eyewitness.

(C) The officer shall not validate or invalidate the eyewitness' identification.

(11) An electronic recording shall be made that includes both audio and visual representations of the identification procedures. Whether it is feasible to make a recording with both audio and visual representations shall be determined on a case-by-case basis. When it is not feasible to make a recording with both audio and visual representations, audio recording may be used. When audio recording without video recording is used, the investigator shall state in writing the reason that video recording was not feasible.

(b) Nothing in this section is intended to affect policies for field show up procedures.

(c) For purposes of this section, the following terms have the following meanings:

(1) "Blind administration" means the administrator of an eyewitness identification procedure does not know the identity of the suspect.

(2) "Blinded administration" means 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 through the use of any of the following:

(A) An automated computer program that prevents the administrator from seeing which photos the eyewitness is viewing until after the identification procedure is completed.

(B) The folder shuffle method, which refers to a system for conducting a photo lineup by placing photographs in folders, randomly numbering the folders, shuffling the folders, and then presenting the folders sequentially so that the administrator cannot see or track which photograph is being presented to the eyewitness until after the procedure is completed.

(C) Any other procedure that achieves neutral administration and prevents the lineup administrator from knowing where the suspect or his or her photo, as applicable, has been placed or positioned in the identification procedure.

(3) “Eyewitness” means a person whose identification of another person may be relevant in a criminal investigation.

(4) “Field show up” means a procedure in which a suspect is detained shortly after the commission of a crime and who, based on his or her appearance, his or her distance from the crime scene, or other circumstantial evidence, is suspected of having just committed a crime. In these situations, the victim or an eyewitness is brought to the scene of the detention and is asked if the detainee was the perpetrator.

(5) “Filler” means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.

(6) “Identification procedure” means either a photo lineup or a live lineup.

(7) “Investigator” means the person conducting the identification procedure.

(8) “Live lineup” means 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.

(9) “Photo lineup” means 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 eyewitness is able to identify the suspect as the perpetrator.

(d) Nothing in this section is intended to preclude the admissibility of any relevant evidence or to affect the standards governing the admissibility of evidence under the United States Constitution.

(e) This section shall become operative on January 1, 2020.

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.