

**REPORT OF THE
CHIEF LEGISLATIVE ANALYST**

DATE: February 27, 2018

TO: Honorable Members of the Rules, Elections, and Intergovernmental Relations
Committee

FROM: Sharon M. Tso  Council File No: 18-0002-S12
Chief Legislative Analyst Assignment No: 18-02-0126

SUBJECT: Resolution (Harris-Dawson – Englander) to support SB 923 (Wiener), which would require law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses.

CLA RECOMMENDATION: Adopt Resolution (Harris-Dawson – Englander) to include in the City’s 2017 - 2018 State Legislative Program SUPPORT for SB 923 (Wiener), which would require law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses.

SUMMARY

The Resolution (Harris-Dawson – Englander), introduced on February 6, 2018, states that valid eyewitness identifications, through the use of lineups with persons or photographs, provide important evidence for solving crimes and securing rightful convictions. However, eyewitness misidentification can damage public safety by leading to wrongful convictions of innocent persons and allowing the real perpetrator to remain undetected and harm others.

Evidence-based procedures, including blind administration of identification, selecting lineup participants that do not make the suspect noticeably stand out, and eliciting a statement of confidence from the eyewitness immediately after an identification, can greatly improve identification and accuracy. These procedures would make justice consistent throughout the state, improving public safety and trust in the justice system. The Resolution recommends that the City support SB 923, which would require law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses.

BACKGROUND

A growing body of research suggests that eyewitness identifications of suspects can sometimes be unreliable. Mistaken eyewitness identifications were a factor in approximately 70% of the 350 wrongful convictions overturned by post-conviction DNA evidence in the United States. In California, eyewitness misidentification played a role in every such instance. Various factors can affect eyewitness performance, including: the type of presentation used (e.g. lineup or photos); the likeness of fillers to the suspect; the number of fillers; whether lineup images are presented simultaneous or sequentially; and the nature of the instructions and feedback provided before and after the identification procedure.

The California Commission on the Fair Administration of Justice (Commission) was created in 2004 to study and review the administration of criminal justice in California. The Commission

issued an interim report with recommendations on eyewitness identification in 2006. In 2008, a final report was issued that provided recommendations on the following topics: eyewitness identification, false confessions, informant testimony, problems with scientific evidence, professional responsibility and accountability of prosecutors and defense lawyers, remedies, and the death penalty. The Commission made nine primary recommendations related to police agencies and the administration of lineups as follows:

1. A minimum of six photos or persons should be presented in a lineup. The fillers or foils should resemble the initial description of the suspect provided by the witness unless this method would result in an unreliable or suggestive presentation.
2. Photo spreads and lineups should be presented to only one witness at a time, or witnesses should be separated so they are not aware of other witnesses' responses.
3. Double-blind procedures, whereby the officer conducting the procedure does not know who the suspect is, should be utilized whenever practicable.
4. Sequential presentation of photos and lineup participants is preferred when double-blind procedures are utilized.
5. All witnesses should be instructed that a suspect may or may not be in a photo spread or lineup, and witnesses should be assured that a failure to make an identification will not end the investigation.
6. At the conclusion of the lineup, witnesses who have made an identification should describe his or her level of certainty, and that statement should be recorded, or otherwise documented, and preserved.
7. Live lineup procedures and photo displays should be preserved on video tape, or audio tape when video is not practicable.
8. A single subject show-up, where only one person is shown to the witness, should not be used if there is probable cause to arrest the suspect.
9. Training programs should be provided and required to train law enforcement in the use of recommended procedures.

Existing law generally regulates the collection and admissibility of evidence for purposes of criminal prosecutions. SB 923 requires police agencies to adopt regulations for eyewitness identification procedures that comply with various requirements. These requirements include all or part of recommendations 1, 2, 3, 5, 6, and 7 from the Commission's above report. In addition, SB 923 defines relevant terms, such as "blinded," "filler," "live lineup," and "photo lineup."

Several jurisdictions have adopted procedures similar to those recommended by the Commission and would be required by SB 923 if enacted. The federal government adopted new procedures for eyewitness identification in January 2017 which directs federal agents to administer photo spreads using either "blind" (where the administrator does not know what the suspect looks like) or "blinded" (where the administrator takes steps to ensure he or she cannot see the arrangement of photos). Administrators are also instructed to document a witness's self-reported confidence at the moment of the initial identification and to video- or audio-record the test whenever possible. Nineteen major jurisdictions, including ten states, require or recommend double-blind procedures. In California, the Santa Clara County District Attorney's Office and some local law enforcement agencies have adopted a lineup protocol requiring double-blind and sequential identification procedures following the Commission's interim report without issue.

The Los Angeles Police Department (LAPD) last reported to Council on its procedures pertaining to eyewitness identification in 2010 (C.F. 08-1943). At that time, LAPD policy required the use of

at least six photos, fillers resembling the description of the subject, separated witnesses, and instructions to witnesses that the suspect may or may not be in the photo spread or lineup. Additionally, investigators were required to have the witness write appropriate comments on the photo, not tell the witness if they picked the right or wrong photo, and instruct the witness not to tell other witnesses they have identified anyone. Identification records were kept in the Investigator's Case Envelope, and the photos and reports were maintained by Robbery-Homicide Division. LAPD did not require a double-blind procedure, the use of sequential presentation of the photograph, and the witness to state his or her level of certainty in the accuracy of the identification. LAPD prepared a trial of the double-blind procedure in 2007, but never conducted this trial due to the objection of the District Attorney's office.

There have been attempts to enact legislation relating to the Commission's recommendations on eyewitness identification in 2006 (SB 1544 - Migden), 2007 (SB 756 - Ridley-Thomas), 2008 (SB 1591 - Ridley-Thomas), 2011 (AB 308 - Ammiano), and 2013 (AB 807 - Ammiano). Legislation in 2006 and 2007 was vetoed by Governor Schwarzenegger; subsequent attempts failed to pass the legislature.

BILL STATUS

1/23/18	Introduced. Read first time.
2/01/18	Referred to Committee on Public Safety.

DEPARTMENTS NOTIFIED

Police Department



Tim Plummer
Analyst

SMT:tcp

- Attachments:
1. Resolution (Blumenfield - Englander)
 2. SB 923 (Wiener)

RESOLUTION RULES, ELECTIONS, INTERGOVERNMENTAL RELATIONS

WHEREAS, any official position of the City of Los Angeles with respect to legislation, rules, regulations or policies proposed to or pending before a local, state or federal governmental body or agency must have first been adopted in the form of a Resolution by the City Council with the concurrence of the Mayor; and

WHEREAS, valid eyewitness identifications, through the use of lineups with persons or photographs, are an important piece of evidence for solving crimes and securing rightful convictions; and

WHEREAS, eyewitness misidentification has played a role in every wrongful conviction overturned by DNA evidence in California; and

WHEREAS, eyewitness misidentification does not merely lead to wrongful convictions of innocent persons, it also damages public safety by allowing the real perpetrator to remain undetected and to harm others; and

WHEREAS, thirty years of peer-reviewed research has demonstrated that the systematic use of evidence-based practices, including blind administration of identification, selecting lineup participants that do not make the suspect noticeably stand out, and eliciting a statement of confidence from the eyewitness immediately after an identification, can greatly improve the accuracy of the identifications; and

WHEREAS, 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; and

WHEREAS, Senate Bill 923 (Wiener) would require law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses that meet minimum requirements designed to ensure reliability and accuracy; and

WHEREAS, uniform eyewitness identification procedures would make justice consistent throughout the state, improving public safety and trust in the justice system;

NOW, THEREFORE, BE IT RESOLVED, with the concurrence of the Mayor, that by the adoption of this Resolution, the City of Los Angeles hereby includes in its 2017 - 2018 State Legislative Program SUPPORT for SB 923 (Wiener), which would require law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses.

PRESENTED BY: 

MARQUEECE HARRIS-DAWSON
Councilmember, 8th District

SECONDED BY: 

ORIGINAL

Introduced by Senator Wiener
(Principal coauthor: Assembly Member Levine)

January 23, 2018

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

LEGISLATIVE COUNSEL'S DIGEST

SB 923, as introduced, Wiener. Criminal investigations: eyewitness identification.

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

This bill would 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.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

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

1 SECTION 1. The Legislature finds and declares the following:

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

9 (b) Eyewitness misidentification is the leading contributor to
10 wrongful convictions proven with DNA evidence nationally. In
11 California, eyewitness misidentification played a role in every
12 DNA-based exoneration in the state.

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

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

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

33 (f) In 2008, the California Commission on the Fair
34 Administration of Justice issued recommendations for law
35 enforcement to adopt evidence-based eyewitness identification

1 practices. While some individual jurisdictions have implemented
2 these procedures, there is currently no uniform statewide use of
3 best practices. Without consistent policies throughout the state,
4 justice will vary by jurisdiction.

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

6 859.7. (a) All law enforcement agencies and prosecutorial
7 entities shall adopt regulations for conducting photo lineups and
8 live lineups with eyewitnesses. The regulations shall be developed
9 to ensure reliable and accurate suspect identifications. In order to
10 ensure reliability and accuracy, the regulations shall comply with,
11 at a minimum, the following requirements:

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

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

18 (3) The investigator shall state in writing the reason that the
19 presentation of the lineup was not made by a person who was not
20 aware of which person in the identification procedure was
21 suspected as the perpetrator of the offense, if applicable.

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

24 (A) The perpetrator might not be among the persons in the
25 identification procedure.

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

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

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

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

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

1 (8) All witnesses shall be separated when viewing an
2 identification procedure.

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

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

8 (A) The investigator shall immediately inquire as to the
9 eyewitness' confidence level in the accuracy of the identification.

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

14 (C) The officer shall not, at any time, validate the eyewitness'
15 identification.

16 (11) An electronic recording shall be made that includes both
17 audio and visual representations of the identification procedures
18 that includes all persons who participated in the identification
19 procedure, the reactions of the witnesses, and the statements of
20 the investigator.

21 (b) For purposes of this section, the following terms have the
22 following meanings:

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

25 (2) "Blinded" means the administrator of an eyewitness
26 identification procedure may know who the suspect is, but does
27 not know where the suspect, or his or her photo, as applicable, has
28 been placed or positioned in the identification procedure.

29 (3) "Eyewitness" means a person whose identification of another
30 person may be relevant in a criminal investigation.

31 (4) "Filler" means either a person or a photograph of a person
32 who is not suspected of an offense and is included in an
33 identification procedure.

34 (5) "Identification procedure" means either a photo lineup or a
35 live lineup.

36 (6) "Investigator" means the person conducting the identification
37 procedure.

38 (7) "Live lineup" means a procedure in which a group of
39 persons, including the person suspected as the perpetrator of an
40 offense and other persons not suspected of the offense, are

1 displayed to an eyewitness for the purpose of determining whether
2 the eyewitness is able to identify the suspect as the perpetrator.

3 (8) “Photo lineup” means a procedure in which an array of
4 photographs, including a photograph of the person suspected as
5 the perpetrator of an offense and additional photographs of other
6 persons not suspected of the offense, are displayed to an eyewitness
7 for the purpose of determining whether the eyewitness is able to
8 identify the suspect as the perpetrator.

9 SEC. 3. If the Commission on State Mandates determines that
10 this act contains costs mandated by the state, reimbursement to
11 local agencies and school districts for those costs shall be made
12 pursuant to Part 7 (commencing with Section 17500) of Division
13 4 of Title 2 of the Government Code.