

Blind Acceptance: A Closer Look at Eyewitness Identification Policies in California



CALIFORNIA
INNOCENCE
COALITION

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BACKGROUND AND HISTORY

According to the National Registry of Exonerations, more than 30% of the known wrongful convictions in California since 1989 involved mistaken eyewitness identifications. These innocent people collectively spent over 800 years wrongfully incarcerated by our State. Wrongful convictions are not only unjust, they threaten public safety. When the wrong person is identified, the actual perpetrator remains free to commit additional crimes, while an innocent person is incarcerated. In some cases, an innocent person is wrongfully incarcerated for a crime that never even occurred.

For nearly four decades, social scientists have demonstrated the fragility and malleability of eyewitness memory. Contrary to common perception, memory does not accurately or thoroughly capture or reproduce a face or an event, especially one that occurs during traumatic events like experiencing or witnessing a crime. Scientific research shows that memory is a constructive, dynamic, and selective process that can be influenced by many factors, including the circumstances of a witnessed event and the practices used by law enforcement. Hundreds of scientific controlled studies have demonstrated that certain traditional—and still widely used—police practices influence eyewitnesses to misidentify suspects as perpetrators. Such misidentifications can lead to the tragic consequence of a wrongful conviction.

The wrongful convictions of Joaquin Ciria and Uriah Courtney for violent crimes illustrate these tragic consequences. Ciria and Courtney were both picked out in low-confidence identifications from lineups that failed to comply with best practices. Both men were eventually exonerated when new evidence helped to conclusively identify the true perpetrators. When misidentifications like these occur, the wrong person is convicted and the real perpetrator remains free. It can take decades for the legal system to acknowledge the error, redirect its investigation, and identify and apprehend the actual perpetrator.

Since 2006, member organizations of the California Innocence Coalition (CIC) have advocated for law enforcement agencies to adopt five evidence-based eyewitness identification practices: blind administration, proper admonishments, certainty statements, proper fillers, and electronic recording. These practices have been shown by social scientists to improve the accuracy of identifications and were recommended by the Senate-created California Commission on the Fair Administration of Justice (CCFAJ). Beginning in 2006, the California legislature made several attempts to pass eyewitness legislation based on the CCFAJ's research and recommendations. However, every attempt was either vetoed by the Governor or failed to make it out of committee hearings.

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In 2010, the Northern California Innocence Project (NCIP), a member of the CIC, in partnership with the van Löben Sels/RembeRock Foundation, surveyed 330 California law enforcement agencies to determine whether any of these agencies had adopted the CCFAJ's recommendations in the absence of legislation. The results were stark. *Not one agency had adopted all five of the recommended best practices in their entirety.* In response, the CIC undertook a new strategy to educate the law enforcement community. The goal was to urge law enforcement to adopt evidence-based eyewitness identification practices voluntarily.

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eyewitness identification procedures. On September 30, 2018, then-Governor Jerry Brown signed the bill, codified as California Penal Code § 859.7. The new law required all law enforcement agencies to produce written policies detailing their adoption of these best practices by January 1, 2020. California Penal Code § 859.7 is reproduced in Appendix E of the report.

In 2018, after years of training and legislative advocacy by CIC and others, Senator Scott Weiner and Assemblymember Marc Levine authored Senate Bill (SB) 923, requiring all California law enforcement agencies to adopt and implement evidence-based practices in their

EVIDENCE-BASED EYEWITNESS IDENTIFICATION PRACTICES

The evidence-based eyewitness identification practices codified in California Penal Code § 859.7 are summarized as follows:

BLIND ADMINISTRATION

The administrator of the eyewitness identification procedure should not be the case investigator and should not know the identity of the suspect.

PROPER ADMONITIONS

An eyewitness shall be instructed of the following, before 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.

CERTAINTY STATEMENTS FROM EYEWITNESS

If the eyewitness identifies a person they believe 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.

PROPER FILLERS

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.

ELECTRONIC RECORDING

An electronic recording shall be made that includes both audio and visual representations of the identification procedures.

THE STUDY

The questions the authors of this report ("the Research Team") seek to answer are:

1. To what extent have California police agencies incorporated evidence-based eyewitness identification practices into their policy manuals in compliance with California Penal Code § 859.7?
2. How adequate are the written policies of those California police agencies that have adopted evidence-based eyewitness identification practices?

The Research Team, comprised of CIC lawyers, law students, and undergraduate volunteers, used the California Public Records Act (CPRA) to request policy manuals, admonishment documents, and training materials from 547 California police departments and sheriff's offices that conduct eyewitness identification procedures.

In response, the Research Team received 397 policy manuals and 381 admonishment documents, as well as training materials (i.e. department memos and PowerPoint presentations) from over 140 agencies. The Research Team also identified another 78 policy manuals on-

line on agency websites from non-responding agencies. In total, the study sample consisted of 475 agency policy manuals, 381 agency admonishment documents, and training materials from over 140 agencies.

The Research Team reviewed these policy manuals, admonishment documents, and training materials to evaluate their compliance with California Penal Code § 859.7. The Research Team's key findings are summarized below.

KEY FINDINGS

A large majority of California law enforcement agencies have incorporated some form of evidence-based practices into their eyewitness identification policies in accordance with California Penal Code § 859.7.

The current study reveals that California law enforcement agencies have taken significant steps to incorporate evidence-based practices into their eyewitness identification written policies since NCIP's 2010 survey.

The Research Team reviewed, analyzed and coded 475 California law enforcement agency policy manuals to assess the extent to which these agencies had adopted evidence-based eyewitness identification practices into their written policies as required by California Penal Code § 859.7. A total of 450 policy manuals, or 95%, contained a specific section or sections that addressed eyewitness identification procedures, and of those, 92% addressed all five evidence-based practices required by the statute. Including the policy manuals with no eyewitness identification section, 87% of all agencies in the study had policy manuals that contained all requirements under California Penal Code § 859.7.

Most California law enforcement agencies currently use identical eyewitness identification policies produced by a for-profit company, Lexipol.

The Research Team's review of the 475 policy manuals reveals that 420 agencies, or 88%, have adopted an eyewitness identification policy created by a private company called Lexipol, LLC. Lexipol produces and sells policy manuals, training bulletins, and consulting services to law enforcement agencies, fire departments, and other public safety departments

across the United States. Their work has not been without controversy. Recently, agencies that have adopted Lexipol's standards have been the subject of several lawsuits, claiming the policies contain vague and insufficient language.

Lexipol provides contracting agencies with a master policy manual for their review, modification, and adoption. The Research Team found that the overwhelming majority of agencies using a Lexipol-produced policy manual adopted Lexipol's eyewitness identification policy as provided to them without making substantive modifications to ensure compliance with California Penal Code § 859.7. Of 420 police agencies that the Research Team identified as using a Lexipol-produced policy manual, 408 agencies included an eyewitness identification section in their policy manual. Of those agencies, 367, or 90%, adopted a version of Lexipol's eyewitness identification master policy with little or no substantive additions, substitutions, or alterations. Only 41, or 10%, of the 408 agencies made substantive changes to Lexipol's eyewitness identification policy to enhance its compliance with the law.

Significant aspects of Lexipol's California master eyewitness identification policies do not comply with California Penal Code § 859.7 in ways that risk officers' non-compliance with the law and may compromise the reliability of the identification process.

In contravention of the plain language of California Penal Code § 859.7, Lexipol's California state master eyewitness identification policy substitutes the word "should" in place of "shall" in most sections of the policy, indicating certain statutorily-required practices are discretionary rather than mandatory. Lexipol's eyewitness identification policy also changes the word order and context of clauses, particularly those concerning electronic recording requirements, in ways that create exceptions that do not exist within the law. As a result, officers guided by Lexipol's eyewitness identification policy may be less likely to comply with required evidence-based practices, which in turn increases the risk of a misidentification.

To assist agencies in ensuring their policies and practices are compliant with California Penal Code § 859.7, *the Research Team modified a Lexipol eyewitness identification policy and included it in Appendix B of the full report.* All agencies that use a Lexipol policy are encouraged to modify their eyewitness identification policy accordingly.

More than half of California law enforcement agencies are using admonishment documents and forms that do not comply with the requirements of California Penal Code § 859.7, including the three statutorily mandated pre-lineup instructions.

One way to decrease the risk of a misidentification during an identification procedure is to provide the witness with proper pre-lineup admonitions. California Penal Code § 859.7 requires law enforcement to give three specific admonishments to an eyewitness before conducting photo lineup or live lineup procedures:

- 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.

While a majority of policy manuals collected as part of this study contained directives on providing admonishments, the actual admonishment documents received in response to the Research Team's request were often not in compliance.

Of the 381 admonishment documents received, only 186, or 49%, included all required admonishments listed under California Penal Code § 859.7.

- 99% included some version of the “perpetrator may or may not be among the persons in the identification procedure.”
- 82% included an admonition that the “eyewitness should not feel compelled to make an identification.”
- Only 59% included an admonition that “an identification or failure to make an identification will not end the investigation.”

Of the 381 agencies that provided admonishment documents in response to the CIC's CPRA request, 367 agencies provided the actual admonishment forms used by the respective agency when conducting live and photo lineup procedures. To highlight some of the exemplary aspects of the forms provided and assist agencies in ensuring their policies and practices are compliant with California Penal Code § 859.7, *the Research Team created a template admonishment form located in Appendix C of the full report.*

Many California law enforcement agencies fail to update their admonishment forms or review and modify their policies.

The Research Team noted that many of the admonishment forms received in response to the CIC's PRA request included date stamps or version dates preceding the enactment of California Penal Code § 859.7. The Research Team compared admonition documents for all agencies whose 2020 admonition documents were not in compliance with California Penal Code § 859.7 to those received in response to NCIP's 2010 survey. In total, the Research Team compared the 2010 and 2020 admonition documents for 82 non-compliant police agencies. Of those agencies, 70% were using an admonishment document in 2020 that was identical to the document it was using in 2010, eight years before the passage of California Penal Code § 859.7.

Some California law enforcement agencies provide insufficient training regarding the changes in the law created by California Penal Code § 859.7.

The Research Team assessed the quality and accuracy of internal agency eyewitness identification trainings intended to familiarize officers with the California Penal Code requirements based on training materials, field guides, training attendance records, and policy acknowledgements received in response to the CIC's PRA request. The quality of inter-departmental agency trainings varied dramatically. Some departments performed insufficient eyewitness identification trainings, while others properly trained officers on the changes under the new law. Several agencies trained officers regarding the rationale behind the policy change: to decrease the risk of misidentifications causing wrongful convictions. A few agencies properly discussed the best practices and included language consistent with California Penal Code § 859.7.

However, other agencies provided trainings that were inadequate or contained inaccurate information. Several agencies did not submit any training documents, training guides, policy acknowledgements, training rosters, or other training materials. Many agencies continue to use an outdated eyewitness identification section of a training workbook written by the California Commission on Peace Officer Standards and Training (POST) that is no longer legally compliant and provides improper suggestions to officers regarding the use of certainty statements. Other departments conducted training sessions of a questionably short duration or used materials that either implicitly or explicitly encouraged officers to not follow the best practices.

RECOMMENDATIONS

The Research Team has identified four mechanisms to encourage law enforcement's compliance with the practices outlined in California Penal Code § 859.7:

1. **Improve Lexipol and law enforcement policies** - Lexipol, and the police agencies who use its services, must update their policies to comply precisely with the law;
2. **Education and training** - Government agencies, professional associations, and Lexipol must conduct state-specific trainings that accurately reflect the practices required under California Penal Code § 859.7 and that provide the rationale for and social science supporting these requirements;
3. **Litigation strategies** - Defense attorneys must know and understand the new law, and know how and when to challenge unreliable identifications. Judges also need to be educated on how to properly assess factors that impact the reliability of identifications and when it is appropriate to exclude eyewitness identifications in their courtrooms;
4. **Legislation and evidentiary reform** - The legislature and the courts can provide a remedy for non-compliance with the law, update the law to reflect the new scientific consensus around eyewitness identifications, and increase opportunities for the accused to challenge improperly obtained identifications.

CONCLUSION

The California legislature's enactment of Penal Code § 859.7 was a positive step toward ensuring that California law enforcement agencies adopt evidence-based eyewitness identification policies and practices to reduce the risks of misidentifications. The Research Team's finding that 95% of agencies have adopted eyewitness identification policies addressing most requirements under the statute is a sign that agencies have begun to embrace this change in the law.

Lexipol's influence over California law enforcement policymaking has also contributed to the increase in agencies' incorporation of evidence-based practices into their policies. However, while agencies' use of and adherence to Lexipol-created policies may bring consistency to policy and practice statewide, it also creates a risk of non-compliance with California Penal Code § 859.7. Lexipol's California state master eyewitness identification policy uses language that fails to convey the mandatory nature of California Penal Code § 859.7, and in some instances excuses officers' failure to comply. Only a minority of Lexipol-subscribing agencies have modified their policies to better comply with the statute. This shows that agencies need to do a more thorough job of scrutinizing their policies.

Police agencies bear the ultimate responsibility to ensure their policy manuals and practices comply with the law. Based on the small number of agencies that have modified their Lexipol-produced eyewitness identification policy, it appears that many California police agencies have abdicated that responsibility to a for-profit company, thereby privatizing a public function.

That fewer than half of the admonishment documents in the study sample contained all three statutorily-required admonishments is further proof that agencies need to do a better job of scrutinizing their policies and practices. Admonishment forms can function as a checklist and serve as a helpful tool to ensure that best practices and requirements have been properly followed and critical evidence accurately recorded. Because these admonishment forms are used in the work of solving crimes in practice, the forms' deficiencies reflect flaws in agencies' implementation of California Penal Code §859.7. Agencies must update their admonishment forms appropriately.

In addition, agencies should improve their officer trainings on policy changes created by California Penal Code § 859.7. Some departments merely distributed an email to officers containing the text of their updated policy and requiring them to sign an acknowledgement of receipt. Other agencies hosted formal in-person sessions and provided officers with substantive materials describing the procedural changes required by the law and the rationales behind the policy modifications. The dramatic difference between these training mechanisms is certain to create a disparity in compliance with the law amongst agencies statewide.

The devastating damage of a misidentification begins when the wrong person is identified and charged. A misidentification becomes exponentially more damaging as a case proceeds through the preliminary hearing and trial, and eyewitnesses, including mistaken ones, only become more confident in their identification. Law enforcement must comply with evidence-based practices to reduce the risk of a misidentification at the beginning of this process before the mistakes become even more ingrained.

California is making progress in eyewitness identification reform, but without a true sense of how California law enforcement agencies actually conduct eyewitness procedures in practice, there can be no assessment of how much further progress is needed. To ascertain the full extent to which California police agencies are employing evidence-based eyewitness procedures in practice, additional research or audits of police investigations need to be conducted.

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