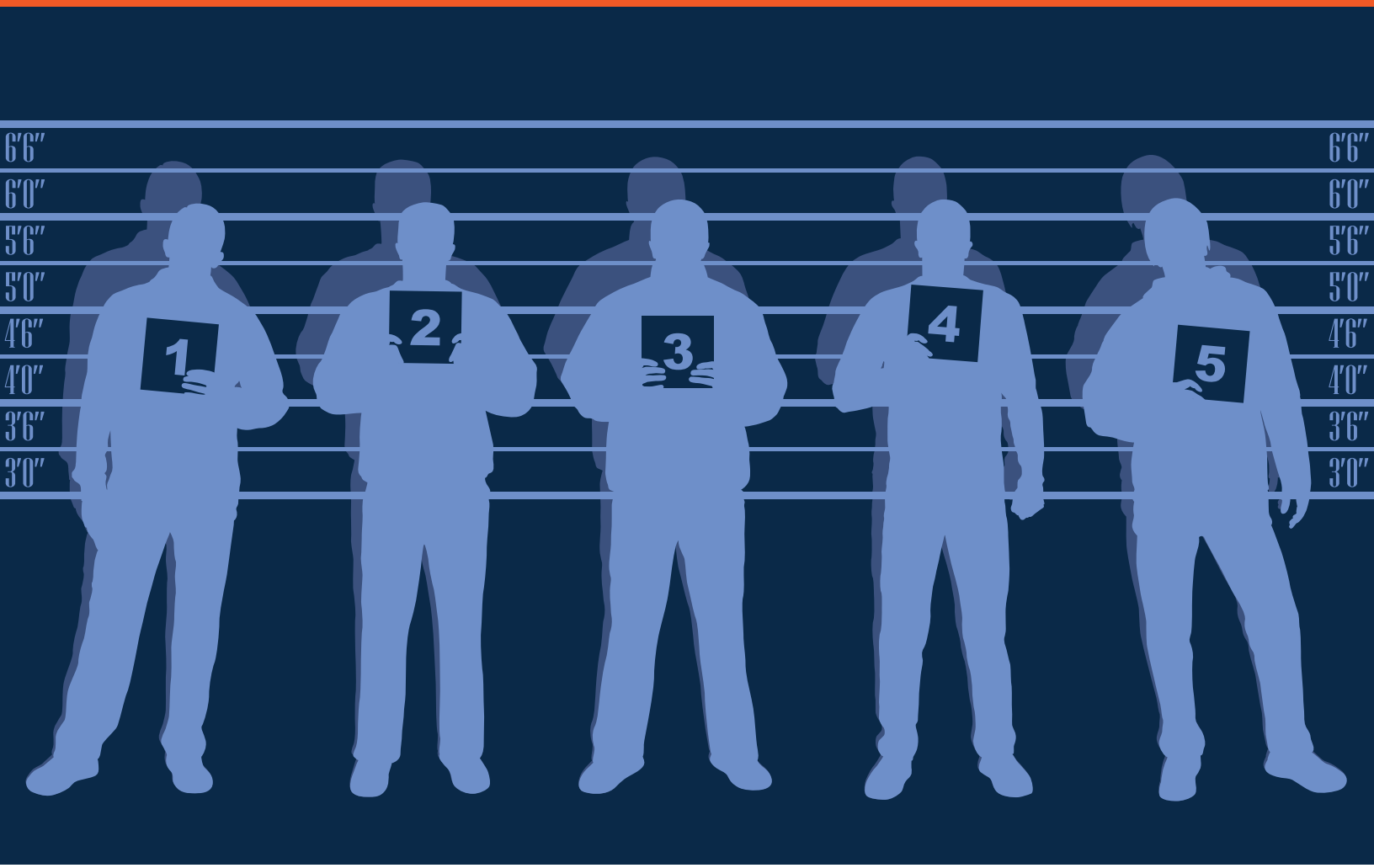
Blind Acceptance:
A Closer Look at Eyewitness Identification Policies in California



NORTHERN CALIFORNIA Innocence Project

CALIFORNIA INNOCENCE COALITION

BY TODD HARRIS FRIES

WHITE PAPER

Blind Acceptance:

A Closer Look at Eyewitness Identification Policies in California

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ABOUT THE CALIFORNIA INNOCENCE COALITION

The California Innocence Coalition (CIC), comprised of the Northern California Innocence Project, Loyola Project for the Innocent, the Los Angeles Innocence Project, and The Innocence Center, works for criminal justice policy reform to prevent and address wrongful convictions and to support those wrongfully convicted in California. Collectively, the CIC partners have won the freedom of over 80 wrongfully-convicted people.

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ABOUT THE VAN LÖBEN SELS/REMBEROCK FOUNDATION

The van Löben Sels/RembeRock Foundation is a private foundation based in San Francisco whose mission is to promote social justice in Northern California by means of legal services and advocacy. The Foundation views the law as a bridge to justice that can be used to right social wrongs, effect social change, and contribute to reducing human suffering. The CIC is thankful to the van Löben Sels/RembeRock Foundation for providing critical funding for this research report.

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I am also especially grateful to Jennifer Thompson for her tireless advocacy and whose efforts were instrumental in getting Senate Bill 923 enacted in California.

I would like to dedicate this report to those wrongfully convicted whose strength, resilience, and grace inspire us.

Any errors or omissions in the study or report are solely the responsibility of the author.

Todd Fries
Executive Director
Northern California Innocence Project

FOREWORD

In order for a justice system to be fair and equitable, among other things, it must protect people from being punished for crimes they did not commit. It is senseless to term our criminal legal system a "justice" system when it not only disproportionately incarcerates poor people and communities of color, but incarcerates those who did not commit a crime. As a California State Senator, by working with those most impacted by our carceral system and those closest to them, I strive to craft policy changes that have a direct impact on Californians with the greatest need — few meet this standard more powerfully than the wrongfully convicted.

As a state government, there is almost nothing we do that has more power to harm an individual, their family, and their community than convict an innocent person. Nationally, eyewitness misidentification is the leading contributor to wrongful convictions that were subsequently overturned with DNA evidence. While those who have been falsely convicted of a crime will never get back the time they spent incarcerated, recommendations in this report give California the opportunity to prevent a false eyewitness identification from harming any more innocent persons.

Although false eyewitness identification is a known risk, as of 2018, California did not apply best practices governing eyewitness identification uniformly across the state. In 2018, twenty other states sought to combat the risk and had statewide requirements for eyewitness identification procedures. Hoping to become the twenty-first state to do so, I introduced Senate Bill (SB) 923 in 2018 with Assemblymember Marc Levine, to set evidence-based standards for eyewitness identification to help prevent misidentifications. In September 2018, then-Governor Jerry Brown signed this bill into law.

The purpose of SB 923 was simple: to keep innocent people out of prison. As a State Legislature, we can craft and pass impactful policies such as this, but the issue of compliance is another matter entirely. In this report, the Northern California Innocence Project asks and answers the important question of whether law enforcement agencies have complied with the law. I believe that this report, and other reports like it that study the impact of enacted legislation on intended communities, are crucial in ensuring that the policies we pass are effective. As the Northern California Innocence Project seeks to do here, we must make absolutely certain to do everything in our power to ensure that the innocent are not wrongfully sent behind bars.

Senator Scott Wiener (D-San Francisco)

I. Executive Summary

A. 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.

When misidentifications like these occur, the wrong person is convicted and the real perpetrator remains free.

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.

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.

The results were stark. *Not one agency had adopted all five of the recommended best practices in their entirety.*

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 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.

California Penal Code § 859.7
Requires all California law enforcement agencies to adopt and implement evidence-based practices in their eyewitness identification procedures.

B. 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.

C. 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 online 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.

D. 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.

E. 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.

F. 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 statue 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.

Police agencies bear the ultimate responsibility to ensure their policy manuals and practices comply with the law.

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.

II. Introduction

A. THE LIMITS OF EYEWITNESS IDENTIFICATION

For nearly four decades, social scientists have demonstrated and attested to the fragility and malleability of eyewitness memory. Contrary to popular belief, memory does not accurately and thoroughly capture or reproduce a face or an event.[1] Memory is a constructive, dynamic, and selective process that can be influenced by many social and situational factors.[2] Through hundreds of controlled studies, scientists have demonstrated that traditional and widely used police practices often inadvertently influence witnesses to choose a particular suspect. Such suggestiveness can lead to the tragic consequence of a wrongful conviction.[3]

Social scientists point to two different types of variables that can affect an eyewitness's ability to make an accurate identification: system variables and estimator variables.

1. **System variables** are those that the criminal justice system can control. These include all of the practices that law enforcement agencies use to retrieve and record witness memory, such as ***live lineups***, ***photo arrays***, and other identification procedures.[4]

2. **Estimator variables** are those that cannot be controlled by the criminal justice system and include the lighting at the scene when the crime occurred, the speed of events, the degree of stress experienced by the eyewitness (i.e. held at gunpoint), and the distance and length of time from which the eyewitness observed the perpetrator.[5]

Eyewitnesses can be extremely persuasive, even when they are mistaken. Unlike a lying witness, mistaken eyewitnesses believe what they are saying and, over time, become more convinced of the accuracy of their identifications. In 57% of 161 DNA exoneration cases involving eyewitness testimony, trial testimony indicated that the witnesses expressed early uncertainty in their identifications, but by the time they testified at trial, they had become convinced that the defendant was the person who had committed the crime.[6] (There was no information about the initial test in the other 43% of these cases.)[7] Cross-examination of such eyewitnesses is ineffective at undermining the testimony because the witness's belief, though mistaken, is unshakable. By the time a case involving mistaken eyewitness identification gets to court, it is often too late to challenge the misidentification effectively.

Such was the case in Jennifer Thompson's misidentification of Ronald Cotton. On July 29, 1984, Thompson, a 22-year-old college student, was brutally attacked and raped in her own bed by an intruder who had forced his way into her North Carolina apartment. Thompson, determined to not only survive her attack but to identify the man who did it, studied her attacker's face. When police arrived, Thompson was able to provide a detailed description

of her attacker, from which police developed a composite sketch. On the following day, the local newspaper published the composite sketch, leading to a tip and the arrest of Ronald Cotton. Immediately after the arrest, Thompson identified Cotton in a ***photo spread*** and later, in a live lineup.

Notably, both of these identifications, which were made early in the police investigation, were extremely tentative. When a face in a photo spread matches the witness's memory of the perpetrator, an identification is typically made without hesitation.[8] Yet Thompson examined the photo spread containing Cotton for four to five minutes before finally landing on Cotton and declaring "I think it's him." She claimed to be sure only after the lineup administrator expressed dissatisfaction with her obvious expression of low confidence. At trial, and now without hesitation, Thompson expressed 100% certainty that Ronald Cotton raped her. A jury convicted Cotton based on Thompson's testimony and the court sentenced him to life in prison.

Eleven years later, DNA test results proved conclusively that Thompson had been mistaken. Ronald Cotton, who had lost eleven years of his life, was freed from prison. Jennifer Thompson was devastated. Thompson spoke about the day she learned of her mistake: "I cried. I felt shame. I felt guilt. It was debilitating. It was suffocating. How do you give back 11 years?"[9] Yet the fault was not hers. Thomson appropriately expressed very low confidence in her initial identification of Cotton, which should have made it clear to all involved that Cotton did not strongly match her freshly formed memory of the perpetrator.

The devastation to both Ronald Cotton and Jennifer Thompson demonstrates clearly that the only person who benefits from a misidentification is the true perpetrator. Incarceration takes a psychological and economic toll on the wrongfully convicted and their families that can last their entire lives. Crime victims and eyewitnesses also suffer harm when innocent defendants who are convicted are later exonerated. Victims must relive the crime, while grappling with the knowledge that the true perpetrator, in many cases, has not yet been found. Eyewitnesses must confront the fact that they contributed to convicting an innocent person.

Uriah Courtney's case is another tragic tale of how misidentification leads to wrongful conviction. On November 24, 2004, a young girl walking along a road in San Diego County, California noticed a man staring at her from an old, light-colored truck with a fake wooden camper. As the girl walked under a freeway overpass, a man grabbed her from behind and told her not to scream. After a scuffle, the man sexually assaulted her. The victim kept fighting and managed to escape.

When police arrived, the victim described her attacker as a white male with facial hair, between 5 feet 8 inches and 5 feet 10 inches tall, 150 to 160 pounds, in his twenties. The victim and an eyewitness tried to assist a sketch artist in rendering a composite sketch, but they could not provide enough details to complete it. However, their descriptions of the

truck led the police to a truck owned by the stepfather of 25-year-old Uriah Courtney, who closely resembled the girl's description of the attacker.

When police showed the victim a picture of the truck, she said she was 80% sure it was the truck she had seen at the time of the crime. Police placed Courtney's photo in a photo lineup and the victim tentatively identified Courtney as her attacker, stating, "Not sure, but the most similar is number 4." She rated her confidence level at 60%. Despite those initial uncertainties, by the time the victim testified at trial, she was positive of her identification of both the truck and Courtney. A jury rendered a guilty verdict and the court sentenced Courtney to life in prison for kidnapping and rape. Law enforcement's failure to appreciate the witness's uncertainty early in the investigation when her memory of the perpetrator was strong and the opportunity for contamination was minimized led the jury to reasonably rely on the unreliable confident identification at trial.

The California Innocence Project began investigating Courtney's case in 2010 and determined that further DNA testing would be appropriate. The testing revealed a male profile, not Courtney's, on the victim's clothes. That male profile was run through the Combined DNA Index System (CODIS), a national databank containing convicted offender profiles. The DNA matched the profile of a man who lived three miles from the crime scene and resembled Courtney. Based on this new evidence, Courtney's conviction was vacated and he was released from prison on May 6, 2013, after nine years of wrongful incarceration.

The Cotton and Courtney cases are exceptional not only because the wrongfully convicted parties were eventually exonerated, but because DNA testing conclusively identified the actual perpetrators. When a misidentification occurs, it is rare for the legal system to correct itself, redirect its investigation, and identify and apprehend the actual perpetrator, giving justice to the wrongfully convicted, victims, and survivors. The Cotton and Courtney cases demonstrate another consequence of mistaken identification: the threat to public safety when the wrong person is convicted because the criminal justice system focuses its attention and resources on an innocent suspect, while the true perpetrator remains free to prey on other victims. Jennifer Thompson's attacker went on to rape six more women while Cotton was awaiting trial and serving time. In Courtney's case, the actual perpetrator committed similar sexual assaults in Washington State, where he was on parole at the time Courtney was exonerated.

B. THE IMPORTANCE OF EVIDENCE-BASED PRACTICES

When law enforcement fails to conduct eyewitness procedures according to ***evidence-based practices*** and control system variables, the chances of a misidentification and wrongful conviction increase dramatically.[10] Evidence-based practices are practices supported by rigorous scientific research which proves the practices work.[11]

In 2018, after twelve hard-fought years of effort by the California Innocence Coalition (CIC), then-Governor Jerry Brown signed CIC co-sponsored Senate Bill (SB) 923,[12] landmark legislation which mandates law enforcement's use of evidence-based practices when conducting live or photo lineups. The new law, codified as California Penal Code § 859.7,[13] took effect on January 1, 2020, and requires all California law enforcement agencies to adhere to the following evidence-based practices:[14]

1. The investigator conducting the identification procedure shall use ***blind administration*** or ***blinded administration*** during the identification procedure.

2. An identification procedure shall be composed so that the ***fillers*** generally fit the eyewitness's description of the perpetrator.

3. An eyewitness shall be ***given proper admonitions***, 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, and c) an identification or failure to make an identification will not end the investigation.

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

5. An ***electronic recording*** shall be made that includes both audio and visual representations of the identification procedures. When it is not feasible to make a recording with both audio and visual representations, audio recording may be used.[15]

C. THE STUDY

Any attempt to determine the extent to which California law enforcement agencies are using evidence-based eyewitness identification procedures requires an understanding of the policies that California law enforcement agencies have in place. As such, the primary objective of this study was to review as many California law enforcement policy documents[16] as possible to provide a fair assessment of the extent to which California police agencies have adopted evidence-based practices into their policies as required by law.

In support of that objective, the study applied a detailed methodology to answer the following quantitative and qualitative questions:

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 best practices?

We recognize that these questions and the study's findings do not necessarily reflect California law enforcement's actual implementation of evidence-based practices, which would require looking beyond just written policies and forms.

The study's findings demonstrate that while most California law enforcement agencies have included many evidence-based practices in their policies as required by California Penal Code § 859.7, some have not. And the majority of the policies that have included many evidence-based practices do not accurately reflect the requirements of the statute. Specifically, the data reveal that most California law enforcement agencies have adopted identical eyewitness identification policies created by a for-profit, private company called ***Lexipol***. The policies created by Lexipol for California police departments **do not match the requirements of California Penal Code § 859.7. Specifically, Lexipol's model policy weakens the language pertaining to certain eyewitness identification procedures, making them suggestions as opposed to mandatory as required by law.** The data also show that more than half of the California law enforcement agencies in the study sample are using admonishment documents and forms which fail to include all of the required instructions under California Penal Code § 859.7.

In light of these findings, the report concludes with proposals for various stakeholders to encourage law enforcement's use of legally-required evidence-based practices. Primarily, to ensure full compliance, police agencies and Lexipol must carefully scrutinize and update their eyewitness identification policies and forms to comply with the letter of the law. Government agencies, professional associations, and Lexipol must develop state-specific trainings that accurately reflect the requirements of California Penal Code § 859.7. Defense attorneys must know and understand the new law so that they can properly challenge identifications that are not obtained according to the proper procedures, and judges need to be updated on how to assess the reliability of identifications and when to exclude eyewitness evidence from their courtrooms. However, this is all with the caveat that research shows that by the time identifications are being examined at the trial stage, the factors or variables that would have contaminated or compromised the identification have long passed (i.e. the damage has been done) and the witness has only become more confident in their identification, making reliability determinations difficult to accurately assess. This reality supports the final recommendation that the legislature and courts should provide a remedy for non-compliance with the law and increase opportunities for the accused to challenge improperly obtained identifications.

III. Eyewitness Identification Best Practices in California

A. PRIOR REFORM EFFORTS

CIC-member organizations have been advocating for California law enforcement agencies to adopt evidence-based practices since Senator Carole Midgen introduced SB 1544 in 2006,[17] which called for the development and implementation of eyewitness identification ***best practices***. CIC-member organizations contributed to this initial effort, meeting with the senator in her office and helping craft language for the bill. Although that first bill passed both houses of the legislature, then-Governor Arnold Schwarzenegger vetoed it.

In 2007, the ***California Commission on the Fair Administration of Justice (CCFAJ)***,[18] created by the Senate in 2004, released their data and recommendations on eyewitness misidentifications.[19] The Commission's general mandate was to "study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past" and to examine safeguards and improvements.[20] The commission's research outlined key evidence-based recommendations for statewide eyewitness identification procedures.

In response to the CCFAJ's report, in 2007, the California legislature again attempted to address eyewitness misidentification by introducing SB 756,[21] which incorporated the CCFAJ's recommendations. Again, the bill passed through the legislature with the CIC member's support and again, Governor Schwarzenegger vetoed the legislation. The legislature introduced a third bill in 2008, SB 1591, but the bill never emerged from the appropriations committee for fiscal reasons.[22]

By 2010, in the absence of legislation to require or improve procedures, the CIC member's best hope to achieve the needed reform in eyewitness identification procedures was to demand transparency from law enforcement agencies regarding the policies they used to identify criminal suspects, and to influence them to adopt best practices. In 2010, CIC member, the Northern California Innocence Project (NCIP), applied for and received funding from van Löben Sels/RembeRock (vLS/RR) to use the ***California Public Records Act (CPRA)***[23] to request that all California police and sheriff's departments produce their written policies and procedures concerning the collection and preservation of eyewitness identification evidence. Such data had never been collected and compiled in California.

NCIP sent its request to 399 police and sheriff's departments and assessed the policy materials maintained by each responding jurisdiction with respect to the recommendations that the CCFAJ compiled based on its review of the relevant social science studies, input from law enforcement, the scientific community, and legal practitioners. NCIP then tracked which CCFAJ recommendations, if any, had been adopted by each department. The

data revealed that no California law enforcement agency had adopted all of the CCFAJ's recommended best practices and most had adopted none.[24]

After NCIP initiated its CPRA requests in 2010, California Assemblymember Tom Ammiano authored two additional eyewitness identification bills in 2011 and 2013, Assembly Bill (AB) 308[25] and AB 807, respectively.[26] Both bills died in the Senate.

In light of limited agency compliance with the CCFAJ's recommendations and a lack of state interest in passing eyewitness identification legislation, the CIC turned to a new strategy–educating the law enforcement community. The goal of training was to convince counties and individual departments that it was beneficial to adopt evidence-based eyewitness identification practices voluntarily. In 2014, NCIP co-hosted an Eyewitness Identification Best Practices Symposium in San Francisco,[27] among other trainings throughout the Bay Area on eyewitness identification. A number of law enforcement agencies in Bay Area counties voluntarily adopted best practices: San Francisco, Alameda, Contra Costa, and San Mateo joined Santa Clara County, which was the first to adopt most of the CCFAJ's recommendations.

By 2018, despite this progress, many of the larger California counties resisted adoption of best practices, and the CIC decided it was once again time to seek legislation. On September 30, 2018, Governor Brown signed SB 923 into law, which included many of the CCFAJ's recommendations. That landmark legislation mandated that all California law enforcement agencies adopt the use of specific and delineated evidence-based practices in their eyewitness identification procedures. It also required that all law enforcement agencies produce written policies detailing their adoption of these best practices. This report explores the best practices required under the new law below.

B. BEST PRACTICES

1. BLIND ADMINISTRATION

A basic tenet of all scientific research is that subjects of experiments are influenced by the expectations of those who perform the tests.[28] It is widely accepted in behavioral sciences and medical fields that a researcher can influence a test subject through both verbal and non-verbal, as well as intentional and non-intentional cues.[29] Scientific testing requires implementing a safety measure referred to as "double-blind" testing in which neither the test administrator, nor the subject know the "correct" or "desired" answer.[30] An example of this occurs when new medical drugs are being tested; neither the administrator nor the patient knows whether the patient received the experimental drug or a placebo.[31]

Within the context of an eyewitness identification procedure, blind administration has the same function. Blind administration means that the administrator of a live or photo lineup procedure is unaware of which lineup member is the suspect under investigation.[32] Law enforcement officers, like scientists performing research, can influence subjects according to

their own beliefs. When an officer administering an eyewitness procedure is unaware of the identity of the suspect, there is less risk that the administrator will inadvertently influence the witness to select the suspect.

Blind administration might not always be possible for small police departments with limited staff. These agencies should use a blinded presentation in which the administrator may know who the suspect is, but does not know which lineup or lineup member is being viewed by the eyewitness. Blind and/or blinded administration prevents officers from reacting to a witness's selection in a manner that may artificially boost the witness's confidence in their identification. Scientists point to blind administration as the "the single most important characteristic that should apply to eyewitness identification."[33]

SIDEBAR:

THE CASE OF FRANCISCO CARRILLO, JR.

Scott Turner was 16 years old when he witnessed a drive-by shooting that killed the father of a close friend. To support his friend and to obtain justice for the family, Turner cooperated with the police investigation.[34] The police showed him a book of photos and asked him to identify the shooter. According to Turner, he picked out several people, but after each selection, the officers told him that the person could not have been the perpetrator because he was either dead or in prison. The process continued until Turner reached a picture of 16-year-old Francisco Carrillo, at which point he told the officers that the man in the picture looked similar to the shooter. The officer responded, "Well, yeah, you know, it could be him. He's a new [gang] member, you know ... so he's got to get his respects, so it could be him."[35] With his confidence bolstered by this feedback, Turner said, "You know, yeah, could be him. Matter of fact, it is him."[36]

But Turner and the officers were wrong. Carrillo was not the perpetrator. Making matters worse, Turner later told five other witnesses, also friends of the victim's family, to choose the same picture he chose. As a result, Carrillo, an innocent man, was convicted and spent twenty years in prison. Years later, during a hearing to determine the validity of Carrillo's conviction, several of the eyewitnesses, including Turner, testified that they never actually saw the shooter. The witnesses' identifications of Carrillo were based solely on information provided to them by Turner, and in Turner's case, by the police.[37] If law enforcement had used blind administration in its identification procedure, Francisco Carrillo's wrongful conviction may have been prevented.[38]

2. PROPER FILLERS

Most identification procedures, including photo and live lineups, involve placing a suspect among distractors (called fillers) and asking whether the witness can identify the perpetrator of the crime they witnessed. A ***filler*** is a person or a photograph of a person who is known not to have been involved or suspected of an offense and is included in an identification procedure.[39] Eyewitness researchers have found that the probability of false identification

is inversely related to the number of lineup members.[40] The fewer options a witness has, the more likely a suspect will be chosen purely by chance. However, merely having a set number of fillers does not guarantee a misidentification will not occur.[41] To minimize the risk of mistaken identification, fillers should also physically resemble the eyewitness's description of a perpetrator.

Research shows that placing an innocent suspect who generally fits the offender's description into a lineup in which the fillers do not fit the offender's description results in a high rate of mistaken identification of that person. This is true even when the "suspect" in the lineup bears only a moderate resemblance to the actual perpetrator. For example, if an eyewitness describes a suspect as tall and thin with dark hair, but some of the fillers are short with light hair, the witness is much more likely to gloss over those fillers, statistically increasing the chance of a false identification.[42] The suspect in a lineup should not unduly stand out. In the context of photo lineups, the photo quality, color, and size of all photos in the lineup should be consistent and administrators should make sure that the photos do not contain any stray markings or information about the subject.

SIDEBAR:

THE CASE OF RAFAEL MADRIGAL

In July of 2000, Rafael Madrigal was charged with committing a drive-by shooting in East Los Angeles on behalf of the Ford Maravilla gang.[43] Witnesses to the shooting identified Madrigal in a photo lineup as either the shooter or the driver of the car involved,[44] though Madrigal claimed he was working 35 miles away in Rancho Cucamonga at the time of the crime.[45] In January of 2002, based largely on eyewitness testimony, a jury convicted Madrigal of attempted murder and the court sentenced him to 25 years to life in prison.[46]

Madrigal was exonerated in 2009 after the California Innocence Project established his innocence by presenting the court with a new alibi witness and a recorded jailhouse conversation of Madrigal's co-defendant claiming that Madrigal was not involved and did not know any details of the crime. The re-investigation of Madrigal's case revealed the photo array used to secure the witness's identifications of Madrigal was deeply flawed. According to court records, one witness said she chose Madrigal's photo because he was the only one with a goatee, while the other witness described the shooter as having a long "Fu Manchu" mustache.[47] The photo array consisted of ten people, many of whom did not resemble one another. Astonishingly, one photo was of a woman. The photo of Madrigal that officers included in the lineup was a photo that also was inconsistent with how Madrigal looked at the time of the crime.[48]

See Madrigal's lineup photo on page 28.

(Rafael Madrigal's photo is in the top row, second from right.) [49]

3. WITNESS ADMONITIONS

An ***admonition*** is an instruction that an officer gives to the eyewitness just before the witness takes part in the identification procedure. Admonitions are commonly read to a witness or presented to a witness in writing on an instruction form that they are expected to read and sign before viewing the lineup or photos. The purpose of the admonition is to reduce the pressure on a witness, who may otherwise feel compelled or expected to identify a suspect.[50] Admonitions that state the perpetrator may or may not be among the photos or in a live lineup convey to the witness that it is acceptable not to identify anyone if the witness is uncertain. It is also important to let witnesses know that the investigation will continue whether or not they identify anyone.

The importance of this admonition is backed by research demonstrating that when eyewitnesses are instructed that the offender might not be in the lineup or among the photos they view, they are less likely to misidentify an innocent person.[51] Studies also confirm that admonitions do not reduce the likelihood that the witness will identify the actual perpetrator.[52]

SIDEBAR:

THE CASE OF ALBERT JOHNSON

In December 1991, a young woman was attacked at gunpoint and raped while jogging at a high school track in Richmond, California.[53] Several months later, a detective showed the victim a photographic lineup that included Albert Johnson's picture and encouraged the victim to make a selection.[54] The detective told the victim that the perpetrator was in the lineup.[55] Even though the victim noted that Johnson's skin was lighter than her assailant's, the detective stated that Johnson had been working out in prison with little sun exposure, which would explain his lighter skin.[56] When the victim ultimately identified Johnson as the assailant, despite her reservations, the detective confirmed that he was indeed the suspect.[57] She later claimed that she felt pressured to make an identification.[58]

Johnson was convicted of rape in 1992. While incarcerated, Johnson studied law and sought DNA testing of the victim's rape kit.[59] In October 2002, Johnson was exonerated after DNA test results proved that Johnson could not have been the perpetrator of the crime.[60] Had law enforcement admonished the victim that (a) the assailant may or may not be included in the photo lineup, (b) it is acceptable not to identify anyone if she felt uncertain, and (c) the investigation would continue whether or not she made an identification, the victim may not have felt pressured to identify Johnson and he may not have been wrongfully convicted of this crime.

4. CERTAINTY STATEMENTS/CONFIDENCE LEVEL

A ***certainty statement*** is a statement obtained from an eyewitness indicating the strength of the witness's confidence in their identification or non-identification of the offender.[61] It is important to record certainty statements during the initial identification procedure because under those conditions, confidence is a strong indicator of the accuracy of the identification.[62] Initial identifications or non-identifications made with high confidence are typically high in accuracy, whereas initial identifications or non-identifications made with low confidence are less accurate.[63] Many witnesses who identified defendants that were subsequently proven innocent did so with a very high degree of certainty at trial despite having low confidence during the initial identification procedure.[64]

Witness confidence can be artificially inflated in several ways. Research demonstrates that having a witness go through multiple rounds of identification procedures often causes a witness's certainty to increase over time.[65] Routine trial preparations such as rehearsing testimony also can increase certainty.[66] Documenting a witness's certainty at the time they first identify a suspect establishes a baseline which can be noted at trial and demonstrate whether the witness's confidence has been bolstered by events, including seeing the witness in the courtroom at a preliminary hearing and trial and/or in prison clothes.[67]

The need to obtain confidence statements at the time a witness first identifies a suspect is underscored by the fact that the very act of testing a witness's memory through an identification procedure can actually contaminate it, especially in cases where a witness's memory is tested more than once.[68] During a lineup, a witness processes each face to

compare it to the culprit's face in their memory.[69] While viewing the faces, the witness's brain adds a memory trace for each face it views, regardless of the suspect's guilt or innocence.[70] Furthermore, this face-memory is being added to the witness's brain while they are thinking about the crime. Therefore, the act of processing faces in a lineup creates a memory associating each suspect's face with the crime, even if the suspects are innocent.[71] This makes it more likely the witness will later remember the innocent suspect as having committed the crime.[72] Thus, if law enforcement tests a witness's memory for the same suspect a second time, either because the witness failed to identify a suspect or was unsure of their initial choice, the witness's memory of these faces from the first lineup may carry over, even if the subjects of the lineup are innocent.[73] Thus, experts recommend that repeated eyewitness identification procedures should be avoided, and that certainty statements be taken at the time of a witness's initial identification.[74]

The same rationale should be extended to any non-identifications made by the witness. Obtaining a witness's confidence statement at the time that a non-identification is made provides necessary context and potentially even evidence of innocence if the witness only identifies the suspect with a high degree of confidence in a subsequent identification procedure or at trial.

In addition to obtaining a confidence statement at the time of the identification or non-identification, investigators should also document the length of time it takes a witness to make that identification or non-identification.[75] In addition to confidence, response time is also a strong indicator of accuracy.[76] Identifications made quickly (in seconds, not minutes) are highly accurate and are more accurate than identifications made more slowly.[77] This is because speed is associated with the automatic processes for images or stimuli that are easy to process because they are familiar or have been encountered before.[78] Recognition is not a search function in the brain.[79] In looking at photos in a lineup, the brain is not trying to remember or recall a face that it has seen before.[80] Instead, when a witness recognizes a face in a lineup, the same part of the brain where the memory was initially stored is activated.[81] Thus, strong memory traces result in a quick and automatic feeling of familiarity when someone closely matches that memory.[82] In fact, eyewitnesses who described their identification process as one of elimination, that is comparing the photos to each other to narrow the choices, were more likely to have made a false identification than those who reported that the face "just popped out at [them]."[83] Recognition takes a matter of seconds, not minutes.[84]

Recording both the witness's confidence and the amount of time that it takes the witness to make an identification will aid in assessing the reliability and accuracy of the identification. Identifications that happen quickly and are made with high-confidence are more likely to be accurate.[85] Whereas identifications that take minutes and/or are made with low-confidence are less likely to be accurate.[86] Gathering this information at the time the initial identification or non-identification is made is crucial evidence and provides necessary context that can assist the jury in determining whether the witness's confidence has been inflated over the course of the investigation, leading to a confident in-court identification.

SIDEBAR:

THE CASE OF JOAQUIN CIRIA

In 1991, Joaquin Ciria, a member of San Francisco's Afro-Cuban community, was wrongfully convicted of murdering his close friend, Felix Bastarrica, and received a sentence of 31 years to life. On the evening of March 24, 1990––while Ciria was at his home with his partner, housemate, and newborn son––Bastarrica was shot and killed in an alley behind the Bay Bridge Motel in San Francisco. Two witnesses testified that before the shooting, they observed Bastarrica argue loudly with the person who shot him.[87] Both witnesses admitted that they had a limited opportunity to see the shooter's face,[88] and one admitted that she only saw the shooter's silhouette.[89] Both agreed that the shooter wore a long trench coat and sported an "afro type haircut"[90]––a description that did not match Ciria.

Police showed the two witnesses a photo lineup of six Black men after the shooting. The first witness selected Ciria's photograph as looking "most like the suspect," but the second witness could not identify Ciria as the shooter.[91] The first witness said it was "especially the profile or maybe more the attitude" as the reason she chose Ciria's photograph and felt about 80% certain of her selection.[92] After the initial photo lineup, law enforcement subjected both witnesses to several more live and photo lineups––the first witness made her first positive identification of Ciria at a preliminary hearing and the second witness first positively identified Ciria at trial while he sat at the defense table in a red county jail issued jumpsuit.[93] Both witnesses testified at Ciria's trial.

Nearly 30 years later, a third eyewitness came forward to identify the actual shooter. That eyewitness personally knew Ciria and the shooter and had viewed the shooting from a motel room in the Bay Bridge Motel. He explained that the actual shooter was another Afro-Cuban man who was known within the community to have an ongoing feud with Bastarrica and resembled the description of the first two eyewitnesses: he often wore a long trench coat and an Afro hairdo. After 32 years of wrongful incarceration, and always maintaining his innocence, Ciria was exonerated on April 18, 2022, by the San Francisco Superior Court.[94] Judge Brendan Conroy emphasized in his decision that the flawed eyewitness identifications contributed to Ciria's wrongful conviction.[95]

5. ELECTRONIC RECORDING

Electronically recording the eyewitness procedure serves as a crucial reference and safety measure for all parties in a criminal case. Recording the procedure preserves the identification process for later review in court and can reveal issues with the identification including suggestiveness or improper feedback. At the same time, recording the procedure may also protect officers against unfounded claims of misconduct and show that the eyewitness procedure was conducted in compliance with evidence-based practices. Challenges to a witness's identification are less successful when law enforcement agencies electronically record the identification procedure and the witness's responses, including the assessment of certainty statements. Video recording allows fact-finders to evaluate a witness's verbal and nonverbal reactions directly and scrutinize aspects of the identification procedure that contextualize the witness's selection.[96] If video recording is not feasible, an audio recording will allow fact-finders to hear the witness themselves, rather than relying exclusively on a secondhand oral or written account report about the procedure.

SIDEBAR:

THE CASE OF OBIE ANTHONY III

Obie Anthony III was 19 years old when he was convicted of murder and attempted robbery in 1995.[97] No physical evidence connected Anthony to the murder.[98] Anthony became a suspect when he was arrested for an unrelated crime that law enforcement thought was similar. Those charges were later dismissed when the victim admitted that he had lied about being carjacked to cover his own misconduct.[99]

But those earlier charges led police to include Anthony's photo in a photo lineup which they showed to John Jones, a convicted killer and pimp who ran a house of prostitution near the scene of the crime and who claimed to have witnessed the shooting.[100] Jones identified Anthony as one of the shooters and Anthony was convicted based on his testimony.[101]

In 2008, NCIP, in partnership with Loyola Law School's Project for the Innocent, began reinvestigating Anthony's case and spoke with John Jones several times.[102] Jones explained to multiple investigators and attorneys, and provided sworn testimony that he had not, in fact, seen the shooters, but instead relied on information provided by others, including law enforcement, to identify Anthony and his co-defendant Reggie Cole. Jones demonstrated how when the detective put the photo lineup with Anthony's photo in front of him, she tapped or in some way indicated to him to choose Anthony's photo. He said that he chose Anthony's photo as the shooter "based upon how [the photo lineup] was handed to him."[103] Jones' identification of Anthony was not electronically recorded and the administering detective denied having influenced the identification.[104]

In response to Jones's declaration that the detective had influenced his identification, the same detective again interviewed Jones. In her report, she claimed that Jones again said he saw Anthony at the shooting. However, the video-recording of the interview revealed that Jones repeatedly indicated that he had not seen Anthony and his later representations were made only in response to the detective's persistent leading questions which the court found appeared "to reflect a desire to ensure that he was not going to change his position, as opposed to objectively revisiting the evidence from the case."[105]

The court then reversed the conviction based on the prosecution's failure to disclose exculpatory information, including that Jones had received benefit for his testimony, that the prosecution failed to correct Jones's false testimony that he had received no benefit, that Jones had fabricated testimony and perjured himself when he claimed that he received no benefit for his testimony, and that Anthony's attorney had rendered ineffective assistance of counsel when he failed to conduct an adequate investigation.[106] The prosecution later dismissed all charges and the court declared Anthony factually innocent.[107]

IV. The Study

The primary objective of this study was to answer the following two questions:

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?

A. METHODOLOGY

In 2010, NCIP conducted a statewide survey of California law enforcement agencies to determine the extent to which these agencies had adopted evidence-based practices into their eyewitness identification policies. NCIP sent California Public Records Act (CPRA)[108] requests to 399 California police and sheriff's departments seeking policy manuals and training materials. In response, NCIP received policy manuals and materials from 330 agencies and assessed these documents for their consistency with recommendations that the CCFAJ had compiled based on the CCFAJ's review of social science studies, input from law enforcement, the scientific community, and legal practitioners. NCIP tracked which CCFAJ recommendations, if any, had been adopted by each department.

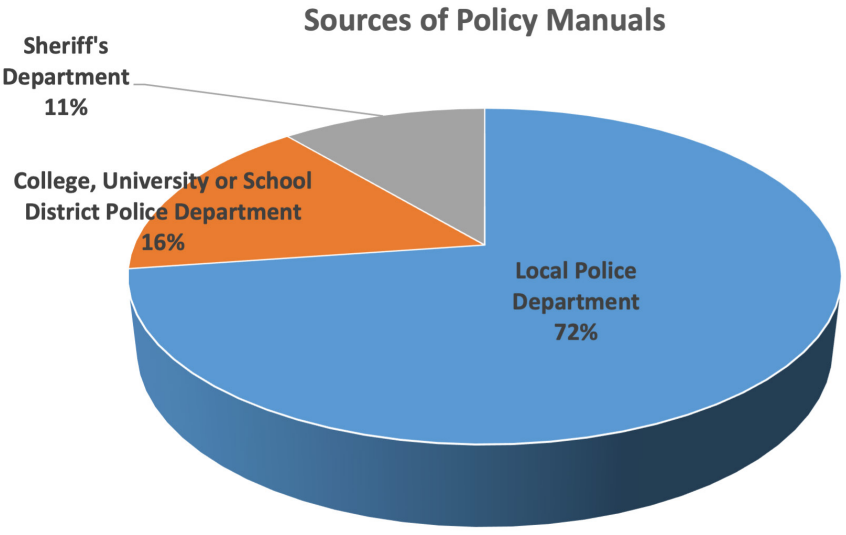
Ten years later, the ***Research Team***[109] began a follow-up survey to determine whether these evidence-based practices had been adopted more widely. The Research Team used a detailed analytical methodology that included obtaining and analyzing three categories of documents: 1) policy manuals, 2) admonishment documents, and 3) training materials. This methodology was guided by two considerations. First, reviewing the actual policies and training tools in use in each jurisdiction is the best way to assess what reforms have been adopted in any given agency. Second, assessing statewide practices provides critically important data to support continued efforts by lawmakers, attorneys, and/or other policy leaders in their pursuit of recommended reforms.

The Research Team first identified the universe of relevant agencies by obtaining a list from the California Commission on Peace Officer Standards and Training (***POST***) website.[110] From that group, the Research Team identified 547 California agencies that conduct eyewitness identification procedures.[111] The Research Team then used the CPRA to request written policies, admonishment documents, and training materials from the agencies concerning their collection and preservation of eyewitness identification evidence. The CIC sent initial CPRA requests[112] via the United States Postal Service to all 547 agencies.

For agencies that failed to respond to the initial PRA request, the Research Team visited the agency websites to determine the most effective method to send a follow-up CPRA request (e.g., United States Postal Service, email, facsimile, or online request form) and to whom the agency prefers the request be sent. The Research Team then sent follow-up CPRA requests to all non-responding agencies using the agencies' preferred methods. For agencies that failed to respond to both requests, the Research Team sought the agencies' policy manual online, which SB 978[113] required to be made available on the agencies' websites as of January 1, 2020. The Research Team tracked the methods used to send the PRA requests, including to whom, where, and when they sent the requests. In addition, the Research Team tracked all responses to the CPRA requests, including the dates of response and all materials received from the agencies.

The CPRA requests sought ***policy manuals*** related to eyewitness identification in five general areas, which are required under California Penal Code § 859.7 and which correlate with CCFAJ's recommended practices. Those general areas, known as the ***five pillars***, are: 1) use of blind administration in eyewitness procedures, 2) use of appropriate fillers in eyewitness procedures, 3) use of proper admonishments prior to the eyewitness procedures, 4) recording of witness certainty/confidence statements immediately following the eyewitness procedures, and 5) standards and processes for electronically recording the eyewitness procedures. Once the policy manuals were collected, the Research Team tracked which agencies had eyewitness identification policies containing all required evidence-based practices, which agencies had policies that included only some of the required practices, and which agencies failed to have any policy relating to eyewitness identification procedures.

In total, the Research Team received 475 policy manuals representing all 58 California counties: 343 (72%) were local city police departments, 54 (11%) were county sheriff's departments, and 78 (16%) were police departments associated with a university, college, or school district.



The CIC also asked the agencies to provide template ***admonishment forms*** used for live and photo lineups. Because the admonishment forms provided by the agencies are presumably used in practice, the Research Team thought that reviewing these documents might provide a data point as to the agencies' compliance in practice as opposed to just policy. The Research Team received admonishment documents from 381 agencies and assessed whether they contained all required instructions under California Penal Code § 859.7 including that: 1) The perpetrator may or may not be among the persons in the identification procedure, 2) The eyewitness should not feel compelled to make an identification, and 3) An identification or failure to make an identification will not end the investigation.

The CPRA request also asked agencies to provide any ***training materials***, field training guides, training attendance records, or acknowledgements of receipt of policies relating to eyewitness identification procedures. The materials the Research Team received in response to this request were too disparate and voluminous to make any fair statistical analysis or system-wide assessment. In order to ensure consistency between the materials assessed for each agency, the Research Team focused its statistical analyses solely on the eyewitness identification sections of agency policy manuals and admonishment documents. However, where appropriate, the Research Team reviewed the training materials to assess the quality and accuracy of individual internal agency trainings, which supplement departmental policy manuals.

The Research Team's findings can only be as accurate as the data that was provided by responding agencies. A wide array/range of officials provided responses to the CPRA requests, including administrative staff at police departments, officers within departments, private counsel representing counties or agencies, and city or county clerks. There was a great deal of inconsistency in the information provided. This suggests that some of the information provided to the Research Team could be outdated or inaccurate. The Research Team has attempted to identify and address this where possible in this report.

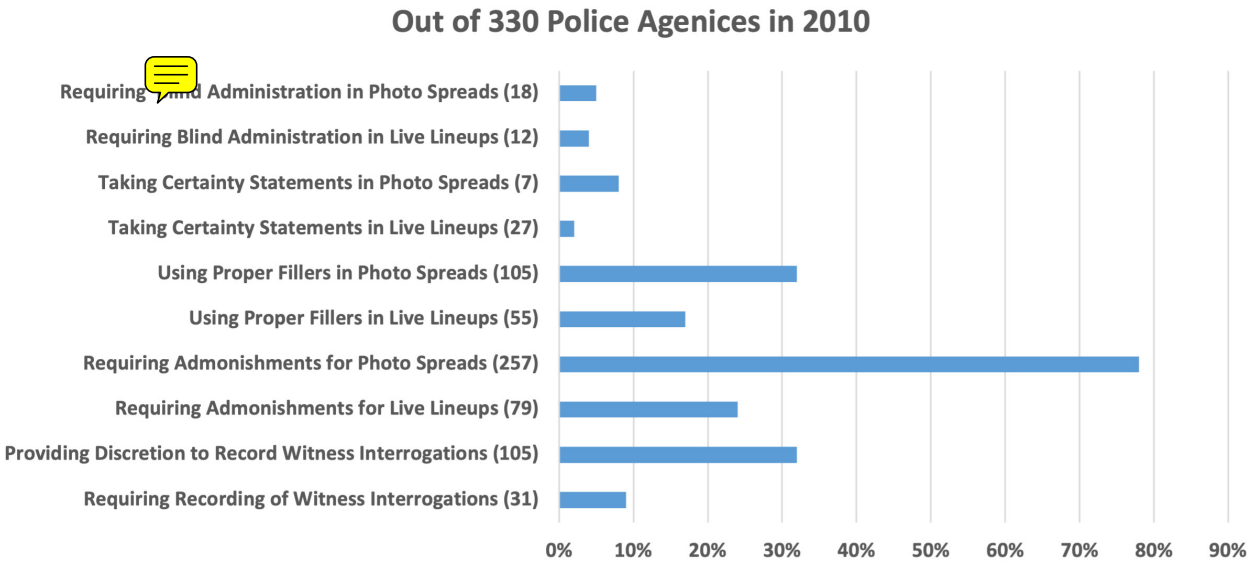
B. KEY FINDINGS

1. Progress in the Adoption of Evidence-Based Eyewitness Identification Policies and Practices

At a high level, California law enforcement agencies have made great strides in incorporating evidence-based practices into their eyewitness identification policies over the last decade. As stories of wrongful conviction have been widely shared in the media through news stories, films and documentaries, television series, and podcasts, police agencies appear to have prioritized efforts to improve policies to increase the accuracy of convictions and gain public trust. However, the data suggest that these policies may not align with day-to-day practices.

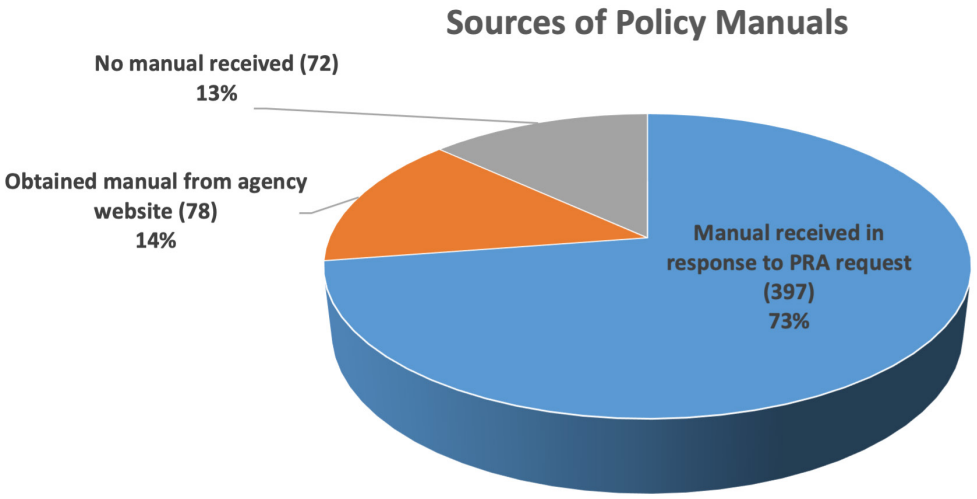
In 2010, 330 agencies, or 83%, provided NCIP with materials in response to NCIP's CPRA request. Of the departments that responded, 25, or 8%, had no written policies or training materials pertaining to identification procedures. Only 18 departments, or 5%, required the use of blind administration of photo spreads in their policy and 12 departments, or 4%, had a blind administration policy for live lineups. Very few departments took certainty statements at the time of the identification procedure—seven departments, or 2%, had policies requiring officers to take certainty statements during live lineups and 27, or 8%, for photo spreads. Some departments had written policies concerning the use of proper fillers—105 agencies, or 32%, had filler policies relating to photo spreads and 55, or 17%, had filler policies relating to live lineups. A number of departments used some type of admonishment letting witnesses know they do not have to choose a suspect—257 departments, or 78%, had admonishments for photo spreads and 79, or 24% had admonishments for live lineups. And though many agencies had policies relating to the interrogation of witnesses, these policies were not specific to eyewitness identification procedures—105 departments, or 32%, left it to the officer's discretion to record interrogations or witness interviews[114] and 31 departments, or 9%, had policies requiring video-recording of witness interrogations.

In 2010, no California law enforcement agency had adopted all of the CCFAJ's recommended practices and many had adopted none.

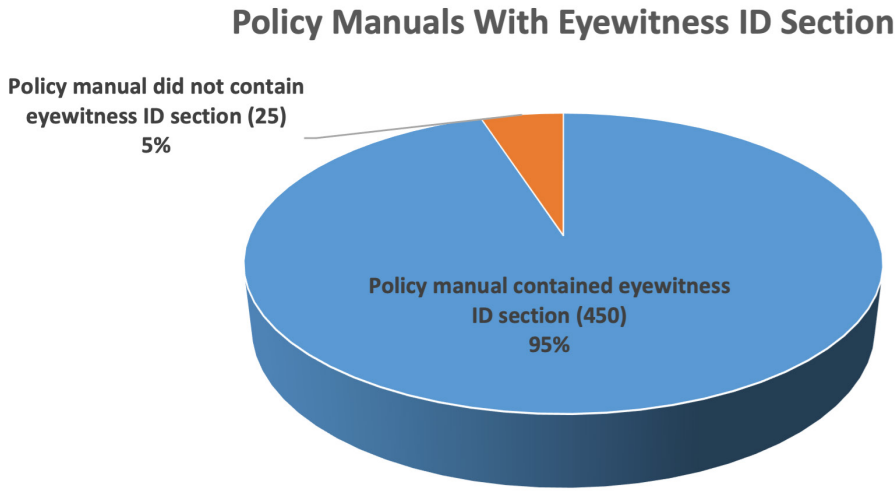


A decade later, most agencies had incorporated evidence-based practices into their eyewitness identification policies. Of the 547 agencies that received a CPRA request in 2020, 397, or 73%, voluntarily provided ***policy manuals***. The Research Team identified an additional 78 policy manuals through the websites of agencies that failed to provide such documents. Of the remaining agencies, 40 failed to respond and had no policy manual available online, nine claimed they are exempt, five agencies claimed they do not conduct eyewitness procedures, and 18 agencies responded that they either contract with another

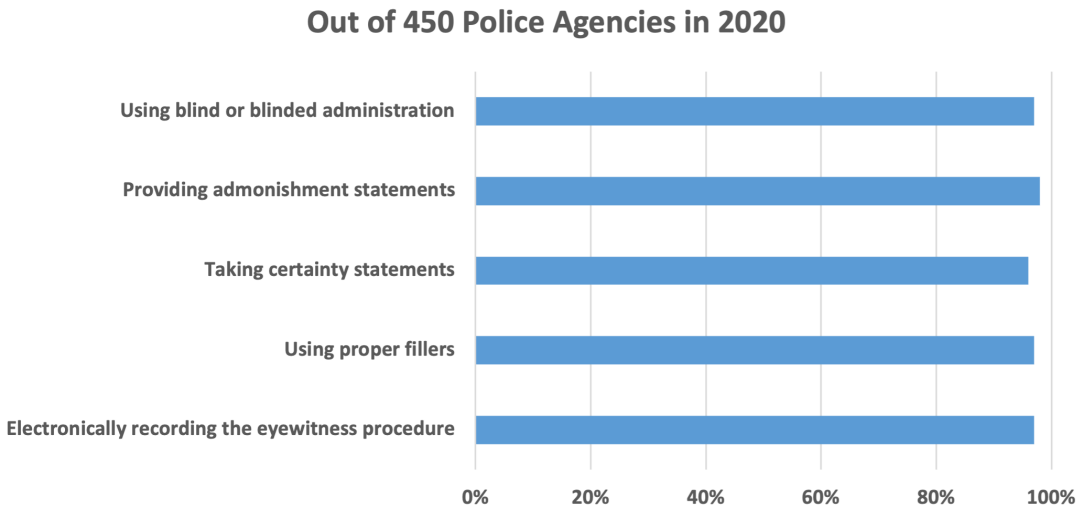
police agency for police services or abide by another department's manual. Of note, 12 of the agencies whose policy manuals did not have an eyewitness identification section responded to the CIC's PRA request with an admonishment document, which suggests that some agencies have eyewitness identification practices or protocols in place that do not appear as a section in their policy manuals.



Most policy manuals the Research Team obtained had a section that dealt with eyewitness identification procedures. Specifically, 450 agencies, or 95%, of the study sample, had policy manuals that contained regulations on eyewitness identification procedures.



Of these 450 policy manuals, 436, or 97%, specified use of blind or blinded administration, 443, or 98%, discussed admonishment statements, 434, or 96%, addressed when and how certainty statements should be taken, 436, or 97%, discussed the use of proper fillers, and 435, or 97%, discussed electronic recording of the eyewitness procedure. But only 413 of those policy manuals, or 92%, included all of the evidence-based practices required under the new law. Including policy manuals with no eyewitness identification policy, only 87% of all agencies in the study sample had policy manuals that contained all requirements under California Penal Code § 859.7.



Of the admonition documents received from these 381 agencies, only 186 agencies, or 49%, use documents that contained all required admonitions.

The Research Team received ***admonishment documents*** from 381 agencies. To gain perspective on agencies' levels of compliance with California Penal Code § 859.7 in practice, the Research Team analyzed the admonishment documents to determine whether they contained all required admonition statements under California Penal Code § 859.7. Of the admonition documents received from these 381 agencies, only 186 agencies, or 49%, use documents that contained all required admonitions.

2. Privatizing Public Policymaking: The Role of Lexipol

One of the study's most notable findings concerned the pervasive influence of Lexipol, LLC. Of the 475 policy manuals in the study, 420 agencies (or 88%) used a Lexipol-produced policy. Lexipol is a private, for-profit company that 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.[115] Lexipol was founded in California in 2003 by attorney and former law enforcement officer Bruce Praet, former law enforcement officer Gordon Graham, and businessman Dan Merkl.[116] Praet, who had previously worked as an attorney defending police in civil matters, was inspired to create a comprehensive set of policies to sell to California law enforcement agencies after having authored a policy on vehicular pursuits to reduce police exposure to liability.[117] Praet's project eventually usurped his work as a private practice attorney and, in 2003, became Lexipol.[118]

Since 2003, Lexipol has expanded its customer base from 40 California agencies to approximately 90% of all California law enforcement agencies and over 3,500 agencies in 35 states.[119] Because the vast majority of California agencies subscribe to Lexipol,[120] Lexipol has tremendous influence over California police policies. Lexipol markets its work by highlighting that it is cost-effective; paying Lexipol, the company contends, is far less expensive than the cost of agencies writing and updating their policies on their own. [121] Lexipol not only produces policies so agencies would not have to, it also sends updates to subscribers when its policies are affected by changes in the law, new court decisions, or research reports.[122]

Lexipol's rapid growth might be attributed to its claims that use of its products can reduce legal liability to officers and agencies. While scholars and experts have traditionally viewed police policymaking as a tool to constrain officer discretion and improve decision making, Lexipol, in contrast, holds itself out as a risk mitigation tool to help agencies avoid legal liability. In its promotional materials, Lexipol claims it provides agencies with up-to-date policies containing "legally sound defensible content" that will shield agencies from liability.[123] Lexipol also asserts that departments that adopt its copyrighted materials face fewer lawsuits and make lower payouts to plaintiffs.[124] Lexipol cites insurance company claims data to support these assertions; however, as legal scholars Ingrid Eagly and Joanna Schwartz reported in a 2018 law review article, Lexipol has not provided datasets, studies, or evidence to substantiate their claims.[125] In response, one Lexipol executive stated that he would plan to work "toward a more statistically defensible correlation of claims to excellence in policy management and training on policy."[126] Without supporting data, Lexipol's claims that its policies are an effective risk mitigation tool for law enforcement cannot be evaluated.

Lexipol's policies have been the subject of several lawsuits, united by the common theme that the policies are vague and contain insufficient language. As alleged in these lawsuits,[127] Lexipol's master policies often leave excessive room for officer interpretation,

which undercuts the spirit of the laws they purport to interpret. The policies that Lexipol markets to law enforcement agencies also enable gaps in policing and, in some cases, serious miscarriages of justice. A recent law review article seeking to understand Lexipol's efforts regarding use-of-force policy reform asserts that the company has "attempted to minimize the efficacy" of legislative changes[128] and that as a result, Lexipol's customer base—which represents about 20% of U.S. law enforcement agencies—is also less likely to adopt reforms.[129]

Lexipol is best known for its copyrighted policy manual. It uses a "global master" manual based on federal standards for law enforcement and "best practices" to develop "state master" manuals that account for state-specific laws and standards.[130] Although Lexipol executives have asserted that they create their policies with a team of attorneys and former law enforcement officials who review court decisions, legislation, and other relevant information, as well as feedback from governmental agencies and nongovernmental organizations, Lexipol's process of policy drafting remains largely opaque.[131]

Lexipol provides contracting agencies with a draft master policy manual.[132] While the company holds itself out as creating policies that protect agencies from the threat of litigation,[133] Lexipol makes clear that it is not any particular agency's policy-maker.[134] Lexipol claims that its master policy is a suggestion, and that agencies have a responsibility to do their own research and make their own decisions about which policies to implement. According to Bill McAuliffe, Director of Professional Services for Lexipol, the policies sold to police are meant to serve as a stepping-stone.[135] The Lexipol policy is the foundation and "the agency needs to take it to the next step and customize it" to ensure compliance and practicality.[136] This, however, is a task that few will take on because of a lack of resources (in other words, the reason they hired Lexipol in the first place). Agencies can work with Lexipol to customize certain policies or supplement the manual with original policy content. For those agencies that wish to author some of their own policies, Lexipol issues a style guide in which it describes "house rules for spelling, punctuation, citations and other style issues."[137]

At the same time, Lexipol advises its users to "fully understand the ramifications and use caution before changing or removing" policies derived from federal and state law.[138] While Lexipol does not overtly discourage changes to its master policy, it recommends adopting the policy with little or no modification and warns its customers about the possible impact of policy modifications, including potential legal liability for the agency.[139] In addition, if an agency automatically adopts an updated version of the policy through Lexipol's update service, this wipes out any previous content specifically modified by the agency.[140] Due to the limits that Lexipol places on maintaining customized policies and agencies' overall lack of time and resources, agencies are likely to accept Lexipol's master policy without substantial modification.[141]

Lexipol also says it equips its adopting agencies with "policy guides" that explain the rationale behind its policies.[142] However, none of the agencies that responded to the CIC's

CPRA request provided any such policy guides. Nor did any of the 174 Lexipol-subscribing police departments in California that Eagly and Schwartz surveyed in their 2018 study.[143] ***Obtaining Lexipol's policy guides, if they exist, would be useful to enable police departments—and other stakeholders—to more critically evaluate Lexipol's policies.*** Knowing the rationale behind Lexipol's verbiage may help police departments decide whether to implement Lexipol's language or to draft their own policies that they determine to be in better compliance with the law.

a. Lexipol's Eyewitness Identification Policy

Given the extensive use of Lexipol policies by California law enforcement agencies, the Research Team analyzed Lexipol's ***California State Master Eyewitness Identification Policy***. While the Master Eyewitness Identification Policy may appeal to law enforcement agencies due to the potential time and cost savings of having an "off-the-shelf" product, the Master Policy has some significant drawbacks—most importantly, its use of "should" instead of "shall" with respect to several legally-required eyewitness identification practices. The benefits and drawbacks of the Lexipol Master Policy are summarized below. (The latest version of the California State Master Eyewitness Identification Policy to which the Research Team had access is reproduced in Appendix B for reference).

i. Content of Lexipol's Eyewitness Identification Policy

Since the enactment of California Penal Code § 859.7, Lexipol has updated its California State Master Eyewitness Identification Policy to address each of the evidence-based practices required by the law, including blind administration, admonishments, fillers, certainty statements, and electronic recording. In addition to the five pillars, the Lexipol policy includes other required evidence-based practices, such as sequestering witnesses during the eyewitness procedure, obtaining witness descriptions prior to the eyewitness procedure, and including only one suspected perpetrator in any identification procedure.

Lexipol's policy also provides agencies with specific guidance as to the law's requirements in two other ways. First, the Lexipol policy cites California Penal Code § 859.7 in parentheses throughout the policy so that the reader understands which sections of the policy are derived from the statute and thus required by law. Second, instead of simply providing general instructions directing officers to provide proper admonishments, the Lexipol policy recites the specific admonitions that an officer must provide to eyewitnesses prior to the eyewitness procedure.

Lexipol's Master Policy also includes language that in some instances goes farther than the requirements under California Penal Code § 859.7. Two specific sections include directives that strengthen the policy and should be considered for legislative amendments: 1) an officer's procurement of a suspect description and 2) an officer's use of blind administration. Lexipol's policy also recommends sequential administration, the use of which remains an unsettled debate within the scientific and law enforcement communities.

1. **Suspect description.** California Penal Code § 859.7 provides: "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."[144] The "eyewitness shall" language appears (perhaps unintentionally) to put the onus on the eyewitness to provide the description to the officer, as opposed to requiring the officer to acquire the suspect description. Compare this to Lexipol's language: "Witnesses should be asked for suspect descriptions as close in time to the incident as possible and before conducting an eyewitness identification."[145] Lexipol's policy makes clear that it is the officer's responsibility to ask the eyewitness for the suspect description, not the eyewitness's responsibility to provide one.

2. **Blind administration.** Lexipol's policy states:

   > [T]he member presenting the lineup should not be involved in the investigation of the case or know the identity of the suspect. In no case should the member presenting a lineup to a witness know which photograph or person in the lineup is being viewed by the witness (Penal Code § 859.7). Techniques to achieve this include randomly numbering photographs, shuffling folders, or using a computer program to order the persons in the lineup.[146]

Though Lexipol's directive does not explicitly use the word "blind" or "blinded" administration, it describes in plain language that the conducting officer should not know the identity of the suspect or which photograph or person is being viewed by the witness. Lexipol's language also includes wording in the text of the policy to ensure that the procedure is blinded. Lexipol's policy goes a step beyond California Penal Code § 859.7 by recommending that the administrator not be involved in the investigation of the case. Penal Code § 859.7, in contrast, states only: "The investigator conducting the identification procedure shall use blind administration or blinded administration during the identification procedure."[147] The provision does not contain a directive that the conducting officer should not be involved in the investigation. However, including such a directive in the law could decrease the risk of inadvertent or purposeful influence on the witness and improve the integrity of the procedure.

3. **Sequential presentation.** In a ***sequential presentation***, lineup subjects are presented to the witness one at a time and the witness reports whether or not each one is the perpetrator.[148] Contrast this with a ***simultaneous lineup***, which asks witnesses to view all subjects in a lineup or photo spread at the same time.[149] Simultaneous lineups, also known as photo arrays, are the most common identification procedure used in the United States.[150]

Early research comparing sequential and simultaneous lineups found that simultaneous presentations yielded similar hit rates (when a guilty suspect is correctly identified as guilty) and higher false alarm rates (when an innocent suspect was incorrectly identified as guilty) than simultaneous lineups.[151] This clear reduction in innocent suspect identifications

coupled with only a small decrease in guilty suspect identifications became known as the "sequential superiority effect."[152] The previous scientific thinking was that the simultaneous lineup format increases the tendency for witnesses to engage in a relative judgment process.[153] That is, the witness would compare each lineup member to the other lineup members and choose the one who *most* resembles the offender.[154] In comparison, in a sequential presentation, witnesses would use an absolute judgment process because the suspects are presented one at a time.[155] Accordingly, the use of sequential lineups would increase the likelihood that a witness will select a suspect based on actual recognition, rather than selecting the person who most resembles the perpetrator.[156]

However, more recent research indicates that sequential lineups are not superior to and may actually be slightly inferior to simultaneous lineups.[157] Contrary to prior research, new studies show that sequential identification procedures do not, in fact, have a lower false alarm rate compared to simultaneous procedures.[158] These new studies measure witness performance not in terms of the previously used variable of the diagnosticity ratio (the ratio of correct identifications to false identifications, which is now known to be a misleading measure), but instead in terms of the witness's response bias (their willingness to identify someone in the lineup) and their discriminability (the degree to which the eyewitness can tell the difference between innocent and guilty suspects).[159] Based on new analyses of these variables, studies now show that the supposed reduction in false identifications in the "sequential superiority effect" came at the expense of a corresponding reduction in correct identifications.[160] This is because sequential lineups induce a more conservative response bias from witnesses, meaning that they need more evidence to make an identification at all.[161] Based on this new data, in a 2017 memorandum to all heads of department law enforcement components and prosecutors, the U.S. Department of Justice highlighted that newer studies suggest that simultaneous procedures may result in more true identifications and fewer false ones.[162] However, the Department of Justice explicitly did not take a position on whether simultaneous or sequential procedures should be used.[163]

It should be noted that if an agency chooses to implement a sequential presentation protocol, it is critically important that the procedure also be conducted by a blind administrator. Research demonstrates that sequential procedures, in the absence of blind administration, can actually be more suggestive than traditional simultaneous presentation.[164] Thus, a sequential presentation that does not have a blind administrator can produce a greater number of misidentifications than the use of a traditional photographic lineups because it may be easier to bias the presentation of a single photo than the presentation of several photos at once.[165]

Currently, there is no scientific consensus as to whether simultaneous or sequential lineups are superior.[166] The National Academy of Science,[167] the International Association of Chiefs of Police,[168] and the U.S. Department of Justice[169] all decline to recommend one procedure over another. Despite this fact, Lexipol's policy instructs officers to use a sequential presentation: "The member presenting the lineup should do so sequentially (i.e., show the witness one person at a time) and not simultaneously." Though the CCFAJ recommended

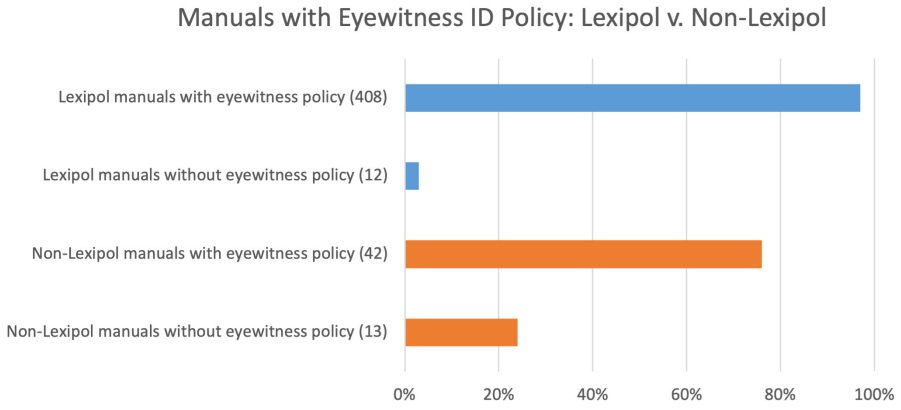
the use of sequential administration in 2007, it was not included in California Penal Code § 859.7 when enacted in 2020. In 2010, only 28 agencies, or 8%, that responded to NCIP's CPRA request had policies mandating sequential procedures. In 2020, the Research Team identified 423 agencies, or 89%, that include sequential administration in their policy manuals, a dramatic increase from a decade earlier. Perhaps not coincidentally, 95% of these agencies used a Lexipol-produced policy manual.

ii. Usage of Lexipol's Eyewitness Identification Policy

The high percentage of California police agencies using Lexipol-produced policy manuals (almost 90%) translates to a high percentage of police agencies including required evidence-based practices in their eyewitness identification policies. The Research Team found that ***agencies that were using a Lexipol-produced manual were far more likely than non-Lexipol-subscribing agencies to have policies addressing the requirements under California Penal Code § 859.7.***

The data shows that, of the 420 agencies in the study sample that were using a Lexipol-produced policy manual, 408, or 97%, had a specific eyewitness identification section. Of those, 386, or 95%, had an eyewitness identification policy that included all of the evidence-based practices required by the statute. Further, 367, or 90%, adopted a version of Lexipol's Master Eyewitness Identification Policy with little or no substantive additions, substitutions, or alterations. More than half of the agencies, 252, or 62%, adopted Lexipol's Master Eyewitness Identification Policy in its entirety with no changes. Eighty-one, or 20%, adopted most of the standard Lexipol Eyewitness Identification Master Policy, but chose to eliminate certain sections or language.

Only 12, or 3%, of the subscribing agencies opted not to include an eyewitness identification section in their policy manual. Compare that to the 55 agencies in the study sample that were not using a Lexipol-produced policy manual: of those, 13, or 24%, opted not to include a dedicated eyewitness identification section in their policy manual.



The Lexipol-subscribing agencies that did not include all of the statute's requirements were relying upon an outdated Lexipol manual, had opted to omit certain sections from the Master Policy, or had failed to include an eyewitness identification section in their policy manual altogether. In the end, the overwhelming majority of Lexipol subscribers in the study sample, 90%, chose to adopt Lexipol's California State Master Eyewitness Identification Policy.

iii. Drawbacks of Lexipol's Eyewitness Identification Policy

There are significant risks associated with adopting Lexipol's Master Policy without modifications. Specifically, based on the plain wording of the policy, officers may interpret much of the policy to be merely advisory ("should") as opposed to mandatory ("shall"). As a result, the Master Policy does not comply with California Penal Code § 859.7. Moreover, the policy substitutes words and rephrases language from California Penal Code § 859.7, which renders the policy inconsistent with statutory requirements and vulnerable to legal challenges.

a) Permissiveness: "Should" vs. "Shall"

As co-sponsors of SB 923, the CIC assisted in crafting the bill's language to ensure that all practices outlined in the bill, if enacted, would be mandatory, not advisory. California Penal Code § 859.7 uses the word "shall" throughout, clearly establishing that the requirements are mandatory. The legislative history is also telling.[170] According to the authors of California Penal Code § 859.7, the bill was intended to **mandate** regulations that all law enforcement officers must follow when conducting eyewitness identification procedures.[171] The authors' purpose was not to develop a set of recommendations similar to previous attempts at eyewitness identification legislation, but to create requirements.[172]

Lexipol's California State Master Eyewitness Identification Policy, however, substitutes the word "should" in place of "shall" in most corresponding sections of the policy. This is intentional and the company is not shy about saying so. In a webinar for Lexipol subscribers, Lexipol founder Bruce Praet explained, "[Lexipol's] secret sauce, so to speak, is rarely, if ever, will you see the word shall in our policies. . . If an agency ill-advisedly said, 'You shall or shall not, based on certain circumstances,' yeah, you'd be hanging out there on a very thin limb.'"[173] Lexipol's policies frequently use dependent clauses that include the words "should" and "may." Praet further explained in a Lexipol blog post, "[A]gencies must exercise extreme caution when mandating action with the use of inflexible 'shalls.'"[174]

Chapter 1 of Lexipol's California State Master Policy provides definitions for terms used throughout the policy manual, including definitions for "shall" and "should." According to the Lexipol definitions, ***should*** "indicates a generally required or expected action, absent a rational basis for failing to conform," while ***shall*** "indicates a mandatory action."[175] Lexipol's policy is silent on what constitutes "a rational basis for failing to conform." Regardless of Lexipol's definitions, the practices outlined in California Penal Code § 859.7 are mandatory,

not "generally required" as contemplated by Lexipol's definition of "should." Further, in most instances, California Penal Code § 859.7 does not excuse failures to comply even if there is a "rational basis" to do so. Section 859.7 even contemplates situations when compliance may be difficult, and builds in specific options to ensure compliance, such as using a "folder shuffle method"[176] to ensure blind administration and allowing for audio recording of procedures when video recording is not feasible.[177] Outside of these specific options, however, the statute does not authorize a general "rational basis" exception to compliance which Lexipol's definition of "should" does. Lexipol's definition of shall, which "indicates a mandatory action," is an accurate reflection of the use of "shall" in California Penal Code § 859.7.

The plain meanings of "shall" and "should" and analysis of these words by courts in general further suggest that Lexipol's eyewitness identification policy is weaker than what the law requires. Webster's Dictionary defines "shall" as "used to express a command or exhortation."[178] It defines "should" as being used to "soften [a] direct statement."[179] Courts also highlight the distinction between words such as "shall" or "must" and "should" or "may." In general, the word "shall" is the "language of command,"[180] while a permissive verb like "may" suggests a discretionary choice.[181] The word "shall," especially when used in a statute, is construed as mandatory as opposed to permissive;[182] if requirements were meant to be permissive, then the legislature would use permissive language such as "may" and "should."[183]

SHOULD	SHALL
U.S. Supreme Court: Suggests a discretionary choice.[184]	U.S. Supreme Court: The "language of command."[185]
Lexipol Master Policy: "[I]ndicates a generally required or expected action, absent a rational basis for failing to conform."[186]	Lexipol Master Policy: "[I]ndicates a mandatory action."[187]
Merriam Webster: Used to "soften a direct statement."[188]	Merriam Webster: "Used to express a command or exhortation."[189]

The Lexipol California State Master Eyewitness Identification Policy has four notable instances where it uses the word "shall."[190] ***The Research Team created a chart comparing the use of "shall" and "should" in the Lexipol policy versus California Penal Code*** § 859.7***, provided in Appendix H.*** That "shall" is used in select sections of the policy, but not others, underscores the notion that Lexipol considers certain sections of the policy to be mandatory while others are merely advisory. The use of "should" is inconsistent with California Penal Code § 859.7, thereby increasing the likelihood that officers following Lexipol's policy

will fail to comply with the required evidence-based practices, which in turn increases the risk of a misidentification, increases the risk of a wrongful conviction, and increases a law enforcement agency's legal exposure for not complying with statutory law.

Ironically, Lexipol tells subscribers that using its policies will help police departments avoid legal liability.[191] Lexipol argues that policies that "box[] officers in [are] likely to create—not solve—legal issues for the agency."[192] If agencies' policies are written in the stricter "shall" fashion, police officers, in Lexipol's view, may become legally liable for not acting in strict compliance with the policy. Yet Lexipol's policies are in part written so permissively that the policies are not compliant with *the law*. Lexipol's tendency to write open-ended policies and avoid mandatory language authorizes police officers to exercise their own judgment, even though the law sets forth strict requirements prohibiting the exercise of such discretion.

Lexipol's Program Manager, Mike Ranalli, opines that, in the context of the use of force, "mere words in a policy" will not change human behavior.[193] He argues that agencies should instead use less restrictive policies that give officers the discretion to use force whenever objectively reasonable,[194] rather than only when necessary in the defense of human life as required by law in California. As explained by legal scholars Joanna Schwartz and Ingrid Eagly,[195] Ranalli also argues that policies strictly prohibiting the use of force, written in a legally-compliant "shall not" fashion, "are not effective" and that officers instead should use less restrictive policies in combination with training—all while "hop[ing] that they make sound tactical decisions."[196]

In the context of eyewitness identification, strong policies help to ensure that innocent people are not incorrectly identified as the perpetrators of crimes that they did not commit. Mere "hope," supported by lenient, noncompliant protocol, is not enough to ensure that police abide by California Penal Code § 859.7. Nor does mere "hope" keep police accountable. Rather than *hoping* that police comply with the law, agencies must *implement* the five evidence-based practices for eyewitness identification procedures as mandated in California Penal Code § 859.7. Lexipol's rationale for greater officer flexibility has even less justification when applied to eyewitness identification procedures, which do not involve the same type of public safety considerations or need for individualized judgment as use of force situations. Lexipol and its subscribing law enforcement agencies should readily implement mandatory protocols that comply with Penal Code § 859.7.

Another overlooked consideration is that open-ended and permissible policy language may *increase* legal exposure for police departments, as exemplified in a recent lawsuit against the Pomona Police Department for its failure to comply with recent use of force legislation.

SIDEBAR:

THE ACLU'S SUIT AGAINST THE POMONA POLICE DEPARTMENT

In January 2020, Assembly Bill 392, codified as California Penal Code § 835a, took effect and provided new guidelines that permit state officers to use lethal force only "when necessary in defense of human life."[197] The Pomona Police Department's Lexipol policy omitted the word "necessary" from its standard.[198] Since the enactment of AB 392, Pomona police have used deadly force several times and killed three people: Anthony Pacheco on March 30, 2020; Nick Costales on June 29, 2020; and Matthew Blake Dixon on July 5, 2020. Following the July 5 shooting, a sergeant in the Pomona Police Department posted a celebratory message on social media: "My boys killed another one tonight. Another notch in the belt."[199]

In response to the shootings, the ACLU of Southern California filed a lawsuit asking the court to enjoin Pomona Police Department from using funds, resources, and employee time in erroneously directing officers that the new law *does not* establish a "necessary" threshold for using deadly force.[200] The complaint also sought an injunction against the department's use of Lexipol materials that flout the new law.[201]

On November 22, 2022, plaintiff Gente Organizada, a community-based, nonprofit social-action organization and the Pomona Police Department settled the matter before the court heard a motion for summary judgment.[202] According to the ACLU, the settlement requires the Pomona Police Department to undertake several actions, including training officers that AB 392 changed the legal standard for officers to apply deadly human force "only when necessary in the defense of human life."[203] The ACLU noted that both Lexipol and the Police Officers Research Association of California (PORAC) had helped to train the Pomona Police Department on the implications of AB 392 and "undermined the law's implementation by falsely declaring it was not a significant change in use of deadly force standards."[204] This settlement, according to the ACLU, "defies a misinformation campaign" spread by police lobbying groups, affirms that AB 392 did change the use-of-force policies, and requires departments to acknowledge the change in the law.[205]

In conducting discovery, the ACLU obtained several communications and training materials that demonstrate how police lobbying groups worked to undermine the changes created by AB 392.[206] After the signing of AB 392 into law, PORAC's president sent an email to its members claiming that AB 392 will "not significantly impact" law enforcement actions, citing the "legal analysis" written by Lexipol co-founder Praet.[207] Then, a Pomona Police Department sergeant sent an email saying "FYI from PORAC. Nothing has changed contrary to Media reports."[208]

One of the more troubling documents which surfaced in discovery was an email Praet sent to the Pomona Police Department after the ACLU filed its lawsuit. Praet stated he would "like to offer as much 'behind the scene' support as possible (at no cost)" to assist the department defend the lawsuit.[209] Rather than viewing the ACLU suit as an opportunity to re-evaluate its policies, Lexipol instead took the position that its policies are defensible. One of the terms of the parties' settlement was that the Pomona Police Department would no longer follow Lexipol's original interpretation of AB 392, which had omitted the word "necessary" from its use of force policy.[210]

This should signal to other agencies that Lexipol's policies are not as infallible as Lexipol claims. Ultimately, Lexipol's encouragement of open-ended policies may hurt law enforcement agencies—and taxpayers—financially, despite its goal of helping police agencies avoid legal liability. Civil lawsuit settlements, jury awards, and state compensation stemming from wrongful convictions can cost individual agencies, cities, counties, and the state millions of dollars.

For these reasons, and in order to fully comply with California Penal Code § 859.7, ***Lexipol would better serve California law enforcement agencies by substituting "shall" in place of "should" in the sections of its eyewitness identification policy that are required under the law***. The CIC contacted Lexipol in May of 2021 with this recommendation and provided the company with a memo that included the points made in this report.[211] Lexipol followed up with the CIC after reviewing the memo and, after a conversation, opted to keep "should" as the operative verb throughout the policy so as not to "paint officers in a corner" in a scenario where an officer is unable to comply with the policy.[212]

b) Electronic Recordings Exception

Electronic recording of the eyewitness identification procedure serves several important purposes: it preserves the identification process for later review in court, it protects officers against unfounded claims of misconduct, and it allows fact finders to directly evaluate a witness's verbal and nonverbal reactions and any aspects of the lineup procedure that would help to contextualize or explain the witness's selection. Recording the eyewitness identification procedure acts as a safeguard for both the defense and the prosecution.

California Penal Code § 859.7(a)(11) requires that "an electronic recording shall be made that includes both audio and visual representations of the identification procedures. . . 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."[213] The section requires officers to make audio and visual recordings, but when both are not feasible, it at the very least requires audio recordings every time an officer conducts an eyewitness identification procedure.

A prior version of the Lexipol California State Master Policy, however, stated: "*Whenever feasible*, the eyewitness identification procedure *should* be audio and video recorded and the recording *should* be retained according to current evidence procedures [emphasis added]."[214] The "[w]henever feasible" qualifier at the beginning of the section made

electronic recording entirely optional when not "feasible," whereas California Penal Code § 859.7 *requires* electronic recording and only excuses *visual* recording when not feasible. Going farther, Lexipol's former policy created a direct exception to electronic recordings in § 604.8.1 when it stated, "The handling member shall document the reason that a video recording *or any other recording of an identification was not obtained*." Again, in violation of Penal Code § 859.7, the policy excused the failure to record by merely requiring the officer to document the reasons why the procedure was not recorded.

California Penal Code § 859.7	CA State Master Police Department Lexipol Policy (Before 2022)
(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.	604.5 . . . ***Whenever feasible***, the eyewitness identification procedure ***should*** be audio and video recorded and the recording ***should*** be retained according to current evidence procedures (Penal Code § 859.7). 604.8.1. . . The handling member ***shall*** document the reason that a video recording or any other recording of an identification was not obtained.

The CIC sent a memo to Lexipol[215] on May 14, 2021, recommending that it modify its electronic recording policy to conform to Penal Code § 859.7, and discussed the proposal with Lexipol in a follow-up conversation on June 28, 2021. The Lexipol team told the CIC it would consider the recommended modification for the next update of its California State Master Eyewitness Identification Policy. After speaking with Lexipol, the Research Team continued to monitor the Lexipol eyewitness identification policies that California law enforcement agencies posted on their websites.

In 2022, some of the Lexipol-subscribing agencies began producing an updated eyewitness identification policy. The updated electronic recording policy is, in part, consistent with the CIC's recommendations. In particular, Lexipol's 2022 California State Master Policy removes the "[w]henever feasible" qualifier from the beginning of the section and adds a sentence clarifying that an audio recording should be made when it was not feasible to both video and audio record the procedure. The Master Policy now provides: "The eyewitness identification procedure should be audio and video recorded and the recording should be retained according to current evidence procedures. When it is not feasible to make a recording with both audio and visual representations, an audio recording should be made (Penal Code § 859.7)."[216]

The CIC commends Lexipol for this change. The updated language is a step in the right direction, but ***Lexipol's recording directive can still be improved in two critical ways***. First, Lexipol must change the operative verb throughout the entire directive from "should" to "shall," in order to communicate the mandatory nature of electronic recording requirement. Second, Lexipol's updated policy does not modify the exception to the recording requirement created by § 604.8.1, which still states: "[t]he handling member shall document the reason that a video recording *or any other recording* of an identification was not obtained," and effectively excuses recording. Lexipol must close this loophole in its Master Policy by substituting language directly from California Penal Code § 859.7: "When audio recording without video recording is used, the investigator *shall* state in writing the reason that video recording was not feasible."[217]

3. Progress, but Room for Improvement on Admonitions

Proper admonishments can help to reduce eyewitness misidentifications. The admonitions required by California Penal Code § 859.7 alert the witness that they are not required to make an identification, that the perpetrator may not be present in the lineup, and that the investigation will continue regardless of whether or not they make an identification.[218] Despite these legally-required witness instructions, **less than half** of the admonishment documents and forms in the study sample contained all three required admonitions and were in full compliance with California Penal Code § 859.7. Admonishment documents and forms, which are used in practice during eyewitness identification procedures, are key indicators of an agency's adoption and implementation of its policies. Accordingly, a proper admonishment form can help agencies to comply with the evidence-based practices required under California Penal Code § 859.7 and ensure those practices are properly implemented in accordance with their policy manuals. ***The Research Team's template admonishment form provided in Appendix C, if adopted by agencies, can assist them to implement best practices and encourage compliance with the statute***.

a. Importance of Admonitions

One way to increase a witness's accuracy during an identification procedure is to provide the witness with proper pre-lineup admonitions. A witness's identification of a suspect is based not only on their memory, but also on their motivation and expectation.[219] Given that a witness is likely to assume or believe that police have placed a suspect in the lineup,[220] a witness may feel it is their job to pick someone out, and that to do otherwise is a failure.[221] However, admonitions that specifically alert the witness to the possibility that the true perpetrator may not be in the lineup give the witness a third option—to rely upon their memory to conclude that the perpetrator is not present.[222]

Researchers have demonstrated that instructing witnesses that the perpetrator may or may not be in the lineup can greatly decrease the rate at which mistaken identifications occur.[223] In a study measuring the effectiveness of pre-lineup admonitions, ***78% of witnesses*** who

were not explicitly warned that the perpetrator may or may not be present made ***mistaken identifications from a perpetrator-absent lineup***.[224] In contrast, the mistaken-identification rate dropped to 33% when the eyewitnesses were given this warning.[225]

Correspondingly, biased pre-lineup instructions, such as those indicating that the perpetrator is in the lineup, increase the likelihood that a witness identify a suspect, regardless of the suspect's guilt or innocence.[226] Such biased instructions, which limit a witness's decision-making criterion and induce them to make a choice,[227] lead to a significant decrease in witnesses rejecting lineups and concluding that the suspect is not present.[228] In one study, witnesses given biased instructions correctly identified the suspect only 39% of the time, whereas witnesses given unbiased and proper instructions made correct identifications 67% of the time.[229]

b. Best Practices for Admonitions

Proper admonitions are comprehensive and include many different types of warnings. Admonitions are commonly presented to witnesses in writing on an instruction form that they are expected to read and sign before viewing the lineup or photos. California Penal Code § 859.7 requires law enforcement to instruct the eyewitness on three specific admonishments 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.[230]

The effect of these three admonishments on eyewitness identifications has been demonstrated by numerous studies.[231] Admonitions A and B decrease misidentifications by providing the witness with additional options. They allow the witness to say "I don't know" or to conclude that the culprit is not present.[232] They alert the witness to the possibility that the perpetrator may not be in the lineup and communicate to a witness that failing to make an identification is not a failure.[233] Consequently, witnesses who would otherwise feel compelled to make an identification and potentially misidentify a suspect have an alternative: pick no one.[234] Studies have found that instructing witnesses that the perpetrator "may or may not" be in the lineup (Admonition A) reduced identification errors from 70% to 43% without any significant decrease in the number of correct identifications.[235] Additionally, witnesses given the "may or may not" admonition were more selective and more accurate in their identifications than witnesses not given the admonition (78% correct identifications with the admonition compared to 69% correct identifications for those given a biased instruction suggesting that the perpetrator was in the lineup).[236]

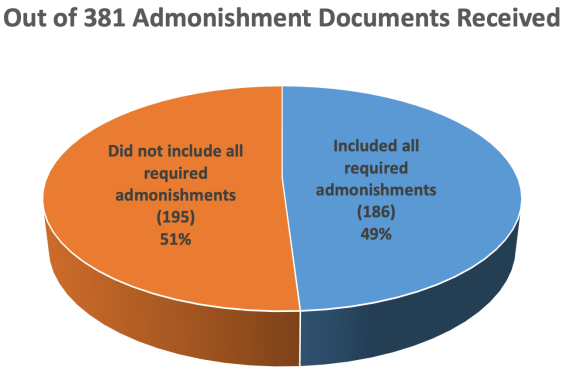
Admonition C, which asserts that the investigation will continue regardless of whether the witness makes an identification, has also been shown to reduce eyewitness misidentifications. Admonitions that inform the witness that there may be future chances for identification decrease selections based on fear of missing the opportunity to identify the

perpetrator.[237] Therefore, these admonitions decrease misidentifications to a greater extent than they reduce accurate perpetrator identifications.[238] In one study, when witnesses were instructed that they would have additional opportunities to see other suspects if they did not make an identification now, misidentifications were reduced from 33% to 15%, whereas accurate perpetrator identifications were only reduced from 56% to 51%.[239] Furthermore, adding the "additional opportunities to see other suspects" instruction (Admonition C) to the "may or may not" instruction (Admonition A) resulted in a robust 33% drop in misidentifications of innocent suspects in field simulations.[240]

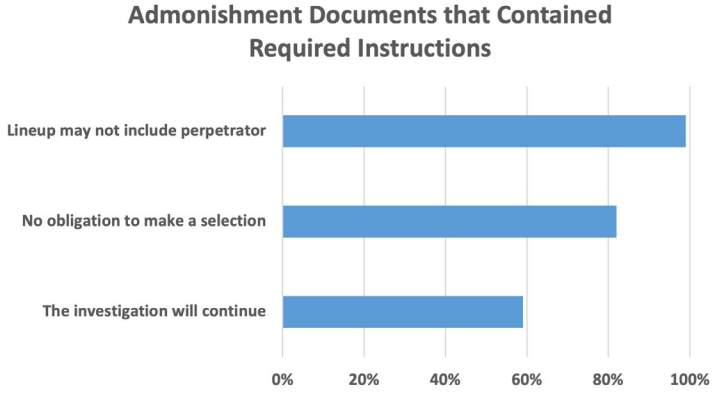
c. Admonitions in Practice—the Study's Findings

Based upon the Research Team's assessment of the 381 admonition documents received in response to the CIC's PRA request, the admonitions for witnesses viewing live and photo lineups vary widely across the state. (See sidebar for more examples of the types of admonishments.) In assessing the extent to which the required admonitions were included in these documents, the Research Team's goal was to provide a data point as to the agencies' compliance level with California Penal Code § 859.7 in practice, as opposed to just policy. While a majority of policy manuals collected as part of this study contained directives on admonishments, the actual admonishment documents and forms received in response to the CIC's CPRA request were often not in compliance.

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



While 99% of the received admonishment forms included some version of the "perpetrator may or may not be among the persons in the identification procedure" (may not include person), only 82% included an admonition that the "eyewitness should not feel compelled to make an identification" (no obligation), and only 59% included an admonition that "an identification or failure to make an identification will not end the investigation" (continue investigation).



The Research Team noted that many of the non-compliant admonishment documents received were either undated or included date stamps or version dates preceding the enactment of California Penal Code § 859.7, which strongly suggests the forms need updating.[241] While the CIC's CPRA request did not ask for documentation on how often or in

SIDEBAR:

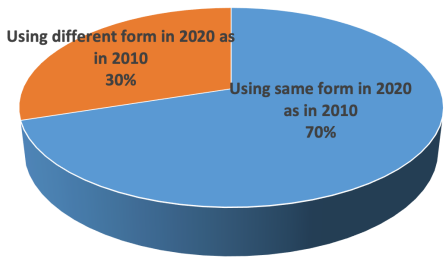
The responding law enforcement agencies provided many admonitions for lineup procedures. The variations included:

- This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. (may not include person)
- Please do not discuss the case with other witnesses. (no discussion)
- You do not have to identify anyone/You should not feel obligated to identify anyone. (no obligation)
- It is just as important to free innocent persons from suspicion as it is to identify those who are guilty. (innocent/guilty)
- Please keep in mind that hairstyles, beards, and mustaches are easily changed. (hair changes)
- You should pay no attention to any markings or numbers that may appear on the photos. (photo style)
- Photographs do not always depict the true complexion of a person—it may be lighter or darker than shown in the photo. (complexion changes)
- Take into consideration that photographs often do not depict what an individual looks like at the present time. (appearances change)
- Please use your own words to tell the officer(s) how certain you are of any identification you make. (certainty statement)
- Regardless of whether an identification is made, law enforcement will continue to investigate the incident. (continue investigation)
- You must make up your own mind and not be influenced by other witnesses. (use own memory)
- You should only make an identification if you can do so. (only ID if can)

what capacity eyewitness forms or procedures are updated, Lexipol's California State Master Eyewitness Identification Policy specifies that "the process and related forms should be reviewed at least annually and modified when necessary."[242] Based on the high percentage of agencies that provided outdated forms, the Research Team concluded that ***many agencies are failing to follow policy manual directives on reviewing and updating documents and forms.***

To further test the hypothesis that documents and forms were not being updated, the Research Team compared admonition documents for all agencies whose 2020 admonition document was not in compliance with California Penal Code § 859.7 to those received in response to NCIP's 2010 CPRA request. In total, the Research Team compared the 2010 and 2020 admonition documents for 82 agencies. Of those agencies, 70% were using an admonishment form or document in 2020 that was identical to the form or document they were using in 2010. Agencies' apparent failure to scrutinize and update these admonishment documents may indicate a larger compliance problem: despite adopting evidence-based practices into written policies in accordance with the law, agencies do not comply with the policies in practice. In order to determine agencies' compliance levels in practice, further research needs to be conducted.

82 Noncompliant Agencies in 2020 that Provided Admonishment Forms in 2010



Of the 381 agencies that provided admonishment documents in response to the CIC's CPRA request,[243] 367 agencies provided the admonishment forms used by the respective agency when conducting live and photo lineup procedures, as opposed to providing only the admonishment language found in their policy or training documents. Because admonishment forms are supposed to be used in practice, the forms provide key insight into an agency's implementation of California Penal Code § 859.7. ***A proper admonishment form can function as a checklist for compliance with the law and serve as a helpful tool to ensure that best practices and requirements have been properly followed and recorded.*** Therefore, the Research Team conducted an audit of the admonishment forms provided to learn more about how agencies are adopting California Penal Code § 859.7 into their eyewitness identification procedures.

The admonishment forms varied widely in format and content, from simple paragraphs of text to be read to witnesses to multi-page documents with checkboxes and spaces for witness statements. While the admonitions required under California Penal Code § 859.7 aim to reduce the pressure on a witness to make an identification, only 107 admonishment forms, or 29%, included a field that explicitly enabled the witness to not make an identification. The field was presented in a number of ways:

- Yes/No option for whether an identification was made[244]
- Checkboxes for a positive, possible, or no identification[245]
- Instructions to simply leave the identification field blank if the witness does not make an identification[246]

Significantly, of the forms that contained a field to indicate a non-identification of a suspect, 53, or 50%, of them used ***failure language*** to describe the witness's non-identification. Failure language includes wording such as "the witness was unable to identify," "failed to identify," or "cannot/could not identify."[247] As described above, admonitions A and B reduce misidentifications by providing the witness with an alternative to making an identification; the witness can state that the suspect is not there. Including failure language on the admonition form furthers the dangerous notion that a witness has failed if they do not identify a suspect.

The other half of the forms containing a field to indicate a non-identification of a suspect used more neutral language to describe the non-identification. Examples of this include:

- Recognition language, such as "I do not recognize anyone in the lineup,"[248]
- Yes/No checkbox response to question "Was a photograph selected?"[249]
- Checkbox for "No identification made"[250]
- Checkboxes for whether an identification was "Positive, Possible, or None"[251]

By using neutral language, these forms empower a witness to not identify a suspect if they do not recognize anyone and reinforces that their non-identification is not a failure.

As required under California Penal Code § 859.7, if a witness makes an identification, the administering officer shall immediately inquire as to the witness's level of confidence in their

identification and record, verbatim, what the eyewitness says.[252] However, only 220, or 60%, of the 367 forms received included a dedicated space for a witness statement. For those that did include a space for a witness statement, the label for this space ranged from:

- Unlabeled blank lines[253]
- "Comments"[254]
- "Remarks"[255]
- "Witness Statement"[256]
- "Witness Statement Regarding Identification"[257]

Some agencies provided more detailed instructions as to how the statement was to be recorded. Some examples of this include:

- "When you have looked at all the photographs, tell the investigator whether or not you see the person who committed the crime. If yes: What is your confidence level in the accuracy of the identification? Verbatim Response:"[258]
- "How certain are you of the identification or non-identification? (Write the witness's exact words)"[259]
- "Record both positive identification and non-identification results in writing, including the witness' own words regarding how certain they are of the identification,"[260]
- "***ADMINISTRATOR*** IF an identification is made, you shall inquire as to the eyewitness' confidence level of the identification and record in writing, verbatim, what the eyewitness says below:"[261]

Most of the 220 forms that contained a dedicated space for witness statements also included an open-ended space for either the witness or the administering officer to fill in (217 forms or 98%). However, a small number of forms directed witnesses to provide their confidence statement using either a scale (five forms or 2%) or a percentage (10 forms or 5%). Scales used included 1-10[262] and "Very Confident, Somewhat Confident, Not Very Confident."[263] Notably, of the 15 forms that used either a scale or percentage, 10 also provided an open-ended space for the witness's statement. Lastly, while some of the forms included instructions for officers to take a witness's confidence statement, the form itself provided no space for the officer to do so.[264]

California Penal Code § 859.7 requires that officers administering eyewitness identification procedures use blind or blinded administration.[265] However, only a few of the forms received included fields to indicate whether blind or blinded administration had been used. Thirty-six forms, or 10%, included spaces to indicate the names of both the investigating and administering officer. Providing space for two different officer names indicates that the agency understands that the officer administering the lineup should not be the investigating officer and that the procedure should be conducted blindly, as required by law under California Penal Code § 859.7. Alternatively, 45 forms, or 12%, included checkboxes for whether the lineup was blind or blinded. These forms did not include a space for the different officer names, but allowed the administering officer to indicate the method used for blinded administration (i.e. the folder shuffle method). Additionally, of those forms

with checkboxes for blind or blinded administration, only 10 forms, or 22%, included a field for the officer to explain why the procedure was blinded instead of blind, as required by California Penal Code § 859.7.[266]

Finally, while California Penal Code § 859.7 requires that the lineup procedure be audio and video recorded,[267] only 42 forms, or 11%, included checkboxes to indicate whether the lineup had been audio recorded, video recorded, or both. The statute also requires that if video recording is not feasible, officers provide the reason in writing.[268] But, only 13 forms, or 31%, of those with checkboxes to indicate whether the procedure was audio and/or video recorded included a field for the officer to provide an explanation as to why either audio, video, or both were not used. Other agencies, rather than providing space for an explanation on the form itself, included instructions for officers to record in their report why audio or video recording was not used.[269] However, this requires the officer to take additional steps and may lead to the information being inadvertently left out if it is not explicitly called for in the report.

d. Model Admonition Form and Recommendations

While no agency in the study has an admonishment form that explicitly addresses all best practices, many forms have aspects that encourage agency compliance with the requirements of California Penal Code § 859.7. To highlight some of the exemplary aspects of these forms and to provide all agencies with an example, ***the Research Team created a template admonishment form located in Appendix C of this report***.

The first page of the form includes:

- Instructions for officers, highlighting best practices and requirements under California Penal Code § 859.7.
- Reminders for investigators about what not to say to the witness prior to the identification procedure.[270]
- A checklist for officers to follow in conducting the identification procedure, as well as definitions of blind and blinded administration to assist officers in correctly administering the lineup.

The second page of the form includes:

- Fields for the names of the witness, the investigating and administering officers, and anyone else present at the identification, including interpreters.[271]
- The admonishment text that the administering officer is required to read to the witness, including the three admonitions required under California Penal Code § 859.7.[272]
- A signature line for the witness to sign and date the form, acknowledging that they understand the instructions provided to them.

The last page of the template form covers the outcome of the identification procedure, as well as documentation for the administering officer to complete. The form:

- Includes a place for the witness to not make an identification and uses neutral, rather than failure language.[273]
- Includes a space for the officer to record how long the witness viewed the lineup before making their identification or non-identification.
- Citing California Penal Code § 859.7, reminds the officer to obtain the witness's confidence statement for both identifications and non-identifications and includes an open-ended space for the officer to record the witness's statement verbatim.[274]
- Includes checkboxes for the administering officer to indicate whether the procedure was conducted using blind or blinded administration, with space for the officer to explain why blinded administration was used, if applicable. The form includes checkboxes for audio and video recording, with space for the officer to explain why the procedure was not video recorded, if applicable. For both of these sections, the relevant language of California Penal Code § 859.7 is included.[275]

Using an admonishment form that directly incorporates the statute's requirements better enables agencies and their officers to follow best practices at the moment they are conducting eyewitness identification procedures. By providing a template admonishment form, the Research Team hopes to assist agencies in ensuring their policies and practices are compliant with California Penal Code § 859.7.

Considering the large number of agencies using Lexipol-produced policies, ***Lexipol could likewise help California police agencies comply with the admonishment requirements by providing agencies with a model admonishment form, either directly in the eyewitness identification policy or as part of the appendices***. While some agencies that use Lexipol policies chose to include additional eyewitness identification resources in the appendices of their policy manuals,[276] only six agencies included an admonishment form. Should Lexipol provide California police agencies with an accurate model form, it may be the impetus agencies need to review their forms appropriately and adopt an admonishment form in compliance with the law.

V. Mechanisms for Encouraging Use of Evidence-based Practices

Eyewitness misidentification remains a leading cause of wrongful convictions. Numerous scientific studies have demonstrated that the conditions under which an eyewitness identification is made may render the identification unreliable.[277] The exoneration of many incarcerated Californians convicted as the result of misidentification[278] highlights the critical need for law enforcement's use of evidence-based eyewitness identification procedures. This section offers four different mechanisms that could ensure California law enforcement's use of these practices, including improving eyewitness identification policies, improving law enforcement education and training, litigation, and legislation and evidentiary reform.

A. IMPROVE LEXIPOL AND LAW ENFORCEMENT POLICIES

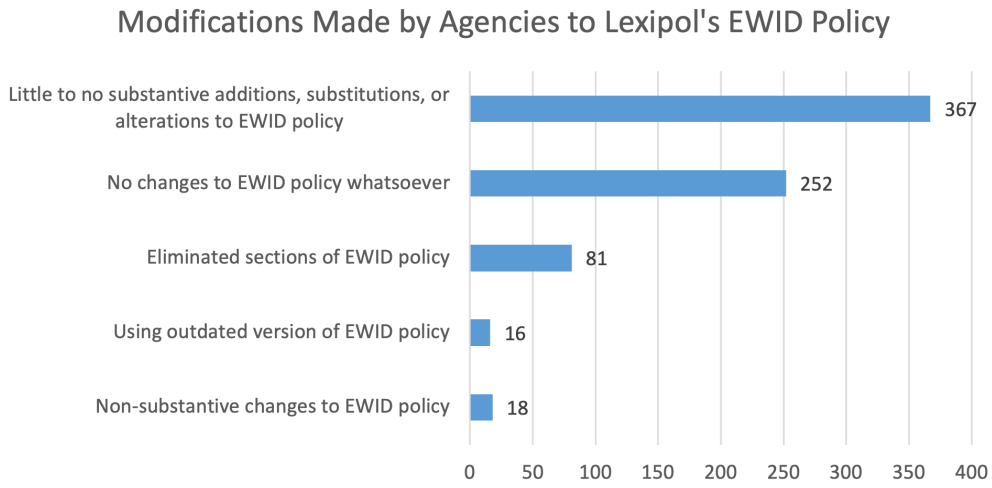
As detailed above, the overwhelming majority of California law enforcement agencies in the study sample, 88%, use a Lexipol-produced eyewitness identification policy. Of the Lexipol-subscribing agencies that included an eyewitness identification section in their policy manual, 367, or 90%, adopted a version of Lexipol's Eyewitness Identification Master Policy with little to no substantive additions, substitutions, or alterations. Therefore, one of the most direct ways to encourage the use of evidence-based eyewitness identification procedures in California is for Lexipol to modify its Master Policy to fully comply with California Penal Code § 859.7. The most significant—and necessary—modification would be for the Master Policy to use "shall" instead of "should" for all mandatory practices. The Master Policy also must remove any qualifying language around the electronic recording requirement. ***The authors have included a modified Lexipol Eyewitness Identification Policy in Appendix B of this report and the CIC encourages all agencies that use a Lexipol policy to modify their eyewitness identification policy accordingly.***

Regardless of whether Lexipol's eyewitness identification policy is compliant with California Penal Code § 859.7, police agencies bear the ultimate responsibility to ensure their policy manuals and practices comply with the law. Given the high percentage of agencies using a Lexipol-produced eyewitness identification policy—most without substantive modification—it appears that California police agencies have by and large outsourced their responsibility to a for-profit company, thereby privatizing a public duty.

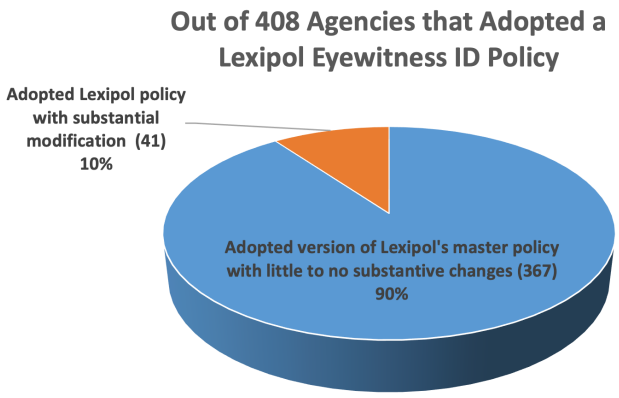
Agencies' modifications to Lexipol's standard Master Policy were varied. Some agencies eliminated explanatory sections of the Master Policy (such as definitions),[279] while other agencies eliminated critical directives or sections, such as instructions on certainty statements and admonishments,[280] or documentation of the eyewitness procedure. The Selma Police Department eliminated the entire standard Lexipol eyewitness identification

policy and replaced it with three definitions and a statement that the "department will strive to use eyewitness identification techniques when appropriate."[281]

The Research Team also identified 16 agencies that were using an outdated version of Lexipol's Master Policy that failed to include certain admonishments,[282] and another 18 agencies that made non-substantive changes to their Lexipol eyewitness identification policy. The Research Team considered non-substantive changes to include changing the formatting of the policy (i.e., moving or adding bullet points unnecessarily or bold-facing non-critical directives), modifying language resulting in a weakening of the policy,[283] or adding sections to the eyewitness identification policy unrelated to the requirements of Penal Code § 859.7.[284]



A minority of jurisdictions, ***41 agencies, or 10%, made substantive modifications to their Lexipol eyewitness identification policy to ensure better compliance with California Penal Code § 859.7***. The Research Team defined a substantive change to ensure better compliance as: 1) substituting language from California Penal Code § 859.7, in whole or in part, in place of the Master Policy language, 2) substituting "shall" in place of "should" in relevant sections of the Master Lexipol Policy, 3) eliminating "whenever feasible" from the recording instruction of the Lexipol Master Policy, 4) including lineup procedures/protocols directly in the policy text, 5) providing expanded definitions of key terms, and/or 6) including supplemental attachments with the policy either in an appendix or a URL directly referenced in the policy itself.



Of the 41 agencies that made substantive modifications to their Lexipol policies, only six agencies incorporated language from California Penal Code § 859.7 in its entirety.[285] Another 14 agencies integrated some of the statute's language, though the particular language or section of the statute varied: one agency included the definitions provided in § 859.7,[286] four agencies used the statute's language regarding certainty statements,[287] two agencies used the statute's admonishment language,[288] two agencies used the statute's language about fillers,[289] and five agencies incorporated the statute's language on blind administration[290] and electronic recording of the eyewitness identification procedure.[291]

The Research Team also evaluated substantive changes made to Lexipol policies that did *not* incorporate the language of § 859.7. The most common modification was the expansion of the Definitions section. Twenty-eight agencies modified their Lexipol policies by better defining key terms or including additional terms. For example, the Department of Insurance and Seal Beach Police Department added and defined several key terms beyond just the four terms[292] included in the standard Lexipol eyewitness identification policy. Seal Beach's policy included expanded definitions for terms such as "blind administration," "blinded administration," "folder shuffle," "filler," and "confidence statement."[293]

Other agencies enhanced their Lexipol policies by including attachments in an appendix or via a weblink directly in the policy. In total, 13 agencies included attachments, mostly consisting of lineup procedure documents or admonishment forms.[294] The Woodland Police Department included two attachments with their policy - instructions on how to conduct a lineup using the folder shuffle method and a checklist for conducting photographic lineups.[295] However, the language in the photographic lineup checklist differs from the language in the policy (the checklist uses the stronger "shall" throughout whereas the policy uses "should"). ***While adding supplementary materials or lineup protocols to a policy may provide officers better direction, agencies must also make sure the policy and supplementary materials use consistent language, or it may confuse officers as to the proper standard or procedure to follow***.

Perhaps as an alternative to appendices or weblinks, 11 agencies modified their Lexipol policies to include a lineup protocol directly in the text of the policy itself.[296] While most of the agencies who did so added the lineup protocol as a section within their eyewitness identification policy, the Delano Police Department included a wholly separate section covering lineups, distinct from their eyewitness identification policy.[297]

Some agencies replaced, eliminated, or added words in their Lexipol policy to make it more consistent with California Penal Code § 859.7. Five agencies replaced the word "should" with "shall" throughout their policy, rectifying Lexipol's phrasing that makes the requirements under the statute appear advisory.[298] Five agencies removed the "whenever feasible" language from Lexipol's recording instruction,[299] and 16 agencies, including those that removed the "whenever feasible" language, substituted the word "shall" in place of "should" in the section of their Lexipol policies that provides guidance on electronic recordings.[300] ***While the CIC applauds the agencies that made substantive changes to their***

Lexipol policies to bring them into closer compliance with the statute, the Research Team also noticed that a few agencies added stronger language to their policies while also failing to remove the problematic Lexipol language.[301] For example, in § 605.6.1 of the Glendale Police Department's policy manual "Recording of Lineup Presentations," the policy includes the recording directives straight from California Penal Code § 859.7.[302] However, on the page before that, in § 605.5 "Eyewitness Identification," the policy uses the standard "whenever feasible" Lexipol language.[303]

Not only is the standard Lexipol language in this policy incorrectly attributed to Penal Code § 859.7, but it is also inconsistent with the language that appears on the very next page of the manual. Though the Glendale Police Department and the other agencies who made the same conflicting modification may have intended to strengthen their policies by incorporating the mandatory recording requirements of § 859.7, by leaving in the default Lexipol language, their policies are inconsistent and therefore not compliant with the law.

Overall, law enforcement agencies have made great strides in incorporating evidence-based practices into their eyewitness identification policies since the enactment of Penal Code § 859.7. More work remains to be done, however, both by the agencies and by Lexipol, to ensure full compliance with the statute's mandates. To assist in that endeavor, ***CIC encourages Lexipol and law enforcement agencies to consider adopting the sample policy in Appendix B of this report*** and to implement these policies in actual practice.

B. EDUCATION AND TRAINING

Eyewitness testimony is one of the most powerful pieces of evidence that a prosecutor can present to a jury. The best way to prevent problematic eyewitness evidence from affecting the outcome of a case is to prevent juries from hearing or considering problematic identifications in the first place. To that end, the trainings conducted by government agencies, professional associations, and Lexipol on the unreliability of eyewitness evidence must accurately reflect the practices required under California Penal Code § 859.7.

Trainings also should include relevant social science, so that the consequences of problematic eyewitness evidence can be understood and addressed by law enforcement, prosecutors, defense attorneys, and judges. Studies have found that merely changing a policy is not sufficient by itself to lead to successful policy implementation if there is no "reculturing" of the organization.[304] When implementing policies, the "goals, strategies, and activities need to be understood in order to comprehend implementation."[305] The motivation and attitudes of those responsible for implementing the policy change are also critical variables in the effectiveness of the implementation.[306] If officers on the front lines of the policy change are not motivated to change or are opposed to the change because they do not understand or agree with the rationale, the policy implementation will not be successful.

1. Statewide Agencies and Police Associations

California Penal Code § 859.7 creates an opportunity for certain government agencies and associations to prioritize statewide trainings on eyewitness identification procedures, especially since the law mandates practices that may not have been previously used by some. If agencies such as California's Commission on Peace Officer Standards and Training (POST), the Office of the Attorney General, the California Police Chiefs Association (CPCA), California State Sheriff's Association (CSSA), and Peace Officers Research Association of California (PORAC) continue to train officers, their trainings must accurately reflect the current state of the law and explain the rationale behind the policy changes to strengthen officers' adherence to required practices. Moreover, these agencies should consider incorporating into their training the findings of social scientists, eyewitness identification experts, CIC-member organizations, and judges who have overturned wrongful convictions based on faulty eyewitness identification regarding the importance of evidence-based practices.

2. Lexipol

In addition to writing policy, Lexipol also plays an integral role in providing trainings on evidence-based practices. Because Lexipol's California State Master Eyewitness Identification Policy is weaker in places than what the law requires, proper training from outside partners and stakeholders would provide agencies with an additional layer of risk management, particularly at a time when individual actors and agencies are facing increased public scrutiny and civil and criminal liability. During the CIC's discussions with Lexipol about recommended changes to its eyewitness identification policy, Lexipol highlighted the importance of officer training. In an effort to improve their trainings on eyewitness identification procedures, Lexipol offered to partner with the CIC to host a webinar or develop other eyewitness identification training materials.

Lexipol gave the CIC access to an eyewitness identification webinar it conducted in 2016 as a sample of the type of training it conducts. The webinar, taught by Leslie Stevens, Vice President of Lexipol, and Chief Ken Wallentine, Senior Legal Advisor to Lexipol, claimed to "review research and legislation regarding eyewitness identification and share some policy recommendations for obtaining accurate and unbiased identifications."[307] The webinar focused on the many factors influencing eyewitness accounts and the importance of using eyewitness identification best practices, such as blind administration, proper pre-lineup admonishments, and sequential instead of simultaneous lineup presentation.

At the end of the webinar, Lexipol solicited viewer questions. One viewer asked whether "the fact that a witness is not one-hundred percent confident [could] cause a challenge when it comes time for court proceedings," and if that would "give a defense attorney some ammunition to raise reasonable doubt about the identification."[308] Chief Wallentine replied that "we want this video recording because really what we want to do is to show the jury, show the finder of fact, that the officer or the investigator administering the identification

procedure followed best practice and did a good job."[309] By demonstrating that the officer did everything right in administering the lineup, a video recording provides the prosecution with an opportunity to bolster their case and instill confidence in the jury that the witness was confident and accurate in their identification. What is concerning is that this response ignores the critical fact that a recording of the process and even perfect compliance with best practices does not change the fact that a witness expressed uncertainty in their identification and that is what is critically important for a jury to hear and understand. More importantly, law enforcement should also understand that this means that the identification has low reliability and should yield caution before carrying forward with a case if that is the only evidence implicating the suspect.

While Lexipol's 2016 eyewitness identification training webinar was thorough, the viewer's question highlights the need for Lexipol's trainings to provide the rationale behind evidence-based policies and practices to foster successful implementation.[310] In addition, because the webinar is several years old and not specific to any one state or jurisdiction, the evidence-based practices now required in California were presented in the webinar as merely advisory, not mandatory practices. Lexipol can best serve California law enforcement agencies by creating an up-to-date California-specific training that highlights the mandatory nature of California Penal Code § 859.7. ***The CIC is well-positioned to assist Lexipol in developing a California-specific training that properly covers requirements under the law, as well the rationale for and social science behind using evidence-based eyewitness identification practices.***

3. Law Enforcement Agencies

The Research Team reviewed the written training materials provided by responding agencies to assess the quality and accuracy of their internal trainings. This review focused on trainings that would supplement departmental policy manuals. The Research Team found that some agencies provided training that properly reinforced best practices consistent with California Penal Code § 859.7, while other agencies provided training that was either inadequate or inaccurate.

Four agencies (the California Highway Patrol, Orange County Sheriff's Department, Pacific Grove Police Department, and San Jose Police Department) responded to the CIC's PRA request by submitting the ***POST Basic Course Workbook***'s Student Materials section regarding Search and Seizure procedures.[311] This workbook serves as an important source of text-based information for the POST Regular Basic Course, the entry-level training program that every peace officer in the state undergoes.[312] Last updated in 2017, this workbook includes explanations of the law, as well as activities for trainees to complete regarding lineup procedures.[313] When explaining the concept of certainty statements, the workbook says:

> If peace officers feel victims or witnesses are certain about their identification, they may ask them for confirmation. However, peace

> officers should never ask a victim or witness to state on a scale of 1-10 or as a percentage how sure they are that they are certain. Any identification presented as a scale may give a juror a *reasonable doubt* about a defendant's guilt.[314]

This directive is problematic for a couple of reasons. First, it conflates a witness's certainty of an identification with an officer's perception of whether the witness is certain about the identification. Section 859.7(a)(10) requires officers to inquire as to the eyewitness's confidence level if the *witness* identifies a person they believe to be the perpetrator—whether or not the *peace officer* feels that the witness is certain about their identification.[315] Conflating these concepts may result in officers only documenting a witness's certainty if the officer believes that the witness is certain about the identification.

Second, the directive implies that officers should avoid recording certainty statements that may give jurors reasonable doubt as to a suspect's guilt. According to § 859.7(a)(10)(A), "[t]he 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."[316] Witnesses may choose to express confidence levels in scales or percentages on their own volition, even if not prompted to do so by the investigator. When the witness does so, the officer must record the witness's statement in the witness's own words—regardless of whether recording that statement would cause a juror to have reasonable doubt as to the suspect's guilt.[317] It is true that presenting a lack of certainty may cause a juror to have reasonable doubt. However, the CA legislature specifically drafted SB 923 with the intent of adopting evidence-based eyewitness identification practices to both improve the reliability of identifications and decrease the risk of wrongful convictions.[318] One way to prevent a wrongful conviction at a criminal trial is for the defense to present evidence that may raise a reasonable doubt as to the guilt of the accused. Therefore, implying that witness statements which cast reasonable doubt should be excluded does not serve the legislative intent of SB 923. Thus, the two flaws within this training directive may cause agencies from across the entire state to improperly train officers on obtaining certainty statements. Accordingly, ***POST must update this section of its workbook to resolve these issues***.

The Cathedral City Police Department also provided interdepartmental training sessions with directives that do not comply with § 859.7. That department hosted four different sessions of "Photographic Line-Up Training[s]" for its officers in January 2018 and provided the CIC with the documents used in these training sessions.[319] A slide regarding considerations when forming a six-pack instructed that, when considering suspect descriptors such as "hair, bald, facial hair, tattoos on face/neck," officers should "[a]dd other photos with the same basic descriptors as the suspect"—but "[n]ot exact."[320] The training indicated, "[w]e don't want to make it too difficult for witnesses to identify" because "[w]e only have one chance!"[321]

This agency's filler instruction is highly flawed because it encourages officers to use improper fillers when creating lineups. Section 859.7(a)(5) requires fillers to "generally

fit" the eyewitness's description of the perpetrator and, if practicable, the photograph of the perpetrator should not unduly stand out.[322] The Cathedral City Police Department's statement that fillers need not be "exact" instructs officers that including fillers that only partially resemble the witness's description of the perpetrator is acceptable. This training may persuade officers to exclude fillers that closely meet the witness's description of the perpetrator. For example, officers may believe that it is acceptable to exclude fillers with a certain style of mustache described by a witness and instead include fillers with other types of facial hair.[323] By emphasizing that the agency has only "one chance" for a witness to identify a perpetrator, the agency is pressuring its officers to stack the lineup in a way designed to obtain an identification. Moreover, California Penal Code § 859.7 requires officers to admonish witnesses that an identification or failure to make an identification will not end the investigation.[324] This training conflicts with that principle since it unnecessarily pressures officers to obtain an identification even though their investigation will continue if no identification is made. This pressure may ultimately cause officers to add improper fillers to the lineup and increase the risk of a mistaken identification and eventually, a wrongful conviction.

Other agencies included documents that demonstrate how officers learn about revised Lexipol-drafted policies. The Hollister, Apple Valley Unified School District, and Fortuna Police Departments, among others, included documents that demonstrate how their officers acknowledge reading new policies. When receiving updates on agency policies, these agencies require their officers to acknowledge online that they have reviewed and read the policy. One email written from Hollister Police Department's Administrative Supervisor in response to the CIC's PRA request indicates:

> Officers are notified by Lexipol via email when there is an update or change to the department's policies or procedures. They are required to review and acknowledge the policy. Administration verifies that all updates have been acknowledged.[325]

The Apple Valley Unified School District Police Department responded to the CIC's CPRA request by including an email sent by its Police Department Coordinator indicating that the department adopted a new policy manual on the day that email was sent.[326] That email instructed officers to read the policy updates from Lexipol's "Knowledge Management System" website or phone application and required officers to submit a "requested 'read receipt' for acknowledgment."[327] The language of Lexipol's standard acknowledgment, as included in responsive documents sent by the Fortuna Police Department, states:

> I understand that it is my responsibility to review, become familiar with, and comply with all of the provisions of this new or updated policy. I further understand that, I [illegible] clarification from my supervisor. I hereby acknowledge that I have received, read and understand this policy.[328]

Besides requiring officers to acknowledge that they have reviewed the new policies, Lexipol does not explain the reasoning behind the policy changes in such instances. Nor did any of these responding documents indicate that officers must complete any new training modules, quizzes, questionnaires, or activities to ensure their comprehension of policy changes after § 859.7 was codified. Some officers may acknowledge that they have reviewed and understood the policy without critically thinking about how the changes in the law will impact their interactions with constituents; the acknowledgment system alone does not require officers to thoroughly analyze the policy or the reasoning behind it. ***Ultimately, requiring a simple acknowledgment of policy changes without providing thorough training may cause the unsuccessful implementation of new policies***, including policies created after § 859.7 was codified.

The Irvine Police Department explained to their officers the compelling reasons to adopt best practices of eyewitness identification, but conducted what appear to be insufficient trainings. The Irvine Police Department responded to the CIC's PRA request with a memorandum containing the Legislative Findings stated in SB 923, including that the failure to comply with the best practices increases the risk of misidentifications that result in wrongful convictions.[329] However, the department only hosted ten-minute training sessions regarding the changes created by the bill.[330] Given that the passage of SB 923 created a multitude of changes within the requirements of eyewitness identification procedures, officers are unlikely to learn the intricacies of the changes in just 10 minutes.

In contrast, the Huntington Beach Police Department conducted a thorough, in-depth training that explained the rationale behind the changed policies. In January 2020, the Department conducted a live training for all sworn personnel during which PowerPoint slides were presented on the revised law.[331] On one slide, the department mentioned that eyewitness identification can be flawed, writing that "[e]yewitness misidentification played a role in 12 out of 13 DNA based exonerations."[332] This slide contains a meaningful explanation of the rationale behind the policy that echoes the legislative intent behind the new law: to prevent wrongful convictions.

The police chiefs of the Eureka Police Department and the California State University, Los Angeles Department of Public Safety sent out orders explaining the rationales behind their eyewitness identification policies, along with the text of the new policy itself.[333] Eureka's police chief distributed a general order that (a) explained the purpose of its policy was "to follow best practices standards, increase correct identification of suspects, decrease false identifications and preserve witness credibility in the courtroom," and (b) highlighted the "utmost importance that the lineup identification be treated as a *scientific exercise* designed to gain an unbiased observation from the witness."[334] The California State University, Los Angeles police chief distributed a similar department order, which also emphasized that its officers will "adhere to the established procedures in order to maximize the reliability of witness identifications, minimize unjust accusations of innocent persons, and to establish evidence that is reliable and conforms to established legal procedure."[335] That department also required its officers to review a memorandum from the California Innocence Project

regarding eyewitness misidentification[336] and also watch a short YouTube video published by the California Innocence Project regarding the topic.[337]

The training materials of the above three departments (Huntington Beach Police Department, Eureka Police Department, and California State University, Los Angeles Department of Public Safety) and the Department of Public Safety go beyond just requiring officers to read the revised policy and sign an acknowledgment form. Importantly, these departments included the rationale for the policy change as a key component of the materials. Two of these departments sent agency-wide general orders drafted by police chiefs, the agencies' highest-ranking officers, highlighting the rationale behind the policy changes. With the orders, these police chiefs included a personalized memorandum describing their motivation for and attitudes toward the policy changes, increasing the likelihood of successfully implementing the new policy and "reculturing" the department in their practice of eyewitness identification procedures.[338]

At a minimum, agency trainings and materials ***must accurately reflect the practices required*** under California Penal Code § 859.7. Trainings should also ***clearly explain the rationale*** for these required practices and be supported by relevant social science so that officers understand the potential consequences of not using these practices. Finally, agency leaders must bolster these trainings by ***reculturing departments*** when necessary, expressing their support for new policies, and motivating officers to implement these policies on the front lines.

C. LITIGATION STRATEGIES

Forty years ago, the United States Supreme Court established the legal test of admissibility of eyewitness identification evidence in ***Manson v. Brathwaite.***[339] In *Manson,* an undercover police officer bought drugs from a narcotics dealer. The undercover officer viewed the dealer close up for several minutes and described the dealer to another officer who took a photograph of Brathwaite. Based on the photograph, the undercover officer identified Brathwaite as the dealer. At Brathwaite's trial, the photograph was admitted as evidence and the officer again identified Brathwaite as the dealer. Brathwaite was convicted by a jury of possession and sale of heroin. The Court in *Manson* considered whether the officer's identification should be excluded from evidence because making an identification from a single photograph was unnecessarily suggestive.

The Supreme Court held that a suggestive identification procedure does not automatically require exclusion of the evidence, so long as the identification is reliable. Under the *Manson* test, reliability is the linchpin in determining the admissibility of identification testimony.[340] Factors that judges consider in determining reliability include: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the degree of attention paid by the witness, (3) the accuracy of the initial description, (4) the witness's level of certainty, and (5) the time between the crime and the identification.[341] Judges weigh these factors

against the effect of the suggestive identification itself,[342] and assess the admissibility of eyewitness evidence under the "totality of circumstances,"[343] including witness confidence.[344] However, as substantial research proves, a witness's confidence level at trial is not an accurate benchmark for measuring the reliability of an identification.[345] ***Further, the factors that a court assesses for reliability under Manson are already tainted if the eyewitness procedure was unnecessarily suggestive.***

The *Manson* test, and other case law, predates the wealth of knowledge and scientific evidence now available regarding the factors affecting eyewitness reliability. As a result, many of the problems that render eyewitness identification unreliable are simply not addressed by the *Manson* test, which nevertheless remains the governing standard for admitting eyewitness evidence in California and most other states. As such, the door is open for additional ***advocacy by defense counsel for a legal test that is better tailored*** to the current research regarding the reliability of eyewitness evidence.[346] As gatekeepers of evidence, judges must understand how to properly assess eyewitness evidence taking current social science into account. In particular, judges should consider:[347]

- Whether the lineup procedure was administered blind;
- Whether proper pre-lineup instructions were given to the witness;
- Whether the police provided the witness with feedback that would cause the witness to believe they selected the correct suspect;
- Whether the witness had multiple opportunities to view the same person, which would both make it more likely for the witness to choose this person as the suspect and would artificially boost the witness's confidence in identifying that person as the suspect;
- Whether the witness's identification or non-identification was made quickly and with a high degree of confidence;
- Whether the witness was under a high level of stress or whether a weapon was used, especially if the crime was of short duration;
- How much time the witness had to observe the event;
- Whether the witness possessed characteristics that would make it harder to make an identification, such as age of the witness and influence of alcohol or drugs;
- Whether the perpetrator possessed characteristics that would make it harder to make an identification, such as wearing a disguise, or whether the suspect had different facial features at the time of the identification;
- How much time elapsed between the crime and identification;
- Whether the case involved cross-racial identification.

Defense attorneys can also mitigate problems associated with eyewitness identification procedures by (1) ***moving to suppress*** unreliable eyewitness identifications, (2) ***cross-examining officers*** to ensure their practices are not suggestive, and (3) ***educating triers of fact*** about the variables associated with eyewitness testimony that can compromise the reliability of the identification. In any case where an officer uses suggestive eyewitness procedures that create a risk of misidentification, defense attorneys should bring motions to

suppress pretrial identifications and prevent in-court identifications. If the court denies the ***suppression motions***,[348] defense attorneys should cross-examine the officer that conducted the photo array or lineup to determine whether the officer used proper eyewitness identification procedures. In this regard, defense attorneys should be familiar with the agencies' policies and procedures and the requirements of California Penal Code § 859.7. In cross-examining the officer, defense attorneys should point out any differences between the procedures used and the legislatively mandated practices and departmental policies.

Defense attorneys should pay close attention to identifications obtained from agencies using Lexipol's California State Master Eyewitness Identification Policy, especially in instances where an officer fails to obtain an electronic recording of the procedure or fails to follow legally required practices because the officer interprets the policy to be advisory rather than mandatory. Based on the admonishment forms the Research Team received in response to the CIC's CPRA request, ***at least half of California police agencies can be cross-examined on their failure to provide adequate witness admonishments,*** since 51% of agencies in the study sample are using admonishment forms or documents that fail to comply with California Penal Code § 859.7. If defense attorneys can show that an eyewitness was not given proper pre-lineup instructions, it may affect the jury's assessment of the identification.

Finally, defense attorneys should caution the jury about the pitfalls of eyewitness identification. To do this effectively, defense attorneys should ***call expert witnesses*** to educate the jury and the court about the social science around eyewitness identification and the system variables (typically law enforcement driven) and estimator variables (circumstance driven) that can contribute to misidentifications. Defense attorneys should also make sure the court provides ***proper jury instructions***[349] so that the jury understands the potential fallibility of eyewitness identifications. It is critical in all cases to ensure that fact-finders understand that, when something goes wrong during the identification procedure, a misidentification becomes harder to demonstrate and rectify as the criminal legal process carries on, compromising justice not only for the wrongfully accused, but for the victims and survivors of crime.

D. LEGISLATION AND EVIDENTIARY REFORM

The enactment of California Penal Code § 859.7 was a historic first step toward preventing misidentifications in California. But more can be done legislatively to ensure that law enforcement agencies comply with legally mandated eyewitness procedures. While the statute addresses the five pillars and other best practices, ***the language of the statute can be improved, particularly with respect to sections discussing blind administration, obtaining suspect descriptions, and recording confidence statements and decision-times for both identifications and non-identifications alike***.

Lexipol's policy does a better job than the statute in describing best practices around blind administration and suspect descriptions. In regard to blind administration, Lexipol's policy recommends that the officer administering the eyewitness procedure lineup "should not be involved in the investigation of the case" in addition to not knowing the identity of the suspect.[350] Regarding witness descriptions of the suspect, Lexipol's policy puts the onus on the investigator to ask the witness for a suspect description, whereas the penal code puts the onus on the eyewitness to provide a description to the investigator. Legislators should consider amending these sections of California Penal Code § 859.7 to make the statute's requirements clearer and stronger. Since blind administration is the single most important evidence-based practice resulting from eyewitness identification research,[351] the directives to law enforcement on the use of blind or blinded administration must be as apparent and well-defined as possible. Though California Penal Code § 859.7 was not written for use in a policy manual, opportunities exist to make the statute's language stronger.

During the 2022 legislative session, the CIC tried to strengthen the language in California Penal Code § 859.7 through the ***omnibus bill*** process. The CIC's goal was to incorporate strong language from Lexipol's California State Master Eyewitness Identification Policy into the new law. An omnibus bill is a legislative process by which stakeholder groups are invited by a legislative committee (i.e. Public Safety Committee or Appropriations Committee) in either house to introduce fix-it language, amendments that do not require advocacy or debate, to an existing statute or code. Omnibus bills package together several proposed amendments to various and often unrelated statutes and codes into one bill. Advocates submit proposals to the soliciting committee which outline the language to be fixed and the justifications for the amendment. The committee then sends all of the proposals to various stakeholder groups which have several opportunities to either accept or object to the proposals. If any stakeholder objects to the inclusion of a proposal, that proposal is dropped from the omnibus bill, without any opportunity to defend the recommendation or respond to concerns. If stakeholders do not object to a proposal, that proposal becomes part of the omnibus bill, which the committee then introduces to the Senate or Assembly floor to go through the typical legislative process.

The CIC's omnibus bill proposal recommended fix-it language to California Penal Code §§ 859.7(a)(1) and 859.7(c)(1), which would have aligned these code sections with the sections of Lexipol's California State Master Eyewitness Identification Policy that address

an officer's procurement of a suspect description and use of blind of administration.[352] The CIC recommended these amendments because most law enforcement agencies had already adopted a Lexipol policy containing identical or similar language, and thus the proposed language would be more consistent with already-existing law enforcement policies.

California Penal Code § 859.7	Omnibus Bill Fix-it Language
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.	Witnesses shall be asked by the investigator for suspect descriptions as close in time to the incident as possible and before conducting an eyewitness identification procedure.
"Blind administration" means the administrator of an eyewitness identification procedure does not know the identity of the suspect.	"Blind administration" means the administrator of an eyewitness identification procedure should not be involved in the investigation of the case or know the identity of the suspect.

In January 2022, the CIC submitted its proposal to the Senate Public Safety Committee,[353] which then distributed it on January 28, 2022, along with other proposals, to stakeholders for review.[354] Although the proposal made it through several rounds of stakeholder review, law enforcement ultimately objected and, on February 9, 2022, it was dropped from inclusion in the omnibus bill.[355] As a result, California Penal Code § 859.7 remains unchanged and an opportunity to strengthen its language still exists. ***The authors have included the CIC's recommended fix-it language to California Penal Code § 859.7 in Appendix F of this report.***

Based on updated research on the science of eyewitness identifications and the ongoing practices of California law enforcement agencies, the Research Team proposes three main areas for future reform to California Penal Code § 859.7. First, the code should be updated to require confidence statements for both identifications and non-identifications. Additionally, officers should be required to record the time it takes for a witness to make an identification or a non-identification. Because both high confidence and quick decision-time are strong indicators of accuracy, both of these data points should be included when conducting any eyewitness identification procedure. Second, only one eyewitness identification procedure should be conducted per suspect. While officers may conduct multiple identification procedures to try to identify the perpetrator, each suspect should only be featured in one identification procedure per witness due to the contaminating effect of repeated lineups with the same suspect. Lastly, the practice of in-court identifications should be prohibited.[356] The initial identification or non-identification of the suspect is

the most reliable identification due to the freshness of the memory and the lack of possible contamination. Thus, the initial identification or non-identification of the suspect is the evidence that a jury should be presented with, rather than a staged tv moment with little to no evidentiary value.

Additionally, California Penal Code § 859.7 ***does not currently impose any consequences*** if law enforcement fails to comply with statutory best practices when conducting identification procedures. Though defense attorneys can move to suppress identifications by constitutional authority as interpreted by *Manson* and cross-examine officers or witnesses, there is no guarantee a judge will exclude the identification or that a jury will consider the unreliable nature of the evidence. If judges admit improperly obtained identifications, there is no incentive for law enforcement or prosecutors to abide by the statute. To prevent this, ***lawmakers must legislate a remedy for failure to comply with the statute***, which should include, for example, suppression of the identification altogether, or a special jury instruction that highlights the improper method by which the identification was obtained.

Thus, the initial identification or non-identification of the suspect is the evidence that a jury should be presented with, rather than a staged tv moment with little to no evidentiary value.

In the absence of legislation, the California Supreme Court and Judicial Council of California can take steps to better inform jurors about factors that affect the reliability of eyewitness evidence. In 2021, the California Supreme Court attempted to do so in *People v. Lemcke*, which addressed whether instructing a jury to consider an eyewitness's level of certainty when evaluating an eyewitness identification violated state and federal due process.[357] The challenged jury instruction, CALCRIM No. 315, provided 15 factors a jury should consider when evaluating identification testimony, one of which was "how certain the witness [was] when he or she made an identification."[358] Based on the research at the time, the CIC, along with the Innocence Project in New York, filed an amicus brief in support of the appellant, arguing that the jury instruction violated a defendant's due process right to a fair trial by instructing jurors to rely upon a witness's confidence in their identification.[359]

While the Court found no constitutional violation, it "nonetheless agree[d] with amici curiae that a reevaluation of the certainty instruction is warranted."[360] Citing multiple cases, the Court acknowledged a near-unanimity in the research that eyewitness confidence was generally an unreliable indicator of accuracy.[361] It further acknowledged CALCRIM No. 315's tendency to reinforce the misconception that an identification is more likely to be reliable when a witness expresses certainty: it is "especially problematic because many studies have shown eyewitness identification is the single most influential factor in juror determinations regarding the accuracy of an identification."[362] As a result, the Court referred

the matter to the Judicial Council of California and its Advisory Committee on Criminal Jury Instructions to evaluate how the instruction could be modified to avoid juror confusion regarding the correlation between certainty and accuracy. It further instructed that, in the meantime, trial courts should omit the certainty factor from the eyewitness identification jury instruction, unless a defendant requests otherwise.[363]

After the Judicial Council of California and its Advisory Committee re-evaluated the instruction per *Lemcke*, CALCRIM No. 315 was revised in March 2022. Under the revised instruction, whenever there is evidence that a witness has expressed certainty about an identification, the jury is to be asked to consider "how certain the witness [was] when he or she made an identification," and is to be further instructed that "[a] witness's expression of certainty about an identification, whether the identification was made before or at the trial, may not be a reliable indicator of accuracy."[364]

However, the research that the *Lemke* opinion and CALCRIM No. 315 are based on predates the new scientific consensus showing that, under the proper conditions,[365] eyewitness confidence can be a strong indicator of accuracy. Research conducted in 2017 reanalyzed the data used by *Lemke* and found that the previous research was done using the wrong method of analysis.[366] The new consensus finds that there is a strong relationship between eyewitness confidence and identification accuracy.[367] Additionally, 87% of experts agree that a witness's confidence level during the *initial* identification procedure is indicative of the accuracy of the identification.[368]

While strengthening jury instructions may help jurors to better understand the issues with eyewitness evidence, lawmakers and the California Supreme Court can do more to prevent misidentifications from getting in front of a jury in the first place. By the time a case involving mistaken eyewitness identification gets to a jury, it is too late to effectively challenge the misidentification. Legislators and the courts can enhance opportunities for the accused to challenge unreliable eyewitness evidence by adopting procedures similar to those adopted by the New Jersey Supreme Court.[369] Under ***New Jersey's standard***, when a defendant produces evidence that suggests the identification is unreliable, the court will hold a hearing to provide the State an opportunity to establish the reliability of the identification procedures used.[370] If the State's evidence is sufficient to demonstrate the probable reliability of the identification, the burden shifts back to the defendant to prove that there is a substantial probability that the identification is mistaken.[371] This legal standard requires courts to scrutinize more closely the nature of suggestive identification procedures, ultimately leading to better practices and fewer mistaken identifications.

VI. Final Thoughts

The California legislature's enactment of Penal Code § 859.7 was a huge step forward in ensuring that California law enforcement agencies adopt evidence-based eyewitness identification policies and practices. The Research Team's finding that at least 87% of agencies in the study sample have incorporated most evidence-based practices into their eyewitness policies is a sign that agencies are paying attention to the requirements of the statute. Undoubtedly, the CIC's twelve-year effort to educate the law enforcement community and to enact eyewitness identification legislation has contributed to this success. In the ten years since NCIP issued its first CPRA request for California police agencies' eyewitness identification policies, these agencies have gone from minimal adherence to majority compliance with the five pillars. California law enforcement agencies should be commended for their progress.

Not only do most California law enforcement agencies have policies that address the requirements outlined in California Penal Code § 859.7, but most agencies have identical policies. The Research Team found that Lexipol's California State Master Eyewitness Identification Policy is being used by 90% of Lexipol-subscribing agencies in the study sample. ***Although these agencies benefit from using Lexipol-produced policy manuals, Lexipol's California State Master Eyewitness Identification Master Policy is a target for challenge***, especially when an officer fails to electronically record the procedure. Further, Lexipol's use of "should" throughout its eyewitness policy, instead of the statutorily-mandated "shall," creates a risk that officers will interpret the policy to be advisory rather than mandatory, resulting in non-compliance with the law. As some of the recent litigation surrounding Lexipol's policies shows, word choice can significantly impact how policies are interpreted and whether laws are followed.

A small number of Lexipol-subscribing agencies in the study sample, 10%, recognized ways to improve Lexipol's Master Eyewitness Identification Policy and modified their policy to better comply with the law. Lexipol makes clear that it is not any particular agency's policy-maker and that their policies are merely starting points for agencies.[372] Thus, ***California law enforcement agencies, not Lexipol, are ultimately responsible to ensure that their respective policy manuals comply with the law***. The fact that most agencies overlooked the electronic recording exception created by Lexipol's eyewitness policy indicates that agencies need to do a better job of scrutinizing and modifying their policies to ensure legal compliance.

The legislative intent behind California Penal Code § 859.7 was to mandate evidence-based eyewitness procedures in practice, not just in written policies. At the outset of this study, the CIC attempted to gauge compliance by requesting that agencies provide the Research Team with training materials, field training guides, training attendance rosters, and policy acknowledgment rosters. After reviewing the quality and accuracy of these documents, the Research Team found that ***the quality of inter-departmental trainings varied greatly***. While some agencies trained officers regarding the rationale behind the changed law—to

prevent wrongful convictions and incorporate evidence-based practices—many departments conducted trainings that contained inaccurate or insufficient information. POST continues to distribute a training workbook that no longer complies with the legal requirements of certainty statements. The Research Team intends to submit a formal request to POST to modify this flawed section of the workbook.

The authors of this report acknowledge that its findings do not address the extent to which the statute's requirements are actually implemented in practice by California law enforcement agencies. The Research Team would have to look beyond written policies, admonishment forms, and training materials to come to any conclusion around the extent to which evidence-based eyewitness procedures are actually employed by a given agency. This remains an area ripe for future research.

While not entirely conclusive, the study does provide some data points on agency practice in regard to admonishments. While 98% of agencies in the study sample addressed proper admonishments in their eyewitness policies, only 49% of the admonishment documents and forms received by the Research Team included all statutorily required instructions. This discrepancy is troubling. Perhaps even more troubling is that of the 82 agencies that provided admonishment forms in response to both NCIP's 2010 PRA request and the CIC's 2020 PRA request, 70% were using the same form in 2020 that they were using in 2010. These data points suggest that ***more than half of California law enforcement agencies are failing to provide eyewitnesses with the statutorily required admonishments*** while also failing to update their forms in accordance with their policies. To ascertain the full extent to which California police agencies are employing evidence-based eyewitness procedures in practice, and to bring clarity to this issue, additional research or audits need to be conducted.

The CIC recommends that mechanisms be put in place to ensure law enforcement complies with the statute. Defense attorneys need to be trained on how and when to ***challenge unreliable identifications***, law enforcement and prosecutors need to be trained on how to ***properly conduct identification procedures***, and judges need to be guided on how to ***assess the reliability of identifications*** consistent with current law and social science and when it is appropriate to exclude eyewitness identifications in their courtrooms. Lawmakers can also act by ***strengthening the language of California Penal Code § 859.7 and building in a remedy*** for failures to comply. Finally, the judiciary, as the ultimate gatekeepers of evidence, can adopt a standard similar to the one adopted by the New Jersey Supreme Court, to ***give defendants an opportunity to more effectively challenge problematic identifications*** and to allow courts to more carefully examine the accuracy of identifications.

"Psychological scientists have been working diligently on procedures to improve eyewitness identification accuracy, but the gap between what we know from this science and the implementation of reform is a wide one." [373] California is making progress in closing that gap. But until we get a true sense of how California law enforcement agencies conduct eyewitness procedures in practice, we cannot be sure how much more of a gap California has to close.

APPENDIX A - REPORT GLOSSARY

Admonishment form: A form given to a witness prior to an eyewitness procedure which contains pre-lineup instructions. In California, statutorily required instructions are: (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, and (C) an identification or failure to make an identification will not end the investigation.

Blind administration: A live or photo lineup procedure in which the administrator is unaware of which lineup member is the suspect under investigation.

Blinded administration: A photo lineup procedure in which the administrator may know who the suspect is, but does not know where the suspect, or their photo, as applicable, has been placed or positioned in the identification procedure.

California Commission on the Fair Administration of Justice (CCFAJ): A commission created by the California State Senate in 2004 to "study and review the administration of criminal justice in California, to determine the extent to which that process has failed in the past" and to examine safeguards and improvements.

California Innocence Coalition (CIC): The California Innocence Coalition is comprised of the four Innocence Network organizations in California (the Northern California Innocence Project, the California Innocence Project, Loyola Project for the Innocent, and the Los Angeles Innocence Project), and The Innocence Center. Together, these organizations work on policy reform for those affected by wrongful convictions in California.

California State Master Eyewitness Identification Policy: The boilerplate eyewitness identification policy produced by Lexipol that serves as a starting point for agencies to customize.

California Public Records Act (CPRA): California Public Records Act requests are made when a member of the public wants to obtain public information that a California agency does not offer as part of normal business services.

Certainty/Confidence statement: A statement obtained from the eyewitness in their own words indicating how confident they are in their identification or non-identification of a person as the offender.

Estimator variables: Variables that cannot be controlled by the criminal justice system, including the lighting at the scene when the crime occurred, the speed of events, the degree of stress experienced by the eyewitness, and the distance from which the eyewitness observed the perpetrator.

Evidence-based practices: Practices that are supported by rigorous scientific research which proves the practices work. The five evidence-based practices mandated by California Penal Code § 859.7, include (i) blind administration, (ii) proper fillers that fit the eyewitness's description of the perpetrator, (iii) proper admonitions, (iv) recording the witness's confidence level, and (v) electronically recording the procedure. Also known as **best practices** or **the five pillars**.

Failure language: When a witness does not make an identification during an eyewitness identification procedure and the non-identification is reported as a failure on the part of the witness, often including language such as "the witness failed to make an identification" or "the witness was unable to identify anyone."

Fillers: A person or a photograph of a person who is not suspected of an offense and is included in an identification procedure. Proper fillers generally fit the eyewitness's description of the perpetrator.

Lexipol: A private company that provides policy manuals, training bulletins, and consulting services to law enforcement agencies, fire departments, and other public safety departments.
Live lineup: A live presentation of individuals to a witness for the purpose of identifying or eliminating an individual as the suspect.

Manson v. Brathwaite: Supreme Court decision in which the Court held that a suggestive identification procedure does not automatically require excluding the evidence if the identification is reliable, considering the totality of the circumstances.

New Jersey's standard: When a defendant produces evidence that calls into question the reliability of an identification, the court will hold a hearing to provide the State an opportunity to establish the reliability of the identification procedures used. If the State's evidence is sufficient to demonstrate the probable reliability of the identification, the burden shifts back to the defendant to prove that there is a substantial probability the identification is mistaken.

Omnibus bill: The legislative process by which stakeholder groups are invited by a legislative Committee in either house to introduce fix-it language, amendments that do not require advocacy or debate, to an existing statute or code.

Photo spread/photo array: Presentation of photographs to a witness for the purpose of identifying or eliminating an individual as the suspect.

Policy manual: A policy manual describes agency policies for employee expectations, performance standards, practices, processes, and procedures.

PORAC: The Police Officers Research Association of California, a lobbying group that advocates for police unions in the state legislature and provides trainings for police officers.

POST: The Commission on Peace Officer Standards and Training, a government agency established by the California Legislature to set the minimum selection and training standards for law enforcement. POST regulations require newly-appointed officers to complete its Basic Course training program in which trainees use its POST Basic Course Workbook.

Research Team: The group of individuals who developed and executed the study including attorneys, students, and volunteers from the Northern California Innocence Project (NCIP), California Innocence Project (CIP), and Loyola Project for the Innocent (LPI).

Sequential presentation: An eyewitness identification procedure where each lineup subject or photo is presented to the witness one at a time.

Shall (Lexipol definition): Lexipol defines shall as "indicates a mandatory action."

Should (Lexipol definition): Lexipol defines should as "indicates a generally required or expected action, absent a rational basis for failing to conform."

Simultaneous lineup: An eyewitness identification procedure in which the witness views all subjects in the lineup or photo spread at the same time.

Study sample: The complete set of 547 targeted law enforcement agencies to which the CIC sent California Public Records Act requests.

Suppression motion: A request to the court to exclude evidence on the grounds that it was obtained improperly or illegally.

System variables: Variables that the criminal justice system can control, including all of the practices that law enforcement agencies use to retrieve and record witness memory, such as lineups, photo arrays, and other identification procedures.

Training materials: Items used to train law enforcement officers, cadets, trainees, or other employees on the subject of how to conduct and administer photo lineups and other types of eyewitness identification procedures, including training manuals, workbooks, documents, presentation slides, field guides, training attendance records and rosters, policy acknowledgements, emails, memoranda, and other internal communications.

APPENDIX B - MODIFIED LEXIPOL CALIFORNIA STATE MASTER EYEWITNESS IDENTIFICATION POLICY

California State Master Police Department

(Modified by the California Innocence Coalition)

California State Master PD Policy Manual

Eyewitness Identification

604.1 PURPOSE AND SCOPE

This policy sets forth guidelines to be used when members of this department employ eyewitness identification techniques (Penal Code § 859.7).

604.1.1 DEFINITIONS

Definitions related to the policy include:

Eyewitness identification process – Any field identification, live lineup or photographic identification.

Field identification – A live presentation of a single individual to a witness following the commission of a criminal offense for the purpose of identifying or eliminating the person as the suspect.

Live lineup – A live presentation of individuals to a witness for the purpose of identifying or eliminating an individual as the suspect.

Photographic lineup – Presentation of photographs to a witness for the purpose of identifying or eliminating an individual as the suspect.

Blind presentation – Both the law enforcement official administering the identification procedure and the witness do not know the suspect's identity.

Blinded presentation – The administrator may know who the suspect is, but does not know which lineup member is being viewed by the witness.

Folder shuffle method – A method for conducting a blinded 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.

Filler – A person or photograph of a person, that is included in a line-up or photo array, but who is not a suspect.

Sequential lineup – Persons or photographs are presented one at a time, and the law enforcement official retrieves one before presenting another.

Confidence statement – A statement in the witness's/victim's own words taken immediately after an identification or non-identification is made stating their level of certainty in the identification or non-identification.

604.2 POLICY

The California State Master Police Department ~~will strive~~ shall use eyewitness identification techniques, when appropriate, to enhance the investigative process and will emphasize identifying persons responsible for crime and exonerating the innocent.

604.3 INTERPRETIVE SERVICES

Members should make a reasonable effort to arrange for an interpreter before proceeding with eyewitness identification if communication with a witness is impeded due to language or hearing barriers.

Before the interpreter is permitted to discuss any matter with the witness, the investigating member should explain the identification process to the interpreter. Once it is determined that the interpreter comprehends the process and can explain it to the witness, the eyewitness identification may proceed as provided for within this policy.

604.4 EYEWITNESS IDENTIFICATION PROCESS AND FORM

The Investigative Bureau supervisor shall be responsible for the development and maintenance of an eyewitness identification process for use by members when they are conducting eyewitness identifications.

The process ~~should~~ shall include appropriate forms or reports that provide (Penal Code § 859.7):

(a) The date, time and location of the eyewitness identification procedure.
(b) The name and identifying information of the witness.
(c) The name of the person administering the identification procedure.
(d) If applicable, the names of all of the individuals present during the identification procedure.
(e) An instruction to the witness that it is as important to exclude innocent persons as it is to identify a perpetrator.
(f) An instruction to the witness that they should not feel compelled to make an identification.
(g) An instruction to the witness that the perpetrator may or may not be among those presented ~~and that the witness is not obligated to make an identification.~~
(h) If the identification process is a photographic or live lineup, an instruction to the witness that the perpetrator may not appear exactly as he/she did on the date of the incident.
(i) An instruction to the witness that the investigation will continue regardless of whether an identification is made by the witness.
(j) A signature line where the witness acknowledges that he/she understands the identification procedures and instructions.

(k) A statement from the witness in the witness's own words describing how certain he/ she is of the identification or non-identification. This statement ~~should~~ shall be taken at the time of the identification procedure.
(l) The amount of time it takes the witness to make an identification or non-identification in minutes and seconds.
(m) Any other direction to meet the requirements of Penal Code § 859.7, including direction regarding blind or blinded administrations and filler selection.

The process and related forms should be reviewed at least annually and modified when necessary.

604.5 EYEWITNESS IDENTIFICATION

Members ~~are cautioned not to~~ shall not, in any way, influence a witness as to whether any subject or photo presented in a lineup is in any way connected to the case.
Members should avoid mentioning that:

- The individual was apprehended near the crime scene.
- The evidence points to the individual as the suspect.
- Other witnesses have identified or failed to identify the individual as the suspect.

In order to avoid undue influence, witnesses ~~should~~ shall view suspects or a lineup individually and outside the presence of other witnesses. Witnesses ~~should~~ shall be instructed to avoid discussing details of the incident or of the identification process with other witnesses.

~~Whenever feasible, t~~The eyewitness identification procedure ~~should~~ shall be audio and video recorded and the recording should be retained according to current evidence procedures (Penal Code § 859.7). When it is not feasible to make a recording with both audio and visual representations, audio recording may be used.

604.6 PHOTOGRAPHIC LINEUP AND LIVE LINEUP CONSIDERATIONS

When practicable, the member presenting the lineup ~~should~~ shall not be involved in the investigation of the case or know the identity of the suspect. In no case ~~should~~ shall the member presenting a lineup to a witness know which photograph or person in the lineup is being viewed by the witness (Penal Code § 859.7). Techniques to achieve this include randomly numbering photographs, shuffling folders, or using a computer program to order the persons in the lineup.

Individuals in the lineup ~~should~~ shall reasonably match the description of the perpetrator provided by the witness and should bear similar characteristics to avoid causing any person to unreasonably stand out. In cases involving multiple suspects, a separate lineup ~~should~~ shall be conducted for each suspect. The suspects ~~should~~ shall be placed in a different order within each lineup (Penal Code § 859.7).

The member presenting the lineup ~~should~~ may do so sequentially (i.e., show the witness one person at a time) ~~and not~~ or simultaneously (i.e., photo array). The witness should view all persons in the lineup.

An individual suspect or filler shall only appear in an identification procedure once. If conducting more than one identification procedure with the same witness, different suspects and fillers shall be used.

A live lineup should only be used before criminal proceedings have been initiated against the suspect. If there is any question as to whether any criminal proceedings have begun, the investigating member should contact the appropriate prosecuting attorney before proceeding.

604.6.1 OTHER SAFEGUARDS

Witnesses ~~should~~ shall be asked for suspect descriptions as close in time to the incident as possible and before conducting an eyewitness identification. No information concerning a suspect ~~should~~ shall be given prior to obtaining a statement from the witness describing how certain he/she is of the identification or non-identification. Members ~~should~~ shall not say anything to a witness that may validate or invalidate an eyewitness's identification. In photographic lineups, writings or information concerning any previous arrest of a suspect shall not be visible to the witness (Penal Code § 859.7).

604.7 FIELD IDENTIFICATION CONSIDERATIONS

Field identifications, also known as field elimination show-ups or one-on-one identifications, may be helpful in certain cases, where exigent circumstances make it impracticable to conduct a photo or live lineup identifications. A field elimination show-up or one-on-one identification should not be used when independent probable cause exists to arrest a suspect. In such cases a live or photo lineup is the preferred course of action if eyewitness identification is contemplated.

When initiating a field identification, the member should observe the following guidelines:

(a) Obtain a complete description of the suspect from the witness.
(b) Assess whether a witness should be included in a field identification process by considering:
    1. The length of time the witness observed the suspect.
    2. The distance between the witness and the suspect.
    3. Whether the witness could view the suspect's face.
    4. The quality of the lighting when the suspect was observed by the witness.
    5. Whether there were distracting noises or activity during the observation.
    6. Any other circumstances affecting the witness's opportunity to observe the suspect.
    7. The length of time that has elapsed since the witness observed the suspect.
(c) If safe and practicable, the person who is the subject of the show-up should not be handcuffed or in a patrol vehicle.
(d) When feasible, members should bring the witness to the location of the subject of the show-up, rather than bring the subject of the show-up to the witness.

(e) The person who is the subject of the show-up should not be shown to the same witness more than once.
(f) In cases involving multiple suspects, witnesses should only be permitted to view the subjects of the show-up one at a time.
(g) The person who is the subject of the show-up should not be required to put on clothing worn by the suspect, to speak words uttered by the suspect or to perform other actions mimicking those of the suspect.
(h) If a witness positively identifies a subject of the show-up as the suspect, members should not conduct any further field identifications with other witnesses for that suspect. In such instances members should document the contact information for any additional witnesses for follow up, if necessary.

604.8 DOCUMENTATION

A thorough description of the eyewitness process and the result of any eyewitness identification should be documented in the case report.
If a photographic lineup is utilized, a copy of the photographic lineup presented to the witness should be included in the case report. In addition, the order in which the photographs were presented to the witness should be documented in the case report.

604.8.1 DOCUMENTATION RELATED TO RECORDINGS

The handling member shall document ~~the reason that a video recording or any other recording of an identification was not obtained~~ in writing the reason that video recording was not feasible. (Penal Code § 859.7).

604.8.2 DOCUMENTATION RELATED TO BLIND ADMINISTRATION

If a presentation of a lineup is not conducted using blind administration, the handling member shall document the reason (Penal Code § 859.7).

APPENDIX C - MODEL ADMONISHMENT FORM

Eyewitness Identification Procedure
Cal. Penal Code § 859.7 Compliance Check List - Instructions to Investigators

You shall not:

- Mention to the eyewitness that a suspect has, or has not been, apprehended.
- Mention to the eyewitness that evidence tends to identify a particular suspect.
- Mention to the eyewitness that other eyewitnesses have, or have not, identified a perpetrator.
- Name, or otherwise identify to the eyewitness, a particular person as a suspect.
- Validate, or invalidate, the eyewitness's identification.

You shall:

- Obtain from the eyewitness, ***prior to the identification procedure*** and as close to the time of the crime as possible, a description of the perpetrator.
- Administer a blind, or blinded, identification procedure.
    - Document why a blind or blinded identification procedure was not used (as applicable).
- Immediately inquire as to the eyewitness's confidence level in the accuracy of the identification or non-identification and record in writing, ***verbatim***, what the eyewitness says.
- Conduct the identification procedure in private, with only one eyewitness present at a time.
- Instruct eyewitnesses not to discuss the identification procedure with other witnesses.
- Audio *and* video record the identification procedure.
    - Document why the identification procedure was not video recorded (as applicable).
- Document in the case report:
    - A thorough description of the eyewitness identification procedure.
    - The result of the identification procedure.
    - A copy of the lineup that was presented to the eyewitness.
    - The order in which the photographs were presented to the eyewitness.

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

"Blinded administration" means the administrator of an eyewitness identification procedure may know who the suspect is, but does not know where the suspect, or their 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 process 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 archives neutral administration and prevents the lineup administrator from knowing where the suspect or their photo, as applicable, has been placed or positioned in the identification procedure.

Case/Report #:	Location of Identification Procedure:
Date of Identification Procedure:	Time of Identification Procedure:
Witness Name:	Witness DOB:
Witness Address:	Witness Phone:
Administering Officer Name:	Administering Officer ID:
Investigating Officer Name:	Investigating Officer ID:
Was an Interpreter Used: ☐ Yes ☐ No	If Yes, Name of Interpreter:
Names of other people present, if applicable:	

Instructions to Eyewitnesses:

In a moment you will be asked to view a group of photographs. Before viewing them, it is important that you understand:

1. The person who committed the crime may, or may not, be depicted among the photographs.
2. You should not feel any pressure to identify anyone from the photographs. It is more important not to identify an innocent person than it is to identify a perpetrator.
3. Law enforcement investigators will not be disappointed or angry if you do not identify a perpetrator.
4. Hairstyles, beards, and mustaches may be easily changed.
5. Photographs may not always depict the true complexion of a person. It may be lighter or darker than shown in photographs.
6. These photographs were not necessarily taken recently. The people depicted in them may not have looked, on the date of the crime, like they do in the photographs.
7. You should pay no attention to any markings or numbers that may appear on the photos or any other differences in the type or style of the photos.
8. If you do not identify anyone, it will not cause the associated investigation to be terminated. In other words, the investigation being conducted does not depend solely on your ability to identify a perpetrator.
9. You should not tell other potential eyewitnesses that you did, or did not, identify anyone.

I hereby acknowledge that I understand the *Instructions to Eyewitnesses* enumerated above.

Eyewitness Signature Date/Time

Identification:
Did the witness identify someone from the lineup? ☐ Yes ☐ No

If yes, photo number: _____

How long did the witness view the lineup before making an identification or non-identification?
_____(min:seconds)

Regardless of whether an identification is made, ask the witness to state, in their own words, how certain they are of any identification or non-identification. Remember to record both positive identifications and non-identification results in writing, including the witness's own words regarding how sure they are. Pursuant to Penal Code § 859.7, if a subject was identified, the investigator **MUST** immediately inquire as to the level of accuracy of the identification and record, in writing, verbatim, the comments of the eyewitness.

Witness Statement Regarding Identification or Non-Identification:

_____

_____

_____

_____

_____
Eyewitness Signature Date/Time

_____
Administering Officer Signature Date/Time

Procedure:
As required by law, an electronic recording - both audio and video representations - of the identification procedure, results, and comments **MUST** be made. Refer to your department/agency policies and procedures for specific instructions.

Recording: ☐ Video ☐ Audio
If video recording was not feasible, explain why: _____

_____

The identification procedures should be both audio and visual recorded. When it is not feasible to make a recording with both audio and visual representations, an audio recording may be used. When audio recording without video recording is used, the investigator shall document the reason that a video recording was not used. (Penal Code § 859.7).

Administration: ☐ Blind ☐ Blinded
If blind administration was not used, explain why: _____

_____

The investigator conducting the identification procedure shall use blind administration or blinded administration during the identification procedure. If a presentation of a lineup is not conducted using blind administration, the investigator shall document the reason in writing. (Penal Code § 859.7).

APPENDIX D - PUBLIC RECORDS ACT REQUEST FROM CALIFORNIA INNOCENCE COALITION

NORTHERN CALIFORNIA Innocence Project

CALIFORNIA INNOCENCE PROJECT

LOYOLA LAW SCHOOL PROJECT FOR THE INNOCENT

[DATE]
[SPECIFIC PRA CONTACT, IF KNOWN]
[LAW ENFORCEMENT AGENCY]
[ADDRESS]
Fax: [FAX NUMBER IF AVAILABLE]
Email: [EMAIL FOR PRA CONTACT, IF KNOWN]

In September 2018, California passed Senate Bill 923 (Pen. Code, § 859.7, effective Jan. 1, 2020) which required that all law enforcement agencies and prosecutorial entities adopt certain minimum best practices for conducting photo lineups and live lineups with eyewitnesses. This request is an effort to learn more about your agency's policies and procedures conducting eyewitness identifications.

Please consider this a formal request for access to records in your department's possession or control for the purposes of inspection and copying pursuant to the California Public Records Act (Gov.Code, § 6250 et seq.) and Article I, § 3(b) of the California Constitution. We request copies of the following records which we believe are in the possession of your agency:

1. **Policies and procedures** governing the administration of photo lineups, live lineups, and field show ups. Please include all guidelines and general orders that officers and trainees are to follow when asking witnesses to engage in the identification of potential suspects.
2. **Admonition statement and standard forms** that document witness participation in the identification process, confidence statement and identification.
3. **All regulations and guidelines** created or adopted in response to the passage of SB 923 in 2018 (Pen. Code, § 859.7, effective Jan. 1, 2020).
4. **Manuals and materials** used to train your department's officers, cadets, trainees, or other employees on the subject of how to conduct and administer photo lineups and other types of eyewitness identification procedures.
5. **Standard acknowledgement form or any other documents or certificates** signed or received by officers documenting their receipt and/or training on the eyewitness identification procedures.

As used above, "policies and procedures" includes but is not limited to codes, regulations, policies, rules and regulations, bulletins, memoranda, directives, and training materials. In addition, please include information as to whether any of these policies, procedures or documents are being updated or revised.

The California Public Records Act requires a response be provided within ten (10) days. Please include in the response the estimated date and time when the records will be made available. (Gov.Code, § 6253(c).) If your agency does not have any policies pertaining to eyewitness identification procedures please indicate so in your response to this request.

Should you claim an exemption from the Public Records Act for all or part of this request, please indicate in writing the statutory basis of the exemption and explain why the public interest favors your denial of the request. (Gov.Code, § 6255.) Please also indicate the person who made the determination that the records are exempt from disclosure. (Gov.Code, § 6253(d).) If you claim that a portion of the records is exempt, you must still provide copies of all reasonably segregable non-exempt portions. (Gov.Code, § 6253(a).)

Please send any documents in electronic format to Cynthia Murphy of the Northern California Innocence Project at ncip@scu.edu. Otherwise, please fax your response to (408)554-5440. If you prefer to send hard copies, please let us know what the approximate cost of duplication will be prior to copying any records. The Public Records Act allows you to charge actual copying costs, but no costs associated with overhead or staff time. (Gov.Code § 6253(b).) Please send any hardcopies to:

Attn: Cynthia Murphy
Northern California Innocence Project
500 El Camino Real
Santa Clara, CA 95053

If you have any questions, please feel free to contact Cynthia Murphy at (408)554-4790 or cmurphy4@scu.edu. Thank you in advance for your timely cooperation with this request. We look forward to hearing from you.

Respectfully,

The California Innocence Coalition

Linda Starr
Executive Director
Northern California
Innocence Project

Justin Brooks
Executive Director
California Innocence
Project

Paula Mitchell
Executive Director
Loyola Project for
the Innocent

APPENDIX E - CALIFORNIA PENAL CODE §859.7

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's 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's 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's 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's statement of confidence level and documenting the exact words of the eyewitness.

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

(Added by Stats. 2018, Ch. 977, Sec. 2. (SB 923) Effective January 1, 2019. Section operative January 1, 2020, by its own provisions.)

APPENDIX F - CALIFORNIA INNOCENCE COALITION OMNIBUS BILL PROPOSAL TO SENATE PUBLIC SAFETY COMMITTEE

2022 Public Safety Omnibus Bill

Penal Code Section 859.7

Amend Penal Code Section 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.~~ Witnesses shall be asked by investigator for suspect descriptions as close in time to the incident as possible and before conducting an eyewitness identification procedure.

(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 should not be involved in the investigation of the case or ~~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.

Justification:

PC Section 859.7 (1) amendment: Current language implies that the eyewitness SHALL give a description; the intent of this subdivision was that the *officer shall obtain* a description from the eyewitness *if* the eyewitness is able to provide a description. The current language would suggest that a witness be forced to provide a description when they are unable to do so.

PC Section 859.7 (c)(1) amendment: Blind Administration is a critical pillar for reducing risks of misidentifications in eyewitness identification procedures. The administrator of the eyewitness procedure could inadvertently or sometimes intentionally influence a witness to select an individual if that administrator is involved in the crime investigation and has a potential suspect in mind. Blind administration is supported by decades of social science supporting eyewitness identification procedure reform. Nearly 95% of law enforcement agencies in the state of California have adopted Lexipol created policies, a private company that creates public safety policies and trainings. Lexipol's eyewitness identification policy for California, which complies in part with Penal Code Section 859.7, adopted the language proposed in the amendment as a means to obtain Blind Administration. This should be explicitly stated as it is the most important factor for a blind administration.

Source: This change was suggested by the California Innocence Coalition.
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APPENDIX G - THE CALIFORNIA INNOCENCE COALITION'S MEMO TO LEXIPOL WITH POLICY RECOMMENDATIONS

MEMORANDUM

To: Amy Thomas, Shannon Pieper
From: California Innocence Coalition
Date: May 12, 2021
Subject: Recommended Changes to Lexipol's Eyewitness Identification Policy in California_

The California Innocence Coalition (CIC) appreciates Lexipol's willingness to consider our recommendations to ensure Lexipol's eyewitness identification policy in California complies with California Penal Code § 859.7. The policy as written is very strong, and we recognize the time and effort it took to craft such a policy and to incorporate recent changes in the law. In addition to our recommendations to strengthen the policy, we have also included background information about CIC's previous efforts to mandate California law enforcement's use of best practices when conducting eyewitness identification (EWID) procedures to reduce the risks of a wrongful identification. We have included a sample edited policy with our recommendations in a separate document.

California Penal Code § 859.7 Background

Eyewitness misidentification is a major cause of wrongful conviction and a contributing factor in more than 69% of convictions overturned through DNA testing nationwide. When mistaken identifications result in wrongful convictions, police investigations are derailed and true perpetrators remain free to commit more crimes.

More than thirty years of social science research has shown that the procedures law enforcement officers use to collect and preserve eyewitness evidence can improve the accuracy of identifications. In 2018, after 12 hard-fought years by the CIC to get eyewitness legislation passed in California, then Governor Brown signed CIC co-sponsored Senate Bill (SB) 923, landmark legislation which mandates law enforcement's use of best practices when conducting live or photo lineups. The new law, codified as California Penal Code § 859.7 and which took effect on January 1, 2020, mandates consistency between all California law enforcement agencies *requiring* their policies adhere to the following evidence-based practices:

1) The investigator conducting the identification procedure *shall* use blind administration or blinded administration during the identification procedure.
2) An identification procedure *shall* be composed so that the fillers generally fit the eyewitness' description of the perpetrator.
3) 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, and c) an identification or failure to make an identification will not end the investigation.

4) 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.
5) An electronic recording *shall* be made that includes both audio and visual representations of the identification procedures. When it is not feasible to make a recording with both audio and visual representations, audio recording may be used.

Since 2006, CIC had been advocating for California law enforcement agencies to adopt best practices when Senator Carol Midgen introduced SB 1544 which called for the development and implementation of eyewitness identification (EWID) best practices. CIC contributed to this initial effort, meeting with the Senator in her office and helping craft language for the bill. Although that first bill passed through the legislature and made it to Governor Schwarzenegger's desk, he vetoed it claiming that the standards that would be developed lacked clarity.

In 2007, the California Commission on the Fair Administration of Justice (CCFAJ), created by the Senate in 2004, released their data on mistaken identifications and recommendations on eyewitness identification practices. The Commission's mandate was to "study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past" and to examine safeguards and improvements. The commission's research outlined key evidence-based recommendations for statewide EWID procedures.

Also in 2007, the California legislature again attempted to address eyewitness misidentification by introducing SB 756, which incorporated the CCFAJ's recommendations. Again, the bill passed through the legislature with CIC supporting the effort and arrived on Governor Schwarzenegger's desk. And again, the Governor vetoed the bill this time calling the CCFAJ's recommendations "questionable" and asserting "law enforcement agencies must have the authority to develop investigative policies and procedures that they can mold to their own unique local conditions and logistical circumstances rather than be restricted to methods created that may make sense from a broad statewide perspective."

By 2010, in the absence of legislation to require or improve procedures, CIC's best hope for reform was to demand transparency from law enforcement agencies regarding their policies used to identify criminal suspects. The Northern California Innocence Project (NCIP) used the California Public Records Act (PRA), Cal. Gov't Code §6250 et seq, to request all California police and sheriff's departments to produce their written policies and procedures concerning the collection and preservation of EWID evidence. Such data had never been collected and compiled in California.

NCIP sent its request to 434 police and sheriff's departments and assessed the training and policy materials maintained by each jurisdiction with respect to the recommendations that the CCFAJ compiled on the basis of its review of the relevant social science studies, input from law enforcement, the scientific community, and legal practitioners. NCIP tracked which CCFAJ recommendations, if any, had been adopted by each department. The data revealed that no California law enforcement agency had adopted all of the CCFAJ's recommended practices and many had adopted none.

After NCIP initiated its PRA requests, California Assemblymember Tom Ammiano authored two additional EWID bills in 2011 and 213, Assembly Bill (AB) 308 and AB 807. Both bills died in the Senate.

As neither the legislature nor the Governor's office was willing to pass and sign EWID legislation, CIC turned to a new strategy – educating the law enforcement community with the goal of getting counties and individual departments to voluntarily adopt EWID best practices. In 2014, NCIP hosted an EWID Best Practices Symposium in San Francisco, as well as other trainings throughout the Bay Area. A number of law enforcement agencies in Bay Area counties voluntarily adopted best practices, including San Francisco, Alameda, Contra Costa, and San Mateo, joining Santa Clara County which was the first to adopt most of the CCFAJ's recommendations.

By 2018, despite this progress, many California counties were still resisting adoption of best practices. So the CIC decided it was once again time to seek legislation. On September 30, 2018 then-Governor Brown signed SB 923—authored by Senator Scott Wiener—into law which included the CCFAJ's recommendations.

Once the new law was enacted, CIC sought to determine how many jurisdictions had implemented best practices into their policies as required by law. In July of 2020, CIC again used PRA requests to compel law enforcement agencies to disclose their policies and procedures concerning the collection and preservation of EWID evidence. The CIC sent nearly 600 PRA requests to California law enforcement agencies that conduct eyewitness procedures. CIC tracked all information from agencies that complied with our request and followed up with agencies that failed to respond. The overwhelming majority of California law enforcement agencies used Lexipol-produced policies.

Recommendation #1: Shall v. Should

As co-sponsors of SB 923, CIC carefully crafted the bill's language to ensure that all practices outlined in the bill, if enacted, would be mandatory as opposed to advisory. California Penal Code § 859.7 uses the word "shall" throughout to emphasize the mandatory nature of the code sections. However, the standard California Lexipol EWID policy substitutes the word "should" in place of "shall" in most corresponding policy sections.

The standard Lexipol policy includes specific definitions for "shall" and "should" at the beginning of its policy. According to the Lexipol definition, "should" *indicates a generally required or expected action, absent a rational basis for failing to conform*. However, the practices outlined in California Penal Code § 859.7 are mandatory, not *generally required* as indicated by the Lexipol definition. Further, California Penal Code § 859.7 does not excuse failures to comply even if there is a rational basis. The penal code section even contemplates situations when compliance may be difficult and builds in options to ensure compliance such as using a folder shuffle method to ensure blind administration and allowing for audio recording of procedures when video recording is not feasible.

Lexipol's definition of "shall," *indicates a mandatory action,* is the accurate definition for how "shall" is used in California Penal Code § 859.7 and consistent with how the legislature intended it to be interpreted and put into practice.

See the table below which compares the use of the word shall in sections of California Penal Code § 859.7 to the analogous section in the California State Master Police Department Lexipol Policy:

California Penal Code § 859.7	California State Master Police Department Lexipol Policy
(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:	604.2 The California State Master Police Department *will strive* to use eyewitness identification techniques, when appropriate, to enhance the investigative process and *will emphasize* identifying persons responsible for crime and exonerating the innocent.
(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.	604.6.1 . . . Witnesses *should* be asked for suspect descriptions as close in time to the incident as possible and before conducting an eyewitness identification.
(2) The investigator conducting the identification procedure *shall* use blind administration or blinded administration during the identification procedure.	604.6 When practicable, the member presenting the lineup *should* not be involved in the investigation of the case or know the identity of the suspect. In no case should the member presenting a lineup to a witness know which photograph or person in the lineup is being viewed by the witness (Penal Code § 859.7). Techniques to achieve this include randomly numbering photographs, shuffling folders, or using a computer program to order the persons in the lineup.
(3) The investigator *shall* state in writing the reason that the presentation of the lineup was not conducted using blind administration, if applicable.	604.8.2 If a presentation of a lineup is not conducted using blind administration, the handling member *shall* document the reason (Penal Code § 859.7).
(4) An eyewitness *shall* be instructed of the following, prior to any identification procedure	604.4 The process *should* include appropriate forms or reports that provide. . .

(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.	604.6 . . . Individuals in the lineup *should* reasonably match the description of the perpetrator provided by the witness and should bear similar characteristics to avoid causing any person to unreasonably 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.	604.5 Members are cautioned not to, in any way, influence a witness as to whether any subject or photo presented in a lineup is in any way connected to the case.
(7) Only one suspected perpetrator *shall* be included in any identification procedure.	604.6 In cases involving multiple suspects, a separate lineup *should* be conducted for each suspect. The suspects *should* be placed in a different order within each lineup (Penal Code § 859.7).
(8) All eyewitnesses *shall* be separated when viewing an identification procedure.	604.5 . . . In order to avoid undue influence, witnesses *should* view suspects or a lineup individually and outside the presence of other witnesses. Witnesses *should* be instructed to avoid discussing details of the incident or of the identification process with other witnesses.
(9) Nothing *shall* be said to the eyewitness that might influence the eyewitness' identification of the person suspected as the perpetrator.	604.6.1 . . . Members *should* not say anything to a witness that that may validate or invalidate an eyewitness' identification.
(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.	604.4 (j) A statement from the witness in the witness's own words describing how certain he/ she is of the identification or non-identification. This statement *should* be taken at the time of the identification procedure.

(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.	604.6.1 . . . No information concerning a suspect *should* be given prior to obtaining a statement from the witness describing how certain he/she is of the identification or non-identification.
(C) The officer *shall* not validate or invalidate the eyewitness' identification.	604.6.1 Members *should* not say anything to a witness that that may validate or invalidate an 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.	604.5 . . . Whenever feasible, the eyewitness identification procedure *should* be audio and video recorded and the recording should be retained according to current evidence procedures (Penal Code § 859.7).

There are four notable instances where "shall" is used in the standard Lexipol EWID policy. Two of these instances are § 604.8.1 and § 604.8.2 which require the handling officer to document why "video recording or any other recording of an identification was not obtained" and also to document anytime "a lineup is not conducted using blind administration" respectively. The word "shall" is also used in the introductory sentence of § 604.4 instructing that the "Investigative Bureau supervisor shall be responsible for the development and maintenance of an eyewitness identification process for use by members. . ." Finally, § 604.6.1 states in part, "In photographic lineups, writings or information concerning any previous arrest of a suspect shall not be visible to the witness." The fact that "shall" is used in select sections of the policy but not others, underscores the notion that certain sections of the policy are mandatory while others are merely advisory. If officers believe parts of the policy to be advisory, it increases the risk they will fail to comply with the best practices, increases the risk of a misidentification and increases an officer's exposure to cross-examination for not complying with statutory law.

To ensure officers fully comply with California Penal Code § 859.7 and that the legislature's intent in enacting the law is met, CIC recommends using the word "shall" in place of "should" for all sections of the standard Lexipol EWID policy that are mandated by California Penal Code § 859.7.

Recommendation #2: Modify section pertaining to electronic recordings

California Penal Code § 859.7(a)(11) requires that, "an electronic recording shall be made that includes both audio and visual representations of the identification procedures. . . 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." The language of this section indicates that anytime an officer conducts an eyewitness identification procedure, the officer is required to make an electronic recording of the procedure. The section denotes that audio and visual recordings should always be made, but at the very least audio recordings are required every time an officer conducts an eyewitness identification procedure.

Section 604.5 of the Lexipol policy reads instead, "Whenever feasible, the eyewitness identification procedure should be audio and video recorded and the recording should be retained according to current evidence procedures." Later in section 604.8.1 the Lexipol policy specifies, "The handling member shall document the reason that a video recording or any other recording of an identification was not obtained." By only requiring law enforcement to make audio and visual recordings "whenever feasible," the Lexipol policy makes the electronic recording advisory and creates an exception to the recording requirement; California Penal Code § 859.7 has no such exception. Furthermore, the Lexipol policy anticipates situations where no electronic recording is made and excuses the failure to record by requiring the officer to document the reasons why the procedure was not recorded. Thus, according to the Lexipol policy, an officer could fail to video or audio record an eyewitness identification procedure and be in compliance with the policy, so long as they document the reasons for not recording. This runs contrary to California Penal Code § 859.7.

California Penal Code § 859.7(a)(11) requires that at a minimum, an audio recording of the procedure must always be made, and when it is not feasible to also make a visual recording, then documentation of the circumstances and reasons must be properly made. CIC recommends that Lexipol modify the corresponding section of the Lexipol EWID policy so as not to create an exception to the electronic recording requirement.

Recommendation #3: Present all required admonishment instructions individually

California Penal Code § 859.7(a)(4)(A) to (C) lays out three specific and separate instructions which an officer should give to the witness prior to conducting an eyewitness identification procedure. Those instructions are:

(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 the Lexipol policy mentions all of the instructions required under California Penal Code § 859.7, it combines two of the instructions together into one line in 604.4(f): "An instruction to the witness that the perpetrator may or may not be among those presented and that the witness is not obligated to make an identification." As a result, the instruction that a witness should not feel compelled to make an identification, perhaps the most important instruction of all, is easily missed and may appear as secondary. Separating out each instruction into a separate line would be an easy solution here and ensure that the witness admonition contains all proper instructions.

As CIC continues to analyze the data from the PRA requests, we appreciate the opportunity to address any additional recommendations to strengthen Lexipol's EWID policy. The recommendations in this memo are just a starting point for what we hope will be many future discussions around how CIC and Lexipol can work together to improve law enforcement policies in California.

APPENDIX H – COMPARISON OF THE USE OF THE WORD "SHALL" IN SECTIONS OF CALIFORNIA PENAL CODE § 859.7 TO ANALOGOUS SECTIONS OF THE LEXIPOL CALIFORNIA STATE MASTER POLICE DEPARTMENT POLICY

California Penal Code § 859.7	Lexipol California State Master Police Department Policy
(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:	604.2 The California State Master Police Department *will* strive to use eyewitness identification techniques, when appropriate, to enhance the investigative process and *will* emphasize identifying persons responsible for crime and exonerating the innocent.
(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.	604.6.1 . . . Witnesses *should* be asked for suspect descriptions as close in time to the incident as possible and before conducting an eyewitness identification.
(2) The investigator conducting the identification procedure *shall* use blind administration or blinded administration during the identification procedure.	604.6 When practicable, the member presenting the lineup *should* not be involved in the investigation of the case or know the identity of the suspect. In no case *should* the member presenting a lineup to a witness know which photograph or person in the lineup is being viewed by the witness (Penal Code § 859.7). Techniques to achieve this include randomly numbering photographs, shuffling folders, or using a computer program to order the persons in the lineup.
(3) The investigator *shall* state in writing the reason that the presentation of the lineup was not conducted using blind administration, if applicable.	604.8.2 If a presentation of a lineup is not conducted using blind administration, the handling member *shall* document the reason (Penal Code § 859.7).
(4) An eyewitness *shall* be instructed of the following, prior to any identification procedure	604.4 The process *should* include appropriate forms or reports that provide. . .

(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.	604.6 . . . Individuals in the lineup *should* reasonably match the description of the perpetrator provided by the witness and should bear similar characteristics to avoid causing any person to unreasonably stand out.
California Penal Code § 859.7	**Lexipol California State Master Police Department Policy**
(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.	604.5 Members are cautioned not to, in any way, influence a witness as to whether any subject or photo presented in a lineup is in any way connected to the case.
(7) Only one suspected perpetrator *shall* be included in any identification procedure.	604.6 In cases involving multiple suspects, a separate lineup *should* be conducted for each suspect. The suspects *should* be placed in a different order within each lineup (Penal Code § 859.7).
(8) All eyewitnesses *shall* be separated when viewing an identification procedure.	604.5 . . . In order to avoid undue influence, witnesses *should* view suspects or a lineup individually and outside the presence of other witnesses. Witnesses *should* be instructed to avoid discussing details of the incident or of the identification process with other witnesses.
(9) Nothing *shall* be said to the eyewitness that might influence the eyewitness' identification of the person suspected as the perpetrator.	604.6.1 . . . Members *should* not say anything to a witness that may validate or invalidate an eyewitness' identification.
(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.	604.4 (j) A statement from the witness in the witness's own words describing how certain he/ she is of the identification or non-identification. This statement *should* be taken at the time of the identification procedure.
(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.	604.6.1 . . . No information concerning a suspect *should* be given prior to obtaining a statement from the witness describing how certain he/she is of the identification or non-identification.

(C) The officer *shall* not validate or invalidate the eyewitness' identification.	604.6.1 Members *should* not say anything to a witness that may validate or invalidate an 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.	604.5 . . . Whenever feasible, the eyewitness identification procedure *should* be audio and video recorded and the recording should be retained according to current evidence procedures (Penal Code § 859.7).

ENDNOTES

1 *See* New Jersey v. Henderson, 27 A.3d 872, 894 (N.J. 2011); *see also* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 64 (Harvard University Press 2011).
2 New Jersey v. Henderson, 27 A.3d 872, 894 (N.J. 2011).
3 Garrett, *supra* note 1, at 50.
4 Henderson, 27 A.3d at 894. Factors such as witness stress, presence of a weapon, distance and lighting, cross-racial identification challenges and memory decay are collectively referred to as "estimator variables," because scientists can only estimate the impact that such factors have on the reliability of an identification.
5 *Id.* at 921. Factors that affect the reliability of identification procedures, but which the system *can* affect through different police practices include improper feedback by officers and unfair composition of lineups. Such factors are known as "system variables."
6 Garrett, *supra* note 1, at 49.
7 *See id.*
8 Adele Quigley-McBride & Gary L. Wells, *Eyewitness Confidence and Decision Time Reflect Identification Accuracy in Actual Police Lineups,* 47 L. and Human Behavior 333, 335 (2023).
9 Jennifer Thompson-Cannino, Keynote Address at the Northern California Innocence Project Justice for All Awards Dinner (Apr. 16, 2009).
10 Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence,* 44(1) L. and Hum. Behav. 3, 4 (2020).
11 *See id.*
12 S.B. 923, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (as approved by Governor, Sep. 30, 2018).
13 Cal. Penal Code § 859.7; *see infra* Appendix E.
14 David Greenwald, *Bill Designed to Keep Innocent People Out of Jail and Prevent Wrongful Convictions*, The Davis Vanguard (July 21, 2018), https://www.davisvanguard.org/2018/07/bill-designed-keep-innocent-people-jail-prevent-wrongful-conviction/.
15 Cal. Penal Code § 859.7; *see infra* Appendix E.
16 Policy documents include eyewitness identification policy and procedure documents, admonishment statements and forms, eyewitness identification training materials, and eyewitness identification policy acknowledgement forms.
17 S.B. 1544, 2005-2006 Leg., Reg. Sess. (Cal. 2006).
18 The California Commission on the Fair Administration of Justice was created by Senate Resolution No. 44 of the 2003-04 Session of the California State Senate, adopted on August 27, 2004.
19 Cal. Commission on the Fair Administration of Justice, California Commission on the Fair Administration of Justice Final Report (Northern California Innocence Project Publications 2008).
20 S. Res. 44, 2003–2004 Leg., Reg. Sess. (Cal. 2004).
21 S.B. 756, 2006-2007 Leg., Reg. Sess. (Cal. 2006).
22 S.B. 1591, 2007-2008 Leg., Reg. Sess. (Cal. 2008).
23 Cal. Gov't Code § 6250.
24 Omnibus Bill Proposal from California Innocence Coalition to Senate Public Safety Commission (Jan. 2022) (on file with authors).
25 A.B. 308, 2011-2012 Leg., Reg. Sess. (Cal. 2011).
26 A.B. 807, 2012-2013 Leg., Reg. Sess. (Cal. 2013).
27 NCIP co-hosted the 2014 symposium with University of San Francisco's International Institute of Criminal Justice Leadership.
28 Innocence Project, Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification 18 (Benjamin N. Cardozo School of Law, 2009).
29 Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2 Wis. L. Rev. 615, 628-29 (2006).
30 *Id.*
31 *Id.* at 629.
32 Cal. Penal Code § 859.7(c)(1); *see infra* Appendix E.
33 Henderson, 27 A.3d at 896 (quoting Dr. Gary Wells).
34 Reporter's Transcript of Proceedings at 63, People v. Francisco Carrillo, Mar. 8, 2011, Los Angeles Super. Ct. (2011) (No. TA-011653-01).
35 *Id.* at 68
36 *Id.*
37 *The Innocence Files: The Witness: The Murder of Donald Sarpy* (Netflix 2020); *The Innocence Files: The Witness: The Trials of Franky Carrillo* (Netflix 2020).

38 It is worth noting that this case also had issues with low-confidence identifications. Turner's initial statement that the man in the picture looked similar to the shooter was not even a positive identification, much less a confident one.
39 Cal. Penal Code § 859.7(c)(5); *see infra* Appendix E.
40 Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Hum. Behav. 603, 635 (1998).
41 Wells, *supra* note 29, at 623.
42 *Id.* at 623-24.
43 Madrigal v. Yates, 662 F.Supp.2d 1162, 1167 (C.D. Cal. 2009).
44 *Id*. at 1168-69.
45 *Id.* at 1169.
46 *Id.* at 1167.
47 Jazmine Ulloa, *To Prevent Wrongful Convictions, California Considering New Eyewitness Lineup Standards*, L.A. Times (Jan. 24, 2018), https://www.latimes.com/politics/la-pol-ca-california-eyewitness-police-standards-20180124-story.html.
48 Madrigal, 662 F.Supp.2d at FN4 (stating that the photo used in the lineup was of Madrigal at 17 years old, when he was 25 years old at the time of the crime).
49 Angélica M. Casas, *How Police Line-ups Jail the Innocent,* BBC (April 26, 2018), https://www.bbc.com/news/av/world-us-canada-43900546.
50 Steven E. Clark, *A Re-Examination of the Effects of Biased Lineup Instructions in Eyewitness Identification,* 29 L. and Hum. Behav. 395, 395 (2005).
51 Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender,* 66 J. Applied Psych. 482, 487 (1981).
52 *Id.*
53 *Albert K. Johnson*, The National Registry of Exonerations (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3326 (last visited May 10, 2023).
54 *Id.*
55 *Id.*
56 *Id*.
57 *Albert Johnson*, Northern California Innocence Project, https://ncip.org/albert-johnson/ (last visited May 10, 2023).
58 *Id.*
59 The National Registry of Exonerations, *supra* note 53.
60 *Id.*
61 Wells, *supra* note 29, at 630; Wells et al., *supra* note 10, at 8.
62 Travis Seale-Carlisle et al., *Confidence and Response Time as Indicators of Eyewitness Identification Accuracy in the Lab and in the Real World,* 8 J. of Applied Rsch. in Memory and Cognition 420, 421 (2019).
63 *Id.*
64 Garrett, *supra* note 1, at 63-64.
65 *See* John T. Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, 22(1S) Psych. Sci. in the Pub. Int. 1S, 5S (2021).
66 Garrett, *supra* note 1, at 64-65.
67 Garrett, *supra* note 1, at 65; Wixted et al., *supra* note 65, at 10S.
68 Wixted et al., *supra* note 65, at 2S (citing Nancy K. Steblay & J.E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect,* 5 J. of Applied Rsch. in Memory and Cognition 284 (2016)).
69 Wixted et al., *supra* note 65 at 5S.
70 *Id.* at 1S.
71 *Id.* at 5S.
72 *Id.*
73 *Id.*
74 *Id.* at 1S, 11S.
75 Seale-Carlisle et al., *supra* note 62, at 421.
76 *Id.*
77 *Id.* at 425.
78 Quigley-McBride & Wells, *supra* note 8, at 336.
79 John T. Wixted, *Eyewitness Memory,* Oxford Research Encyclopedia: Psychology (Mar. 22, 2023), https://oxfordre.com/psychology/display/10.1093/acrefore/9780190236557.001.0001/acrefore-9780190236557-e-911.
80 *Id.*
81 *Id.*

82 Quigley-McBride & Wells, *supra* note 8, at 335.
83 Wells et al., *supra* note 40, at 617 (citing Lindsay et al., *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 J. of Applied Psych. 796 (1991)).
84 Seale-Carlisle et al., *supra* note 62, at 425.
85 *Id.* at 427.
86 *Id.*
87 Transcript of Record at 535-36, People v. Joaquin Ciria, San Francisco Super. Ct. No. 137440 (1991) [hereinafter Ciria Transcript].
88 *Id.* at 490, 578; Transcript of Preliminary Hearing at 27, People v. Joaquin Ciria, San Francisco Super. Ct. No. 137440 (1991).
89 Ciria Transcript at 490.
90 *Id.* at 455, 486-87, 549.
91 *Id*. at 457-58, 551-52.
92 *Id*. at 458, 461, 489.
93 *Joaquin Ciria*, The National Registry of Exonerations (June 8, 2023), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6225.
94 *Joaquin Ciria*, Northern California Innocence Project, https://ncip.org/joaquin-ciria/ (last visited May 13, 2023).
95 Annie Rosenthal, *Even the District Attorney Believed Joaquin Ciria Was Innocent. Why Did It Take So Long to Set Him Free?*, Politico (August 7, 2022), https://www.politico.com/news/magazine/2022/08/07/california-innocence-commission-joaquin-ciria-00037546.
96 Off. of the Deputy Attorney General, U.S. Dep't of Justice, Memorandum For Heads of Department Law Enforcement Components All Department Prosecutors 10 (2017).
97 *Obie Anthony*, Northern California Innocence Project, https://ncip.org/obie-anthony-iii/ (last visited March 6, 2024).
98 *Id.*
99 Petition for Writ of Habeas Corpus at 3, People v. Anthony, Los Angeles Super. Ct. No. BA097736 (June 28, 1994) (citing to Transcript of Record at 354-355, 361, 383).
100 *Anthony*, *supra* note 97.
101 *Id.*
102 Michael S. Perry & Maurice Possley, *Obie Anthony*, The National Registry of Exonerations (January 23, 2017), https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3824.
103 Mr. Anthony's Reply to the prosecution's Informal Response provides a complete summary of all the detective's efforts to influence Jones's testimony when she interviewed him. *See* Reply to Informal Response at 9-13, 46-58, People v. Anthony, Los Angeles Super. Ct. No. BA097736 (June 28, 1994); *see also* Petition for Writ of Habeas Corpus at Exhibits 42-43, People v. Anthony, Los Angeles Super. Ct. No. BA097736 (June 28, 1994).
104 Petition for Writ of Habeas Corpus at 17-18, 23, 25-26, and Exhibits 3, 10, 40, People v. Anthony, Los Angeles Super. Ct. No. BA097736 (June 28, 1994); Transcript of Evidentiary Hearing at 6834-35, 6863, People v. Reggie D. Cole, Imperial County Super. Ct. No. CF-8268 (Dec. 21, 2007).
105 Petition for Writ Habeas Corpus at 13, People v. Anthony, Los Angeles Super. Ct. No. BA097736 (June 28, 1994).
106 *Id.*
107 Order Granting Motion for Finding of Innocence by a Preponderance of the Evidence Pursuant to California Penal Code Section 1485.55, Subdivision (b), People v. Anthony, Los Angeles Super. Ct. No. BA097736 (June 28, 1994).
108 Cal. Gov't. Code §§ 6250-6720.7.
109 The group who developed and executed the study included attorneys, students and volunteers from the Northern California Innocence Project (NCIP), California Innocence Project (CIP), and Loyola Project for the Innocent (LPI).
110 Commission on Peace Officer Standards and Training, *California Law Enforcement Agencies,* State of California (Feb. 12, 2024), https://post.ca.gov/le-agencies.
111 The Research Team did not seek policy manuals or admonishment forms from district attorney offices, social service agencies, coroners offices, medical examiners, probation departments, communications agencies, or several other California Departments that do not conduct criminal investigations.
112 California Innocence Coalition, Public Records Act Request (July 14, 2020) (on file with authors).
113 S.B. 978, 2017-2018 Leg., Reg. Sess. (Cal 2018).
114 In 2010, many departments used a relatively standard Lexipol 450 policy in regard to recording suspect interrogations and witness interviews. The policy stated that officers are assigned personal audio recorders for their on-duty use. A typical 450 policy stated something similar to: "Any member of this department may surreptitiously record any conversation during the course of a criminal investigation in which the officer reasonably believes that such a recording will be beneficial to the investigation. . . For the purposes of this policy, any officer contacting an

individual suspected of violating any law or during the course of any official law enforcement related activity shall be presumed to be engaged in a criminal investigation." Albany Police Dep't, *Activation of the Audio Recorder*, *in* Albany Police Dep't Policy Manual 236 (2009).

115 *About Us*, Lexipol, https://www.lexipol.com/about/ (last visited Mar. 6, 2024).

116 Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 Tex. L. Rev. 891, 900-01 (2018).

117 *Id.* at 900.

118 Lexipol, *supra* note 115.

119 Eagly & Schwartz, *supra* note 116, at 922; Jamal Andress, *A Growing Number of Police Departments Are Outsourcing Their Policies*, Scripps News (July 29, 2019), https://scrippsnews.com/stories/why-outsourcing-u-s-police-policy-concerns-some-citizens/.

120 Eagly & Schwartz, *supra* note 116, at 922.

121 *See id.* at 919-20.

122 Lexipol, *Public Safety Policy Services & Policy Management Software,* https://www.lexipol.com/solutions/policies-and-updates/ (last visited Mar. 6, 2024).

123 Gordon Graham, *Rules, Policies and Procedures*, Lexipol (Jan. 17, 2017), https://www.lexipol.com/resources/todays-tips/rules-policies-procedures/.

124 Eagly & Schwartz, *supra* note 116, at 895.

125 *Id.* at 918-19.

126 *Id.* at n. 149.

127 In April 2021, Andrew Brown, Jr. was shot by sheriff's deputies in Pasquotank County, North Carolina after fleeing arrest. The county's Lexipol-provided policy allowed officers to fire at a moving vehicle if they "reasonably" believed that it was the only way to avoid an "imminent threat" to themselves or the public. The policy defined "imminent" as "impending," and not immediate. Brown's family settled a civil rights suit against the county for $3M in June 2022. *See Shooting of Andrew Brown, Jr Was Justified, District Attorney Says*, 13NewsNow (May 18, 2021), https://www.13newsnow.com/article/news/local/north-carolina/shooting-of-andrew-brown-jr-was-justified-pasquotank-county-district-attorney-says/291-89a9817b-b2b4-4ef0-9f66-82f3129293fe; Pasquotank County Sheriff's Dep't, *Use of Force, in* Policy Manual 1-6 (2021), https://static1.squarespace.com/static/5b0584b6aa49a1a281fb3205/t/6088943c6b11b952db4fad89/1619563580268/Use+of+Force+Policy.pdf; *see also* Jamiel Lynch & Devon M. Sayers, *Estate of Andrew Brown Jr., Who Was Fatally Shot by North Carolina Deputies Last Year, Reaches $3 Million Settlement With County*, CNN (June 6, 2022), https://www.cnn.com/2022/06/07/us/andrew-brown-estate-settlement-pasquotank-county-north-carolina/index.html. In California, the ACLU of Southern California sued Pomona Police Department to enjoin them from enforcing their Lexipol policy, which omitted the word "necessary" as required by Assembly Bill 392 regarding use-of-force. Since the enactment of AB 392 in January 2020, Pomona Police Department has used deadly force several times and killed at least three people (*see infra* notes 184-195 and accompanying text). And in Spokane, Washington, the ACLU of Washington filed a lawsuit after Spokane police contacted U.S. Border Patrol to inquire whether the Border Patrol had interest in detaining the victim of a car accident to which police had responded. Although Lexipol was not a named party in the suit, which eventually settled, the ACLU highlighted the fact that Spokane Police's Lexipol policy "incorrectly authorized officers to seize individuals and extend detentions for purposes of investigating and aiding in potential civil immigration enforcement." *See* ACLU of Washington, *Faulty Lexipol Policies Expose Police Departments to Costly Lawsuits, ACLU-WA and NWRIP Warn in Letter to Law Enforcement Agencies Statewide*, ACLU (Jan. 23, 2018), https://www.aclu.org/press-releases/faulty-lexipol-policies-expose-police-departments-costly-lawsuits-aclu-wa-and-nwirp.

128 Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol's Fight Against Police Reform*, 97 Ind. L. Rev. 1, 5 (2022).

129 *Id.* at 6.

130 Eagly & Schwartz, *supra* note 116, at 903.

131 *Id.*

132 *Id.* at 905.

133 *See* Lexipol, *Public Safety Policy Services & Policy Management Software, supra* note 122 (highlighting that Lexipol provides fully developed state-specific policies researched and written by subject matter experts and vetted by attorneys to replace outdated policies that can leave an agency vulnerable to financial risk).

134 Eagly & Schwartz, *supra* note 116, at 939.

135 Andress, *supra* note 119.

136 *Id.*

137 Lexipol, *Lexipol Style Guide* (2015), https://perma.cc/H59U-W6D7.

138 Eagly & Schwartz, *supra* note 116, at 905-06.

139 Gregg Satula, *Change Management? Factors to Consider When Altering a Lexipol Policy*, Lexipol (Oct. 3, 2016), https://www.lexipol.com/resources/blog/change-management-factors-consider-altering-lexipol-policy/.

140 Eagly & Schwartz, *supra* note 116, at 935.

141 *See generally* Eagly & Schwartz, *supra* note 116.
142 *Id.* at 933.
143 *Id*.
144 Cal. Penal Code § 859.7(a)(1); *see infra* Appendix E.
145 Lexipol, *Eyewitness Identification, in* California State Master Police Department Policy Manual 3 (Apr. 16, 2021) (on file with authors) [hereinafter Master Policy]; *see infra* Appendix B for the Research Team's modified version of the Lexipol Master Policy.
146 *Id.*
147 Cal. Penal Code § 859.7(a)(2); *see infra* Appendix E.
148 Nat'l Rsch. Council, Nat'l Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification 77 (2014).
149 Wells, *supra* note 29, at 625.
150 Nat'l Rsch. Council, *supra* note 148 at 23.
151 R. C. L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation,* 70 J. of Applied Psych. 556, 562 (1985).
152 Shannon M. Andersen et al., *Individual Differences Predict Eyewitness Identification Performance,* 60 Personality and Individual Differences 36, 36 (2014).
153 Lindsay & Wells, *supra* note 151, at 558.
154 Wells, *supra* note 29, at 625.
155 Lindsay & Wells, *supra* note 151, at 558-9.
156 *Id.* at 559.
157 *See* Nat'l Rsch. Council, *supra* note 148; *see also* Curt A. Carlson & Maria A. Carlson, *An Evaluation of Perpetrator Distinctiveness, Weapon Presence, and Lineup Presentation Using ROC Analysis,* J. of Applied Rsch. in Memory and Cognition (2014); Andersen et al., *supra* note 152.
158 *See* Carlson & Carlson, *supra* note 157; *see also* Andersen et al., *supra* note 152.
159 Scott D. Gronlund et al., *Evaluating Eyewitness Identification Procedures Using Receiver Operating Characteristic Analysis,* 23 Current Directions in Psych. Sci. 3, 3-4 (2014).
160 Andersen et al., *supra* note 152, at 36.
161 Gronlund et al., *supra* note 159, at 4.
162 U.S. Dep't of Justice, *supra* note 94, at 8.
163 *Id.*
164 Phillips et al., *supra* note 148, at 944 (citing Wells et. al, *supra* note 40).
165 Phillips et al., *supra* note 148, at 948.
166 *See* Nat'l Rsch. Council, *supra* note 143, at 3 (explicitly stating that the relatively superiority of simultaneous versus sequential procedures is unresolved).
167 *Id.*
168 Int'l Ass'n of Chiefs of Police, Model Policy: Eyewitness Identification (2016).
169 U.S. Dep't of Justice, *supra* note 96.
170 Tarrant Bell Prop., LLC v. Super. Ct., 51 Cal.4th 538, 542 (2011) (noting that the Legislature's use of the word "shall" denotes a mandatory act); *see also* Cal. Code Regs. tit. 2, § 13 ("(a) 'Shall' means action which is necessary to achieve compliance and no alternative courses of action are acceptable to achieve compliance. (b) 'Should' means action which is preferable to achieve compliance, while recognizing that there are circumstances where alternative courses of action are open to users.").
171 *Criminal Investigations: Eyewitness Identification: Hearing on S.B. 923 Before the S. Rules Comm.*, 2017-2018 Leg., Reg. Sess. 4 (Cal. 2018) ("This bill *requires* 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.") (emphasis added).
172 *Criminal Investigations: Eyewitness Identification: Hearing on S.B. 923 Before the S. Comm. on Public Safety*, 2017-2018 Leg., Reg. Sess. (Cal. 2018), https://www.senate.ca.gov/media/senate-public-safety-committee-20180410/video (statement of Sen. Scott Wiener, Member, S. Rules Comm.) ("SB 923 sets out minimum requirements for law enforcement eyewitness identification procedures.").
173 Rowan Moore Gerety, *Who Writes the Rules for Cops?*, Esquire Mag. (Feb. 2, 2022), https://www.esquire.com/news-politics/a38941594/lexipol-bruce-praet-police-policy-guidelines-handbooks/.
174 *Id.* (citing Bruce Praet, *National Consensus on Use of Force Should Not Trigger Changes to Agency Policies*, Lexipol (2017) https://www.lexipol.com/resources/blog/use-caution-when-changing-use-of-force-policy-language/) (URL removed).
175 Master Policy, *supra* note 145; *see infra* Appendix B.
176 Cal. Penal Code § 859.7(c)(2)(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.").

177 Cal. Penal Code § 859.7(a)(11); *see infra* Appendix E.

178 *Shall*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/shall (last visited May 13, 2023).

179 *Should*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/should (last visited May 13, 2023).

180 Anderson v. Yungkau, 329 U.S. 482, 485 (1947).

181 Rastelli v. Warden, Metro. Corr. Ctr., 782 F.2d 17, 23 (2d Cir. 1986).

182 Judith P. v. Super. Ct., 126 Cal.Rptr.2d 14, 26 (Ct. App. 2002).

183 Union Elec. Co. v. Consolidation Coal Co., 188 F.3d 998, 1001 (8th Cir. 1999) (The use of words "may" and "should" constituted non-obligatory language; if the parties wanted to make the regulations mandatory, they could have used words like "must" and "shall.")

184 Anderson v. Yungkau, 329 U.S. at 485.

185 *Id.*

186 Master Policy, *supra* note 145; *see infra* Appendix B.

187 *Id.*

188 *Should, supra* note 179.

189 *Shall, supra* note 178.

190 "Shall" is used in § 604.8.1 and § 604.8.2 of Lexipol's master policy, which require, respectively, that the handling officer document (1) why "video recording or any other recording of an identification was not obtained," and (2) any time "a lineup is not conducted using blind administration." The word "shall" is also used in the introductory sentence of § 604.4, instructing that the "Investigative Bureau supervisor shall be responsible for the development and maintenance of an eyewitness identification process for use by members. . ." Finally, § 604.6.1 states in part, "In photographic lineups, writings or information concerning any previous arrest of a suspect shall not be visible to the witness." Master Policy, *supra* note 145; *see infra* Appendix B.

191 *See generally* Eagly & Schwartz, *supra* note 116, for a description of Lexipol's history, products, and influence.

192 Lexipol, *Use of Force Policies: Dispelling the Myths* 5 https://info.lexipol.com/use-of-force-policy-myths [https://perma.cc/S7FG- BNVQ] [hereinafter Dispelling the Myths]. Lexipol has removed the link regarding its use of force policy and, as of March 2024, is still revising its policy following a recent court settlement regarding the flawed policy.

193 Michael Ranalli, *Police Use of Force: Reality vs. Law*, Lexipol (Oct. 24, 2017), https://www.lexipol.com/resources/blog/police-use-of-force-reality-vs-law/ [https://perma.cc/6XVL-GA6G].

194 *Id.; see also* Dispelling the Myths, *supra* note 192, at 5.

195 *See* Eagly & Schwartz, *supra* note 128, at 35-36.

196 *Id.*

197 Complaint for Declaratory and Injunctive Relief at 6, Gente Organizada, et al. v. Pomona Police Dep't, No. 20STCV28895, 2020 WL 4391818 (Cal. Super. July 31, 2020).

198 *Id.* at 11; Pomona Police Dep't., *Use of Force, in* Pomona PD Policy Manual (Dec. 14, 2020), https://www.pomonaca.gov/home/showpublisheddocument/464/637457098753730000.

199 Complaint at 12, Gente Organizada, 2020 WL 4391818.

200 *ACLU Files Suit Against Pomona PD Over Deadly Force Policy Alleging Misuse Taxpayer Funds*, CBS L.A. (July 31, 2020), https://losangeles.cbslocal.com/2020/07/31/aclu-pomona-pd-lawsuit-deadly-force-taxpayer-funds/.

201 Complaint at 13-14, Gente Organizada, 2020 WL 4391818.

202 ACLU SoCal Communications & Media Advocacy, *Police Shooting Law Settlement Forces Changes in Officer Training*, ACLU Southern Cal. (Nov. 22, 2022), https://www.aclusocal.org/en/press-releases/police-shooting-law-settlement-forces-changes-officer-training.

203 *Id.* According to the ACLU, the settlement requires the Pomona Police Department to: (1) train officers that AB 392 "creates a higher standard for the application of deadly force in California," that the law established a "significant change in use-of-force threshold," and that "it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life," (2) agree not to use any communications from PORAC to train officers in the future, and (3) when investigating officer-involved shootings and deaths, agree to "consider whether officers evaluated and used other reasonably available resources and techniques [. . .] in determining whether deadly force was necessary." *Id.* Following this settlement, Lexipol removed its online sources regarding its use of force policy and, as of December 2022, purports that the company is in the process of revising it. *See* Dispelling the Myths, *supra* note 192.

204 ACLU SoCal, *supra* note 202.

205 *Id.*

206 *See* ACLU of Southern California, *Timeline of How Police Groups Undermine AB 392*, https://www.aclusocal.org/gente-timeline (last visited May 13, 2023).

207 *Id.*

208 *Id.*
209 *Id.*
210 Stipulation of Parties Requesting the Court to Retain Jurisdiction to Enforce Settlement Agreement . . . and Joint Request for Dismissal with Prejudice at Exhibit 1, Gente Organizada, et al. v. Pomona Police Dep't, No. 20STCV28895, 2020 WL 4391818 (Cal. Super. July 31, 2020).
211 CIC's memo to Lexipol with eyewitness identification policy recommendations was dated May 12, 2021, and was sent to Lexipol via email on May 14, 2021. CIC's follow-up conversation with Lexipol regarding the memo was held via Zoom on June 28, 2021.
212 These comments were made by Lexipol during the June 28, 2021, call with CIC.
213 Cal. Penal Code § 859.7(a)(11); *see infra* Appendix E.
214 Master Policy, *supra* note 145; *see infra* Appendix B.
215 Memorandum from California Innocence Coalition to Lexipol (May 12, 2021) (on file with authors); *see infra* Appendix G.
216 *see* Burlingame Police Dep't, *Eyewitness Identification*, *in* Burlingame PD Policy Manual 459 (Jan. 17, 2023).
217 Cal. Penal Code § 859.7(a)(11); *see infra* Appendix E.
218 Cal. Penal Code § 859.7(a)(4)(A-C); *see infra* Appendix E.
219 Nancy K. Steblay, *Lineup Instructions, in* Reform of Eyewitness Identification Procedures 65, 66 (B.L. Cutler ed., 2013).
220 *Id.*
221 Clark, *supra* note 50, at 395.
222 Steblay, *supra* note 219, at 67.
223 Laura Smalarz & Gary L. Wells, *Eyewitness-Identification Evidence: Scientific Advances and the New Burden on Trial Judges,* 48 CT. Rev.: J. Am. Judges Ass'n 14, 16 (2012).
224 Malpass & Devine, *supra* note 51 at 487.
225 *Id.*
226 Clark, *supra* note 50, at 421.
227 Malpass & Devine, *supra* note 51, at 487.
228 Clark, *supra* note 50, at 396.
229 *Id.* at 403.
230 Cal. Penal Code § 859.7(a)(4)(A-C); *see infra* Appendix E.
231 *See* Steblay, *supra* note 219; Clark, *supra* note 50; Malpass & Devine, *supra* note 51.
232 Steblay, *supra* note 219, at 67.
233 Clark, *supra* note 50, at 395.
234 Steblay, *supra* note 219, at 73.
235 *Id.* at 70-72.
236 *Id.* at 72.
237 Mitchell L. Eisen et al., *An Examination of Showups Conducted by Law Enforcement Using a Field-Simulation Paradigm*, 23 Psych. Pub. Pol'y & L. 1, 20 (2017).
238 *Id.*
239 *Id.* at 3.
240 *Id.* at 19.
241 Of the admonishment forms received in response to the CIC's request, 55 forms included version dates. Of the 55 forms that included version dates, 43 forms, or 78%, were dated before 2019 when SB 923 was enacted.
242 For examples of policies that include a recommendation of when agencies should review and modify their processes and related forms *see* Albany Police Dep't, *Eyewitness Identification*, *in* Policy 2 (Aug. 17, 2020); *see also* Milpitas Police Dep't, *Eyewitness Identification, in* Milpitas PD CA Policy Manual 412 (Jul. 16, 2020).
243 Admonishment documents consisted of admonishment forms to be completed by witnesses or read to witnesses by law enforcement, protocol or policy documents containing agency-specific admonishment language, and training documents containing agency-specific admonishment language.
244 Barstow Police Dep't, Eye Witness Identification Procedures Witness Admonishment (Sept. 9, 2020) (on file with authors).
245 Fullerton Police Dep't, Photo Lineup (on file with authors).
246 Fremont Police Dep't, Alameda County Double Blind Sequential Lineup Identification Form (on file with authors).
247 Clark, *supra* note 50, at 395.
248 Anderson Police Dep't, Photo Line-Up Admonishment (on file with authors).
249 Arroyo Grande Police Dep't, Photographic Line-Up Instructions (on file with authors).
250 Coronado Police Dep't, Admonition Form, Photo Array (on file with authors).

251 Yuba City Police Dep't, Photo Lineup (1990) (on file with authors).
252 Cal. Penal Code § 859.7(a)(10)(A); *see infra* Appendix E.
253 Newark Police Dep't, NPD Photo Line Up #2 (on file with authors).
254 Modesto Police Dep't, Photo Line Up Information (on file with authors).
255 City of Pinole Police Dep't, Photo Line Up Statement (2011) (on file with authors).
256 Shasta County Sheriff's Dep't, Photo Line Up Admonition (on file with authors).
257 San Jose Police Dep't, Line-up Identification Form (2004) (on file with authors).
258 Apple Valley District Police Dep't, Photographic Line-Up Admonishment and Checklist 1 (on file with authors).
259 Barstow Police Dep't, *supra* note 244.
260 Campbell Police Dep't, Photo Line-up Admonishment (2010) (on file with authors).
261 Palos Verdes Estate Police Dep't, Photographic Line-Up Admonition (2020) (on file with authors).
262 King City Police Dep't, Advice to Witness Regarding Photographic Identification (on file with authors); San Joaquin Delta College District Police Dep't, Eyewitness Identification Form, 2 (on file with authors).
263 Firebaugh Police Dep't, Photo Line Up Admonition (on file with authors); Orange Cove Police Dep't, Photo Line Up Advisement (on file with authors); Pomona Police Dep't, Photo Line-Up Admonishment (on file with authors).
264 Clearlake Police Dep't, Photographic Lineup Instructions (2019) (on file with authors).
265 Cal. Penal Code § 859.7(a)(2); *see infra* Appendix E.
266 Apple Valley Dist. Police Dep't, *supra* note 258, at 1.
267 Cal. Penal Code § 859.7(a)(11); *see infra* Appendix E.
268 *Id.*
269 *See* Chaffey Cmty College Dist. Police Dep't, Photo Lineup, Case Information Sheet (on file with authors); *see also* Vallejo Police Dep't, Photo Line-Up Admonishment Form (2019) (on file with authors).
270 Fresno State Police Dep't, Eyewitness Identification Procedure, Instructions to Investigators (on file with authors).
271 Chaffey Cmty College Dist. Police Dep't, Photo Lineup, Eyewitness Identification Form (on file with authors).
272 Clovis Police Dep't, Eyewitness Identification Procedure And California Penal Code 859.7 Compliance Check List (on file with authors).
273 Chaffey Cmty College Dist. Police Dep't, *supra* note 271.
274 *See* Chula Vista Police Dep't, Photo Line-Up Admonishment, 2 (on file with authors).
275 *Id.* at 1; Barstow Police Dep't, *supra* note 244; Clearlake Police Dep't, *supra* note 264.
276 The following agencies included admonishment forms in the appendix of their policy manual: Berkeley Police Department, CSU Fresno University Police Department, Lompoc Police Department, Santa Ana Police Department, Simi Valley Police Department, and Vallejo Police Department.
277 *See* Quigley-McBride & Wells, *supra* note 8; *see also* Wells et al., *supra* note 10.
278 *See Exoneration Detail List,* The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=CA&FilterField2=MWID&FilterValue2=8%5FMWID (last visited May 13, 2023).
279 *See* Folsom Police Dep't, *Eyewitness Identification, in* Folsom PD Policy Manual 403 (Aug. 7, 2020) (eliminating entire "Definitions" section from policy).
280 *See* UC Riverside Police Dep't, *Eyewitness Identification, in* UC Riverside PD Policy Manual 1 (Jun. 11, 2020) (eliminating sequential lineup instruction from "Photographic and Live Lineup Considerations" section of policy); *see also* Antioch Police Dep't, *Eyewitness Identification, in* Antioch PD Policy Manual 164 (Jul. 9, 2020) (removing admonishments from "Eyewitness Identification Process and Form" section of policy).
281 Selma Police Dep't, *Eyewitness Identification, in* Selma PD Policy Manual 348 (Oct. 21, 2019) (on file with authors).
282 The admonishments missing from these agencies' forms are listed as bullets (e), (g), (j), and (k) in the "Eyewitness Identification Process and Form" section of Lexipol's 2022 standard eyewitness identification policy. In outdated policies, this section only goes through (g), whereas in the updated policy, the bullets go through (k).
283 *See* Santa Maria Police Dep't, *Eyewitness Identification, in* Santa Maria PD Policy Manual 1 (Jul. 22, 2020) (replacing "should" with "may").
284 *See* Shafter Police Dep't, *Eyewitness Identification, in* Shafter PD Policy Manual 439 (Jun. 9, 2020) (adding section regarding handling of confidential recordings); *see also* Monrovia Police Dep't, *Eyewitness Identification, in* Monrovia PD Policy Manual 2 (June 22, 2022) (adding section regarding transportation of witnesses).

285 The agencies that used the language of Cal. Penal Code § 859.7 in its entirety are Glendora Police Department, Ontario Police Department, Riverside Police Department, Santa Monica Police Department, Santa Rosa Police Department, and South Gate Police Department.
286 The Department of Insurance used definitions from Cal. Penal Code § 859.7.
287 The four agencies that included § 859.7's language around certainty statements are Laguna Beach Police Department, San Mateo County Sheriff's Department, Shasta County Sheriff's Department, and Whittier Police Department.
288 The two agencies that used § 859.7's admonishment language are San Mateo County Sheriff's Department and Shasta County Sheriff's Department.
289 The two agencies that used § 859.7's language about fillers are San Mateo County Sheriff's Department and Shasta County Sheriff's Department.
290 The five agencies that used § 859.7's language on blind administration are Orange Cove Police Department, Pasadena Police Department, Shasta County Sheriff's Department, Ventura County Sheriff's Department, and West Covina Police Department.
291 The five agencies that used § 859.7's language on electronic recordings are Glendale Community College District Police Department, Glendale Police Department, Ridgecrest Police Department, Roseville Police Department, and Stanislaus County Sheriff's Department.
292 Lexipol's California Master Eyewitness Identification Policy defines only four key terms: eyewitness identification process, field identification, live lineup, and photographic lineup. Master Policy, *supra* note 145; *see infra* Appendix B.
293 Seal Beach Police Dep't, *Eyewitness Identification, in* Seal Beach PD Policy Manual, 489 (Jul. 27, 2020).
294 The 13 agencies that included attachments in their policies were Berkeley Police Department, CSU Los Angeles University Police Department, El Cajon Police Department, Fontana Unified School District Police Department, Lompoc Police Department, Monterey Police Department, Orange County Auto Theft Task Force, Palo Alto Police Department, Santa Ana Police Department, Simi Valley Police Department, Sunnyvale Department of Public Safety, Vallejo Police Department, and Woodland Police Department.
295 Woodland Police Dep't, *Attachments, in* Woodland PD Policy Manual 4-6 (Jul. 17, 2020) (on file with authors).
296 The 11 agencies that modified their Lexipol policies to include a lineup protocol directly in the text of the policy itself are Berkeley Police Department, Citrus Heights Police Department, the Department of Insurance, Hayward Police Department, Indio Police Department, Ontario Police Department, Palo Alto Police Department, Piedmont Police Department, San Mateo County Sheriff's Department, Santa Rosa Police Department, Shasta County Sheriff's Department, and South San Francisco Police Department.
297 Delano Police Dep't, *Line Ups, in* Delano PD Policy Manual, 1 (Aug. 10, 2020) (on file with authors).
298 The agencies that substituted "shall" in place of "should" throughout their policies are Ontario Police Department, Pasadena Police Department, Roseville Police Department, Santa Rosa Police Department, and South Gate Police Department.
299 The agencies that removed the "whenever feasible" language are Laguna Beach Police Department, Livermore Police Department, Ontario Police Department, South Gate Police Department, and Stanislaus County Sheriff's Department.
300 The agencies that substituted "shall" in place of "should" in the electronic recording section of its Lexipol eyewitness identification policy are Central Marin Police Authority, CSU Los Angeles University Police Department, Glendale Community College District Police Department, Glendale Police Department, Glendora Police Department, Hayward Police Department, Laguna Beach Police Department, Livermore Police Department, Ontario Police Department, Pasadena Police Department, Ridgecrest Police Department, Roseville Police Department, Santa Monica Police Department, Shasta County Sheriff's Department, South Gate Police Department, and Stanislaus County Sheriff's Department.
301 The agencies that use shall instead of should in their recording section but failed to remove the problematic recording language from elsewhere in their policies are CSU Los Angeles University Police Department, Glendale Community College District Police Department, Glendale Police Department, Glendora Police Department, Hayward Police Department, and Ridgecrest Police Department.
302 Glendale Police Dep't, *Eyewitness Identification, in* Glendale Police Dep't Policy Manual 510 (Jul. 21, 2020) (on file with authors).
303 *Id.* at 509.
304 Michael Fullan, *The Three Stories of Education Reform*, 81 Phi Delta Kappan Prof. J. 581, *3 (2000).
305 Lucie Cerna, Organisation for Economic Co-operation and Development, The Nature of Policy Change and Implementations: A Review of Different Theoretical Approaches 18 (2013).
306 Ase Gornitzka et al., *Implementation Analysis in Higher Education, in* Reform and Change in Higher Education: Analyzing Policy Implementation 35-56, 42 (Springer Dordrecht, 2005).
307 Leslie Stevens & Ken Wallentine, *Eyewitness Identification: Best Practices & Strategies to Prevent Wrongful Convictions,* Lexipol, at 00:00-:00:30 (Jun. 14, 2016) https://info.lexipol.com/eyewitness-ID-ty.

308 *Id.* at 38:15-41:00.
309 *Id.*
310 Eagly & Schwartz, *supra* note 116 at 933; *see supra* text accompanying notes 115-143 for a summary of Eagly and Schwartz's findings. As mentioned by Eagly and Schwartz, Lexipol claims to supply their customers with "policy guides" that supposedly include general background information about their policies. However, none of the 174 Lexipol-subscribing police departments surveyed by the scholars seemed to possess any of these guides.
311 Cal. Commission on Peace Officer Standards and Training, *Learning Domain 16 Search and Seizure, in* Basic Course Workbook Series Student Materials (Version 4.8 6-5 2017) (provided by California Highway Patrol, Orange County Sheriff's Department, Pacific Grove Police Department, and San Jose Police Department) (on file with authors).
312 *Id.*; 11 Cal. Code Regs. § 1005.
313 Cal. Commission, *supra* note 311.
314 *Id.* at 5-6.
315 Cal. Penal Code § 859.7(a)(10).
316 *Id.*
317 *Id.*
318 S.B. 923, 2017-2018 Leg., Reg. Sess. (Cal 2018).
319 *See* Cathedral City Police Dep't, Cathedral City Police Dep't Photographic Lineup Training (Jan. 2018) (on file with authors).
320 *Id.* at *10.
321 *Id.*
322 Cal. Penal Code § 859.7(a)(5).
323 *See supra* text accompanying notes 43-49 (the wrongful conviction of a California resident based on improper fillers that unduly stood out due to differences in facial hair).
324 Cal. Penal Code § 859.7(a)(4)(C).
325 E-mail from Valerie Reyna, Administrative Supervisor of the Hollister Police Department, to Northern California Innocence Project (July 30, 2020, 17:00 PST) (on file with authors).
326 E-mail from Police Department Coordinator, Apple Valley District Police Department, to all officers (names redacted) (July 28, 2020) (on file with authors).
327 *Id.*
328 Lexipol, *Knowledge Management System Electronic Policy Acknowledgement, in* Eyewitness Identification (July 23, 2020) (on file with authors) (provided by the Fortuna Police Department).
329 Memorandum from the Irvine Police Department on Eyewitness Identifications to officers (undated) (on file with authors).
330 Irvine Police Dep't, Activity Detail and Student Roster (December 2019) (on file with authors).
331 Huntington Beach Police Dep't, Eyewitness Identification: Field Show-Ups & Photo Lineups (Jan. 2020) (on file with authors).
332 *Id.* at *4.
333 City of Eureka, General Order 2019-0003 (December 20, 2019) (on file with authors); Cal. State Univ., Los Angeles Dep't of Public Safety, Dep't Order IV-44, Eyewitness Identification (August 13, 2020) (on file with authors).
334 City of Eureka, *supra* note 333.
335 Cal. State Univ., *supra* note 333.
336 The California Innocence Project, The California Innocence Project: Eyewitness Identification (undated) (on file with authors) (provided by California State University, Los Angeles Department of Public Safety).
337 Cal. State Univ., *supra* note 333.
338 *See* Gornitzka, et al., *supra* note 306, at 42; *see supra* text accompanying notes 304-06 for discussion on reculturing offices after policy changes.
339 Manson v. Brathwaite, 432 U.S. 98 (1977).
340 *Id.* at 114.
341 *Id.*
342 *Id.*
343 *Id.* at 104 (citing Stovall v. Denno, 388 U.S. 293, 302 (1967)).
344 Manson, 432 U.S. at 114.
345 *See* Wells et al., *supra* note 40, at 625.
346 *See* Brian Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence,* 14 L. & Human Behav. 185, 190 (1990); Wells et al., *supra* note 40, at 619-21.
347 *See* Henderson, 27 A.3d at 896-908.

348 Douglas W. Otto, *Lineups and Identification, in* California Criminal Law Procedure and Practice 586 (2023).
349 Innocence Project, Identification: In-Court and Out-of-Court Identifications (July 19, 2012), https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdf.
350 Master Policy, *supra* note 145; *see infra* Appendix B.
351 Henderson, 27 A.3d at 896.
352 Omnibus Bill Proposal from California Innocence Coalition to Senate Public Safety Commission (Jan. 2022) (on file with authors); *see infra* Appendix F.
353 *Id.*
354 E-mail from Melissa O'Connell, NCIP Staff Attorney & Policy Liaison, to Stella Choe, Committee Counsel, California Senate Public Safety Committee (January 28, 2022, 16:00 PST) (on file with authors).
355 Email from Stella Choe, Committee Counsel, California Senate Public Safety Committee to Melissa O'Connell, NCIP Staff Attorney & Policy Liaison (February 9, 2022, 13:21 PST) (on file with authors).
356 There is some precedent for this. The Connecticut Supreme Court held that in cases in which identity is an issue, "in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court." The state must request permission before offering a first-time in-court identification, and the trial court may only grant permission if there is no factual dispute as to identity or the ability of the eyewitness to identify the defendant is not in dispute. The court made its decision to exclude many first-time in-court identifications because the court was "hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." State v. Dickson, 141 A.3d 810 (Conn. 2016); *see also* Commonwealth v. Crayton, 21 N.E.3d 157 (Mass. 2014) ("Where an eyewitness has not participated before trial in an identification procedure, we shall treat the in-court identification as an in-court showup, and shall admit it in evidence only where there is 'good reason' for its admission.").
357 Lemke, 11 Cal.5th 644 (2021).
358 CALCRIM No. 315.
359 Brief for the Innocence Project, the California Innocence Project, the Project for the Innocent at Loyola Law School, and the Northern California Innocence Project as Amicus Curiae Supporting Appellant, at 12, People v. Lemcke, 11 Cal.5th 644 (2021) (No. S250108).
360 Lemcke, 11 Cal.5th at 647.
361 *Id.*
362 *Id.*
363 *Id.* at 648.
364 *Id.* Under CALCRIM No. 315, jurors are further instructed on six factors they may consider when evaluating the significance of the witness's certainty in the identification. These factors include (1) the time between the event and the expression of certainty, (2) whether the witness expressed certainty at an identification made before trial, (3) if the witness expressed confidence in making an identification prior to making an identification, (4) how confident the witness was in their identification, (5) whether the witness received information before or after the identification increasing their level of confidence, and (6) whether police used procedures that increased a witness's level of confidence about an identification.
365 *See* discussion *supra* Section III.A.4.
366 John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psych. Sci. in the Pub. Int. 10, 49 (2017).
367 *Id.*
368 Travis M. Seale-Carlisle et al., *New Insights on Expert Opinion About Eyewitness Memory Research,* Perspectives on Psych. Sci. (forthcoming).
369 Henderson, 27 A.3d 872.
370 *Id.* at 920.
371 *Id.*
372 Eagly & Schwartz, *supra* note 116, at 939.
373 Wells, *supra* note 29, at 643.

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