

RESOLUTION 01-13-2010

DIGEST

Criminal Law: Procedures for Eyewitness Identifications

Adds Penal Code sections 686.3 and 13519.10 to develop uniform guidelines to reduce errors in eyewitness identifications.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Identical to resolution 03-04-2007, which was approved.

Reasons:

This resolution adds Penal Code sections 686.3 and 13519.10 to develop uniform guidelines to reduce errors in eyewitness identifications. This resolution should be approved in principle because uniform guidelines designed to reduce errors in eyewitness identifications will reduce erroneous convictions of innocent persons.

Eyewitness identification can be a very unreliable process. Lineup procedures can be suggestive, and can have the effect of contaminating a witness’s recollection and testimony. Scientific research has shown that sequential lineups are less suggestive and more reliable than simultaneous or field lineups. Research has also shown that lineups are more reliable when the witness is told that it is possible that the perpetrator is not among those presented in the lineup, and when the person conducting the lineup does not know who the suspect is. This resolution incorporates these and other protections for the integrity of the eyewitness identification process.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code sections 686.3 and 13519.10 to read as follows:

- 1 §686.3
- 2 (a) On or before July 1, 2011, the Department of Justice, in conjunction with local
- 3 law enforcement agencies, prosecutors, and defense attorneys, including representatives of
- 4 the California District Attorneys Association, the California Public Defenders Association
- 5 and the California Attorneys for Criminal Justice, shall develop guidelines for policies and
- 6 procedures with respect to collection and handling of eyewitness evidence in criminal
- 7 investigations by all law enforcement agencies operating in California. These guidelines
- 8 shall be developed to ensure reliable and accurate suspect identifications. All law
- 9 enforcement agencies shall adopt the guidelines by January 1, 2012. In order to ensure
- 10 reliability and accuracy, the guidelines developed by the Department of Justice shall
- 11 comply with, at a minimum, the following requirements:

12 (1) Prior to conducting the identification procedure, and as close in time to the
13 incident as possible, the eyewitness shall complete a standardized form describing the
14 perpetrator of the offense.

15 (2) The investigator conducting the identification procedure shall be a person who
16 is not aware of which person in the identification procedure is suspected as the perpetrator
17 of the offense.

18 (A) Individuals and photos used in an identification procedure shall be presented
19 sequentially, not simultaneously. However, when it is not practicable for the investigator to
20 be a person who is not aware of which person in the identification procedure is suspected
21 as the perpetrator of the offense, then the following shall apply:

22 (i) The lineup will be presented simultaneously, not sequentially.

23 (ii) The investigator will state in writing the reason that the presentation of the
24 lineup was not made by a person who was not aware of which person in the identification
25 procedure was suspected as the perpetrator of the offense.

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

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

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

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

32 (4) If the identification procedure is being done sequentially, rather than
33 simultaneously, then, prior to the identification procedure, an eyewitness shall also be
34 instructed of all of the following:

35 (A) Each photograph or person shall be viewed one at a time.

36 (B) The photographs or persons shall be displayed in random order.

37 (C) The photographs will be presented in shuffled envelopes.

38 (D) The eyewitness should take as much time as needed in making a decision about
39 each photograph or person before moving to the next one.

40 (E) All photographs or persons will be shown to the eyewitness, even if an
41 identification is made before all have been viewed.

42 (5) An identification procedure shall be composed so that the fillers generally fit
43 the description of the person suspected as the perpetrator and, in the case of a photo lineup,
44 the photograph of the person suspected as the perpetrator should resemble his or her
45 appearance at the time of the offense and does not unduly stand out.

46 (6) If the eyewitness has previously viewed an identification procedure in
47 connection with the identification of another person suspected of involvement in the
48 offense, the fillers in the lineup in which the person suspected as the perpetrator
49 participates shall be different from the fillers used in any prior lineups.

50 (7) At least eight fillers shall be included in a photo lineup and at least four fillers
51 shall be included in a live lineup, in addition to the person suspected as the perpetrator.

52 (8) In a photo lineup, no writings or information concerning any previous arrest of
53 the person suspected as the perpetrator shall be visible to the eyewitness.

54 (9) In a live lineup, any identification actions, such as speaking or making gestures
55 or other movements, shall be performed by all lineup participants.

56 (10) All live lineup participants shall be out of the view of the eyewitness prior to
57 the beginning of the identification procedure.

58 (11) Only one suspected perpetrator shall be included in any identification
59 procedure.

60 (12) All witnesses shall be separated when viewing an identification procedure.

61 (13) Nothing shall be said to the eyewitness regarding the position of the person
62 suspected as the perpetrator during the identification procedure.

63 (14) Nothing shall be said to the eyewitness that might influence the eyewitness's
64 selection of the person suspected as the perpetrator.

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

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

69 (B) No information concerning the identified person shall be given to the
70 eyewitness prior to or after obtaining the eyewitness's statement of confidence level.

71 (16) A written record of the identification procedure shall be made that includes, at
72 a minimum, all of the following:

73 (A) All identification and nonidentification results obtained during the
74 identification procedure, signed by the eyewitness.

75 (B) A statement of the eyewitness's own words regarding how certain he or she is
76 regarding the accuracy of his or her identification, signed by the eyewitness.

77 (C) The names of all persons present at the identification procedure.

78 (D) The date, time, and location of the identification procedure.

79 (E) If the identification procedure was conducted sequentially, the order in which
80 the photographs or persons were displayed to the eyewitness.

81 (F) Color copies of all photographs used in a photo lineup.

82 (G) Identification information and the sources of all photographs used in a photo
83 lineup.

84 (H) An electronic recording that includes both audio and visual representations of
85 the identification procedures that includes all persons who participated in the live lineup
86 and the reactions of the witnesses and the statements of the investigator.

87 (b) (1) Field showups of a suspect are unnecessarily suggestive and are disallowed,
88 except under any of the following circumstances:

89 (A) The witness is gravely injured and may not survive to participate in an
90 alternative procedure.

91 (B) (i) There is no probable cause for arrest without a field showup identification
92 and only a single witness will be making the identification.

93 (ii) There is no probable cause for arrest without a field showup identification and
94 there are multiple witnesses, however each witness shall be shown the suspect separately.
95 The field showup shall cease when the first identification is made by a witness. All other
96 identification procedures must be in compliance with subdivision (a) of this section.

97 (iii) If there is no probable cause for arrest without a field showup identification,
98 the suspect shall be given the opportunity to waive probable cause for the arrest and accept
99 a prompt identification procedure in compliance with this statute in lieu of a field showup.
100 Evidence of the waiver is inadmissible and shall be immune from prosecutorial comment.

101 (2) Whenever practicable and safe, during a field showup a witness should view the
102 suspect while the suspect is not restrained by handcuffs or an officer and while the suspect
103 is not seated in the squad car.

104 (3) A field showup shall be electronically recorded, unless it is shown to have been
105 impracticable.

106 (4) During the field showup, the eyewitness must make a contemporaneous signed
107 statement or electronic recording regarding any identification.

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

109 (1) "Eyewitness" means a person whose identification of another person may be
110 relevant in a criminal investigation.

111 (2) "Photo lineup" means a procedure in which an array of photographs, including a
112 photograph of the person suspected as the perpetrator of an offense and additional
113 photographs of other persons not suspected of the offense, is displayed to an eyewitness for
114 the purpose of determining whether the eyewitness is able to identify the suspect as the
115 perpetrator.

116 (3) "Live lineup" means a procedure in which a group of persons, including the
117 person suspected as the perpetrator of an offense and other persons not suspected of the
118 offense, is displayed to an eyewitness for the purpose of determining whether the
119 eyewitness is able to identify the suspect as the perpetrator.

120 (4) "Investigator" means the person conducting the live or photo lineup.

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

122 (6) "Filler" means either a person or a photograph of a person who is not suspected
123 of an offense and is included in an identification procedure.

124 (7) A field showup means a presentation of a single suspect to a witness or
125 witnesses.

126 (d) When an identification procedure is composed or conducted in violation of any
127 of the provisions of this statute, the court shall give the jury a limiting instruction regarding
128 the reliability of the identification substantially similar to the following: Specific
129 procedures are in place to increase the reliability of eyewitness identifications; jurors may
130 consider evidence that police officers did not follow such procedures or failed to adopt
131 such procedures when determining whether an eyewitness was mistaken in identifying the
132 defendant as the perpetrator.

133

134 §13519.10

135 The Commission on Peace Officer Standards and Training shall implement, on or
136 before January 1, 2012, a course or courses of instruction for the required training of all
137 peace officers on the methods and technical aspects of the eyewitness identification
138 practices and procedures referenced in Section 686.3.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: In California there are no uniform procedures governing the use of an eyewitness to identify persons suspected of committing crimes. The only limitation is that the identification procedure must have been fair in the Constitutional sense. Testimony related to eyewitness identification is made admissible by case law and has not been codified.

This Resolution: This resolution requires law enforcement agencies to adopt written policies governing the use of an eyewitness to identify a person suspected of committing a crime. The policies apply to practices under which an eyewitness identifies a suspect upon viewing him or her in person, such as in a line-up or field show-up, and to practices under which an eyewitness identifies a suspect upon viewing a representation of the suspect, as by viewing a photograph array. The policies must be designed to reduce the potential of erroneous identifications by eyewitnesses.

The Problem: The problem is well known - innocent persons are convicted of crimes they did not commit based in large part upon an identification made by a crime victim or witness. Scientific research has identified the factors that contribute to eyewitness identification error and has identified changes in procedure which must be made to reduce the chance of erroneous identification. This resolution causes the justice system to change by adopting procedures empirically determined to improve the likelihood of accurate eyewitness identifications.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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