

SPECIAL DIRECTIVE 19-12

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM:  JOSEPH P. ESPOSITO  
Chief Deputy District Attorney

SUBJECT: SENATE BILL 923 – EYEWITNESS IDENTIFICATION  
PROCEDURES (PENAL CODE § 859.7)

DATE: DECEMBER 19, 2019

On January 1, 2020, Penal Code (PC) § 859.7<sup>1</sup> goes into effect. This section sets mandatory guidelines for law enforcement and prosecutorial entities to follow when conducting eyewitness identifications. The guidelines provide standardized procedures for conducting live and photographic line-ups. Notably, the guidelines do not apply to field show-up procedures. The Office has been offering training on the guidelines to local law enforcement agencies. A summary of these guidelines has been distributed at law enforcement trainings and is provided for reference here as Attachment A.

Although adherence to the guidelines is mandated under the statute, noncompliance goes to the weight of the identification, not the admissibility, in criminal proceedings so long as the procedures otherwise meet constitutional standards. (PC § 859.7(d); *Simmons v. U.S.* (1968) 390 U.S. 377, 384.) Deputies shall consider adherence and nonadherence to the guidelines when analyzing eyewitness identifications for charging purposes.

Effective January 1, 2020, Legal Policies Manual § 2.04 shall be amended to state:

A deputy shall be satisfied there is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime(s) to be charged. *When an eyewitness identification involves a live or photographic lineup, adherence or nonadherence to the requirements of PC § 859.7 shall be considered when evaluating the weight of that identification.*

(LPM § 2.04. Added language in italics.)

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Attachment

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<sup>1</sup> PC § 859.7 was signed into law in 2018 as Senate Bill 923.

## ATTACHMENT A – Summary for Law Enforcement (by DDA John Colello – 12/19/2019)

### SB 923 / PC 859.7 - Eyewitness Identification (operative 1/1/2020)

#### Background:

- Standardized eyewitness identification protocols are needed
- Designed to enhance the investigative process, to properly identify suspects, and to exonerate those persons not involved
- Policies and procedures shall ensure accuracy and reliability in identification procedures (photographic arrays and live line-ups)
- Law does **not** apply to field show-ups
- Law applies to all law enforcement agencies and prosecutorial entities

#### Mandates:

- Both an **audio and video** recording **shall** be made of the entire identification procedure
- When it is *not* feasible to make both an **audio and video** recording, an audio recording (alone) may be used
- When audio recording *without* video is used, the investigator shall state *in writing* the reason
- Whether or *not* it is feasible to make both an audio and video recording shall be determined on a *case-by-case* basis
- The eyewitness shall provide the suspect's description after the crime and *before* any identification procedure
- **“Blind”** or **“blinded”** administration **shall** be utilized
  - **“Blind”** means the investigator does *not* know the identity of the suspect
  - **“Blinded”** means the investigator may know who the suspect is, but does *not* know where the suspect, or his/her photograph, has been placed or positioned in the identification procedure (via an automated computer program, the sequential “folder shuffle method” or “any other procedure that achieves neutral administration...”)

- When “blind” administration is *not* used, the investigator shall state *in writing* the reason
- Before any identification procedure, an eyewitness shall be instructed:
  - **The suspect may or may not be among the persons or photographs shown**
  - **Not to feel compelled to make an identification**
  - **An identification, or lack thereof, will not end the investigation**
- “Filler” photographs or persons used in a line-up must generally fit the eyewitness’ description of the suspect
- The suspect’s photograph should resemble his/her appearance at the time of the crime and cannot unduly stand out
- In a photographic lineup, arrest or booking numbers/writings shall not be visible
- Only one suspect/suspect photograph shall be used in any identification procedure
- All eyewitnesses shall be separated when viewing an identification procedure
- Nothing shall be said / done that might influence the eyewitness’ identification
- If the eyewitness identifies a suspect, **all** of the following shall apply:
  - The investigator shall immediately inquire as to the **confidence level** and record in writing, *verbatim*, what the eyewitness says
  - Information concerning the identified person shall *not* be given to the eyewitness prior to obtaining the eyewitness’ confidence level and documenting the *exact* words of the eyewitness
  - The investigator shall *not* validate or invalidate the eyewitness’ identification

\*\*\* Assuming federal constitutional standards are met, eyewitness identifications will still be **admissible** as **relevant evidence** despite non-compliance [PC 859.7(d)]. Possible remedies include broad cross-examination, defense identification experts, or pinpointed jury instructions.