

Chapter 977: “I think that’s him, but I’m not sure” Should Not Be Enough to Put Someone in Jail for Life

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Code Sections Affected

Penal Code § 859.7 (new).
SB 923 (Wiener); 2018.

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I. INTRODUCTION

Francisco “Franky” Carrillo missed the birth of his son, the death of his father, and twenty years of his life because of a faulty eyewitness testimony that put him behind bars in 1991.¹ On January 21, 1991, a drive-by shooting ended Donald Sarpy’s life.² During the investigation of the shooting, law enforcement coerced eyewitnesses to make false identifications of Mr. Carrillo.³ Those faulty identifications led to Franky Carrillo’s murder conviction.⁴

During the investigation of Sarpy’s homicide, law enforcement brought six teenage boys into the station as eyewitnesses.⁵ Officer Craig Ditsch only showed photos to one eyewitness—Scott Turner.⁶ Officer Ditsch first showed Mr. Turner a “gang book” with 140 Latino teenagers.⁷ At the time, Mr. Carrillo was a Latino teenager.⁸ Mr. Turner started randomly selecting several photos.⁹ At each selection, Officer Ditsch told Mr. Turner the photo he selected “could not be the suspect.”¹⁰ Mr. Turner eventually selected Mr. Carrillo’s photo, and according to Officer Ditsch—the fifteen-year-old Scott Turner had just made the “right choice.”¹¹ Officer Ditsch’s leading confirmation sealed Mr. Carrillo’s fate.¹² Mr. Turner told the other five eyewitnesses, including the victim’s son, Dameon Sarpy, that Mr. Carrillo was the first photo in the lineup.¹³ Dameon Sarpy later admitted he relied on Mr. Turner’s word to identify Mr. Carrillo.¹⁴ A jury convicted Mr. Carrillo of murder, and the judge sentenced him to thirty years to

1. TEDx Talks, *Justice for All: Francisco Carrillo Jr. at TEDxSonomaCounty*, YOUTUBE (June 25, 2014), <https://www.youtube.com/watch?v=R5hyzeJd-Pc> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. Carrillo v. Cty. of L.A., 798 F. 3d 1210, 1217 (9th Cir. 2015).

5. *Id.* at 1216.

6. *Id.*

7. *Id.*

8. Abby Sewell, *L.A. County to Pay \$10 Million to Man Whose Murder Conviction Was Overturned*, L.A. TIMES (July 19, 2016, 2:00 PM), <http://www.latimes.com/local/lanow/la-me-ln-francisco-carrillo-settlement-20160719-snap-story.html> (on file with *The University of the Pacific Law Review*).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Franky Carrillo*, NAT’L REGISTRY OF EXONERATIONS (July 20, 2016), <https://www.law.umich.edu/spacial/exoneration/Pages/casedetail.aspx?caseid=3090> (on file with *The University of the Pacific Law Review*).

life plus another life sentence in jail.¹⁵

Mr. Carrillo is just one example of how faulty eyewitness identification has led to wrongful convictions.¹⁶ In the case of Andrew Wilson, an officer prompted an eyewitness to make a particular identification.¹⁷ That officer, Richard Marks, asked the eyewitness, while pointing directly at Mr. Wilson, “what about him?”¹⁸ Or the case of Ronald Cotton, where an officer responded, “you did great” after an eyewitness asked if she did “okay” in picking Mr. Cotton as the suspect.¹⁹

Consider also the case of Thomas McGowan, who was incorrectly convicted for rape based on a highly suggestive photo and live lineups.²⁰ During the first live lineup, rather than just one suspect being present, three of the men in the lineup were suspects, and the other three men were fillers.²¹ Despite the witness not picking any of the individuals, including Mr. McGowan, an officer placed Mr. McGowan’s picture in front of the witness for a photo lineup.²² In that lineup of six photos, two of the photos were photocopies, one was in black and white, and one was labeled Garland Police Department—while the other three were labeled Richardson Police Department.²³ The rape occurred in Richardson.²⁴

While courts later overturned all of the convictions based on DNA evidence, Mr. Wilson was behind bars for thirty-two years, Mr. Cotton for ten, and Mr. McGowan for twenty-three.²⁵

The California Innocence Project helped overturn twenty-three convictions based on eyewitness testimony.²⁶ DNA evidence helped overturn fifteen of those cases.²⁷ In the wake of previous unsuccessful attempts, Chapter 977 is the California Legislature’s attempt to stop convictions based on improper

15. TEDx Talks, *supra* note 1.

16. See *23 Years After Improper Photo Lineup Led to Wrongful Conviction, DNA Proves Thomas McGowan’s Innocence in Dallas County Rape*, INNOCENCE PROJECT (Apr. 15, 2018), <https://www.innocenceproject.org/23-years-after-improper-photo-lineup-led-to-wrongful-conviction-dna-proves-thomas-mcgowans-innocence-in-dallas-county-rape/> (on file with *The University of the Pacific Law Review*) (noting how an improper eyewitness identification led to Mr. McGowan’s false conviction).

17. Marisa Gerber, ‘You Took 32 Years of My Life’: Freed Man Accuses LAPD Detective of Manipulating Eyewitness ID, L.A. TIMES (July 5, 2018, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-wrongful-conviction-lawsuit-20180705-story.html> (on file with *The University of the Pacific Law Review*).

18. *Id.*

19. Gretchen Gavett, *Eyewitness Accounts Still Prove Problematic in the Criminal Justice System*, PBS (Aug. 8, 2011), <https://www.pbs.org/wgbh/frontline/article/eyewitness-accounts-still-prove-problematic-in-the-criminal-justice-system/> (on file with *The University of the Pacific Law Review*).

20. *23 Years After Improper Photo Lineup Led to Wrongful Conviction, DNA Proves Thomas McGowan’s Innocence in Dallas County Rape*, *supra* note 16.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; Gerber, *supra* note 17; Gavett, *supra* note 19.

26. Jazmine Ulloa, *To Prevent Wrongful Convictions, California Considering New Eyewitness Lineup Standards*, L.A. TIMES (Jan. 24, 2018), <http://www.latimes.com/politics/la-pol-ca-california-eyewitness-police-standards-20180124-story.html> (on file with *The University of the Pacific Law Review*).

27. *Id.*

administration of eyewitness identification procedures.²⁸

II. LEGAL BACKGROUND

Section A discusses the relevant case law regarding eyewitness identification procedures.²⁹ Section B addresses pertinent statutes to criminal proceedings in California.³⁰ Section C surveys three different states' statutes on eyewitness identification procedures.³¹ Section D identifies California counties that adopted more stringent eyewitness identification procedures.³² Section E lays out the different eyewitness procedures throughout the United States and their level of effectiveness within police departments.³³

A. Case Law Regarding Eyewitness Identification Procedures

The Fourteenth Amendment obligates states to give defendants and victims the same rights—namely, due process rights to protect against the unfair denial of life, liberty, and property.³⁴ The Sixth Amendment affords defendants the right to a fair and speedy trial, the right to effective counsel, and the right to be confronted with the witnesses against them.³⁵

The Supreme Court finds improperly administered eyewitness identification procedures can deny a defendant his or her right to a fair trial.³⁶ In response, the Supreme Court developed a test to determine the propriety of law enforcement procedures used to elicit eyewitness testimony.³⁷ There are two different identification procedures: the pretrial and the in-trial.³⁸ While Chapter 977 only addresses pretrial identifications,³⁹ the Supreme Court created a single test to determine the admissibility for both identification procedures.⁴⁰

In *Mason v. Brathwaite*, the Supreme Court rejected the per se admissibility standards that made out-of-court eyewitness testimony inadmissible if the identification was “obtained through unnecessarily suggestive confrontation

28. Times Editorial Board, *Eyewitness Testimony Is Often Unreliable and Police and Lawmakers Know It*, L.A. TIMES (May 8, 2018, 4:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-eyewitness-testimony-20180508-story.html> (on file with *The University of the Pacific Law Review*).

29. *Infra* Part II.A.

30. *Infra* Part II.B.

31. *Infra* Part II.C.

32. *Infra* Part II.D.

33. *Infra* Part II.E.

34. U.S. CONST. amend. XIV, § 1.

35. U.S. CONST. amend. VI.

36. *United States v. Wade*, 388 U.S. 218, 226–27 (1967).

37. *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977).

38. *Id.* at 124 (Marshall, J., dissenting).

39. CAL. PENAL CODE § 859.7(a) (enacted by Chapter 977).

40. *Manson*, 432 U.S. at 124 (Marshall, J., dissenting).

procedures.”⁴¹ The Court considered the per se standard as: (1) too stringent in restricting reliable and relevant evidence;⁴² (2) not an effective deterrence for improper law enforcement eyewitness procedures;⁴³ and (3) hindering the administration of justice.⁴⁴

The Court instead adopted the totality of the circumstances standard, which relies heavily on the reliability of the identification procedures.⁴⁵ The standard first analyzes whether “the procedures used were impermissibly suggestive.”⁴⁶ Courts typically assume for the sake of argument the first prong is met, leading courts to analyze the second prong.⁴⁷ The second prong examines the witness’ opportunity to view the criminal “at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”⁴⁸ Finally, if the court finds the evidence to be sufficiently reliable under the two-prong test, the evidence is permissible—“even if the identification was made pursuant to an unnecessarily suggestive procedure.”⁴⁹ However, if the identification was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,” then the evidence is inadmissible.⁵⁰

B. Relevant California Criminal Statutes

Subsection 1 discusses what jurors must consider when assessing witness credibility.⁵¹ Subsection 2 addresses the burden of proof used in criminal trials.⁵²

1. Evidence Code Section 780

Pursuant to the California Evidence Code, jurors may consider more than just the words the witness says on the stand.⁵³ Jurors may consider a witness’ demeanor, character, bias, motive, interest, honesty, veracity, attitude, and “[t]he extent of his capacity to perceive, to recollect, or to communicate any matter

41. *Id.* at 110.

42. *Id.*

43. *Id.* at 112.

44. *Id.* at 112–13.

45. *Id.* at 110.

46. *United States v. Love*, 746 F.2d 477, 478 (9th Cir. 1984).

47. *Id.*

48. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

49. *United States v. Bagley*, 772 F.2d 482, 493 (9th Cir. 1985).

50. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

51. *Infra* Part II.B.1.

52. *Infra* Part II.B.2.

53. CAL. EVID. CODE § 780 (West 2018).

about which he testifies.”⁵⁴ These considerations are meant to enable jurors to make their own determinations.⁵⁵ For example, if an eyewitness has cataracts and claims to have seen the defendant from 300 yards away, the jury can take into account that witness’ eyesight.⁵⁶

2. Penal Code Section 1096

In criminal cases, the California Penal Code states the burden of proof falls upon the prosecution to prove the defendant is guilty of the charged crime beyond a reasonable doubt.⁵⁷ This standard allows the jury to convict the defendant only if the jurors do not have any reasonable doubts about the defendant’s guilt.⁵⁸ Further, the judge or jury must presume the defendant is innocent until the prosecution meets its burden.⁵⁹

C. Other States’ Eyewitness Procedures

In order to contextualize how other states approach identification procedures, subsection 1 describes the statutory requirements for the Connecticut eyewitness identification procedure,⁶⁰ subsection 2 explores the Florida statute,⁶¹ and subsection 3 analyzes the Ohio statute.⁶²

1. Connecticut General Statutes Section 54-1p

Section 54-1p of the Connecticut General Statutes requires law enforcement to conduct photo lineups or live lineups so the investigator does not know the identity of the suspect.⁶³ It also requires law enforcement to use one of three methods during photo or live lineups, which include: (1) the folder-shuffle method, (2) a computer program, or (3) comparable methods that require the person conducting the procedure not to know which photograph the witness is viewing.⁶⁴ Further, law enforcement must give eyewitnesses several instructions prior to the procedure.⁶⁵ For example, they must inform each witness of the

54. *Id.* § 780(a)–(f).

55. *See id.* § 780 (allowing courts and jury members to consider “any matter that has any tendency in reason to prove or disprove the truthfulness of [a witness’] testimony”).

56. *See id.* § 780(c) (providing that jurors may consider an eyewitness’ capacity to perceive the matter on which the witness is testifying).

57. CAL. PENAL CODE § 1096 (West 2018).

58. *Id.*

59. *Id.*

60. *Infra* Part II.C.1.

61. *Infra* Part II.C.2.

62. *Infra* Part II.C.3.

63. CONN. GEN. STAT. ANN. § 54-1p (West 2018).

64. *Id.* § 54-1p(c)(2).

65. *Id.* § 54-1p(c)(3).

following: the importance of excluding innocent people;⁶⁶ that the individual may look different due to changed features, such as facial hair;⁶⁷ that he or she shall not be compelled to make an identification;⁶⁸ and that he or she should feel free to take as much time as necessary to make a decision.⁶⁹ During the procedure, the law enforcement cannot have any writing or information about the perpetrator's previous arrest record visible to the eyewitness⁷⁰ nor say anything to the witness about the photo lineup.⁷¹

2. Florida Statute Section 92.70

Florida Statutes section 92.70 also requires the use of an independent administrator, a computer program, the folder system, or another neutral administration procedure.⁷² Additionally, each eyewitness must sign a document affirming his or her understanding of the process.⁷³ Lastly, the statute supports creating educational material for law enforcement for proper lineup procedures.⁷⁴

3. Ohio Revised Code Annotated Section 2933.83

Ohio's section 2933.83 focuses primarily on the impact of non-compliance with proper procedures.⁷⁵ For example, a judge may consider the fact that one party failed to comply with eyewitness procedures when adjudicating suppression motions.⁷⁶ Further, the statute allows law enforcement to adopt additional lineup procedures.⁷⁷ However, the scientific community must consider any additional procedure effective.⁷⁸

D. California Counties' Identification Procedures

Four counties in California: Santa Clara, San Francisco, Alameda, and Contra Costa, have implemented procedures similar to Chapter 97.⁷⁹ The law enforcement agencies in the remaining fifty-four California counties have not

66. *Id.* § 54-1p(c)(3)(B).

67. *Id.* § 54-1p(c)(3)(C).

68. *Id.* § 54-1p(c)(3)(E).

69. *Id.* § 54-1p(c)(3)(F).

70. *Id.* § 54-1p(c)(8).

71. *Id.* § 54-1p(c)(12).

72. FLA. STAT. ANN. § 92.70(3)(a) (West 2018).

73. *Id.* § 92.70(3)(b).

74. *Id.* § 92.70(5).

75. OHIO REV. CODE ANN. § 2933.83(C) (West 2018).

76. *Id.* § 2933.83(C)(1).

77. *Id.* § 2933.83(D).

78. *Id.* § 2933.83(D).

79. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 923, at 3 (Apr. 10, 2018) [hereinafter SENATE PUBLIC SAFETY COMMITTEE ANALYSIS].

adopted the scientifically proven eyewitness identification procedures.⁸⁰ Law enforcement agencies in these remaining counties “generally conduct lineups by using a single-blind, simultaneous procedure with high administrator-witness contact.”⁸¹

E. National Eyewitness Identification Procedures

A national survey of eyewitness identification procedures asked 567 law enforcement agencies to select all methods applying to photo lineup identification documentation. The survey revealed 20.7% use video recording, 20.9% use audio, 48.6% use a written report by the administrator, 56.1% said they use a written report by another, 5.0% said “other,” and 1.4% did not use documentation.⁸²

III. CHAPTER 977

The catalyst behind Chapter 977 is that in California, “eyewitness misidentification played a role in 12 out of 13 DNA-based exonerations in the state.”⁸³ Not only does this cause injustice to a wrongly convicted person, but it also allows the actual criminal to go unpunished and free in society.⁸⁴ Chapter 977 aims to prevent these dual harms by requiring all law enforcement agencies and prosecutorial entities to use specific enumerated procedures when conducting photo and live lineups with eyewitnesses.⁸⁵

Before the law enforcement investigator allows witnesses to view photos or potential suspects for identification, “the eyewitness shall provide the description of the perpetrator of the offense.”⁸⁶ The individual conducting the identification procedure must use “blind” or “blinded administration.”⁸⁷ Blind administration occurs when the individual conducting the identification process “does not know the identity of the suspect.”⁸⁸ Blinded administration is when the person conducting the identification process may know who the suspect is; however,

80. See *id.* (noting how four counties have adopted eyewitness procedures similar to Chapter 977); *California Counties by Population*, CALIFORNIA DEMOGRAPHICS, https://www.california-demographics.com/counties_by_population (last visited Aug. 31, 2018) (on file with *The University of the Pacific Law Review*) (stating how there are fifty-eight counties in California).

81. Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator—Witness Contact on Eyewitness Identification Accuracy*, 89 J. OF APPLIED PSYCHOL. 1106, 1110 (2004).

82. POLICE EXEC. RES. FORUM, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES 54 (2013), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/242617.pdf> (on file with *The University of the Pacific Law Review*).

83. 2018 Cal. Stat. ch. 977, § 1(b).

84. *Id.* § 1(c).

85. CAL. PENAL CODE § 859.7(a) (enacted by Chapter 977).

86. *Id.* § 859.7(a)(1).

87. *Id.* § 859.7(a)(2).

88. *Id.* § 859.7(c)(1).

they do not know where the suspect's photo is in the lineup.⁸⁹ If the investigator does not use blind administration, he or she must write a record explaining why.⁹⁰

Before the photo or live lineup, the investigator must make three statements to the eyewitness.⁹¹ First, the perpetrator of the crime may or may not be one of the persons in the identification procedure.⁹² Second, the eyewitness should not feel obligated to choose a person to identify.⁹³ Finally, any identification (or lack thereof) will not end the investigation.⁹⁴

Chapter 977 also requires "fillers" in lineups—people included in the lineup but not suspected of a crime.⁹⁵ The law requires the fillers to "fit the eyewitness' description of the perpetrator."⁹⁶ Also, if practicable, the suspect's photo must resemble his or her appearance at the time of the crime.⁹⁷ Moreover, the lineup must not include prior-arrest information,⁹⁸ and only one suspect can be in a lineup.⁹⁹ Further, nothing should be said to the eyewitness that may influence their identification.¹⁰⁰

Law enforcement must follow a series of procedures if an eyewitness identifies a subject.¹⁰¹ Once an eyewitness identifies a person in the lineup, the investigator must ask about the eyewitness' confidence in their identification and record what the eyewitness says.¹⁰² In addition, the investigator may not disclose any information about the person identified,¹⁰³ and may not validate or invalidate the eyewitness' identification.¹⁰⁴ Chapter 977 also requires an audio and visual recording of the identification lineup when feasible.¹⁰⁵ Finally, "[n]othing in [Chapter 977] 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."¹⁰⁶ Peer-reviewed research indicates that the procedures discussed above will improve the accuracy of the eyewitness identifications.¹⁰⁷ In sum, Chapter 977 aims to eliminate mistaken eyewitness

89. *Id.* § 859.7(c)(2).

90. PENAL § 859.7(a)(3).

91. *Id.* § 859.7(a)(4).

92. *Id.* § 859.7(a)(4)(A).

93. *Id.* § 859.7(a)(4)(B).

94. *Id.* § 859.7(a)(4)(C).

95. PENAL §§ 859.7(a)(5), 859.7(c)(5).

96. *Id.* § 859.7(a)(5).

97. *Id.* § 859.7(a)(5).

98. *Id.* § 859.7(a)(6).

99. *Id.* § 859.7(a)(7).

100. PENAL § 859.7(a)(9).

101. *Id.* § 859.7(a)(10).

102. *Id.* § 859.7(a)(10)(A).

103. *Id.* § 859.7(a)(10)(B).

104. *Id.* § 859.7(a)(10)(C).

105. PENAL § 859.7(a)(11).

106. *Id.* § 859.7(d).

107. 2018 Cal. Stat. ch. 977, § 1(d).

identification through faulty and non-existent procedures.¹⁰⁸

IV. ANALYSIS

Chapter 977 is designed to implement scientifically proven procedures that reduce false identification by eyewitnesses.¹⁰⁹ Section A discusses the need for improved eyewitness identification procedures.¹¹⁰ Section B analyzes Chapter 977's eyewitness identification procedure requirements and their effects.¹¹¹ Section C addresses defendants' and victims' due process rights as affected by Chapter 977.¹¹²

A. Issues with Eyewitness Identification Procedures

Before Chapter 977, California law did not mandate how law enforcement conducted eyewitness identification procedures.¹¹³ This created two major problems.¹¹⁴ First, “[e]yewitness misidentification is [a] leading contributor to wrongful convictions.”¹¹⁵ Second, misidentification exposes police departments, counties, and cities to liability for wrongful conviction lawsuits.¹¹⁶

Prior to Chapter 977, no adequate standard existed to ensure proper law enforcement identification procedures.¹¹⁷ Further, there was no statewide requirement to monitor eyewitness identification procedures.¹¹⁸ Without any monitoring requirements, there was no guarantee law enforcement agencies would follow the more equitable and scientifically proven eyewitness identification procedures.¹¹⁹ Accordingly, there was no guarantee that people like

108. *Senator Wiener Introduces Bill to Help Prevent Wrongful Convictions of Innocent People by Strengthening Eyewitness ID Standards*, SCOTT WIENER REPRESENTING CAL. SENATE DIST. 11 (Jan. 24, 2018), <http://sd11.senate.ca.gov/news/20180124-senator-wiener-introduces-bill-help-prevent-wrongful-convictions-innocent-people-0> (on file with *The University of the Pacific Law Review*).

109. *Id.*

110. *Infra* Part IV.A.

111. *Infra* Part IV.B.

112. *Infra* Part IV.C.

113. 2018 Cal. Stat. ch. 977, § 1(f).

114. See SENATE PUBLIC SAFETY COMMITTEE ANALYSIS, *supra* note 79, at 3 (“eyewitness misidentification contributed to [sixty-six] wrongful convictions”); see also Sewell, *supra* note 8 (stating L.A. County paid Mr. Carrillo \$10 million dollars in a wrongful conviction settlement involving improper eyewitness identification procedure).

115. SENATE PUBLIC SAFETY COMMITTEE ANALYSIS, *supra* note 79, at 3.

116. See Sewell, *supra* note 8 (noting L.A. County paid Mr. Carrillo \$10 million dollars in a wrongful conviction settlement involving improper eyewitness identification procedure).

117. 2018 Cal. Stat. ch. 977, § 1(f).

118. See *Senator Wiener Introduces Bill to Help Prevent Wrongful Convictions of Innocent People by Strengthening Eyewitness ID Standards*, *supra* note 108 (noting how Chapter 977 adds the statewide requirement that law enforcement record eyewitness identification procedures).

119. See Gerber, *supra* note 17 (discussing how the false conviction was discovered through the detective's admission that he failed to use proper protocol when conducting the eyewitness identification procedure).

Mr. Carrillo, Mr. Wilson, Mr. Cotton, and Mr. McGowan would be afforded fair criminal proceedings.¹²⁰

Law enforcement agencies, counties, and states are regularly sued for administering identification procedures that are noncompliant with local department polices.¹²¹ Mr. McGowan settled with the State of Texas for \$1.8 million dollars¹²² and Mr. Carrillo settled with L.A. County for \$10 million dollars.¹²³ Therefore, wrongful convictions based on faulty eyewitness identification costs public entities millions.¹²⁴ Because of this, adopting a statewide eyewitness identification procedure will likely help reduce the frequency of costly settlements.¹²⁵

B. How Chapter 977 Leads to More Reliable Eyewitness Identification

Chapter 977 leads to more reliable eyewitness identification by implementing scientifically proven procedures.¹²⁶ Subsection 1 addresses how blind administration helps eliminate bias in eyewitness identification procedures.¹²⁷ Subsection 2 analyzes how Chapter 977 improves the dependability of eyewitness identification procedures in the context of lineup “fillers.”¹²⁸ Subsection 3 analyzes how recording the identification procedure increases reliability in the courtroom and safeguards suspects by ensuring law enforcement follow proper procedures.¹²⁹

1. The Blind Administration

Chapter 977 requires that all eyewitness identification procedures use the

120. See *Franky Carrillo*, *supra* note 14 (stating Mr. Carrillo was released from prison after an investigation revealed improper eyewitness identification procedures); Gerber, *supra* note 17 (describing Mr. Wilson’s release from prison after the revelation a detective directed an eyewitness to Mr. Wilson’s photograph during an identification procedure); Gavett, *supra* note 19 (noting Mr. Cotton did not get a fair trial because of faulty eyewitness procedures which were only discovered after DNA evidence exonerated Mr. Cotton); *23 Years After Improper Photo Lineup Led to Wrongful Conviction, DNA Proves Thomas McGowan’s Innocence in Dallas County Rape*, *supra* note 16 (noting how Mr. McGowan was denied a fair trial because of improper photo lineup procedures which were only revealed after DNA evidence exonerated Mr. McGowan).

121. See Sewell, *supra* note 8 (stating L.A. County paid Mr. Carrillo \$10 million dollars in a wrongful conviction settlement involving improper eyewitness identification procedure).

122. *Thomas Clifford McGowan*, WRONGLY CONVICTED DATABASE RECORD, <http://forejustice.org/db/McGowan—rape-conviction—Thomas-Clifford-.html> (last visited Sept. 2, 2018) (on file with *The University of the Pacific Law Review*).

123. Sewell, *supra* note 8.

124. See *id.* (stating L.A. County paid Mr. Carrillo \$10 million dollars in a wrongful conviction settlement involving improper eyewitness identification procedure).

125. See *infra* Part IV.B (noting Chapter 977 leads to more reliable eyewitness identification).

126. SENATE PUBLIC SAFETY COMMITTEE ANALYSIS, *supra* note 79, at 3.

127. *Infra* Part IV.B.1.

128. *Infra* Part IV.B.2.

129. *Infra* Part IV.B.3.

“blind” or “blinded administration” tests.¹³⁰ These tests address the problem where the administrator knows the suspect’s identity and, consciously or not, leaks his or her hypothesis to the eyewitness.¹³¹ One scientific study found “a lineup administrator with knowledge of the suspect’s identity may exhibit subtle nonverbal behaviors that lead the witness to choose a particular lineup member.”¹³² However, other studies argue blind administration is not the key to eliminating administrator bias.¹³³

Studies show that while blind administration helps eliminate bias, other methods, such as limited contact between the law enforcement administrator and the witness, reduce administrator bias and decrease the likelihood of incorrect identifications.¹³⁴ Another study found that while the blind administrator procedure does overcome knowledge-based bias, it fails to account for unintentional behavior by the administrator that may influence the witness.¹³⁵ For example, a subtle smile or certain body posture may influence the witness, even without the administrator’s intention.¹³⁶ The study also found that reduced contact between the administrator and the witness reduces false identifications, and that low-contact administration does not present the same police training concerns as blind administration.¹³⁷

Before Chapter 977, most law enforcement departments used simultaneous identification procedures.¹³⁸ In this type of procedure, the administrator shows the witness a photo lineup with usually six, but more than one, individuals.¹³⁹ On the other hand, in a sequential lineup, the administrator shows the witness one photo at a time.¹⁴⁰ Studies show that in sequential lineups, witnesses are less likely to choose a suspect; however, the rate of false identification is lower.¹⁴¹ Another study confirmed that “correct rejection rates are significantly higher for sequential than simultaneous lineups.”¹⁴²

While Santa Clara law enforcement agencies have adopted sequential lineups

130. CAL. PENAL CODE § 859.7(a)(2) (enacted by Chapter 977).

131. Sarah H. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 L. AND HUM. BEHAV. 70, 71 (2009).

132. *Id.*

133. See Haw & Fisher, *supra* note 81, at 1107 (stating blind administrators cannot control for all potential bias); Greathouse & Kovera, *supra* note 131, at 71 (noting that the rejection of lineups is not affected by the administrator’s knowledge).

134. Haw & Fisher, *supra* note 81, at 1107.

135. *Id.*

136. *Id.*

137. *Id.*

138. See POLICE EXEC. RES. FORUM, *supra* note 82, at 85–86 (noting that 69% of law enforcement agencies use simultaneous presentation of photographs).

139. Haw & Fisher, *supra* note 81, at 1108.

140. *Id.*

141. *Id.*

142. Nancy Steblay, Jennifer Dysart, Solomon Fulero, & R. C. L. Lindsay, *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 L. AND HUM. BEHAV. 459, 471 (2001).

over simultaneous lineups,¹⁴³ Chapter 977 did not.¹⁴⁴ Chapter 977 also did not adopt low contact procedures.¹⁴⁵ However, Chapter 977 did adopt blind administration, which is proven to reduce hypothesis leaking and administrator bias.¹⁴⁶ Thus, while Chapter 977 may lead to more reliable eyewitness identification through its mandated procedures, the statute likely could have been more effective in improving eyewitness identification reliability.¹⁴⁷

2. Match to the Description Filler Test

Police use one of two tests to choose the “filler” photos or lineup participants: either the “match to the appearance” test, or the “match to the description” test.¹⁴⁸ The more common method is the match to the appearance test.¹⁴⁹ Under the match to the appearance test, officers match the fillers in the lineup to the appearance of the suspect.¹⁵⁰ Alternatively, under the match to the description test, the officers match the fillers to the description provided by the eyewitness.¹⁵¹ Studies find, however, that “matching fillers to the suspect’s appearance could ‘backfire’ and actually increase the likelihood of innocent suspect misidentification.”¹⁵² Innocent suspects are chosen from match to the appearance lineup “at a higher rate than all the filler combined.”¹⁵³

Compared with lineups composed of fillers who were low in similarity to the culprit, matching fillers to the witness’ description resulted in a 30% reduction in false identifications and had virtually no effect on correct identifications. Moreover, compared with lineups composed of fillers who are very similar to the culprit, matching fillers to the description test resulted in a 45% increase in correct identifications and an equivalent rate of false identifications.¹⁵⁴ Chapter 977 uses match to the description lineups and therefore protects innocent

143. DON JOHNSON, PRESIDENT, POLICE CHIEFS’ ASSOCIATION OF SANTA CLARA COUNTY LINE-UP PROTOCOL FOR LAW ENFORCEMENT 1–2, available at <https://www.scribd.com/document/77710055/Santa-Clara-Lineup-Protocols> (on file with *The University of the Pacific Law Review*).

144. See CAL. PENAL CODE § 859.7 (enacted by Chapter 977) (noting Chapter 977 does not mandate sequential lineups or low contact procedures).

145. See *id.* (identifying how Chapter 977 did not adopt low contact procedures).

146. *Id.* § 859.7(d); Ryan J. Fitzgerald, Heather L. Price & Chris Oriet, *The Effect of Suspect-Filler Similarity on Eyewitness Identification Decisions: A Meta-Analysis*, 19 PSYCHOL., PUB. POL’Y, AND L. 151, 153 (2013).

147. See PENAL § 859.7 (enacted by Chapter 977) (noting how Chapter 977 mandates certain scientifically proven eyewitness identification procedures, but does not require sequential lineups or low contact procedures).

148. Fitzgerald, Price & Oriet, *supra* note 146, at 151.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 152.

153. *Id.*

154. *Id.*

suspects more than match to the appearance lineups.¹⁵⁵

3. Recording Eyewitness Identification Procedures

Eyewitness testimony is highly pervasive to a jury, yet highly unreliable.¹⁵⁶ One way law enforcement can help is to record eyewitnesses' reactions and eyewitness identification procedures.¹⁵⁷ Although no legislation has passed regulating body-worn cameras, California law enforcement agencies generally use body-worn cameras to accurately record events.¹⁵⁸ Chapter 977 requires all eyewitness identification procedures be recorded by audio and visual, if feasible.¹⁵⁹

The U.S. Department of Justice generally does not require its agents to record their identification procedures, though a 2017 memorandum suggests recording as an option in lieu of written documentation.¹⁶⁰ Both the 1997 U.S. Department of Justice Eyewitness Guide for Law Enforcement¹⁶¹ and the 2017 U.S. Department of Justice Memorandum to Heads of Department Law Enforcement Components and All Department Prosecutors¹⁶² do not require the audio and visual recording of the identification procedures. While the 1999 guide does not mention recording, the 2017 memo suggests recording as an option in lieu of written documentation of the procedure.¹⁶³

While requiring law enforcement to record every identification procedure has

155. See CAL. PENAL CODE § 859.7 (enacted by Chapter 977) (noting Chapter 977 requires the match to the description approach to fillers in lineups).

156. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 923, at 1 (June 27, 2018).

157. See CAL. PENAL CODE § 832.18 (West 2018) (allowing law enforcement officers to download and store data from their body-worn camera in accordance with best practices); CAL. PENAL CODE § 633 (West 2018) (exempting law enforcement from California's two-party consent recording law).

158. See Liam Dillion, *Rules for Body Cameras Are Left to Local Police Departments as Lawmakers Struggle to Pass Statewide Regulations*, L.A. TIMES (Jan. 13, 2017), <http://www.latimes.com/politics/la-pol-sac-police-body-cameras-no-laws-20170113-story.html> (on file with *The University of the Pacific Law Review*) (noting that while several attempts to pass a bill in the legislature to regulate body-worn cameras have failed, local law enforcement departments create their own policies regarding body-worn cameras).

159. CAL. PENAL CODE § 859.7(a)(2) (enacted by Chapter 977).

160. Memorandum from Sally Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Law Enforcement Components, All Department Prosecutors 5 (Jan. 6, 2017) [hereinafter Memorandum from Sally Yates] (on file with *The University of the Pacific Law Review*) (noting that audio and video recording is merely an option when documenting identification procedures and not required).

161. See U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 20 (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf> (on file with *The University of the Pacific Law Review*) (noting that there is no requirement or option to use audio or visual recording to document identification procedures).

162. See Memorandum from Sally Yates, *supra* note 160, at 5 (noting that audio and video recording is merely an option when documenting identification procedures and not required).

163. See U.S. DEP'T OF JUSTICE, *supra* note 161, at 20 (noting that there is no requirement or option to use audio or video recording to document identification procedures); Memorandum from Sally Yates, *supra* note 160, at 5 (noting that audio and video recording is merely an option when documenting identification procedures).

fiscal ramifications,¹⁶⁴ the main concern is how this recording requirement affects the witness during the procedure.¹⁶⁵ Chapter 977 only requires recording when it is “feasible.”¹⁶⁶ Chapter 977 fails to provide guidelines for: (1) the meaning of “feasible”; and (2) whether the “feasible” escape clause protects particular groups of people.¹⁶⁷

Chapter 977 does not define the feasibility standard.¹⁶⁸ Without a definition, police departments may have difficulty determining if they are compliant with the law.¹⁶⁹ Further, the lack of clarity may lead to legal challenges over the precise definition of feasibility.¹⁷⁰

The lack of a definition for “feasible” may create issues with witnesses wary of being recorded.¹⁷¹ Victims of sex crimes, minors, gang members, or criminal informants might feel less inclined to comply with the procedures when they are being audio and visually recorded.¹⁷² Because “feasible” is not defined by the statute, courts may turn to dictionaries to determine the word’s meaning.¹⁷³

Black’s Law Dictionary defines “feasible” as, “something [that] is capable of being accomplished.”¹⁷⁴ Accordingly, with recording equipment, it is “feasible” within the plain meaning of the word to record sensitive eyewitnesses.¹⁷⁵ Therefore, the feasibility standard for recording identification procedures fails to address the concerns of sensitive eyewitnesses because they may have to be recorded under Chapter 977.¹⁷⁶ While protecting the integrity of eyewitness identification procedures is crucial, protecting victims and sensitive eyewitnesses must also be considered.¹⁷⁷

164. SENATE PUBLIC SAFETY COMMITTEE ANALYSIS, *supra* note 79, at 9.

165. See Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393, 393 (2000) (noting certain witnesses, such as child abuse victims, may be sensitive about undergoing questioning about their experiences).

166. CAL. PENAL CODE § 859.7(a)(11) (enacted by Chapter 977).

167. See *id.* (noting that feasibility is not defined and the recording requirement does not address witnesses’ privacy concerns).

168. *Id.*

169. See *id.* (noting law enforcement agencies are required to comply with Chapter 977, but the term “feasible” for the recording requirement is not defined).

170. See *id.* (noting that feasibility is not defined).

171. See Richards, *supra* note 165, at 393 (noting certain witnesses, such as child abuse victims, may be sensitive about undergoing questioning about their experiences).

172. See *id.* (stating certain witnesses, such as child abuse victims, may be sensitive about undergoing questioning about their experiences).

173. See Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES (June 13, 2011), <https://www.nytimes.com/2011/06/14/us/14bar.html> (on file with *The University of the Pacific Law Review*) (discussing how the Supreme Court justices frequently consult dictionaries in judicial opinions).

174. *What Is Feasible?*, LAW DICTIONARY, <https://thelawdictionary.org/feasible/> (last visited Aug. 31, 2018) (on file with *The University of the Pacific Law Review*).

175. See *id.* (noting feasible means “something [that] is capable of being accomplished”).

176. See CAL. PENAL CODE § 859.7(a)(11) (enacted by Chapter 977) (noting that witnesses’ privacy interests are not addressed in Chapter 977’s recording requirement).

177. See Richards, *supra* note 165, at 393 (noting certain witnesses, such as child abuse victims, may be

C. Defendants' Due Process

The aim of an eyewitness identifying a suspect is to confirm the suspect is the person responsible for a crime.¹⁷⁸ When identification procedures call for the investigator to direct eyewitnesses to select the suspect, the defendant is not afforded a fair trial.¹⁷⁹ Chapter 977 states “[n]othing 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.”¹⁸⁰ However, the admission of an improper eyewitness identification procedure may create a due process issue.¹⁸¹ By allowing evidence to come into trial that was obtained out of compliance with Chapter 977, the statute may not preserve defendants’ due process rights.¹⁸²

IV. CONCLUSION

Before Chapter 977, there were no statewide requirements for scientific eyewitness identification procedures in California.¹⁸³ Senator Wiener introduced Chapter 977 to regulate law enforcement and prosecutors’ eyewitness identification procedures.¹⁸⁴ The scientifically proven methods in Chapter 977 likely help eliminate administrator bias and hypothesis leaking, and may increase the number of correct eyewitness identifications.¹⁸⁵ The recording requirement, recently suggested by the U.S. Department of Justice, ensures that law enforcement administrators follow the proper procedure.¹⁸⁶ Further, because Chapter 977 does preclude eyewitness testimony elicited through noncompliant procedures, Chapter 977 may raise due process issues for defendants.¹⁸⁷ Ultimately, due to the more equitable standards adopted by Chapter 977, individuals like Franky Carrillo may not be placed behind bars for a crime they did not commit and the chance of catching the real perpetrators increases.¹⁸⁸

sensitive about undergoing questioning about their experiences).

178. 2018 Cal. Stat. ch. 977, § 1(a).

179. See *23 Years After Improper Photo Lineup Led to Wrongful Conviction, DNA Proves Thomas McGowan’s Innocence in Dallas County Rape*, *supra* note 16 (noting investigators in one case influenced the eyewitness to select a particular person during an identification procedure).

180. CAL. PENAL CODE § 859.7(d) (enacted by Chapter 977).

181. *United States v. Wade*, 388 U.S. 218, 226–27 (1967).

182. See CAL. PENAL CODE § 859.7(d) (enacted by Chapter 977) (allowing an eyewitness identification procedure not complying with the statute to be admitted as evidence); *Wade*, 388 U.S. at 226–27 (holding the admission of an improper eyewitness identification procedure denies a defendant due process).

183. SENATE PUBLIC SAFETY COMMITTEE ANALYSIS, *supra* note 79, at 3.

184. *Senator Wiener Introduces Bill to Help Prevent Wrongful Convictions of Innocent People by Strengthening Eyewitness ID Standards*, *supra* note 108; *supra* Part IV.B.1.

185. *Supra* Part IV.B.2.

186. *Supra* Part IV.B.3.

187. *Supra* Part IV.C.

188. See *supra* Part IV.B (stating Chapter 977 leads to more reliable eyewitness identification); TEDx Talks, *supra* note 1 (discussing how Mr. Carrillo’s conviction was in part due improper ID procedures).