

AMENDED IN SENATE AUGUST 13, 2013

AMENDED IN ASSEMBLY APRIL 29, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

**ASSEMBLY BILL**

**No. 604**

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**Introduced by Assembly Member Ammiano**

February 20, 2013

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An act to add Section 806 to the Evidence Code, and to add Sections 686.3 and 1127i to the Penal Code, relating to criminal investigations.

LEGISLATIVE COUNSEL'S DIGEST

AB 604, as amended, Ammiano. Criminal investigations: eyewitness identification.

Existing law allows opinion testimony from expert witnesses to be admitted at trial upon specified showings.

This bill would allow expert testimony regarding the reliability of an eyewitness identification to be admitted at trial if the proponent of the evidence establishes relevancy and proper qualifications of the witness.

Existing law generally regulates the collection and admissibility of evidence for purposes of criminal prosecutions.

This bill would authorize any law enforcement agency to adopt regulations for conducting photo and live lineups with eyewitnesses, and provides that specified procedures should be considered when adopting the regulations, including sequentially presenting photos used in an identification procedure and separating all witnesses when viewing an identification procedure.

Existing law provides that in any criminal case which is being tried before the court with a jury, all requests for instructions on points of law must be made to the court before commencement of argument.

This bill would require the court in a criminal trial or proceeding in which a witness testifies to an identification made before trial, as specified, *and where the local law enforcement agency in that jurisdiction has adopted recommended live and photo eyewitness identification procedures*, to give specified instructions to the jury, including an instruction that they may consider evidence that law enforcement officers did or did not follow specified procedures during identification procedures when determining the reliability of the eyewitness identification. *The bill would authorize the court to provide the same instructions in a jurisdiction that has not adopted the recommended live and photo eyewitness identification procedures.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. The Legislature finds and declares the following:

2 (a) The goal of a law enforcement criminal investigation is to  
3 find and apprehend the person or persons responsible for  
4 committing a crime.

5 (b) Eyewitness identification procedure studies indicate that the  
6 criminal justice system can significantly decrease the rate of  
7 erroneous eyewitness identifications by implementing changes to  
8 identification procedures.

9 (c) A decrease in the number of erroneous eyewitness  
10 identifications will increase public trust in the criminal justice  
11 system, which, in turn, will increase the ability of law enforcement  
12 and prosecutors to convict the guilty and protect our communities.

13 (d) New policies and procedures, such as those recommended  
14 by the National Institute of Justice, are readily available and have  
15 proven effective in other jurisdictions. States, including New Jersey  
16 and Oregon, have recognized and adopted the importance of tested  
17 eyewitness identification procedures that are shown to increase  
18 reliability. Several local jurisdictions in California have also  
19 adopted tested eyewitness identification procedures with great  
20 success and significant cost savings.

21 SEC. 2. Section 806 is added to the Evidence Code, to read:

22 806. Expert testimony may be admitted regarding factors that  
23 affect the reliability of eyewitness identification, including the

1 identification procedure, if the proponent of the evidence  
2 establishes relevancy and proper qualifications of the witness.

3 SEC. 3. Section 686.3 is added to the Penal Code, to read:

4 686.3. (a) Any local law enforcement agency, including, but  
5 not limited to, police departments, sheriffs, and prosecutors, may  
6 adopt regulations for conducting photo and live lineups with  
7 eyewitnesses. In adopting the regulations, those agencies are  
8 encouraged to consider all of the following procedures:

9 (1) Prior to conducting the identification procedure, and as close  
10 in time to the incident as possible, have the eyewitness complete  
11 a standardized form describing the perpetrator of the offense.

12 (2) If practicable, have the investigator conducting the  
13 identification procedure be a person who is not aware of which  
14 person in the identification procedure is suspected as the perpetrator  
15 of the offense.

16 (3) Present photos used in an identification procedure  
17 sequentially, and not simultaneously.

18 (4) Prior to any identification procedure, instruct an eyewitness  
19 of all the following:

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

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

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

26 (5) If the identification procedure is being done sequentially,  
27 instruct an eyewitness of all of the following prior to the  
28 identification procedure:

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

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

32 (C) The eyewitness should take as much time as needed in  
33 making a decision about each photograph or person before moving  
34 to the next one.

35 (D) All photographs or persons will be shown to the eyewitness,  
36 even if an identification is made before all photographs or persons  
37 have been viewed.

38 (6) Compose an identification procedure so that the fillers  
39 generally fit the description of the person suspected as the  
40 perpetrator, and in the case of a photo lineup, the photograph of

1 the person suspected as the perpetrator resemble his or her  
2 appearance at the time of the offense and does not unduly stand  
3 out.

4 (7) If the eyewitness has previously viewed an identification  
5 procedure in connection with the identification of another person  
6 suspected of involvement in the offense, have the fillers in the  
7 lineup in which the person suspected as the perpetrator participates  
8 be different from the fillers used in any prior lineups.

9 (8) In a live lineup, have any identification actions, such as  
10 speaking or making gestures or other movements, be performed  
11 by all lineup participants.

12 (9) All live lineup participants shall be out of the view of the  
13 eyewitness prior to the beginning of the identification procedure.

14 (10) Have only one suspected perpetrator included in any  
15 identification procedure.

16 (11) Have all witnesses separated when viewing an identification  
17 procedure.

18 (12) If the eyewitness identifies a person he or she believes to  
19 be the perpetrator, then have all of the following apply:

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

22 (B) No information concerning the identified person shall be  
23 given to the eyewitness prior to obtaining the eyewitness's  
24 statement of confidence level.

25 (13) Have a written record of the identification procedure be  
26 made that includes, at a minimum, all of the following:

27 (A) All identification and nonidentification results obtained  
28 during the identification procedure and signed by the eyewitness.

29 (B) A statement of the eyewitness' own words regarding how  
30 certain he or she is regarding the accuracy of his or her  
31 identification and signed by him or her.

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

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

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

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

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

1 (H) Identification information for all individuals used in a live  
2 lineup and a video recording of the lineup.

3 (b) For purposes of this section, the following terms have the  
4 following meanings:

5 (1) “Eyewitness” means a person whose identification of another  
6 person may be relevant in a criminal investigation.

7 (2) “Filler” means either a person or a photograph of a person  
8 who is not suspected of an offense and is included in an  
9 identification procedure.

10 (3) “Identification procedure” means either a photo lineup or a  
11 live lineup.

12 (4) “Investigator” means the person conducting the live or photo  
13 lineup.

14 (5) “Live lineup” means a procedure in which a group of  
15 persons, including the person suspected as the perpetrator of an  
16 offense and other persons not suspected of the offense, is displayed  
17 to an eyewitness for the purpose of determining whether the  
18 eyewitness is able to identify the suspect as the perpetrator.

19 (6) “Photo lineup” means a procedure in which an array of  
20 photographs, including a photograph of the person suspected as  
21 the perpetrator of an offense and additional photographs of other  
22 persons not suspected of the offense, is displayed to an eyewitness  
23 for the purpose of determining whether the eyewitness is able to  
24 identify the suspect as the perpetrator.

25 SEC. 4. Section 1127i is added to the Penal Code, to read:

26 1127i. (a) In any criminal trial or proceeding in which a  
27 witness testifies to an identification made before trial, either by  
28 viewing photographs or ~~in person~~ *in-person* lineups, and where  
29 *the local law enforcement agency in that jurisdiction has adopted*  
30 *the recommended live and photo eyewitness identification*  
31 *procedures listed in Section 686.3*, the court shall instruct the jury  
32 ~~as follows:~~ *follows or admonish the jury with a substantially similar*  
33 *instruction:*

34 (a)

35 (1) ~~The procedures listed in Section 683.3 of the Penal Code~~  
36 ~~686.3~~ are designed to decrease the likelihood of misidentification  
37 when the police conduct an identification procedure, such as a  
38 lineup. As jurors, you may consider evidence that police officers  
39 did or did not follow those procedures when you decide whether

1 a witness in this case was correct or mistaken in identifying the  
2 defendant as the perpetrator of the crime.

3 (b)

4 (2) Use of these procedures alone does not mean that the witness  
5 is correct or is credible, but only that police followed procedures  
6 that are designed to decrease the likelihood that the witness will  
7 make a mistake during the lineup or other identification procedure.

8 (c)

9 (3) If police officers did not follow the procedures recommended  
10 in Section ~~683.3~~ of the Penal Code, 686.3, consider the eyewitness  
11 identification with caution and close scrutiny. This does not mean  
12 that you may arbitrarily disregard his or her testimony, but you  
13 should give it the weight you think it deserves in the light of all  
14 the evidence in the case.

15 (b) *In any criminal proceeding or trial in which a witness*  
16 *testifies to an identification made before trial in a jurisdiction that*  
17 *has not adopted the recommended live and photo eyewitness*  
18 *identification procedures listed in Section 686.3, the court may,*  
19 *but is not required to, provide the jury with the instruction in*  
20 *subdivision (a) or admonish the jury with a substantially similar*  
21 *instruction.*

22 (c) *In addition to the jury instruction required under subdivision*  
23 *(a) and authorized under subdivision (b), the court may, but is not*  
24 *required to, provide the jury with any additional instructions the*  
25 *court may deem necessary.*