

Bill as Introduced

HB 1263 - AS INTRODUCED

2010 SESSION

10-2373
04/10

HOUSE BILL **1263**

AN ACT relative to eyewitness identification procedures for photo lineups.

SPONSORS: Rep. Robertson, Ches 3

COMMITTEE: Criminal Justice and Public Safety

ANALYSIS

This bill requires state and local law enforcement agencies to establish eyewitness identification procedures.

Explanation: Matter added to current law appears in ***bold italics***.
 Matter removed from current law appears [~~in brackets and struckthrough.~~]
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT relative to eyewitness identification procedures for photo lineups.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Subdivision; Eyewitness Identification Procedures. Amend RSA 516 by inserting after
2 section 37 the following new subdivision:

3 Eyewitness Identification Procedures

4 516:38 Definitions. In this subdivision:

5 I. "Eyewitness" means a person who observes another person at or near the scene of a
6 criminal offense.

7 II. "Photo lineup" means a procedure in which an array of photographs, including a
8 photograph of the person suspected as the perpetrator of an offense and additional photographs of
9 other persons not suspected of the offense, is displayed to an eyewitness for the purpose of
10 determining whether the eyewitness is able to identify the suspect as the perpetrator.

11 III. "Live lineup" means a procedure in which a group of persons, including the person
12 suspected as the perpetrator of an offense and other persons not suspected of the offense, is displayed
13 to an eyewitness for the purpose of determining whether the eyewitness is able to identify the
14 suspect as the perpetrator.

15 IV. "Investigator" means the person conducting the live or photo lineup.

16 V. "Identification procedure" means either a photo lineup or a live lineup.

17 VI. "Filler" means either a person or a photograph of a person who is not suspected of an
18 offense and is included in an identification procedure.

19 516:39 Eyewitness Identification Procedures. Every state and local law enforcement agency
20 shall adopt procedures for conducting photo lineups and live lineups that comply with the following
21 requirements:

22 I. When practicable, the investigator shall be a person who is not aware of which person in
23 the photo lineup or live lineup is suspected as the perpetrator of the offense. When it is not
24 practicable for the investigator to be a person who is not aware of which person in the photo or live
25 lineup is suspected as the perpetrator of the offense:

26 (a) The investigator shall give consideration to performing the lineup either sequentially
27 or simultaneously and shall record the method used and the reasons why; and

28 (b) If the investigator conducting the lineup is aware of the identity of the suspect, then
29 the investigator shall state in writing the reason that the presentation of the lineup was not made by
30 a person who was not aware of which person in the photo lineup or live lineup was suspected as the
31 perpetrator of the offense.

1 II. Prior to the identification procedure, the investigator shall instruct the eyewitness that:

2 (a) The perpetrator may not be among the persons in the photo lineup or the live lineup.

3 (b) The eyewitness should not feel compelled to make an identification.

4 (c) When administering a live lineup or photo lineup in sequence rather than
5 simultaneously:

6 (1) Each photograph or person will be viewed one at a time;

7 (2) The photographs or persons will be displayed in random order;

8 (3) The eyewitness should take as much time as needed in making a decision about
9 each photograph or person before moving to the next one; and

10 (4) All photographs or persons will be shown to the eyewitness, even if identification
11 is made before all have been viewed.

12 III. When administering a live lineup or photo lineup in sequence rather than
13 simultaneously, the investigator shall conduct the identification procedure with the eyewitness as
14 follows:

15 (a) Each photograph or person shall be viewed one at a time;

16 (b) The photographs or persons shall be displayed in random order;

17 (c) The eyewitness shall take as much time as needed in making a decision about each
18 photograph or person before moving to the next one; and

19 (d) All photographs or persons shall be shown to the eyewitness, even if identification is
20 made before all have been viewed.

21 IV. The photo lineup or live lineup shall be composed so that the fillers generally fit the
22 description of the person suspected as the perpetrator and, in the case of a photo lineup, so that the
23 photograph of the person suspected as the perpetrator resembles his or her appearance at the time of
24 the offense and is not unnecessarily suggestive.

25 V. At least 5 fillers shall be included in the photo lineup and at least 4 fillers shall be
26 included in the live lineup, in addition to the person suspected as the perpetrator.

27 VI. The person suspected as the perpetrator shall be the only suspected perpetrator included
28 in the identification procedure.

29 VII. The investigator shall seek, in the eyewitness's own words, his or her confidence level
30 that the person or persons identified in the lineup is the suspect.

31 VIII. A written record of the identification procedure shall be made that includes the
32 following information:

33 (a) All identification and non-identification results obtained during the identification
34 procedure, signed by the eyewitness, including the eyewitness's own words regarding how certain he
35 or she is of the selection.

36 (b) The names of all persons present at the identification procedure.

37 (c) The date and time of the identification procedure.

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1 516:40 Remedies for Noncompliance. Evidence of a failure to comply with any of the provisions
2 of this subdivision shall be admissible for consideration by the trial court in adjudicating motions to
3 suppress eyewitness identification. Evidence of a failure to comply with any of the provisions of this
4 subdivision shall be admissible in support of claims of eyewitness misidentification as long as such
5 evidence is otherwise admissible pursuant to the rules of evidence and criminal procedure.

6 2 Effective Date. This act shall take effect 60 days after its passage.

Speakers

Hearing Minutes

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

PUBLIC HEARING ON HB 1263

BILL TITLE: relative to eyewitness identification procedures for photo lineups.

DATE: January 21, 2010

LOB ROOM: 204 Time Public Hearing Called to Order: 12:63

Time Adjourned: 13:35 pm.

(please circle if present)

Committee Members: Reps. Shurtleff, Pantelakos, Berube, Robertson, Movsesian, Burridge,
Cushing, Rodd, Chandley, B. McCarthy, M. Ryden, Welch, Oharron, Pesh, Weare, Stevens,
Villeneuve, Gagne, Swinford and Willette

Bill Sponsors: Rep. Robertson, Ches 3

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Robertson - Prime sponsor.

- Lays out how to conduct a lineup.

*Michael Iacopino - N. H. Association of Criminal Defense Attorneys (Support)

- Had written testimony.
- Provided handouts.

*Major Russ Conte - N. H. State Police (Opposed)

- Provided written testimony.

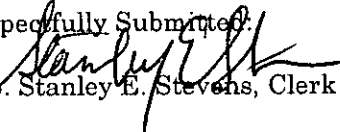
Chief Crate - N. H. Association of Chiefs of Police (Opposed)

- While he admits there is some need he believes current court procedures provide the safeguards sought in this legislation.

Ann Rice - Attorney General's Office (Opposed)

- Provided copy of the Law Enforcement Manual regarding Pre-Trial Identification Procedures.

Respectfully Submitted:


Rep. Stanley E. Stevens, Clerk

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

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Bill Sponsors: Rep. Robertson, Ches 3

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

HB 1263

21 Jan 2010

Start : 1263
Finish 1335

Rep. Roberson prime sponsor
• lays out how to conduct a lineup

Michael Jacobs NH Assn of Criminal Defence Atty. (support)
• had written testimony
• provided handouts.

^{Mgt.}
Russ Lantz NH State Police (opposed)
• provided written testimony.

Chief Oute NH Assn of Chiefs of Police (opposed)
• while he admits there is some merit
he believes current court procedures provide
the safeguards sought in this legislation.

Ann Rice AG's office (opposed)

• provided copy of the Law Enforcement Manual
re Pre-Trial Identification Procedures.

Testimony

HB 1263

NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

January 21, 2010

**Written Testimony of Michael J. Iacopino in Support of the
New Hampshire Innocence Agenda**

HB 1263 An Act Relative to Identification Procedures for Photo Lineups

**HB 1619-FN An Act Requiring Law Enforcement Officers
to Record Interviews of Suspects in Felony Cases**

HB 1650-FN An Act Establishing a Forensic Science Oversight Commission

Before the

**N.H. House of Representatives
Criminal Justice and Public Safety Committee**

Mr. Chairman, Representatives:

Good afternoon. My name is Michael J. Iacopino and I am here today representing the New Hampshire Association of Criminal Defense Lawyers (NHACDL). I am privileged to serve as the Chair of the NHACDL Legislative Committee and as the Immediate Past President of NHACDL.

The New Hampshire Association of Criminal Defense Lawyers (NHACDL) consists of approximately 280 New Hampshire lawyers with practices that include a significant amount of criminal defense work. The membership of NHACDL includes private practitioners, and state and federal public defenders. NHACDL is the local affiliate of the National Association of Criminal Defense Lawyers (NACDL) and shares its mission to ensure due process and fairness in the administration of the criminal justice system. NHACDL provides its membership with significant continuing legal education opportunities in the field of criminal defense. NHACDL facilitates communication amongst members of the organization about issues that confront criminal defense lawyers on a daily basis. NHACDL will also, from time to time, take public positions with respect to important cases before the courts, or proposed legislation, that affects fairness and due process in the administration of the criminal justice system. Ultimately NHACDL is most concerned with ensuring that our criminal justice system renders the "right result" in every case.

NHACDL wholeheartedly supports the bills before you today that make up the New Hampshire Innocence Agenda. These bills have been designed to address issues that have been fundamentally problematic for the criminal justice system. The bills

address reform of eyewitness identification procedures used by law enforcement (HB 1263); recording of custodial interrogations by law enforcement (HB 1619); and oversight of our crime lab and medical examiner offices (HB 1650).

These bills address known problems in our system of justice. It is now apparent that the State of Texas executed an innocent man, Cameron Todd Willingham, in 2004. Willingham was convicted of arson and murder based upon bogus scientific evidence and testimony presented by so-called "trained arson experts." Just this past September, Joseph Abbitt was exonerated of rape, burglary and kidnapping charges by DNA evidence. Abbitt's conviction was based on mistaken eyewitness identification. Abbitt spent 14 years in prison. Also in September, DNA testing also exonerated a Florida man, Anthony Carvalla. At the age of 15, Carvalla with an IQ of 67, was convicted of rape and murder after he gave five coerced confessions to investigators. On September 10, 2009, he walked from the courthouse as a free and innocent man. While these are well publicized cases of errors in the system they are by no means outliers or abnormalities. The Innocence Project at Cardozo Law School reports that there were more than 20 DNA exonerations in 2009. In 2008 at least 14 men were exonerated as the result of DNA testing. The Innocence Project has cataloged 249 cases where convicted persons have been exonerated by the use of DNA technology.

What do these exonerations mean for our criminal justice system here in New Hampshire? What can we, as a society, learn from these exonerations?

We know that our criminal justice system is not perfect. Because we value our liberty, we take every precaution to ensure that the criminally accused receives a fair trial. Unfortunately, not every criminal case yields biological material from which DNA analysis can be performed. However, by studying those cases where we know that an innocent person was wrongfully convicted, we can take steps that will work to limit the risk of convicting the innocent in the future. Every time that an innocent person is convicted, a guilty person goes free!

The New Hampshire Innocence Agenda is based upon the careful studies of DNA exonerations performed by the Innocence Project at Cardozo Law School, The Center on Wrongful Conviction at Northwestern School of Law and data collected by the President's DNA Initiative.

Those organizations have studied the most common causes of wrongful conviction. They find that mistaken eyewitness identification, false or fraudulent confessions, crime lab negligence/fraud, and the use of bad confidential informants are the most common factors existing amongst the cases. There are ways to limit such problems in our criminal justice system. The New Hampshire Innocence Agenda includes three bills for your consideration. The bills address the following issues:

1. Requiring police officers to record all felony interrogations.
2. Reforming eyewitness identification procedures such as photo arrays and line-ups.

3. Independent oversight of New Hampshire's Crime Labs and Medical Examiner Offices.

In this written testimony I will try to provide a brief outline of each bill and the reasons why you should support this agenda.

HB 1263 – Eyewitness Identification Reform

HB 1263 seeks to reform the manner in which identification lineups and photo lineup procedures are conducted. Erroneous eyewitness identifications were involved in 77% of the first 225 DNA exoneration cases studied by the Innocence Project. The bill is based on recommendations from the USDOJ's National Institute of Justice, Technical Working Group for Eyewitness Evidence (1999), the American Bar Association's "Best Practices for Promoting Accuracy of Eyewitness Identification Procedures (2004)" and the International Association of Chiefs of Police publication: "Training Key on Eyewitness Identification (2006)." In addition the procedures required in the bill are also based on more than 30 years of social science research. I have provided the Committee with two copies of the report from the Innocence Project entitled: Reevaluating Lineups: Why Witnesses Make Mistake and How to Reduce the Chance of a Misidentification. There is very little dispute in the legal community that eyewitness identifications are fraught with the risk of error. This bill requires police officers to use the best practices available to ensure that those errors don't occur here in New Hampshire.

HB 1619 – Recording Interrogations

The Innocence Project reports that about 25% of the exoneration cases involved a false or coerced confession. H.B. 1619 is designed to make sure that the New Hampshire criminal justice system can say, with confidence, that no one will be convicted here based upon a false confession or a bogus claim that a confession was made.

After all, recording interrogations is simply good police work. There is nothing so powerful in a court room as a video tape of a defendant confessing to a crime. I don't know why most of the police departments in our state don't require videotaping of confessions for that reason alone. But the simple fact is that the vast majority of police departments in the State do not require the recording of interrogations and this Bill will ensure that that do.

H.B. 1619 is a "win-win" Bill for all players in the criminal justice system. It serves the interest of law enforcement by substantiating confessions and documenting what occurred. This will significantly limit the ability of a defendant to attack the credibility of the interrogating officers and will limit the court room time necessary to litigate issues involving interrogations. Moreover, the Bill ensures that guilty defendants are convicted by eliminating the various doubts that can be raised about what may have occurred during an interrogation session.

The Bill also protects the innocent by preventing erroneous convictions based upon false confessions or false claims that the defendant confessed. It will also serve to highlight and eliminate coercive interrogation techniques which overbear a defendant's will and cause false and involuntary confessions.

Additionally recording interrogations will reduce the burden on both judge and jury time. The likelihood of a case going to trial with a solid confession on video tape is very low. Indeed, this Bill will encourage guilty people to plead guilty and avoid the prospect of a jury trial where the video taped confession will be presented.

You may hear two legal objections to this Bill. Some may claim that the Bill mandates a program which is not fully funded by the State in violation of Part I Article 28-a of the State Constitution. This is not true. The Bill does not require any police department to spend new money. First virtually every police department in the state has access to tape recording or video taping equipment. Second, the Bill does not require the expenditure of local funds. The Bill conditions the admissibility of interrogation evidence on recording. A police department is not required to record. If they do not the interrogation is simply inadmissible in court. Each department can make a choice whether or not it wishes to invest in additional equipment but they are not required to do so.

The second legal objection that you may hear is that this Bill violates the separation of powers doctrine because it deals with the admissibility of evidence. It does not. In State v. Barnett, (December 21, 2001) our Supreme Court implicitly recognized that legislative direction in this area could establish a rule which excludes unrecorded interrogations. NHACDL urges you to act on the Supreme Court'

HB 1650 – Forensic Science Oversight

Bad science, scientific fraud, or misleading scientific evidence is involved in more than half of the wrongful convictions studied by the Innocence Project. This fact has also been recognized by the National Academy of Science in their recent report entitled: "Strengthening Forensic Science in the United States: A Path Forward" (2009). One of the primary observations of these studies is that there is a lack of cohesive regulation within the forensic sciences. NAS recommends a system of federal nationwide oversight. Here in New Hampshire we can address this problem by creating our own oversight board. The Bill structures a standing committee of people who are familiar with science and law and the frequent intersection of both. The Bill draws on talent available to us through existing source in state government including our stellar university system. The Committee is tasked with creating an error reporting system and investigating scientific error or fraud in the forensic arena. This Committee is not designed to determine the result of any particular criminal matter but rather ensures that the public is protected from negligence and fraud in this very important area of our justice system. I have provided a copy of the NAS Summary for your review.

In conclusion these three bills are presented to you in an effort to protect the innocent here in the State of New Hampshire. We urge you to report each of these bills favorably.

Contact Information
www.nhacdl.org

The New Hampshire Association of Criminal Defense Lawyers (NHACDL) is a voluntary bar association consisting of approximately two hundred and eighty New Hampshire lawyers who devote a significant part of their practice to the representation of the criminally accused. NHACDL membership includes state and federal public defenders, and private practitioners. NHACDL is the New Hampshire affiliate of the National Association of Criminal Defense Lawyers and shares its mission to ensure justice and due process for persons accused of crime and to promote the proper and fair administration of criminal justice.

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Maj Conte

**New Hampshire Department of Safety
Legislative Position Paper
Date: January 11, 2010**

Bill Title: EYEWITNESS ID PROCEDURES FOR PHOTO LINE-UPS

Testimony before:

LSR#: 10-2373

BILL#: HB 1263

AMENDMENTS:

SAFETY'S POSITON

SUPPORT

OPPOSE

NO POSITION

SUGGEST AMENDMENT

REQUEST INFORMATION

Currently, the law as it is, does the following:

As proposed, the Bill is intended to do the following:

This bill requires state and local law enforcement agencies to establish eyewitness identification procedures.

This bill is no doubt well intended in response to widely publicized news reports and articles regarding the reliability of eyewitness identification procedures.

However, it is the Department of Safety's position that it really should be up to the courts to establish eyewitness identification procedures, which they have done, both in terms of State and Federal appellate court decisions. The Judge's most important task is to see that each defendant receives a fair trial and we believe the judge handling the case, and applying the case law, is best able to assure a fair trial.

First of all, the bill flies under false colors because the title of the bill would delude one into thinking that it applies only to photo lineup procedures. However, once you get into the details of the bill it is plain that it seeks to control not only photo lineups but also live lineups. It requires each law enforcement agency in the state to adopt procedures

for conducting photo lineups and live lineups, and then goes on to describe in detail what those procedures must be.

The bill says that "when practicable" the investigator who conducts a live lineup or a photo lineup shall be a person who is not aware of which individual in the lineup is the suspect and if not practicable then the investigator must decide whether to show all the pictures or in the case of a live lineup all the individuals at once or one at a time, and requires him or her to justify in writing why he or she decided to show them sequentially vs. at once, or vice-versa, and why the lineup was not conducted by a person unfamiliar with who the suspect is. This might work in New York City or Chicago, but this is New Hampshire, where the typical police department has 10 or fewer officers and only one or two on duty at any one time, at the most. This simply adds another hurdle to the investigative process and one more issue to wrangle over in court. The same could be said of the requirement in the bill that in any photo or live lineup there be at least 4 persons or 5 photos known as "fillers" who closely resemble the suspect in appearance at the time of the offense. Once again, this is New Hampshire and many of our small towns do not have an exhaustive supply of individuals to put in lineups, nor do they, for example, where a robbery was committed by a person wearing a tank top, necessarily have 5 more photos of persons that resemble the suspect, all wearing tank tops when their photo was taken. The bill contains a litany of information that must be recorded and reported in a particular manner.

The vast majority of investigations are completed without the use of a lineup and the majority of seasoned investigators are fully aware of the potential problems with eyewitness identifications. In the end, prosecutors in NH rarely base any case on eyewitness ID alone without linking a suspect to the scene by a confession or other evidence. Regardless of what the Legislature writes into a law, the State and Federal appellate courts will continue to set forth procedures for eyewitness identifications and photo lineups. We believe this is an area best left to the courts rather than creating another set of hurdles that may or may not be consistent with what the courts are requiring.

Fiscal Impact:

Ann Rice



New Hampshire
Department of Justice

Office of the Attorney General

Law Enforcement Manual

VIII. Pre-Trial Identification Procedures

A. Introduction

A common investigative tool is a pre-trial identification procedure, in which the police show an eyewitness or victim of a crime one or more individuals, either in person or by photograph, for possible identification of the perpetrator. An identification obtained through one of these processes can be valuable evidence in a criminal trial. However, unless the identification process complies with a suspect's constitutional rights to due process and right to counsel, any resulting identification may be suppressed. This chapter discusses the right to counsel and the right to due process as they pertain to pre-trial identification procedures.

B. Right To Counsel

The right to counsel attaches at the commencement of adversary judicial proceedings -- typically when a complaint is filed or an indictment returned. From that point forward, a defendant has a right to consult with counsel and have counsel present at any critical stage in the criminal process. A pre-trial identification procedure that involves an in-person showing of a defendant to a witness or victim is considered a critical stage. Thus, a defendant who has been formally charged with a crime must be given the opportunity to confer with

counsel, or waive the right to counsel, before being involved in an in-person identification procedure.⁵⁰⁴ The right to counsel does not apply to photo identifications,⁵⁰⁵ thus a photo array can be used to obtain an identification at any point in the criminal investigative / pre-trial process without concern for the suspect's right to counsel.

C. Due Process

The use of a pre-trial identification can constitute a violation of a defendant's due process right if the process used to obtain the identification was "unnecessarily suggestive and conducive to irreparable mistaken identification."⁵⁰⁶ In determining whether an out-of-court identification procedure was unnecessarily suggestive, a court will evaluate "whether the police have implicitly conveyed their opinion of the criminal's identity to the witness."⁵⁰⁷

A defendant who challenges the fairness of a pre-trial identification procedure has the burden to prove that the process used was unnecessarily suggestive. If the defendant is successful in making that showing, evidence of the identification will be suppressed unless the State can prove that the identification is nonetheless reliable, because it was based on factors that were uninfluenced by the police.⁵⁰⁸ There are five factors that courts will consider in making that determination:⁵⁰⁹

- The witness's opportunity to view the suspect.

- What was the lighting like at the time of the viewing?
- How close was the witness to the perpetrator at the time?
- Was there anything blocking or interfering with the witness's view?
- How long was the witness able to look at the suspect?
- The witness's degree of attention.
- Why was the witness looking at the suspect?
- Was there a reason that the witness was focused on the suspect?
- The detail and accuracy of the witness's identification.
- The witness's level of certainty at the time of the identification.
- The lapse in time between the crime and the identification.

Because these factors may be critical to the use of the identification as evidence at trial, officers should cover each of the factors during an interview with the witness and document the witness's responses in a report.

1. Show-Ups

A show-up consists of presenting a single suspect to an eyewitness for possible identification. Show-ups are "widely condemned" because they are inherently suggestive.⁵¹⁰ They should be employed, if ever, in the most limited types of circumstances. Courts have recognized that there are times when a show-up may be necessary and, if done properly, will still satisfy due process by not being unnecessarily suggestive. Before using a show-up in any investigation, officers should consult with their county attorney or the attorney general's office.

The New Hampshire Supreme Court has decided only one case involving a show-up, State v. Fecteau,⁵¹¹ and found the procedure was not unnecessarily

subjective. In that case, the police took the victim of a sexual assault into the district court when they knew the suspect would be present for an arraignment. They chose a day when they knew the courtroom would be crowded and other non-uniformed males would be present. The Court found that under those circumstances, the police had taken all the necessary steps to avoid the process being unnecessarily suggestive.⁵¹²

Fecteau also involved an unintentional show-up, which the Court upheld. The police were standing outside the courtroom with the two victims when the defendant arrived at the courthouse and went inside. Despite the officer's attempt to divert the victim's attention, one of the women saw the defendant and spontaneously identified him as her attacker. The N.H. Supreme Court held that the identification was not unnecessarily suggestive because it was an accidental process.⁵¹³

Other courts have upheld the use of a show-up procedure against a challenge of unnecessary suggestiveness in the following circumstances:

- A one-person show-up within hours of the crime, in order for the police to determine whether their investigation was "on the right track";⁵¹⁴ and
- A one-person show-up to the victim who was in serious condition in the hospital, where it was not known how long she would live, and she could not be transported to the jail to attempt to identify her assailant.⁵¹⁵

2. Photo Arrays

A photo array involves showing a witness a series of photos, one of which is the person suspected of committing the crime under investigation, to see if the witness is able to identify the suspect. The photo array is developed based on a witness's description of a suspect. It should consist of a photograph of the suspect and at least seven other "filler" photographs of other individuals who resemble the suspect. The photos are shown to the witness either as a group or in sequence, and the witness is instructed to view the photos and determine whether any of the individuals is the person he or she observed.

To eliminate possible suggestiveness in a photo array, there are a number of guidelines that officers should follow in constructing and conducting an array.

a. Constructing The Array

The photo array should consist of a minimum of eight photos, including that of the suspect. When available, the photo of the suspect should resemble his or her appearance at the time of the incident being investigated.

The filler photographs should be of individuals who generally fit the witness's description of the suspect with respect to race, age, height, and weight. If the witness has highlighted particular features of the suspect in his or her description, the filler photographs should, to the extent possible, resemble the suspect with respect to those specific features. For example, if a witness specifically recalls that the suspect had a thick neck, wore glasses, or had a neck

tattoo, officers should attempt to use filler photographs that are consistent with that characteristic.

The photo array should contain only one suspect's photograph. If there are multiple suspects in an investigation, a separate photo array should be constructed for each.

Officers should attempt to use all black and white or all color photographs. To the extent possible, the photos should be consistent with respect to the background, pose and lighting. Any prejudicial information, such as a booking number, arrest date, or police department name should be removed or hidden from view.

b. Presenting The Array

It is preferable that the officer who presents the photo array to a witness has no knowledge of the suspect's identity or the location of the suspect's picture in the array. That eliminates the possibility that the officer might unintentionally influence the witness's selection of a particular photo. However, given the staffing levels of most law enforcement agencies in the state, as well as the practical reality that in many investigations all available officers will know the suspect's identity, this type of "blind presentation" may not be feasible. Under those circumstances, any officer presenting a photo array must exercise caution to refrain from saying anything that points out or suggests a particular photograph to the witness.

Before presenting the array, officers should include the following information in their instructions to the witness:

- the photos are in random order;
- the person who committed the crime may or may not be included in the array, so the witness should not feel compelled to make an identification;
- the investigation will continue, regardless of whether or not the witness makes an identification;
- at the completion of the process, the witness will not be given any feedback on the results of the process;
- the witness should take as much time as he or she needs; and
- if the person's photo is present in the array, it is possible that his or her appearance may have changed from the time of the event, as features such as clothing and head/facial hair are subject to change.

In the event that a witness recognizes someone's photograph, the officer should ask the witness to explain how he or she knows the person and to describe his or her degree of certainty of the identification. The witness should be asked to initial and date the selected photograph.

Upon completion of the process, the witness should not be given any feedback as to whether the "correct" selection was made. Officers should document the entire process in a report, and include a copy of the array. The report should include information about the instructions given to the witness, whether or not the witness selected any photograph and, if a selection was made, the witness's own words regarding the identification.

If more than one witness is going to view the array, the presentations

should be made separately. Officers should take steps to prevent any witness who has viewed the array from talking to other witnesses prior to their being shown the array.

3. Line-Ups

A line-up involves an in-person viewing of a suspect and at least five “filler” individuals by a witness or victim of a crime. As with a photo array, law enforcement must exercise caution in organizing and conducting a line-up, so as to avoid any unnecessary suggestiveness.

a. Composing A Line-Up

One of the most difficult challenges with a line-up is selecting fillers. As with a photo array, fillers in a line-up should resemble the suspect in significant features such as race, age, height, weight, and particularly those features that the witness may have described. No person with whom the witness may be acquainted should be included in the line-up.

Officers should permit the suspect to take any place in the line-up that he or she chooses. If counsel for the suspect is present, counsel may offer reasonable suggestions about the composition or arrangement of the individuals in the line-up. Any suggestions offered by counsel, whether or not incorporated into the line-up, should be documented and included in the written report of the lineup.

Once the composition of the lineup is established, an officer should

photograph the lineup in the order the witness will see it, as well as document the names of the individuals involved and their positions in the lineup.

b. Conducting A Line-Up

As with the photo array, it is preferable that the officer who conducts a line-up has no knowledge of the suspect's identity or position in the line-up. However, for staffing reasons, such a "blind presentation" may not be feasible. If it is not, the officer presenting the line-up must exercise caution to refrain from saying anything that points out or suggests a particular individual to the witness.

Prior to conducting the line-up, the witness should be told the following:

- the individuals are placed in random order;
- the person who committed the crime may or may not be included in the line-up, so the witness should not feel compelled to make an identification;
- the investigation will continue, regardless of whether or not the witness makes an identification;
- at the completion of the process, the witness will not be given any feedback on the results of the process;
- the witness should take as much time as he or she needs; and
- if the person is present, it is possible that his or her appearance may have changed from the time of the event, as features such as clothing and head/facial hair are subject to change.

In the event that a witness recognizes someone, the officer should ask the witness to explain how he or she knows the person and the level of certainty about the identification. The witness's identification, or lack thereof, and any comments should be documented. Regardless of whether the witness makes an

identification, the officer should not provide any feedback to the witness about his or her selection or non-selection.

During a line-up, a suspect can be required to exhibit him or herself without violating the right against self-incrimination. For example, it is permissible to ask a suspect, as well as the fillers, to do such things as wear a specific article of clothing, say a specific word or phrase, or make a certain gesture.⁵¹⁶

At the completion of the line-up, the officer should write a report that covers all of the relevant information about the line-up, including the names of the individuals involved, the process by which they were selected, the instructions given to the witness, any comments made by the witness, and whom the witness identified, if anybody.

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**AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association adopts the American Bar Association
2 Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures
3 dated August 2004.
4

5 FURTHER RESOLVED, That the American Bar Association urges federal, state, local
6 and territorial governments to reduce the risk of convicting the innocent, while increasing the
7 likelihood of convicting the guilty, by adopting the following principles:
8

9 1. Police and prosecutors craft detailed guidelines for conducting lineups and
10 photospreads in a manner that maximizes their likely accuracy;
11

12 2. Police and prosecutors receive periodic training on how to implement the above-
13 referenced guidelines,
14

15 3. Police and prosecutors receive periodic training on non-suggestive techniques for
16 interviewing witnesses;
17

18 4. Internal mechanisms be created within police departments and prosecutors'
19 offices to periodically update such guidelines to incorporate advances in social scientific research
20 and in the continuing lessons of practical experience; and
21

22 5. Every set of guidelines should address at least the subjects, and should
23 incorporate at least the social scientific teachings and best practices, set forth in the American
24 Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness
25 Identification Procedures dated August 2004.
26

27 FURTHER RESOLVED, That the American Bar Association, to improve the ability of
28 juries and judges to make fully informed trial decisions concerning the accuracy of eyewitness
29 identifications, urges federal, state, local and territorial governments to reduce the risk of
30 convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the
31 following principles:
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33 1. Courts should have the discretion, where appropriate in an individual case, to
34 allow a properly qualified expert to testify both pretrial and at trial on the factors affecting
35 eyewitness accuracy; and
36

37 2. Whenever there has been an identification of the defendant prior to trial, and
38 identity is a central issue in a case tried before a jury, courts should consider exercising their
39 discretion to use a specific instruction, tailored to the needs of the individual case, explaining the
40 factors to be considered in gauging the accuracy of the identification.
41

**AMERICAN BAR ASSOCIATION STATEMENT OF BEST PRACTICES
FOR PROMOTING THE ACCURACY OF EYEWITNESS
IDENTIFICATION PROCEDURES DATED AUGUST, 2004**

A. General Guidelines for Administering Lineups and Photospreads

1. Whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) should be unaware of which of the participants is the suspect;
2. Eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make or the lack thereof;

B. Foil Selection, Number, and Presentation Methods

1. Lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition;
2. Foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect;
3. The advisability of either a sequential lineup or photospread (showing one person or photo to a witness at a time, with the witness being asked to identify or not identify each person or photo immediately after it is presented) or a simultaneous lineup or photospread (showing a witness all lineup members or photographs at the same time) should be carefully considered;
4. Police departments and prosecutors should be urged to participate in properly-designed comparative field experiments in which one group of police districts in a city or county uses simultaneous lineup and photospread methods while another group of police districts uses sequential methods;

C. Recording Procedures

1. Whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police;
2. Absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.
3. Regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing

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the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.

D. Immediate Post-Lineup or Photospread Procedures

1. Police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man" -- the person believed by law enforcement to be the culprit.

REPORTI. *Introduction: Illustrating the Problem*

On June 5, 1999, Calvin C. Johnson, Jr. was released from prison after having served more than 15 years of a life sentence for rape.¹ Johnson was released because he had recently been exonerated by DNA evidence. Johnson's conviction had been based largely on a flawed eyewitness identification.

The rape victim, Ms. Mitchell, had selected Johnson's black-and-white photo from a photospread that included a number of full color pictures. But Ms. Mitchell selected *someone other than Johnson* during a live lineup. Johnson was clean-shaven in the photospread, but his work identification photos taken around the time of the rapes showed him sporting a very full, bushy beard. He still had the beard at the time of the lineup. The lineup was held about one week after the crime, far too soon after the rape for him to have had sufficient opportunity to grow a full beard in the interim. Yet Ms. Mitchell had told the police that her assailant was either clean-shaven or sported some "stubble."

The rape took place mostly in darkness (there was some light from the nearby bathroom shining into the bedroom), with Ms. Mitchell passing in and out of consciousness. Ms. Mitchell was white, while her assailant was African-American, as was Johnson. The police reported finding a single African-American pubic hair on Ms. Mitchell's body, a hair that police forensics examiners twice concluded could not have been Johnson's.

Ms. Mitchell had, at the request of the police, attended a preliminary hearing on another rape charge against Johnson, watching as Johnson was there identified in open court as a rapist. The two rapes were so similar that the police believed that the same man had committed both crimes. Yet Johnson was later acquitted of the second rape, with that victim's father actually congratulating Johnson because, after hearing the evidence, the father believed that Johnson was innocent of the crime.

When Ms. Mitchell identified Johnson at the trial that would eventually lead to his conviction, Ms. Mitchell claimed at one point that she was so upset at the lineup that she *purposely identified the wrong man*. She also changed her story, now saying at trial that her assailant "might have had a beard." At another point, she said, "I just wanted to pick someone out [of the lineup] and get out of there." Johnson offered alibi witnesses to further challenge the victim's testimony. Nevertheless, the jury convicted the entirely innocent Johnson.

¹ This summary of Calvin Johnson's case is drawn from CALVIN C. JOHNSON, JR., WITH GREG HAMPIKIAN, EXIT TO FREEDOM: THE ONLY FIRSTHAND ACCOUNT OF A WRONGFUL CONVICTION OVERTURNED BY DNA EVIDENCE XCI-XVII, 73-74, 84-133, 239-47 (2003). A more complete version of this Report will be available to the public soon.

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When this error was finally brought to light, the prosecutors' office announced that too much time had passed to determine who the real rapist was. Forensics sciences professor Greg Hampikian later explained: "The DA has more pressing needs than to reinvestigate a sixteen-year-old case, especially without an available victim; meanwhile, someone has gotten away with rape."²

Although there were numerous likely causes of Calvin Johnson's wrongful conviction, flawed eyewitness identification was a chief contributor. Cross-racial identifications, like that made by Ms. Mitchell, the research shows, are less trustworthy than intra-racial ones; the victim had little opportunity to observe her assailant; she misidentified someone as her attacker at the lineup; and her testimony was tainted by her attendance at a hearing in another related case, all of which happened in the face of forensics evidence *excluding* Johnson as a suspect.³ Johnson's conviction starkly illustrates how entirely innocent persons can be convicted when condemned by confident eyewitnesses in good faith fingering the wrong man.

The reliability of eyewitness identification is frequently questionable, as this Report will explain, even under circumstances in which the police do a much better job than they did with Calvin Johnson. Nor is Johnson's case unusual. Numerous high-profile cases of exonerations where the innocent were convicted based substantially upon inaccurate eyewitness testimony have made their way into the media.⁴

The most notorious of the recent cases was that of Anthony Porter, who was once but a few days from execution and whose experience eventually led to a complete re-examination of the death row process in Illinois.⁵ Other notorious cases have been the subject of recent best-selling or well-received books.⁶ Perjured or compelled eyewitness testimony is part of the problem and is addressed in a related paper.⁷ The subject of this Report, however, is *mistaken* eyewitness testimony, and its status has been concisely summarized by award-winning journalist Stanley Cohen, who notes that many criminal cases commonly include the sorts of factors that wrongly took away Calvin Johnson's freedom:

It is difficult to counter [a] mistaken identification offered in good faith by a witness who actually saw the accused. But even when the sole intent of the witness is to abet the judicial process, eyewitness accounts have been

² *Id.* at 281.

³ See *infra* text accompanying notes 16-20 for a discussion of the significance of these factors.

⁴ See, e.g., STANLEY COHEN, *THE WRONG MAN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS* 39-82 (2003) (discussing many of these cases); BARRY SCHECK, PETER NEUFELD, JIM DWYER, *WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 53-100 (2001) (discussing additional cases).

⁵ See COHEN, *supra* note 4, at 41-46.

⁶ See generally COHEN, *supra* note 4; SCHECK, *supra* note 4.

⁷ See COHEN, *supra* note 4, at 40 (on perjured or compelled eyewitness identifications); Honorable Arthur L. Burnett, Sr., *A Preliminary Analysis of How the Criminal Justice System Handles Accomplice and Informant Testimony and Some Recommendations for Improvements* (internal report to the ABA Ad Hoc Committee on Innocence and the Integrity of the Criminal Justice System).

found to be generally unreliable. The original identification is often made under unfavorable conditions; the witness was likely to be a good distance away from the accused who was possibly shrouded in darkness; the glimpse of a suspect was likely a fleeting one, perhaps no more than a second or two; observations made in extreme circumstances, when adrenaline is running high, tend to be untrustworthy. When a defendant is convicted solely on the basis of such testimony, the possibility of error is exceptionally high.⁸

Cohen's point is not to suggest that eyewitnesses are routinely wrong - - an extreme position that would flatly require exclusion of most such testimony from trial.⁹ Rather, Cohen apparently argues that the *risk* of error is so high that safeguards are needed to minimize that risk.¹⁰ The state of the research into the causes of, and cures for, eyewitness error is luckily sufficiently advanced that there is widespread agreement on some ways that we can do better now.¹¹ In other areas, there is a dispute about whether the research has gone far enough to justify implementing certain new procedures without more data.¹² This Report summarizes the state of, and lessons learned from, that research. The Report concludes that the research unequivocally supports: (1) using "double-blind" procedures in which no one involved in administering a lineup or photospread knows who is the suspect; (2) carefully instructing eyewitnesses not to assume that the right person is in the line or spread; (3) increasing the number of "foils" in the line and selecting them to match the particular eyewitness's description of the perpetrator; (4) the witness's reciting in her own words how confident she was in her selection; and, whenever practicable, (5) videotaping or digitally video recording a lineup. The Report further concludes that powerful research mandates wider use of special jury instructions and expert testimony on eyewitness identification problems to assist factfinders in fairly evaluating the evidence in appropriate cases. However, concerns about the maturity of the research and its dependence on simulations rather than fieldwork caution against a too-ready embrace of one new procedure, "sequential" lineups or photospreads, in which foils and the suspect are presented to the witness one-at-a-time instead of, as is currently done, in a single simultaneous presentation of all the participants.¹³ This Report does recommend, however, that the accuracy and practicability of the promising sequential techniques should be tested in comparative field studies in which some

⁸ See COHEN, *supra* note 4, at 39-40.

⁹ Cf. Edward J. Imwinkelried, *Flawed Expert Testimony: Striking the Right Balance in Admissibility Standards*, 18 CRIM. J. 28, 30 (2003) ("The problem with erroneous expert testimony is smaller than and more tractable than the problem of mistaken eyewitness testimony by layperson.").

¹⁰ Although Cohen does not expressly state his argument in terms of risk, a fair reading of his work suggests that risk minimization is his goal, though he also sees the fear of error as grounds for opposing the irreversible punishment of death. See COHEN, *supra* note 4, at 39-82, 269-90. This Report expresses no opinion on the question of capital punishment. The risk of eyewitness error is present in many types of criminal cases, the vast majority of which do not involve even a potential death sentence.

¹¹ See *infra* Part III; Saul M. Kassir, *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405 (2001) (survey of experts reveals an agreement rate of at least 80% on many of the factors affecting eyewitness accuracy that are discussed in this report).

¹² See *infra* text accompanying notes 34-35.

¹³ See *infra* text accompanying notes 34-35.

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police districts use the new method while others do not, an approach similar to that recently implemented in Illinois by statute.¹⁴ Greater detail about these proposals is contained in the *Resolution on Eyewitness Identification* attached to this Report.¹⁵

Part II of this Report examines the causes of eyewitness error, while Part III summarizes the data relevant to our suggested improvements for conducting lineups and photospreads. Part IV explores the data on ways to enhance the jury's ability better to gauge the quality of eyewitness testimony, with Part V summarizing other reform efforts and stating this Report's conclusions.

II. *The Causes of Eyewitness Error*

A. *Factors Affecting Identification Accuracy*

The sorts of factors that can lead eyewitnesses into or out of sin are routinely grouped into five categories, specifically, those concerning witness characteristics, perpetrator characteristics, the nature of the event (the crime) itself, post event experiences, and witnessing or testifying factors:

1. *Witness Characteristics*: Neither the eyewitness's sex, race, nor ethnicity, nor his intelligence (if within normal range), belief in having strong face-recognition skills, personality, or expectation of a future recall or recognition test have any influence on his ability accurately to identify the perpetrator. However, very young children do poorer than older ones or adults at recognizing strangers and are more susceptible to suggestion, while the elderly may have information – recall and face-recognition - - disadvantages. Witnesses intoxicated at either the time of the crime or during a later interview respectively have greater encoding and accurate recall problems.¹⁶
2. *Perpetrator Characteristics*: Perpetrators with distinctive appearances, such as unusual hairstyles, tattoos, or scars, are more easily recognized than are the less distinctive. Cross-racial identifications are generally inferior to within-race identifications.¹⁷
3. *Event Factors*: The longer the crime, the more time effectively to encode information, thus enhancing memory. Visible weapons ("weapons focus"), however, draw a witness's attention to, for example, the gun or knife, thus reducing accuracy in describing people, things, or events. Moderate levels of stress-induced physiological

¹⁴ See *infra* text accompanying notes 97.

¹⁵ See *Resolution on Improving the Eyewitness Identification Process*.

¹⁶ BRYAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESSES 13-17 (2002).

¹⁷ *Id.* at 18. For more details on cross-racial identification, see *American Psychological Association, Special [Symposium] Theme: The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decisionmaking*, 7 PSYCH., PUB. POL'Y, & L. 3-262 (2001).

arousal enhance memory performance but low or high arousal levels harm performance.¹⁸

4. *Post-Event Factors*: The greatest memory decline occurs shortly after the crime, but memory degradation continues as more time passes. If an eyewitness commits to an identification of a mug shot, the witness is likely to identify the same person at later photo arrays, lineups, or trials, whether or not the suspect is the perpetrator. "Unconscious transference" is also a significant problem "in which an eyewitness is familiar with the suspect from some event other than the crime (perhaps, for example, because both occasionally use the same subway station), does not recall why he knows the suspect, and therefore assumes that he knows the suspect because the suspect is the perpetrator."¹⁹
5. *Testimonial Factors*: These factors concern the relationship between the quality of eyewitness testimony and the accuracy of identification. Counter-intuitively, a mismatch between an eyewitness's description of a perpetrator and the appearance of the suspect is often not an appropriate reason to doubt the witness's accuracy. This is so because of the difference between "recall" - - retrieving information from memory - - and "recognition," simply recognizing the right answer when someone else presents it to you. Research reveals that the quality of the recall process of describing the perpetrator is only weakly related to the accuracy of the recognition process of identifying a lineup or photospread suspect. Similarly, inconsistency among multiple perpetrator descriptions given by a single witness can be caused by variation in interview methods, interviewer expectations, or other factors, but is, in any event, not a good predictor of identification accuracy.

Also counter-intuitively, there is a *weak* association between the eyewitness's confidence in the accuracy of an identification and its true accuracy. Confidence is also malleable and can be raised or lowered by post-crime events such as investigating officer feedback that the witness "picked the right man."²⁰

Countering these factors' influence can be done at two separate stages: the input stage in which identification events are implemented by law enforcement and the processing stage in which the judicial system must evaluate the accuracy of identifications resulting during input.

III. *Improving Inputs: Police Procedures and Human Memory*

A. *The Victim or Eyewitness's Initial Report of a Crime and Pre-Identification Interviews*

¹⁸ CUTLER, *supra* note 16, at 18-20.

¹⁹ *Id.* at 21-22.

²⁰ *See id.* at 22-25.

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Suggestion can inadvertently be introduced by the police during their first contact with a witness, such as a 911 call. Non-leading, open-ended questions; a thorough effort to obtain complete information; and careful record-keeping (ideally audio or video records, whenever possible) are among the suggestions made by research psychologists for minimizing the influence of the police on witness memory and for later accurate reporting of the witness's memory as it existed *at the time of the contact with the police*.

B. *The Lineup*

The main goals for improving lineup accuracy are reducing potential sources of suggestion and the influence of relative judgment processes. Research suggests that a substantial amount of guessing goes on by eyewitnesses in lineups. Sometimes guessing results in accidentally identifying a guilty party, sometimes in fingering the innocent, as defined in simulation and archival studies.²¹ The potentially pernicious influence of guessing must, therefore, also be controlled. Here are some of the various techniques for accomplishing these goals:

1. *Sequential Lineups*: The usual lineup procedure is to present all suspects to the witness simultaneously in a line.²² However, this process encourages relative judgments, that is, choosing the person who, among those in the line, looks most like the perpetrator.²³ With sequential lineups, the witness views one lineup participant at a time and is not told how many he will see.²⁴ As each participant is presented, the eyewitness states whether or not it is the perpetrator.²⁵ The witness is thus encouraged to compare the individual participant's face to the witness' recollection of the perpetrator's face rather than also comparing the participants' faces to one another in a quest for the "best match." Once an identification is made in a sequential procedure, the procedure stops.²⁶

There is near uniform agreement in all the published literature that the sequential procedure "produces a lower rate of mistaken identifications when the perpetrator is absent...."²⁷ This conclusion was reaffirmed in a recent "meta-analysis" of studies conducted around the world using a variety of methodologies.²⁸ This meta-analysis concluded that false identifications were

²¹ See Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. J. 37, 37-45 (2003).

²² See CUTLER, *supra*, note 16, at 39.

²³ See Michael J. Saks, *et. al*, *Model Prevention and Remedy of Erroneous Convictions Act*, 22 ARIZ. ST. L.J. 665 (2001) [hereinafter Saks, *Model Act*].

²⁴ See CUTLER, *supra* note 16, at 39.

²⁵ *Id.* at 39.

²⁶ *Id.* at 39.

²⁷ Saks, *Model Act*, *supra*, note 23, at 686; see also Gary L. Wells, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUMAN BEHAVIOR 603, 639 (1998); Penrod, *supra* note 21, at 46 (summarizing literature); CUTLER, *supra*, note 16, at 39; Kassir, *supra* note 11, at 410-11.

²⁸ See Penrod, *supra*, note 21, at 46.

twice as likely in target-absent arrays using simultaneous presentation than when using sequential presentation.

The vast majority of researchers also conclude that sequential methods result in “little loss of accuracy when the perpetrator is present.”²⁹ However, what constitutes a “little loss” is debatable. Thus the same “meta-analysis” noted above reported a 15 percent loss in correct identifications by foregoing simultaneous methods in favor of sequential ones.³⁰ Professor Steven Penrod suggests that this loss may be attributable, however, largely to former “lucky guessers” now making no choice whatsoever, thus constituting no real loss at all. Sequential methods arguably function best, however, only in conjunction with the “blind lineup” procedure, in which no one involved in administering the lineup knows who is the suspect, a procedure about which there is no scientific dispute and is also of critical importance in administering accurate simultaneous lineups. These methods may face resistance in the field because they differ so much from the old ones and are not self-evidently superior based on officers’ everyday commonsense.³¹ Nevertheless, some police departments in the United States are already making tentative efforts toward adopting sequential methods.³²

Justice Robert Kreindler also ordered a sequential lineup in a recent case in which he concluded that the scientific community was “unanimous in finding that sequential lineups are fairer and result in a more accurate identification.”³³ Justice Kreindler further noted that he found not “a single scientific article criticizing the sequential lineup or criticizing the scientific method used by psychologists in their experiment.”³⁴

Justice Kreindler was not, however, entirely correct. There is a growing dissenting view among some very well-respected social scientists that the research has not proceeded far enough to determine under what conditions, if any, a sequential lineup is to be preferred to a simultaneous lineup.³⁵ Moreover, say some researchers, it may be that there are factors other than the simple order of presentation that are the cause of better outcomes for sequential lineups in many experiments. Additionally, field studies have not been done to determine the practicability of sequential methods, though new technologies entering the marketplace now may substantially reduce the time and out-of-pocket costs involved. These dissenters do not argue that

²⁹ Saks, *Model Act*, *supra*, note 23, at 686 (citing Wells, et. al., *supra*, note 27, at 639-40).

³⁰ See Penrod, *supra*, note 21, at 46.

³¹ See Wells et. al., *supra*, note 27, at 617.

³² See CUTLER, *supra* note 16, at 56-67.

³³ *State of New York v. Rahim Thomas* (2001). Although the vast majority of researchers accept the superiority of sequential methods, Justice Kreindler was wrong to find, “unanimity” among those researchers. See *infra* text accompanying notes 62-76.

³⁴ *Id.* See also CUTLER, *supra*, note 16, at 57. Other New York State judges have disagreed, however, with Judge Kreindler, largely doing so in unpublished decisions collected by Committee member Dino Amoroso.

³⁵ The sources relied upon for the position stated in this paragraph are Ebbe B. Ebbesen and Heather D. Flowe, *Simultaneous v. Sequential Lineups: What Do We Really Know?*, www.psy.ucsd.edu/~eeebbesen/SimSeq.htm2003; Dawn E. McQuiston, Roy S. Malpass, & Colin Tredoux, *Sequential v. Simultaneous Lineups: A Review of Method and Theory* (draft); Amina Memon & Fiona Gabbert, *Unraveling the Effects of Sequential Presentation in Culprit Present Lineups* (in press); Kassir, *supra* note 11.

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simultaneous lineups are the preferred method, and some seem to believe that sequential lineups will eventually be proven superior in many circumstances. Nevertheless, their current view, if accepted, suggests that the scientific evidence is insufficient to choose one method over another; therefore, either might do. To add to the knowledge base and to test the practicability of the sequential method, Illinois has by statute mandated that some police districts in cities of varying sizes use sequential methods, while others use simultaneous methods, with careful tracking of the results and problems by social scientists or by others working under their guidance. Although the dissenters are thus far few in number, this Committee finds their critique persuasive and the Illinois approach most consistent with an effort to improve the long run accuracy of lineups and thus the chances of convicting the guilty while acquitting the innocent.

2. *Lineup Size:* Lineups in the United States typically involve five or six participants.³⁶ Given the substantial evidence of eyewitness guessing, larger lineups should reduce the chances of a false positive -- of a guesser selecting the (in fact innocent) suspect focused on by the police. The math is straightforward: there is 1 in 6 chance of selecting the suspect by entirely random guessing (if no other forces are at work) in a 6 person lineup but only a 1 in 12 chance of doing so in a 12 person lineup.³⁷

There is no magic correct number. Britain, for example, uses arrays of 9.³⁸ The point is simply that any increase in size will help to reduce the false positive rate.³⁹ But many researchers believe that 6 person lineups create an unacceptably high risk of error, one study concluding, for example, that in real-world 6 person lineups the likely risk of a false positive would be 10% *even if most of the other recommendations to improve lineup accuracy were followed.*⁴⁰ This report therefore urges larger size lineups than is currently the case whenever practicable. However, given debate over the necessary lineup size, this report does not mandate a specific minimum number of foils, leaving that to the judgment of local jurisdictions in light of the teachings of science and the resources available to local departments. It is useful to note, nevertheless, that computerized databases should make it easier to have more foils in photo arrays than in live lineups so that there need not necessarily be the same required minimum number of foils in both sorts of procedures.

3. *Foil Selection:* Foils should be selected so that they fit the witness's description of the culprit rather than that the foils and the suspect look like one another.⁴¹ If all foils fit the suspect description, then a witness cannot guess based on who comes closest to that

³⁶ Penrod, *supra*, note 21, at 45.

³⁷ *See id.* at 45.

³⁸ *See id.* at 45. *But see* Roy Malpass, *General Principles of Lineup Fairness Evaluation*, www.eyewitness.utep.edu/consult04.html (last visited April 13, 2004) (American Psychology and Law Policy guidelines for constructing fair lineups suggest, in Dr. Malpass's view, a lineup size of at least 9 foils, meaning an array of at least 10 persons when including the target).

³⁹ *See* Penrod, *supra*, note 21, at 45.

⁴⁰ *See, e.g.,* Wells, et. al., *supra* note 29, at 635 (describing the 10% error rate as "far higher than what would seem acceptable to the justice system."); Penrod, *supra* note 48.

⁴¹ *See* Penrod, *supra*, note 21, at 45-46.

witness's description - - a relative judgment process and a reasoned guess.⁴² On the other hand, if every effort is made to select foils because they all look so much like the suspect rather than because they fit the suspect description, then, at some point, "the lineup would be composed of clones," unduly interfering with recognition of a guilty suspect.⁴³ Furthermore, there are a small number of special circumstances in which alternative foil-selection strategies make more sense.⁴⁴

At the same time, the lineup must be designed to avoid the suspect's standing out unduly from the foils. For example, if the suspect is the only one wearing clothes similar to those worn by the perpetrator during the crime,⁴⁵ that would draw undue attention to that suspect.⁴⁶

4. *Avoiding Instruction Bias:* The instructions given by the lineup administrator can significantly raise the risk of false identification, even where the biases are subtle.⁴⁷ Eyewitnesses must be told that the perpetrator may not be in the lineup, that they should not therefore feel that they must make an identification, and that the person administering the lineup does not himself know which person is the suspect.⁴⁸ Non-verbal cues must also be avoided by the lineup administrator.⁴⁹ Of course, where there are multiple eyewitnesses, each lineup must be conducted with one witness at a time and out of the sight of other witnesses.

5. *Collecting Confidence Judgments:* "A clear statement should be taken from the eyewitness at the time of the identification and before any feedback as to whether he or she identified the accurate culprit."⁵⁰ This accurately preserves the witness's confidence level at the time the identification was made and before other influences can taint or alter the witness's memory of how confident he was in his choice.⁵¹

⁴² See Wells et. al., *supra*, note 27, at 632.

⁴³ See *id.* at 632.

⁴⁴ See *id.* at 632-34.

⁴⁵ See CUTLER, *supra*, note 16, at 40-41.

⁴⁶ See Wells, et. al., *supra*, note 27, at 630.

⁴⁷ See CUTLER, *supra*, note 16, at 34.

⁴⁸ See Penrod, *supra*, note 21, at 45.

⁴⁹ See CUTLER, *supra* note 16, at 34.

⁵⁰ Penrod, *supra*, note 21, at 46.

⁵¹ See *id.* at 46. Psychology Professor Brian L. Cutler summarizes much of the research on the relationship between a witness's confidence in an identification and its accuracy thus:

[T]he relationship between a witness's confidence and the accuracy of her testimony or identification is modest at best. This is because confidence and accuracy are influenced by different things. Some people are always confident, but not always right. Others may be rarely confident, but frequently correct. The bigger problem with eyewitness confidence is that it is malleable.

CUTLER, *supra* note 16, at 24-25. Concerning this last point, the research reveals that telling a witness that she made the correct choice increases confidence while reducing the confidence-accuracy correlation. See Steven Smith, et. al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed in the Cross-Race Situation?*, 7 PSYCH., PUB. POL'Y, & LAW 153, 165 (2001). Repeated post-event questioning can have a similar effect. See *id.* at

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Ideally, the witness should never be told whether he selected the “right man” so that his confidence is not artificially inflated by the time of trial.

6. *Accurately Record the Lineup, Including Videotaping*: Accurate records of a lineup procedure can help to improve later judicial and jury assessment of the quality of the lineup and the accuracy of the identification.⁵² Videotaping would especially enable accurate recreation of lineup circumstances.⁵³ However, multiple cameras are likely necessary to achieve this goal most effectively; the procedure does not itself improve lineup accuracy; and videotaping can be costly in terms of time, money, and equipment.⁵⁴ Nevertheless, on balance, videotaping or digital video recording of lineups seems highly desirable, where practicable.

C. Show-ups

Show-ups involve showing a single suspect to an eyewitness and asking him to identify or reject the suspect as the perpetrator.⁵⁵ There is clear evidence that show-ups are more likely to yield false identifications than properly constructed lineups.⁵⁶ Show-ups hint to the witness that

165. *The bottom line*: The at-best modest association between confidence and accuracy when measured “‘cleanly’ - - just after an interview or identification and without any social influence” - - degrades as social influences seep in with the passage of time. See CUTLER, *supra* note 16, at 25. Therefore, prompt recording of a witness’s stated confidence level elicited in a non-suggestive manner immediately after the identification is essential. See Penrod, *supra* note 21, at 46.

⁵² See Wells et. al., *supra*, note 27, at 640.

⁵³ See *id.*

⁵⁴ See *id.* at 641.

⁵⁵ See ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 788 (2d ed. 2003). There is some research suggesting that show-ups may be widely used. Thus one study found that 55% of identifications in a 488 case sample over a four year period in a major metropolitan area were show-ups; another study found a show-up rate of 30% in El Paso, Texas; and an intensive study of one Illinois detective found a 77% show-up rate. See Steblay, et. al., *Eyewitness Accuracy Rates In Police Show-up and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUMAN BEH. 523, 524 (2003) (summarizing research) [hereinafter Steblay, *Eyewitness Show-up Accuracy Rates*].

⁵⁶ Wells et. al., *supra*, note 27, at 631. However, a more recent meta-analysis of the research done on the accuracy of show-ups versus lineups strikes a more cautionary note. See Steblay, *Eyewitness Show-up Accuracy Rates*, *supra* note 114. These researchers found only eight papers on the subject, with conflicting results; found further that, depending on the measure chosen, under certain conditions show-ups may be no more dangerous for the innocent than are lineups, though using other measures the opposite conclusion might be reached; and found inadequate exploration of the impact of a wide array of variables on accuracy. Their conclusion, however, was that the “data currently available leave us with residual concern regarding potential dangers of show-ups and with a strong appreciation of the need for research that will specifically address show-up accuracy under realistic conditions comparing competent practice with biased procedure.” *Id.* at 539. Overall, there was a “paucity of data and...[a] need for more deliberate attention to show-ups.” *Id.* at 539.

A few related points must be noted. For any identification method, accuracy declines as the time between the crime and the identification increases, thus raising the number of false identifications. See Otto H. Maclin, et. al., *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCH., PUB. POL’Y, & L. 134, 136-37 (2001). If part of the argument in favor of show-ups is that they enable

the police believe that “this is the man,” a highly suggestive message.⁵⁷ Moreover, given no other options, it is often hard independently to judge the accuracy of the witness’s choice.⁵⁸ On the other hand, there is some research suggesting that “a show-up is preferable to a poorly constructed lineup,”⁵⁹ though well-constructed lineups are unquestionably the best choice.⁶⁰ Furthermore, show-ups can enable the quick release of innocent persons at the crucial early stages of an investigation.⁶¹ Many representatives of law enforcement at the recent American Judicature Society Conference on Wrongful Convictions described show-ups as common and as essential to effective law enforcement, contrary to the constitutional mandate that they be used only when “necessary.” Given these competing concerns, it is difficult, absent further research, to craft a general rule concerning when even prompt show-ups should or should not be permissible, so this Report postpones any recommendation on this subject.

D. Photospreads

Photo arrays are governed by substantially the same principles as for lineups. Thus blind and sequential spreads of adequate size, with foils selected to match eyewitness descriptions, with efforts made to avoid the suspect’s standing out, and with proper instructions from the lineup administrator, are generally advised by researchers.⁶² One study comparing subject responses to photos of lineups versus videotaped lineups maintains that a photo of a lineup and a photo array (a collection of photos of individuals) are very different things.⁶³

Photo arrays are probably becoming increasingly important. As a Washington Post investigative staff writer recently explained:

Like woolen uniforms, wooden batons and six-shot revolvers, the old-fashioned lineup is a vanishing part of police work. The DC police

prompt identifications when memories are the most fresh, that argument vanishes for show-ups done significantly after the time of the crime. *But see id.* at 538 (“The fact that the show-up generally occurs shortly after the crime may further convince witnesses that the suspect is unlikely to be innocent. They may ask themselves, ‘How many people can there be in this area that are wearing clothes like that?’” But more research on clothing bias is needed). Moreover, new software programs usable on laptops or personal digital assistants combined with digital camera technology enable the prompt creation of on-the-scene video or photographic lineups by either simultaneous or sequential methods, perhaps in the near future further minimizing the need-for-urgent-action justification for using show-ups. *See* Otto H. Maclin, et. al., *PCE_Basic: A Computerized Framework for the Administration and Practical Application of Research in Eyewitness Psychology* (March 2004) (paper presented at the 2004 Annual Conference of the American Psychology and Law Society).

⁵⁷ *See* Wells, *supra* note 27, at 631.

⁵⁸ *See id.* at 631.

⁵⁹ Saks, *Model Act*, *supra* note 23, at 687.

⁶⁰ *See id.* at 687.

⁶¹ *See id.* at 687.

⁶² *See* CUTLER, *supra*, note 16, at 31-32.

⁶³ *See* Tim Valentine & Pamela Heaton, *An Evaluation of the Fairness of Police Lineups and Video Identifications*, 13 *Applied Cognitive Psychology* 559 (1999).

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department is the only one in the Washington area that still uses it regularly, and only a decade ago it conducted 300 lineups a year.

Police departments today are far more apt to ask victims or witnesses to identify photographs of suspects instead of the suspects themselves. Detectives can use computer programs to comb through photo databases and can quickly create an array of pictures from which a suspect can be identified at any time or place.

A live lineup is “a big hassle, compared to what we can do with what’s already on the computer,” said Capt. John Fitzgerald of the Montgomery County police.⁶⁴

Some in law enforcement continue to be lineup advocates, however, noting that “lineups display a suspect’s profile, posture and other features that a simple mug shot cannot capture, all of which can aid the victim or witness in making an identification.”⁶⁵ Lineups also add the dimension of voice that is missing from photospreads.⁶⁶ As former United States Attorney for the District of Columbia, Joseph E. diGenova, explains: “They [the witnesses] didn’t look at a photo when the crime was committed. They looked at a person.”⁶⁷

If photospread use is indeed rising relative to lineup frequency, that merely underscores the importance of using the same principles for sound identification procedures, whether done by lineup or photospread.

Caution in administering photospreads and show-ups is especially important because flawed ones can easily taint later lineup and at-trial identifications.⁶⁸

IV. *Improving the Processing Stage*

Once an identification has been made at a lineup, show-up or photo array, a new set of concerns must be addressed: How, if at all, can we improve factfinders’ abilities properly to evaluate the fairness and accuracy of lineup identifications. A variety of options have been

⁶⁴ David A. Fahrenthold, *Lack of Suspect Look-Alikes Helps Lead to Demise*, WASH. POST, April 19, 2004, A01. The Post reporter explained further:

D.C. Police have trouble not only in finding enough officers who bear some resemblance to the suspect, but also in locating officers who can spare the time to go to police headquarters when they could be patrolling the streets or investigating crimes. These human scavenger hunts can take hours, they said.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CUTLER, *supra* note 16, at 42-44.

suggested. Here we discuss just two that we found most promising: use of experts and revamped jury instructions.

A. *Expert Testimony*

There is substantial psychological research establishing that eyewitness identification and memory processes are not common knowledge⁶⁹ and correspondingly not within the knowledge of most jurors.⁷⁰ Jurors are likely unaware of such phenomena as weapons focus, retention intervals, and instruction bias.⁷¹ Wells and colleagues summarize matters thus:

Taken together, the survey, post diction and mock-juror experiments, and the confidence-accuracy studies converge on a worrisome set of conclusions: Jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses - - because they rely so heavily on witness confidence, which is relatively nondiagnostic - - and are generally insensitive to other factors that influence identification accuracy. Furthermore, this picture is even gloomier when one considers that eyewitness confidence proves to be highly malleable.⁷²

Expert testimony is thus needed to educate jurors. Moreover, much of such expert testimony, if properly presented by a qualified witness, should logically survive scrutiny under *Daubert* and other potential hurdles to admissibility. Nevertheless, the courts are divided on the question. Some state and federal courts have found such expert testimony inadmissible because it concerns knowledge within jurors' everyday understanding⁷³ or because cross-examination is deemed adequate to reveal deficiencies in eyewitness testimony.⁷⁴ Other courts leave it within the discretion of the trial judge to admit or exclude expert testimony, such trial-judge-deference

⁶⁹ *Id.* at 129-30.

⁷⁰ Wells et al., *supra*, note 27, at 354.

⁷¹ *Id.* at 354.

⁷² *Id.* at 454.

⁷³ See, e.g., *U.S. v. Larkin*, 978 F. 2d 964 (7th Cir. 1992); *U.S. v. Purham*, 725 F. 2d 450 (8th Cir. 1974); *U.S. v. Fosher*, 590 F. 2d 381 (1st Cir. 1979); *State v. Gaines*, 260 Kan. 752 (1996); *Commonwealth v. Ashley*, 427 Mass. 620 (1998); *State v. Coley*, 32 S. W. 4d 831 (Tenn. 2000); *Commonwealth v. Simmons*, 541 Pa. 211 (1995).

⁷⁴ See e.g., *U.S. v. Poole*, 794 F. 2d 462 (9th Cir. 1986). Support for the assertion that expert eyewitness identification testimony by qualified witnesses should survive *Daubert* scrutiny and related admissibility tests can be found in CUTLER, *supra* note 163, at 125-32.

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apparently being the predominate view among both federal and state courts.⁷⁵ Still other jurisdictions allow expert testimony only under specific circumstances.⁷⁶

In a recent study, researchers found that expert testimony enhances jurors' sensitivity to the factors that influence identification accuracy without overly increasing juror skepticism of the witness's identification.⁷⁷ These conclusions are largely consistent with numerous earlier trial simulation studies concluding that expert testimony does indeed increase juror awareness of factors affecting eyewitness accuracy, assists them in evaluating eyewitness testimony effectiveness, and reduces conviction rates.⁷⁸

D. Jury Instructions

Some courts give special instructions about eyewitness testimony, often as a replacement for expert testimony. The earliest and most well-known of these is the *Telfaire* instruction.⁷⁹ The *Telfaire* instruction, however, omits many important factors and can be misleading, for example, by suggesting that witness confidence is a good predictor of eyewitness accuracy when the research shows otherwise.⁸⁰ The "Revised Telfaire Instruction," proposed by Professor Edith Greene, has been found in her own jury research to be more effective than the original *Telfaire* instruction.⁸¹ This revision is simpler, more accurately conveys the lessons of the research, and explains the processes by which various factors affect eyewitness memory.⁸² But, in the view of one of the leading experts in the area, California's *Wright* instruction does an even better more

⁷⁵ See e.g., *U.S. v. Curry*, 977 F. 2d 1042 (7th Cir. 1992); *U.S. v. Hudson*, 884 F. 2d 1016 (1st Cir. 1995); *U.S. v. Blade*, 811 F. 2d 461 (8th Cir. 1987); *U.S. v. Langford*, 802 F. 2d 1176 (9th Cir. 1986); *U.S. v. Brien*, 59 F. 3d 274 (1st Cir. 1995), cert. denied, 516 U.S. 953 (1995); *U.S. v. Hicks*, 103 F. 3d 837 (9th Cir. 1996); *State v. Chapple*, 135 Ariz. 281 (1983); *State v. Nordstrom*, 200 Ariz. 229 (2001); *People v. Lee*, 96 N.Y. 2d 157 (2001); *State v. Cole*, 147 N.C. App. 637 (2001).

⁷⁶ See e.g., *State v. Moon*, 45 Wash. App. 692 (1986); *U.S. v. Hines*, 55 F. Supp. 2d 62 (D.Mass. 1999); *Brodes v. State*, 250 Ga. App. 323 (2001); *People v. Whittington*, 74 Cal. App. 3d Supp. 806 (1997).

⁷⁷ See Jennifer Devenport, Brian Cutler, Veronica Stinson, & David Kravitz, *How Effective Are the Cross-Examination and Expert Testimony Safeguards? Juror' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 87 J. Applied Psych. 1042 (2002).

⁷⁸ See, e.g., S. Fox & G. Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock-Juror Judgment*, 10 L. & Human Beh. 387 (1980); Elizabeth Loftus, *Impact of Experts Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. of Applied Psychology 9 (1980); G. Wells, R. Lindsay & J. Tounignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 L. & Human Behavior 2785 (1980). See also BRIAN L. CUTLER & STEVEN L. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 240 (1995) (concluding that various studies support this conclusion: "Expert testimony improve[s] sensitivity without affecting jurors' overall level of skepticism about the identification."). There is, however, reason to believe that identifying errors in cross-racial identifications may still be particularly difficult, even for the most well-informed and well-instructed juries. See Smith, *supra* note 106, at 165-67.

⁷⁹ See *United States v. Telfaire*, 469 F. 2d 552, 558-59 (D.C. Cir. 1979).

⁸⁰ See CUTLER, *supra*, note 16, at 159-60.

⁸¹ See Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOCIAL PSYCH. 252, 252-76 (1988); CUTLER, *supra*, note 16, at 160-63) (reprinting the revised instruction).

⁸² See CUTLER, *supra*, note 16, at 163.

thorough job.⁸³ The *Wright* instruction can readily be updated with new research and easily tailored to the factors important to a particular case.⁸⁴

In most jurisdictions, the question whether a jury instruction is proper is left to the trial court's discretion. Some courts find an instruction necessary where the evidence raises serious doubts as to the accuracy of an identification.⁸⁵ Omission of an instruction is usually found to be an abuse of discretion only where identity is *the* central issue, there is no corroborating evidence, and the circumstances raise doubts about the reliability of the defendant's identification.⁸⁶ Some jurisdictions, by contrast, hold as a general proposition that special instructions are unnecessary.⁸⁷ Still others consider it adequate to use only general instructions about judging the credibility of any witnesses,⁸⁸ or special instructions to be unnecessary where identification testimony has been corroborated by other evidence.⁸⁹ Jury instructions in other areas generally have not, however, had a good record of sufficiently altering jury reasoning processes as intended so that the efficacy of a more specific instruction, at least absent other reforms, such as use of expert testimony on the subject and improvement of the quality of identification procedures themselves, is in doubt.⁹⁰ Jury instructions about eyewitness identification accuracy tend to instruct jurors on general principles, such as "unconscious transference," that are relevant to the facts involved in a particular case but do not more specifically instruct the jury about how those principles apply to the case at hand.⁹¹ The instructions are necessarily general because even experts cannot reliably opine after the fact that a particular identification was reliable. Generality also avoids "usurping the jury's role" as factfinder.⁹² Nevertheless, some prosecutors object to specific instructions precisely because, in their view, generalities tell the jury nothing about the particular case.⁹³ Some judges might also hesitate to give instructions not supported by expert testimony at the particular trial.⁹⁴ On the other hand, jury instructions on the areas in which there is widespread scientific consensus can save time, much in the way that operation of

⁸³ See *id.* at 163-68 (also reprinting the *Wright* instructions, which was first articulated in *People v. Wright*, 43 Cal. 3d 399 (1987)).

⁸⁴ See *id.* at 168.

⁸⁵ See e.g., *State v. Harden*, 175 Conn. 315 (1978); *Commonwealth v. Ashley*, 427 Mass. 620 (1998); *State v. Mann*, 56 P. 3d 212 (Kan. 2002); *State v. Pierce*, 330 N.J. Super. 479 (2001).

⁸⁶ See e.g., *State v. Cromedy*, 158 N.J. 112 (1999).

⁸⁷ See e.g., *State v. Chatman*, 109 A112. 275 (1973), *cert. denied*, 414 U.S. 1010 (1973); *State v. Osorio*, 187 Ariz. 579 (1996); *State v. Taft*, 57 Conn. 19 (2000); *Young v. State*, 226 Ga. 640 (1997).

⁸⁸ See e.g., *McLean v. People*, 172 Colo. 338 (1970); *Riley v. State*, 268 Ga. 640 (1997); *State v. Jones*, 273 S.C. 723 (1979), or the availability of an alibi (See e.g., *State v. Valencia*, 118 Ariz. 136 (1977); *State v. Sloan*, 575 S.W. 2d 836 (Mo. App. 1978).

⁸⁹ See e.g., *Taylor v. State*, 157 Ga. App. 212 (1981); *Gunning v. State*, 347 Md. 332 (1997).

⁹⁰ See generally RANDOLPH JONAKAIT, *THE AMERICAN JURY SYSTEM* 202-15, 290-94 (2003).

⁹¹ See CUTLER, *supra*, note 16, at 163-68.

⁹² See generally David L. Faigman, et. al., *SCIENCE IN THE LAW: SOCIAL SCIENCE ISSUES* (2002).

⁹³ See Deborah Bartolomey, *Cross-Racial Identification Testimony and What Not to Do About It: A Comment on the Cross-Racial Jury Charge and Cross-Racial Expert Identification Testimony*, 7 PSYCH. PUB. POL'Y. & L. 247 (2001).

⁹⁴ This view was expressed by one sitting judge at the Criminal Justice Section's Spring 2004 Council Meeting at which this Report and its associated recommendations were discussed.

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the doctrine of judicial notice does.⁹⁵ Moreover, there is reason to believe that well-crafted jury instructions in this area can at least have some positive impact, however modest, on creating a more-informed jury better able to reach a rational decision.⁹⁶

V. Other Efforts at Reform and Conclusions

Well-known efforts at reform have been undertaken by the National Institute for Justice (NIJ), the New Jersey State Police, Former Illinois Governor Ryan's Commission on Capital Punishment, and North Carolina's Actual Innocence Commission.⁹⁷ Here we offer the briefest summaries of those approaches and a comparison among them.

Three of these four organization's reports mandate double-blind lineups, with the fourth (DOJ) acknowledging that double-blind is the best practice. These same three reports mandate sequential lineups, with DOJ acknowledging their likely advantages but questioning their practicability absent field studies. The Illinois state legislature, as noted above, rejected the Ryan Commission's mandating of sequential procedures, instead adopting a pilot study requiring three police districts, each in police departments in municipalities of various sizes, to use sequential procedures and to evaluate their effectiveness and practicability using mechanisms "consistent with the most objective scientific research methodology." This Council recommends a conservative approach similar to that adopted by Illinois. All these reports mandate a specific *minimum* number of lineup or photospread foils, but these numbers, while minima and not maxima, are still smaller than the best practices suggested by the science. However, rather than specify a precise number, and given resource concerns, this Council has simply recommended embracing the principle that there should, where practicable, be a sufficient number of foils to minimize the risk of error by guessing, an approach that makes larger numbers of foils aspirational, but not mandatory, and that allows for local variation and change as the teachings of science improve. Most of the remaining recommendations by this Council concerning lineup and photospread procedure are largely inspired by similar variations adopted in one or another of these reports. The best practices recommended in this Report – including blind lineups, experimental use of sequential methods, enhanced number of foils, expert testimony, and special

⁹⁵ See STEVEN FRIEDLAND, ET. AL., EVIDENCE LAW AND PRACTICE (2000)(discussing judicial notice).

⁹⁶ See Christian A. Meissner & John Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces*, 7 PSYCH., PUB. POLICY, & L. 3, 25 (2001) ("cautionary jury instructions may have some potential...assuming that they contain accurate information...") (summarizing research).

⁹⁷ The summary of these reports in this section is drawn from reviewing the following sources: CUTLER, *supra* note 19, at 45-47, 56-57; DOJ-Suggested Standards for Pretrial Identifications 376-83; *The JusticeDepartment Guidelines: An Incomplete Attempt to Remedy Police Contamination*, reprinted in WRONGFUL CONVICTIONS: A CALL TO ACTION 379, 379-83 (The Criminal Justice Institute of Harvard Law School, April 19-20, 2002); *Attorney General Guidelines for Preparing and Coinducting Photo and Live Lineup Identification Procedures*, reprinted in WRONGFUL CONVICTIONS: A CALL TO ACTION, *supra*, at 387-93; *Ryan Commission Report*, Saks, et al., *Model Act*, *supra* note 23; SB 472 and Edwin Colfax, *Status of Action on Recommendations of the Illinois Goivernor's Commission on Capital Punishment*, www.northwestern.edu/depts./clinics/wrongful/documents/GCEStatus.htm; and *North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification*.

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jury instructions -- are fully supported by the scientific data and will go far toward improving identification procedure accuracy.

Respectfully submitted,

Norman Maleng, Chair, Criminal Justice Section, August 2004

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GENERAL INFORMATION FORM

1. Summary of Recommendation

This recommendation on eyewitness testimony seeks to increase the chances of convicting the guilty while reducing the risks of convicting the innocent by reforming eyewitness identification procedures, such as lineups and photospreads, to improve their likely accuracy. The primary components of the recommendation are that police and prosecutors should draft detailed guidelines to improve the accuracy of eyewitness identification procedures; that those guidelines should at least address the topics and reflect the teachings of the ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures; and that police and prosecutors should receive periodic training in these procedures and create internal mechanisms for updating them. The recommendation also states that, where appropriate in an individual case, courts should: (1) have the discretion to allow properly qualified experts to testify on the factors affecting eyewitness accuracy and, (2) when there has been a pretrial identification of the defendant, and identity is a central issue in a case tried before a jury, consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup and photospread accuracy.

2. Approved by Submitting Entity.

This recommendation was approved by the Criminal Justice Section Council at its April 17-18, 2004 meeting.

3. Similar Recommendations Submitted Previously.

This recommendation has not previously been submitted to the House of Delegates or the Board of Governors.

4. Relevant Existing ABA Policies and Affect on These Policies.

There are no relevant existing ABA Policies.

5. Urgency Requiring Action at this Meeting.

The problem of wrongful convictions has recently received widespread attention as numerous defendants have been exonerated after spending years in prison, while the real culprits have gone free. Public pressure and pressure within the legal profession for quick and effective improvements in our system of justice is intense. States and localities throughout the nation are considering a variety of reforms. If the ABA does not act now, it will lose the opportunity to influence this national debate in a positive way. This urgency is

greatest in the case of eyewitness misidentification, which is the single largest contributor to mistaken convictions.

6. **Status of Congressional Legislation (If applicable).**

No legislation is currently pending.

7. **Cost to the Association.**

The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at the state and federal levels. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. **Disclosure of Interest (If Applicable).**

No known conflict of interest exists.

9. **Referrals.**

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the August 2004 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

10. **Contact Person (Prior to 2004 Annual Meeting).**

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Voting Sheets

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

EXECUTIVE SESSION on HB 1263

BILL TITLE: relative to eyewitness identification procedures for photo lineups..

DATE: February 2, 2010

LOB ROOM: 204

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Stanley E. Stevens

Seconded by Rep. Lori A. Movsesian

Vote: 17-2 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: 17-2

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,


Rep. Stanley E. Stevens, Clerk

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

EXECUTIVE SESSION on HB 1263

BILL TITLE: relative to eyewitness identification procedures for photo lineups..

DATE: 2-2-10

LOB ROOM: 204

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, (ITL) Interim Study (Please circle one.)

Moved by Rep. *Stevens*

Seconded by Rep. *Murphy*

Vote: 17-2 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: 17-2

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Stanley E. Stevens, Clerk

Committee Report

CONSENT CALENDAR

February 3, 2010

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Committee on CRIMINAL JUSTICE AND PUBLIC SAFETY to which was referred HB1263,

AN ACT relative to eyewitness identification procedures for photo lineups. Having considered the same, report the same with the following Resolution:
RESOLVED, That it is INEXPEDIENT TO LEGISLATE.

Rep. Stanley E Stevens

FOR THE COMMITTEE

COMMITTEE REPORT

Committee:	CRIMINAL JUSTICE AND PUBLIC SAFETY
Bill Number:	HB1263
Title:	relative to eyewitness identification procedures for photo lineups.
Date:	February 3, 2010
Consent Calendar:	YES
Recommendation:	INEXPEDIENT TO LEGISLATE

STATEMENT OF INTENT

This bill would require state and local law enforcement agencies to establish eyewitness identification procedures, but then set out to attempt to establish what those procedures would be. Currently, NH police departments operate under the guidelines set forth in the "law enforcement manual" provided by the NH department of justice. The manual covers photo arrays, how to construct the arrays, how to present the array and then goes on to cover lineups. It sets forth procedures for composing and conducting a lineup. These procedures are established to ensure that photo arrays and lineups protect due process for the accused. The committee agreed that current practice as established by the Attorney General provides more than adequate instruction to departments to safeguard the rights of individuals suspected to be the perpetrator of a crime.

Vote 17-2.

Rep. Stanley E Stevens
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

CONSENT CALENDAR

CRIMINAL JUSTICE AND PUBLIC SAFETY

HB1263, relative to eyewitness identification procedures for photo lineups. **INEXPEDIENT TO LEGISLATE.**

Rep. Stanley E Stevens for CRIMINAL JUSTICE AND PUBLIC SAFETY. This bill would require state and local law enforcement agencies to establish eyewitness identification procedures, but then set out to attempt to establish what those procedures would be. Currently, NH police departments operate under the guidelines set forth in the "law enforcement manual" provided by the NH department of justice. The manual covers photo arrays, how to construct the arrays, how to present the array and then goes on to cover lineups. It sets forth procedures for composing and conducting a lineup. These procedures are established to ensure that photo arrays and lineups protect due process for the accused. The committee agreed that current practice as established by the Attorney General provides more than adequate instruction to departments to safeguard the rights of individuals suspected to be the perpetrator of a crime. **Vote 17-2.**

Original: House Clerk
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**Rep. Stanley E. Stevens
For the Committee
17-2 ITL
CC**



HB 1263

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Stanley E. Stevens



COMMITTEE REPORT

COMMITTEE: Criminal Justice and Public Safety

BILL NUMBER: HB 1263

TITLE: Relative to eyewitness identification procedures for photo lineups.

DATE: 2-2-10 CONSENT CALENDAR YES NO

- OUGHT TO PASS
- OUGHT TO PASS WITH AMENDMENT
- INEXPEDIENT TO LEGISLATE
- RE-REFER
- REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT (Include Committee Vote)

See attached

Vote. 17-2

Rep. Stanley E. Slavin
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT