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# Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification

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**PROTECTING THE INNOCENT/CONVICTING THE  
GUILTY: HENNEPIN COUNTY'S PILOT PROJECT IN  
BLIND SEQUENTIAL EYEWITNESS IDENTIFICATION**

Amy Klobuchar<sup>†</sup> and Hilary Lindell Caligiuri<sup>††</sup>

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## I. INTRODUCTION

In 1984, Jennifer Thompson Cannino was a twenty-two-year-old college student living in North Carolina when a man broke into her apartment one night and raped her at knifepoint.<sup>1</sup> Cannino gave police a detailed description of her attacker for a composite sketch. She then picked the suspect out of a series of photos. She later said, "I knew this was the man. I was completely confident. I was sure."<sup>2</sup> Later, Jennifer picked the same suspect out of a live lineup.<sup>3</sup> In court, she testified against him and he was convicted. His name was Ronald Cotton.<sup>4</sup> Jennifer recalled: "It was the happiest day of my life because I could begin to put it all behind me."<sup>5</sup>

In 1987, Cannino's case had to be re-tried because an appellate court overturned the original conviction.<sup>6</sup> But Cotton was convicted again and sentenced to life in prison.<sup>7</sup>

In 1995, eleven years after the rape, Cannino learned that Cotton was not the man who raped her. Instead, it was Bobby Poole, who was serving life in prison for a series of rapes and who bragged to fellow inmates that he had committed the rape for which Cotton was imprisoned.<sup>8</sup> DNA evidence confirmed that Poole, not Cotton, was Cannino's rapist.<sup>9</sup> Poole pleaded guilty to Cannino's rape and Cotton was released from prison after serving eleven years.<sup>10</sup>

Since his exoneration, Cannino has become friends with Ronald Cotton, the man whom she mistakenly identified. "Although he is now moving on with his own life," she writes, "I live with constant anguish that my profound mistake cost him so dearly."<sup>11</sup> Cannino has also become a vocal advocate for reforms

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1. See Jennifer Thompson, *I Was Certain, but I Was Wrong*, N.Y. TIMES, June 18, 2000, § 4, at 15; see also *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997), <http://www.pbs.org/wgbh/pages/frontline/shows/dna/etc/script.html>. Note that since 1984, Jennifer Thompson has married and changed her name to Jennifer Thompson Cannino.

2. Thompson, *supra* note 1, § 4, at 15.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

that would prevent the same miscarriage of justice that Cotton suffered. In particular, she has spoken out in support of improving eyewitness identification procedures in order to reduce the possibility of future mistaken identifications.<sup>12</sup>

Prosecutors are not merely zealous advocates. Our job is not simply to win cases and secure convictions. We have an ethical and legal obligation to be "ministers of justice."<sup>13</sup> Our overriding duty is to see that justice prevails for everyone.<sup>14</sup> To fulfill this duty, we have a responsibility to promote a fair process, to apply the law consistently and equally, to protect the rights of innocent people, and to make sure we are prosecuting and convicting only those people who are guilty of committing crimes. No one is served when an innocent person is wrongfully convicted while the actual criminal remains free to commit additional crimes.

To ensure that justice is being done, it is important for prosecutors, police, and everyone in the criminal justice system to continually evaluate what we are doing and to make improvements whenever they are warranted and feasible. In recent years, it has become clear that mistaken eyewitness testimony has been a key factor in dozens of wrongful convictions nationwide.<sup>15</sup> In addition, there is a growing body of psychological research demonstrating that several simple changes in lineup procedures can dramatically reduce the chance of mistaken identifications.<sup>16</sup> As a result, eyewitness identification procedures represent an area of the criminal justice process that is now ripe for reform.

Eyewitness identification of a perpetrator, whether known or unknown to the witness, is one of the most frequently used types of evidence in the criminal justice system.<sup>17</sup> The victim of a crime recognizes a face in a photographic lineup, and later identifies the culprit from the witness stand during the trial. When the perpetrator leaves no biological or other forensic evidence at the scene of the crime, a conviction may rest largely on eyewitness identification. The jury relies, appropriately, on the direct

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12. *Id.*; Bill Moushey & Nathan Crabbe, *Witnesses' Eyes Can Oftimes Deceive*, PITTSBURGH POST-GAZETTE, May 8, 2005, at A1.

13. *See* MINN. RULES OF PROF'L CONDUCT R. 3.8 cmt. (1985); NAT'L. DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS §§ 1.1, 1.3 (2d ed. 1991).

14. *See* MINN. RULES OF PROF'L CONDUCT R. 3.8 cmt.

15. *See* Moushey & Crabbe, *supra* note 12.

16. *See generally* BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995).

17. *Id.* at 6.

evidence offered by a witness or a victim who identifies the defendant as the same person he or she observed commit the crime charged.

It has long been recognized, however, that, in certain cases, fallible human memory has led to mistaken identifications of the perpetrators of crimes. As early as 1932, Yale Law Professor Edwin Borchard examined wrongful convictions in his work, *Convicting the Innocent: Errors of Criminal Justice*.<sup>18</sup> Borchard determined that, in the majority of the wrongful convictions he reviewed, eyewitness evidence played a crucial role in convicting the innocent.<sup>19</sup>

The advent of deoxyribose nucleic acid (DNA) typing has provided a powerful new tool in reducing the impact of mistaken eyewitness identifications. In cases where the perpetrator has left behind biological evidence, such as blood, semen, or saliva, the accuracy and precision of DNA evidence offers virtually absolute proof of identification, and thus may allow the criminal justice system to determine the guilt or innocence of a defendant with near certainty.<sup>20</sup>

Since 1989, DNA evidence has been used to exonerate more than 120 individuals who, like Ronald Cotton, were wrongfully convicted.<sup>21</sup> Of those, approximately 75% were originally convicted based on eyewitness identification, in some cases by more than one eyewitness.<sup>22</sup> In one report, eyewitness experts studied the first forty cases in which DNA evidence was used to exonerate an innocent individual.<sup>23</sup> In thirty-six of these cases—fully 90%—eyewitness misidentification played a role in the convictions.<sup>24</sup> With the help of DNA-facilitated exonerations, researchers have now determined that the single leading cause of wrongful conviction is mistaken eyewitness identification.<sup>25</sup>

While the DNA exoneration cases have grabbed the attention

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18. EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932).

19. *Id.* at vi.

20. See, e.g., Donna Lyons, *DNA: Proof Positive*, STATE LEGISLATURES, June 2001, at 10, available at <http://www.ncsl.org/programs/pubs/601DNA.htm>.

21. PETER NEUFELD & BARRY SCHECK, *commentary in* TARYN SIMON et al., *THE INNOCENTS 8* (2003).

22. Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 THE CHAMPION 12, 12 (2005).

23. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605-08 (1998).

24. *Id.* at 605.

25. CUTLER & PENROD, *supra* note 16, at 8.

of the public, DNA evidence is not always available, or material, in establishing innocence or guilt. Proof of a defendant's innocence through DNA is only possible in cases where the perpetrator has left behind sufficient biological material at the scene of the crime. In the majority of crimes committed, there is no biological evidence left behind.<sup>26</sup> In such cases, a mistaken eyewitness identification may never be realized and corrected.

This is what occurred in the case of Shaun Deckinga. In 1993, after a series of bank robberies in northeastern Minnesota, an anonymous tip led police to Deckinga.<sup>27</sup> At trial, the State introduced no biological evidence, but three bank tellers identified Deckinga.<sup>28</sup> Despite evidence that another bank robbery was committed after Deckinga's arrest by a person with his same general appearance, Deckinga was convicted.<sup>29</sup> After the trial, jurors told the media that the tellers' identification of Deckinga and their certainty about the identification were major factors in securing the conviction.<sup>30</sup>

The real bank robber struck yet again after Deckinga's conviction.<sup>31</sup> The airing of the robber's picture on the news led to the arrest of Jerry Clepper, who confessed to robbing five banks, including those for which Deckinga had been convicted.<sup>32</sup> Deckinga was released from prison after Clepper's confession.<sup>33</sup>

The Deckinga case illustrates the relatively rare occurrence of an exoneration based on non-DNA evidence. DNA is a marvelous tool, and has corrected many terrible errors made by the criminal justice system due to mistaken identifications. It cannot, however, be the only fail-safe. Cases like the Deckinga case, where DNA cannot catch our mistakes, illustrate the need to take a step back and work on methods to avoid mistaken identifications in the first instance.

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26. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 589 (2000).

27. CUTLER & PENROD, *supra* note 16, at 3-4.

28. *Id.* at 4.

29. *Id.*

30. *Id.*

31. *Id.* at 4-5.

32. *Id.* at 5.

33. *Id.*

## II. THE PSYCHOLOGY OF MISIDENTIFICATION

A. *The History of Eyewitness Science*

The scientific debate over eyewitness evidence began as early as 1908, when Harvard Psychology Professor Hugo Munsterberg published *On the Witness Stand*.<sup>34</sup> In his book, Munsterberg challenged the reliability of eyewitness testimony, but offered little in the way of a solution.<sup>35</sup>

It was not until the late 1970s that eyewitness scientists began to analyze seriously the reasons for the lack of accuracy in some eyewitness identifications and to develop possible solutions.<sup>36</sup> Because many of the eyewitness scientists began their research before the use of DNA evidence in criminal trials, it came as little surprise to the scientists when DNA exonerations revealed that eyewitness misidentifications had played a major role in wrongful convictions. In fact, DNA exonerations afforded scientists a national platform to promote their research findings and created legitimacy for their studies within the criminal justice system.<sup>37</sup>

Eyewitness scientists advanced the theory, not that *all* eyewitness evidence is unreliable, but rather that eyewitness evidence could be made more reliable with research-based improvements in methods of gathering the evidence.<sup>38</sup> In their research, scientists observed that there are certain variables within the control of the criminal justice system and certain variables outside its control.<sup>39</sup> These scientists theorized that both types of variables affect the accuracy of eyewitness identifications, but only the variables under the control of the criminal justice system could be mended.<sup>40</sup> Based on this idea, eyewitness scientists have advocated a partnership with the criminal justice system to identify those variables that will improve eyewitness identification and to encourage changes in the way lineups are conducted.<sup>41</sup>

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34. HUGO MUNSTERBERG, *ON THE WITNESS STAND* (1908).

35. JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* 20 (2005).

36. Wells et al., *supra* note 26, at 590.

37. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 *ANN. REV. PSYCHOL.* 277, 278 (2003).

38. Wells et al., *supra* note 23, at 605.

39. Wells et al., *supra* note 26, at 582.

40. *Id.*

41. *Id.* at 587.

Scientists have long argued that by reforming the techniques we use to obtain eyewitness identifications, we are able to reduce the number of false identifications that occur.<sup>42</sup> Of the 1000 publications on eyewitness evidence written in the past twenty-six years, many are specifically aimed at the lineup procedures used within the criminal justice system.<sup>43</sup> Before the late 1990s, however, there were no definitive guidelines on a national level for conducting lineups and photospreads.<sup>44</sup> Each attempt was beset with practical problems in implementation.<sup>45</sup> In 1998, eyewitness scientists, with a mandate from the American Psychology/Law Society and the American Psychological Association, published a best practices guideline for conducting lineups and photospreads for witnesses to crimes.<sup>46</sup> This guideline, referred to as *The Wells White Paper*, examined the prevalence of mistaken identifications in wrongful convictions and set forth recommendations for reducing the risk of eyewitness misidentification.<sup>47</sup>

The federal government has also joined in the study of mistaken identification. In 1995, three years before the publication of *The Wells White Paper*, the National Institute of Justice, the research arm of the U.S. Department of Justice, reviewed the cases of individuals who had been exonerated with DNA evidence and published a report on its findings.<sup>48</sup> Concluding that eyewitness misidentification played a major role in securing a conviction in 80% of the cases, then-U.S. Attorney General Janet Reno formed a working group to address the problem of eyewitness misidentification.<sup>49</sup>

In 1999, the National Institute of Justice published a report to "explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system."<sup>50</sup> The report officially recognized that by using the principles of science, eyewitness identification evidence

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42. Wells, *supra* note 22, at 12.

43. Wells et al., *supra* note 26, at 595.

44. Wells et al., *supra* note 23, at 609.

45. *Id.* at 612.

46. *Id.* at 603.

47. *Id.* at 627.

48. Wells et al., *supra* note 26, at 581.

49. *Id.* at 596.

50. NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT iii (1999).



could be improved and made more reliable.<sup>51</sup> The report set forth general recommendations to improve eyewitness identification evidence collection.<sup>52</sup>

*B. Solutions—Five Procedures to Minimize Eyewitness Misidentification*

On the basis of the clinical studies, eyewitness researchers have coalesced around several specific improvements to increase the accuracy of eyewitness identifications. They include:

- the use of double-blind lineup administration;
- the documentation of the witness's statement of certainty at the time of identification;
- the effective use of fillers;
- the use of a cautionary instruction that the perpetrator might not be present in the lineup; and
- the sequential presentation of the lineup photographs.<sup>53</sup>

*1. Double-Blind Administration*

One change advocated by eyewitness scientists is the double-blind administration of photographic lineups, where the individual administering the photographic lineup has no knowledge of the identity of the actual suspect and the eyewitness is told this fact. The root of this recommendation is the potential for suggestive procedures in lineup presentations. Suggestive procedures are those behaviors that are under the control of the lineup administrator and are likely to influence the eyewitness with regard to the identification.<sup>54</sup> An example of a suggestive procedure is one that indicates to the eyewitness, with unintentional or intentional verbal or physical cues, that the suspect is in the lineup and may even indicate which individual is the suspect.<sup>55</sup>

Scientific research indicates that suggestive procedures can have an impact both on the accuracy of the identification and on the witness's confidence in that identification.<sup>56</sup> With respect to accuracy, researchers have determined that suggestive procedures,

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51. *Id.* at 3.

52. *Id.* at 29–38.

53. *See infra* Part II.1–5.

54. CUTLER & PENROD, *supra* note 16, at 114.

55. *Id.* at 115.

56. *Id.* at 114.

including inadvertent cues by the lineup administrator, are a factor in increasing the likelihood of false identifications.<sup>57</sup>

With respect to witness confidence, eyewitness scientists have found that witnesses are subject to "confidence malleability," meaning that feedback by the administrator affects the level of confidence an eyewitness has in an identification.<sup>58</sup> Post-identification feedback may include nodding or statements such as "that's who we thought did it," on the one hand, or "are you sure you got a good look at the other photos?" on the other hand. Depending on the feedback received, eyewitnesses may become more or less confident about the identification they have made.<sup>59</sup> If the eyewitness picks the suspected culprit and receives positive feedback from the lineup administrator, the witness is more likely to feel confident about the selection.<sup>60</sup> Ultimately, any influence on an eyewitness, whether intentional or unintentional, affects eyewitness certainty in identifying a perpetrator.<sup>61</sup>

By way of illustration, in one laboratory experiment, some eyewitnesses were given positive feedback after identifying a suspect.<sup>62</sup> Following the lineup, eyewitnesses were asked about factors relating to certainty, including their opportunity to view the suspect, attention to the event itself, and time taken to make the identification.<sup>63</sup> The eyewitnesses who were given positive feedback were found to be more confident in all factors relating to making the identification.<sup>64</sup> For example, they believed they had a better opportunity to view the suspect, paid more attention to the event itself, and took less time to make the identification.<sup>65</sup> Thus, feedback can dramatically affect the certainty with which an eyewitness makes an identification.<sup>66</sup>

The witness's confidence level, whether justified or unjustified, plays a significant role in the potential prosecution of the

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57. *Id.*

58. Wells et al., *supra* note 23, at 624.

59. *Id.*

60. *Id.* at 628.

61. *Id.* at 624.

62. Gary L. Wells & Amy Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 363 (1998).

63. *Id.*

64. *Id.* at 366.

65. *Id.*

66. *Id.*

individual picked out of the lineup. Researchers have long understood that the eyewitness's level of confidence does not correlate to the accuracy of the identification.<sup>67</sup> In fact, the evidence has indicated that, even with a false identification, there can be a corollary high rate of certainty on the part of the eyewitness.<sup>68</sup> Eyewitnesses tend to convince themselves that the identification they have made is accurate, though it may not be.<sup>69</sup> Nonetheless, studies conducted on the issue reveal that jurors rely on eyewitness confidence as an indicator of accuracy.<sup>70</sup> Researchers also have found that jurors tend to place less emphasis on other factors that affect eyewitness accuracy.<sup>71</sup> Given that jurors strongly rely on eyewitness confidence, it is important for the criminal justice system to avoid influencing eyewitness certainty.<sup>72</sup>

Because of the potential for suggestion and its impact on accuracy and confidence, scientists recommend the use of a blind administrator when conducting a photographic lineup.<sup>73</sup> A blind administrator is unaware of the identity of the suspect or even whether the suspect is present in the lineup.<sup>74</sup> Under these circumstances, the administrator is less likely to give intentional or unintentional cues to the eyewitness and the witness's certainty is less likely to be affected.<sup>75</sup> In addition, the eyewitness should be instructed that the administrator does not know the identity of the suspect; hence the term "double-blind."<sup>76</sup> With this caution, it is believed that the eyewitness is less likely to look to the administrator for cues about whom to identify.<sup>77</sup> Double-blind administration can also help to minimize the occurrence of post-identification feedback, whether positive or negative, and its concomitant effect on the confidence level of an eyewitness.<sup>78</sup>

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67. Gary L. Wells et al., *The Confidence of Eyewitnesses in Their Identifications From Lineups*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 151, 151 (2002).

68. CUTLER & PENROD, *supra* note 16, at 9.

69. *Id.*

70. Wells et al., *supra* note 23, at 620-21.

71. *Id.* at 623-24 (listing factors other than confidence that may affect eyewitness accuracy, such as disguises and biases).

72. *Id.* at 626-27.

73. *Id.* at 627-29.

74. *Id.* at 627.

75. *Id.* at 627-29. Cues can include both verbal and nonverbal behaviors, such as smiling. *Id.* at 628.

76. *Id.* at 629.

77. *Id.* at 630.

78. Wells et al., *supra* note 67, at 153.

## 2. *Witness Statement of Certainty*

To minimize the distorting effect of confidence malleability, researchers further recommend that an eyewitness's statement of certainty be summarized by the investigator at the time of identification.<sup>79</sup> Researchers have found that confirming feedback, whether from an investigator or another witness, can overinflate the confidence level of the eyewitness, while playing no role in ensuring the accuracy of the identification made.<sup>80</sup> However, researchers contend that eyewitness confidence assessed at the time of the identification and absent any external influence can be useful in evaluating eyewitness identification accuracy.<sup>81</sup> Noting an eyewitness statement of certainty at the time of identification, when practiced in conjunction with double-blind administration, ensures that the fact finder in an eventual prosecution is able to judge the confidence of the eyewitness as it existed at the time of identification.<sup>82</sup>

## 3. *Effective Use of Fillers*

A third recommendation for improvement in lineup administration to prevent false identifications is the effective use of fillers, or non-suspects used to fill out the lineup. Researchers have found that, while viewing a lineup, an eyewitness employs a relative judgment process.<sup>83</sup> If the perpetrator is absent from the lineup, the eyewitness will tend to select the person that, relative to the other fillers, most closely resembles his or her memory of the perpetrator.<sup>84</sup> Consequently, the lineup becomes a process of elimination.<sup>85</sup>

Studies have demonstrated that mistaken identifications can occur because an innocent individual resembles the witness's memory of the perpetrator more than the other members of the lineup do.<sup>86</sup> Because of the resemblance, eyewitnesses are more likely to select the innocent individual using the relative judgment

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79. *Id.*

80. *Id.*

81. *Id.*

82. Wells et al., *supra* note 23, at 635–36.

83. Wells, *supra* note 22, at 14.

84. *Id.*

85. *Id.*

86. *Id.*; Wells et al., *supra* note 23, at 632.

process.<sup>87</sup> When the police have caught the correct individual and included that person in the lineup, the relative judgment process does not skew the results.<sup>88</sup> By contrast, if an innocent person becomes the suspect and closely resembles the true perpetrator, the eyewitness is more likely to choose that innocent individual than to decide that no one in the lineup is the perpetrator.<sup>89</sup>

Researchers recommend that, in assembling the lineup, the fillers used should resemble the description given by eyewitnesses at least as much as the suspect does.<sup>90</sup> If the suspected culprit does not match the eyewitness's description, then some of the fillers should be similar to the suspect and others similar to the description of the suspect given by the eyewitness.<sup>91</sup> The most important goal of this recommendation is that the suspect should not stand out relative to the fillers.<sup>92</sup> Through the effective use of fillers, investigators can combat the tendency of the relative judgment process to result in false identifications.

#### 4. *Cautionary Instruction*

Prior to the presentation of lineup photographs, scientists recommend that the eyewitness be given a cautionary instruction that the perpetrator may or may not be included in the photo array.<sup>93</sup> Central to this recommendation is the relative judgment process, by which the eyewitness tends to compare those individuals present in the lineup and identify the one who most closely resembles the perpetrator.<sup>94</sup>

The benefit of the cautionary instruction was demonstrated in an experiment using target-present and target-absent lineups. Rather than a cautionary instruction, witnesses were given a biased instruction, suggesting that the perpetrator was in the lineup.<sup>95</sup> With the biased instruction, the test subjects were more willing to choose an individual—any individual—from the lineup, rather

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87. Wells, *supra* note 22, at 14.

88. *Id.*

89. *Id.*

90. *Id.*

91. Wells et al., *supra* note 23, at 632.

92. *Id.* at 630.

93. *Id.* at 615.

94. *Id.* at 613.

95. Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 294 (1997).

than make no choice at all.<sup>96</sup> Where the target was, in fact, present in the lineup, this unsurprisingly resulted in more correct choices.<sup>97</sup> In the target-absent lineups, however, the biased instruction resulted in more false identifications.<sup>98</sup> This same result was found at significant levels with merely the subtle bias of omitting an option to reject the lineup, without an express statement that the perpetrator was present.<sup>99</sup>

Scientists have demonstrated that eyewitnesses are just as likely to correctly identify a culprit from a lineup when the witness is warned that the culprit may not be present as compared to times when the witness is not so warned.<sup>100</sup> By instructing the eyewitness that the perpetrator may or may not be present, however, both the tendency for the eyewitness to use the relative judgment process and the likelihood of a false identification is reduced.<sup>101</sup> Giving a cautionary instruction, in effect, legitimizes a “no choice” selection for the eyewitness who might otherwise select the individual who most closely resembles the perpetrator.<sup>102</sup> If the perpetrator is absent, because the suspect in the lineup is actually an innocent person, the use of a cautionary instruction thus lessens the chance of a mistaken eyewitness identification.<sup>103</sup>

##### 5. *Sequential Presentation*

The final suggested improvement is the sequential presentation of lineup photospreads. Traditionally, lineups are conducted simultaneously.<sup>104</sup> That is, the eyewitness views the suspect and the fillers all at once and attempts to identify the perpetrator.<sup>105</sup> According to researchers, however, the relative judgment process often causes eyewitnesses to use a process of elimination when evaluating a simultaneous lineup.<sup>106</sup> The witness examines the six photographs and chooses that which most closely resembles the perpetrator. When the real perpetrator is absent

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 296.

100. Wells et al., *supra* note 23, at 615.

101. *Id.*

102. Wells, *supra* note 22, at 14.

103. *Id.*

104. CUTLER & PENROD, *supra* note 16, at 127.

105. *Id.*

106. Wells et al., *supra* note 23, at 617.

from the lineup, false identifications result.<sup>107</sup>

In a sequential presentation, the eyewitness is shown one individual at a time instead of all the photographs at once.<sup>108</sup> According to researchers, an eyewitness is more likely to use an "absolute judgment" rather than relative judgment process in a sequential lineup and is therefore less likely to make a false identification.<sup>109</sup> The sequential presentation prevents the eyewitness from performing a process of elimination, because no two photographs can be viewed together to judge which is relatively more like the perpetrator.<sup>110</sup> Using the absolute judgment process, the eyewitness must compare his or her memory of the perpetrator independently to each individual in the lineup.<sup>111</sup>

One study evaluating the use of sequential versus simultaneous presentation found that, when the perpetrator was present in the lineup, using the sequential lineup procedure did not significantly reduce the correct identification rate compared to the simultaneous procedure.<sup>112</sup> When the perpetrator was absent from the lineup, the sequential presentation method caused the rate of misidentification of 17%, whereas the rate of misidentification for the simultaneous method was 43%, resulting in a difference of 26%.<sup>113</sup> Research thus has demonstrated that the use of a sequential lineup may reduce the likelihood of false identification without impairing accurate identifications.<sup>114</sup>

Researchers believe that the benefit in reduced misidentifications from the use of a sequential lineup presentation is only realized if the other changes are also employed.<sup>115</sup> In other words, each improvement in the identification process could be adopted independently, but the addition of the sequential presentation recommendation, though very important to reduce the number of false identifications, is only useful if the other changes are adopted as well.<sup>116</sup> Without the adoption of blind administration, for instance, the eyewitness may be more

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107. *Id.*

108. CUTLER & PENROD, *supra* note 16, at 128.

109. Wells et al., *supra* note 23, at 617.

110. *Id.*

111. *Id.*

112. Wells et al., *supra* note 26, at 586.

113. *Id.*

114. *Id.*

115. Wells et al., *supra* note 23, at 639-41.

116. *Id.* at 639-40.

susceptible to a lineup administrator's cues during a sequential presentation because, with only one photo being shown at a time, the administrator knows exactly which photo is being viewed by the eyewitness at any given moment.<sup>117</sup>

### III. MOVEMENT TOWARD CHANGE

During the last five years, the increased awareness of the problem of misidentification, combined with the growing knowledge of improved techniques, has led to a slow move toward making these advancements across the country. New Jersey was the first—and thus far the only—state to adopt mandatory guidelines regarding eyewitness lineups.<sup>118</sup>

Leading up to the implementation of improvements in eyewitness identification procedures, a series of reports had been published about the existence of race discrimination in the New Jersey criminal justice system.<sup>119</sup> In the midst of that discussion, the New Jersey Supreme Court decided *New Jersey v. Cromedy*.<sup>120</sup> In *Cromedy*, a white female college student had been raped by an African-American man.<sup>121</sup> Approximately eight months after the attack, the student saw the defendant while walking across the street from him and identified him as her attacker.<sup>122</sup> At trial, the prosecution relied on the victim's identification of the defendant, and no corroborating forensic evidence was offered.<sup>123</sup>

On appeal, the New Jersey Supreme Court held that the jury should have been instructed on cross-racial identification evidence, because of the fallibility of such identifications and the lack of corroborating evidence to support the victim's identification of Cromedy.<sup>124</sup> The supreme court reversed Cromedy's conviction and remanded the case for a new trial.<sup>125</sup> Before retrial, however, a

117. *Id.* at 627–29, 640.

118. See Memorandum from the Office of the Attorney Gen., Dep't of Law and Pub. Safety, State of N.J. to all County Prosecutors, Police Chiefs, and Law Enforcement Chief Executives, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001) [hereinafter State of New Jersey] (on file with author).

119. DOYLE, *supra* note 35, at 192.

120. 727 A.2d 457 (N.J. 1999).

121. *Id.* at 459.

122. *Id.*

123. *Id.* at 460.

124. *Id.* at 467.

125. *Id.* at 468.



DNA test of the biological evidence collected in the crime exonerated the defendant.<sup>126</sup>

In the aftermath of *Cromedy*, New Jersey Attorney General John Farmer was faced with a criminal justice system that lacked credibility.<sup>127</sup> One of his deputies was aware of the work done by psychologists on eyewitness misidentification,<sup>128</sup> and the attorney general's office invited eyewitness scientist Professor Gary Wells to discuss the topic with New Jersey prosecutors and law enforcement personnel.<sup>129</sup> Though reception to the idea of change was lukewarm, Attorney General Farmer developed guidelines for conducting lineups that went beyond the National Institute of Justice suggested techniques.<sup>130</sup> Due to the unique authority of the attorney general in that state, Farmer was able to implement mandatory guidelines applicable to all prosecutors and law enforcement throughout the state.<sup>131</sup> Thus, in 2001, New Jersey became the first state to uniformly put into practice improved guidelines for conducting lineup procedures.<sup>132</sup>

Following New Jersey's lead, several states have taken steps to explore the implementation of the new protocols in their own jurisdictions. Illinois Governor George H. Ryan's Commission on Capital Punishment, appointed to determine what reforms, if any, would ensure the justness and accuracy of that state's capital punishment system, recommended in 2002 that eyewitness identification reforms be adopted.<sup>133</sup> The North Carolina Actual Innocence Commission developed recommendations in 2003 for that state's law enforcement that include a detailed protocol for conducting eyewitness lineups.<sup>134</sup> Just this year, the Avery Task Force published similar recommendations for Wisconsin law enforcement,<sup>135</sup> and, directed by the Virginia General Assembly,

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126. Ronald Smothers, *DNA Tests Free Man After 6 Years; Had Been Convicted in Rape of Student*, N.Y. TIMES, Dec. 15, 1999, at B6.

127. DOYLE, *supra* note 35, at 192-93.

128. *Id.* at 193.

129. *Id.*

130. *Id.*

131. *Id.*

132. See State of New Jersey, *supra* note 118.

133. STATE OF ILL., REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT i, 31-40 (2002).

134. N.C. ACTUAL INNOCENCE COMM'N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION 1-6 (2003).

135. AVERY TASK FORCE, EYEWITNESS IDENTIFICATION PROCEDURE RECOMMENDATIONS 1-8 (2005).

the Virginia State Crime Commission made recommendations to improve the procedures for conducting lineups in the Commonwealth of Virginia.<sup>136</sup>

#### IV. HENNEPIN COUNTY PILOT PROJECT

Although mistaken eyewitness identifications have not been a notable problem in Minnesota, there has nonetheless been growing concern about the wrongful convictions uncovered elsewhere in the nation, as well as growing awareness of what psychological research says about the limits of traditional lineup procedures.

In 2001 the Hennepin County Attorney's Office initiated a DNA review project to identify and examine criminal convictions prior to 1991, when DNA analysis of evidence became common, to determine whether DNA testing could possibly exonerate any of the defendants. The review focuses on murder, attempted murder and sexual assault cases. While the review is ongoing, to date it has uncovered no cases where DNA testing would provide critical new evidence. This may be due, in part, to Minnesota statutes that liberally allow judicial postconviction review of DNA and other evidence on a defendant's petition.<sup>137</sup>

In neighboring Ramsey County, County Attorney Susan Gaertner's review of DNA cases resulted in only one exoneration for a rape conviction.<sup>138</sup> In that case, the victim identified David Sutherlin from a photograph as her attacker.<sup>139</sup> In court, the victim testified that Sutherlin "resembled" the man who raped her, but did not conclusively identify him as the rapist.<sup>140</sup> Nevertheless, based on the victim's identification, Sutherlin was convicted and sentenced to forty-three months for the rape.<sup>141</sup> In 2002, a DNA test was conducted on biological evidence collected from the victim, and the test determined that Sutherlin could not have been the rapist.<sup>142</sup> The evidence matched another individual, who also

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136. VA. STATE CRIME COMM'N, *MISTAKEN EYEWITNESS IDENTIFICATION*, H. 79-40, 1st session, at 1, 14-15 (2005).

137. See MINN. STAT. § 590.01 (2004).

138. Paul Gustafson, *DNA Exonerates Man Convicted of '85 Rape*, STAR TRIB. (Minneapolis-St. Paul), Nov. 14, 2002, at 1A.

139. *State v. Sutherlin*, 393 N.W.2d 394, 395 (Minn. Ct. App. 1986).

140. *Id.*

141. *Id.* at 397.

142. Gustafson, *supra* note 138, at 1A.

fit the description given by the victim.<sup>143</sup> Unfortunately, because the statute of limitations had run, the actual culprit could not be charged in the case, and Sutherlin remained incarcerated for an unrelated double homicide.<sup>144</sup>

One "close call" in a Hennepin County rape case also sounded a warning bell that traditional lineup procedures could result in a mistaken identification. In October 2000 a young woman was raped in her suburban Minneapolis apartment by a man wearing a Halloween mask.<sup>145</sup> Because the mask came off briefly during the attack, the victim was able to give the police a good description of her assailant.<sup>146</sup> Police soon located a suspect and the victim positively identified him in a traditional photo lineup.<sup>147</sup> The suspect was then charged.<sup>148</sup>

Because there were some inconsistencies in the evidence, police continued their investigation.<sup>149</sup> They eventually located another man who closely resembled the description of the suspect and who lived in the same apartment complex as the victim.<sup>150</sup> His palm print also matched one found at the crime scene.<sup>151</sup> Charges were dismissed against the initial suspect who the victim identified from the lineup and the new suspect, Richard Luers, was charged.<sup>152</sup> DNA evidence ultimately tied Luers to two other unsolved rapes, as well as the October 2000 assault.<sup>153</sup> He was convicted of all three crimes and sentenced to a lengthy prison term.<sup>154</sup>

This real-life example from Hennepin County is a pointed reminder that when the wrong individual is identified in a lineup, not only does an innocent person get wrongly accused, but the real criminal gets to remain free. This is a serious concern for police and prosecutors. When there are stronger eyewitness identifications, the right person is more likely to be arrested and

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143. *Id.*

144. *Id.*

145. Amy Klobuchar & Scott Knight, *New Lineup Procedures Can Reduce Eyewitness Mistakes*, STAR TRIB. (Minneapolis-St. Paul), Jan. 12, 2005, at 11A.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

convicted for the crime.

In the interest of justice, the Hennepin County Attorney's Office decided in 2003 that it was time to improve eyewitness identifications by adopting a new lineup protocol that would minimize the risk of mistaken identifications and would be workable for local police.<sup>155</sup>

With a total population of more than 1.1 million residents, Hennepin County includes Minneapolis and several dozen suburban communities. The initial participating agencies were from Minneapolis (approximate population 380,000) and three suburban communities—two larger (Bloomington, approximate population 86,000, and Minnetonka, approximate population 52,000), and one smaller (New Hope, approximate population 21,000).

In the fall of 2003, the Hennepin County Attorney's Office and the four police agencies designed the new lineup protocol. Prosecutors reviewed a number of academic publications and U.S. Department of Justice technical working papers on eyewitness identification procedures. Prosecutors also consulted with a leading researcher, Professor Gary Wells of Iowa State University, and with several other jurisdictions around the country that were contemplating similar programs.

#### A. *The Protocol*

The new Hennepin County protocol includes all five procedures discussed in this article: the effective use of fillers, the cautionary instruction, the documentation of confidence statements, the use of double-blind administration, and sequential presentation.<sup>156</sup> Of these, the first three were already in place prior to the pilot study.<sup>157</sup> Specifically, investigators were instructed as follows:

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155. Memorandum from Paul Scoggin, Managing Attorney, Violent Crimes Division, Hennepin County Attorney's Office to the Investigators/Detectives, Minneapolis (Central Investigation Division), Bloomington, Minnetonka, and New Hope Police Departments on Pilot Program for the Sequential Identification Process Memorandum 1 (Oct. 27, 2003) (on file with the *William Mitchell Law Review*).

156. *Id.*

157. Memorandum from Nancy Steblay, Augsburg College, on Hennepin County Blind-Sequential Lineup Pilot Program: Preliminary Findings (Mar. 28, 2005) (on file with the *William Mitchell Law Review*).

- Use existing Minnesota Repository of Arrest Photos parameters. These defaults include the use of photographs depicting suspects of a similar age, skin color, complexion, hair style, build, backdrop, glasses, and the consistent use of color or black and white suspect photos.
- Use no less than six photographs.
- Preserve a copy of the photos in the order in which they were displayed. One way is to preserve the traditional simultaneous six-photo display.
- Interview witnesses in private, separate from other witnesses.
- Do not tell the witness that the suspect is in a group of photos. The witness should be told the suspect “may or may not” be in the group of photos.
- Tell the witness that the displaying officer does not know whether the suspect is in the group of photos.
- Any officer knowing which photo is of the suspect should be out of the view of the witnesses during the display. But a knowledgeable officer may be available for consultation during the display and to provide support after the display process is finished.
- The photos should be shown one at a time with the other photos face down, or otherwise out of sight during the display of another photo.
- The witness may look at the photos more than once, but all the photos should be shown in the same order each time. The witness may take as long as he or she needs to look at the photos, but may not pull the photos out of order.
- If a witness identifies a photo before looking at all of the photos, the rest of the display should be shown and the witness asked to identify or eliminate the rest of the photos. The officer should not encourage the witness to focus on a particular photo.
- After the display, the investigator showing the photos should create a report describing how many times the witness looked through the photos, how quickly an identification was made, the level of certainty expressed by the witness, any other comments made by the witness during the display and any other relevant

observations.

- After the display, the investigator should ask the witness to describe the level of certainty associated with any identification (or lack of identification) including the qualifying conditions about the photo (longer hair, older, heavier, etc.)[.] Numerical certainty (percentages) should be avoided but a statement of why the photo looks like the suspect is encouraged.
- Exceptions:
  - Do not use sequential identification with children age twelve or younger.
  - The blind examination requirement may be abandoned if necessary. For example, the display may take place at 3:00 a.m. and no uninformed officer is available or everyone in your department knows the suspect. Reports should include why sequential identifications are not possible.<sup>158</sup>

After drafting the protocol, which was approved by the respective chiefs of police following a number of policy discussions, our office conducted one training session in each of the smaller jurisdictions and three trainings in Minneapolis. In all, the County Attorney's Office instructed just under 100 investigators in the implementation of the protocol. In November 2003, the new protocol was put into use.

It is important to acknowledge that the new lineup protocol does not affect every criminal case. In fact, eyewitness identification is not a major issue in most criminal cases.<sup>159</sup> But they can be especially crucial in serious violent crimes, such as rapes and robberies, with suspects who may be complete strangers.

It is also important to note that the focus of this new protocol is on photo lineups.<sup>160</sup> Although they are popular in the movies and on television shows, live in-person lineups are rare in real life as a practical matter because it is very difficult and time-consuming to assemble six similar-looking individuals.

In Hennepin County, photo lineups are created using the

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158. See Memorandum from Paul Scoggin, *supra* note 155, at 1–3.

159. *Police and Prosecutors Team Up for Better Eyewitness IDs*, NEWS & PUBLICATIONS (Hennepin County Attorney), Nov. 3, 2003, [http://www.hennepinattorney.org/news\\_2.asp?NRecno=179](http://www.hennepinattorney.org/news_2.asp?NRecno=179).

160. See generally Memorandum from Paul Scoggin, *supra* note 155.

Hennepin Repository of Arrest Photos (HennRAP) system. HennRAP is a central database of arrest and booking photos submitted by law enforcement agencies in the county and administered by the Hennepin County Sheriff's Office. Using HennRAP, a police agency is able to search arrest and booking photos from a variety of law enforcement agencies to create an appropriate "six pack" of photos for a lineup with a witness. The officer can quickly construct a lineup of suspects based on relevant demographic and descriptive characteristics such as gender, age, skin color, height, weight, eyes, hair, complexion, scars, marks, or tattoos.

*B. Pilot Project Results*

The Hennepin County Attorney's Office partnered with Professor Nancy Steblay, a research psychologist at Augsburg College in Minneapolis, to gather and analyze the data generated by the pilot project. The County Attorney's Office asked Professor Steblay whether the number and quality of identifications changed with the blind sequential lineup procedure.<sup>161</sup> The office also sought to answer whether departments could smoothly and effectively implement the recommended procedure.<sup>162</sup>

The data set, compiled by Professor Steblay over the course of one year, encompassed 280 lineups conducted in 117 cases for 206 eyewitnesses in the four participating jurisdictions.<sup>163</sup> Investigators were asked to record a number of details regarding the type of crime, the lineup administration, and the eyewitness's response to the lineup.<sup>164</sup>

Because lineup results had not been systematically recorded in Hennepin County prior to the implementation of the pilot project, Professor Steblay compared the Hennepin County results to results from a California field study on simultaneous lineups,<sup>165</sup> and data from laboratory comparisons of simultaneous versus sequential lineups.<sup>166</sup>

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161. Memorandum from Steblay, *supra* note 157, at 2.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 3; Bruce W. Behrman & Sherric L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475 (2001).

166. Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001).

The California field study on simultaneous lineups, where the actual suspect was present in the lineup, indicated that the suspect was identified 50% of the time, a filler was identified 24% of the time, and the witness failed to make a choice 26% of the time.<sup>167</sup> Identical results were obtained with a simultaneous presentation in the laboratory.<sup>168</sup> When the format was changed in the laboratory to a sequential presentation, identification of the suspect decreased to 35%, identification of a filler decreased to 19%, and “no choice” jumped to 46%.<sup>169</sup> Thus, with sequential presentation, witnesses were less likely to choose someone from the lineup, but greater protection was afforded for the innocent suspect, as indicated by the decreased choice of fillers.<sup>170</sup>

As found by Professor Steblay, the Hennepin County results compared very favorably with previous studies.<sup>171</sup> She found that the eyewitness chose the suspect in 54% of lineups, the filler in only 8% of lineups, and made no choice in 38% of lineups.<sup>172</sup>

**Lineup Performance: Sequential Versus Simultaneous**

**Lineup Formats**<sup>173</sup>

	<b>Hennepin County (field)</b>	<b>Simultaneous (field and laboratory)</b>	<b>Sequential (laboratory)</b>
<b>Suspect ID</b>	54%	50%	35%
<b>Filler ID</b>	8%	24%	19%
<b>No choice</b>	38%	26%	46%

Compared to the previous studies cited above, the Hennepin County protocol resulted in slightly more frequent identification of the suspect, with a “no choice” rate between those seen in the previous simultaneous and sequential studies.<sup>174</sup> Significantly, the rate with which the eyewitness identified the filler photographs—

167. Behrman & Davey, *supra* note 165, at 482.

168. Steblay et al., *supra* note 166, at 463 tbl.1.

169. *Id.*

170. *Id.*

171. See Memorandum from Steblay, *supra* note 157, at 4.

172. *Id.*

173. See *id.* at 4; Steblay et al., *supra* note 166, at 463 tbl.1.

174. See Memorandum from Steblay, *supra* note 157, at 4.



only 8%—was drastically lower than either the simultaneous lineup data or the laboratory results on the sequential procedure.<sup>175</sup> According to Dr. Steblay, this represents dramatically increased protection for innocent suspects.<sup>176</sup> Thus, the Hennepin County pilot project substantially decreased the rate of false identification, yet maintained an effective rate of suspect identification.<sup>177</sup> The high rate at which witnesses chose the actual suspect should allay the concerns of many police that the simultaneous lineup method causes deterioration in these identifications.

Anecdotally, we also received a positive answer to our question of whether the departments could smoothly and effectively implement the blind sequential protocol.<sup>178</sup> The four police departments, having completed the year-long pilot project, remain committed to making these changes permanent within their jurisdictions. The investigators, who were openly skeptical at the time of the training sessions, found they were not hindered by the protocol.

The small difficulties experienced during the project had been predicted by the four police chiefs before we started. One recurring theme was the inability, at times, to find a truly “blind” officer to conduct the lineup. Even in a jurisdiction the size of Minneapolis, there are certain chronic offenders whose presence in a lineup would cause the administrator to presume they were the actual suspect, whether or not the administrator was familiar with the specific investigation. In smaller jurisdictions, it may simply be that all on-duty investigators are working the same case. For these reasons, the Hennepin County Attorney’s Office has been assisting the police departments to develop a procedure to use a laptop computer, rather than a blind officer, to display the photographs to the witness. The monitor is turned away from the officer, and the photographs are scrambled, so as to maintain the proven benefits of blind administration despite the real-world constraints experienced by the departments.

One great benefit of the project, unrelated to the specific advancements, was the improved documentation of lineups required by the standardized protocol and necessary for the data collection. The memorialization of each witness’s comments and

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175. *Id.*

176. *Id.*

177. *Id.*

178. *See id.* at 1.

other facts surrounding the lineup administration offered better information to the prosecutor, and ultimately the jurors, with which to weigh the strength of each identification.

#### V. FOLLOW-UP

In February 2005, the Hennepin County Attorney's Office presented *Protecting the Innocent/Convicting the Guilty*, a day-long conference for criminal justice professionals. The 400 members of the audience included judges, public defenders, federal officials, prosecutors from twenty-five Minnesota counties, and police and sheriffs' deputies from sixty departments across the state. Our office enlisted the support of the Hamline University School of Law, the University of Minnesota Law School, the University of St. Thomas School of Law, and William Mitchell College of Law to bring in researchers and practitioners from around the country to discuss the most recent research and findings on increasing the reliability of eyewitness identifications, as well as real-world experiences with the new procedures. The keynote speaker was Jennifer Thompson Cannino, whose misidentification of her rapist in 1984 resulted in an innocent man spending eleven years in prison.<sup>179</sup>

As a follow-up to this conference and the success of the pilot project, the Hennepin County Attorney's Office plans to encourage voluntary adoption of the blind sequential protocol throughout the county, as well as in other jurisdictions within the state.

#### VI. CONCLUSION

In the 1994 *Scales* decision, the Minnesota Supreme Court ordered the electronic recording of all police interrogations of people who were in custody.<sup>180</sup> This includes the reading of the suspect's *Miranda* rights, any waiver of those rights and all questioning by police.<sup>181</sup> At the time, Alaska was the only other state that required the taping of interrogations.<sup>182</sup>

Because the *Scales* decision was primarily aimed at protecting

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179. See *Local Law Enforcement Conference Looks at Preventing Wrongful Convictions*, NEWS & PUBLICATIONS (Hennepin County Attorney), Feb. 10, 2005, [http://www.hennepinattorney.org/news\\_2.asp?NRecno=237](http://www.hennepinattorney.org/news_2.asp?NRecno=237).

180. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

181. *Id.*

182. *Id.* at 591; see *Stephan v. State*, 711 P.2d 1156, 1159 (Alaska 1985).

the rights of suspects, many police officers and prosecutors were initially uneasy that this requirement would have a “chilling effect” on their investigations and interviews with suspects.<sup>183</sup> “But during the past [decade] it has become clear that videotaped interrogations have strengthened the ability of police and prosecutors to secure convictions against the guilty.”<sup>184</sup> “At the same time, they have helped protect the rights of suspects [and] ensur[e] the integrity of the criminal justice process.”<sup>185</sup>

Likewise, there is good reason to expect that new eyewitness identification procedures will help improve police investigations, strengthen prosecutions and better protect the rights of innocent people while convicting those who are guilty. The new lineup protocol will give everyone in the criminal justice process, not only police and prosecutors, but also judges and jurors, a clearer view of the truth of what the eyewitness observed. This leads to more confidence in the result, which is good for public trust and accountability in the criminal justice system.<sup>186</sup>

Will these changes in eyewitness identification procedures lead to perfect justice? No. But our justice system must strive for that ideal. When a person gets charged with a crime, his liberty is at stake and, in states with the death penalty, his very life may be on the line. We must always be willing to embrace the benefits of new technology and scientific research that may help us strengthen the integrity of the criminal justice process to ensure that those guilty of crimes do not remain free because an innocent person has been convicted. That means sometimes fighting against our own complacency, bureaucratic inertia, or even our own hubris that we have already done everything we can.

For prosecutors, to do justice is the highest standard we have, and there is always more we can do. That is why efforts to improve eyewitness identification procedures are so important in keeping us focused on doing more and doing better to live up to our promise as a truly just and fair society where the innocent are protected and the guilty are brought to justice.

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183. See *Scales*, 518 N.W.2d at 592 (quoting *Stephan*, 711 P.2d at 1162).

184. See Amy Klobuchar, *Eye on Interrogations: How Videotaping Serves the Cause of Justice*, WASH. POST, June 10, 2002, at A21.

185. *Id.*

186. *Id.*

# HENNEPIN COUNTY'S BLIND SEQUENTIAL LINEUP PILOT PROJECT

Amy Klobuchar,<sup>†</sup> Nancy K. Mehrkens Steblay,<sup>††</sup>  
and Hilary Lindell Caligiuri<sup>†††</sup>

## I. INTRODUCTION\*

On a summer night in 1984, 22-year-old college student Jennifer Thompson Cannino was raped at knifepoint by a man who had broken into her North Carolina apartment.<sup>1</sup> The police were able to create a composite sketch of the perpetrator from Cannino's detailed description.<sup>2</sup> At a photo lineup, she identified the police suspect, Ronald Cotton, as her rapist.<sup>3</sup> One week later, she also picked Cotton out of a live lineup.<sup>4</sup> She later remarked, "I knew this was the man. I was completely confident."<sup>5</sup> Cannino testified against Cotton in court and he was convicted.<sup>6</sup> She called it "the happiest day of my life because I

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<sup>1</sup> Jennifer Thompson, *I Was Certain, but I Was Wrong*, N.Y. TIMES, June 18, 2000, § 4, at 15.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

could begin to put it all behind me.”<sup>7</sup> An appellate court overturned Cotton’s original conviction for reasons unrelated to Cannino’s identification.<sup>8</sup> In a second trial in 1987, Cotton was convicted again and sentenced to life in prison.<sup>9</sup>

In 1995, eleven years after the rape, Cannino learned she had been mistaken.<sup>10</sup> The man who raped her was not Ronald Cotton, but Bobby Poole.<sup>11</sup> Poole was already serving life in prison for a string of rapes, and had bragged to other inmates about committing the rape for which Cotton had been imprisoned.<sup>12</sup> DNA testing verified that Poole had raped Cannino, and he pleaded guilty to the crime.<sup>13</sup> Cotton was freed after having spent eleven years in prison.<sup>14</sup> After Cotton’s release, he and Cannino became friends.<sup>15</sup> Although Cotton has been able to move ahead with his life, Cannino wrote, “I live with constant anguish that my profound mistake cost him so dearly.”<sup>16</sup> As a result of the experience, Cannino became a prominent advocate for criminal justice reforms, including changes in eyewitness identification procedures that reduce the potential for misidentifications.<sup>17</sup>

There have been few problems with mistaken eyewitness identifications in Minnesota. There is increasing concern, however, about the number of wrongful convictions in other parts of the country. When an innocent person is convicted of a crime, not only is there a grave miscarriage of justice, but the actual criminal remains free and able to commit other crimes. This troubling reality raises serious public safety concerns and erodes public confidence in the justice system.

Fortunately, there is a persuasive body of research concerning new methods to secure eyewitness identifications from photographic lineups.<sup>18</sup> This research shows that relatively simple changes in lineup pro-

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; see also *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997).

<sup>18</sup> Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 582 (2000) [hereinafter *From the Lab to the Police Station*].

cedures can lead to stronger eyewitness identifications, making it more likely that the right person is held responsible for the crime.<sup>19</sup> Accordingly, in the interests of justice, the Hennepin County Attorney's Office spearheaded an initiative to improve traditional lineup procedures. In the fall of 2003, the office worked with several police departments to adopt a new photographic lineup protocol consistent with recent scientific evidence on procedures designed to minimize the risk of misidentifications. The county attorney's office developed a year-long pilot program to examine recommended eyewitness procedures in real police field investigations. The results of this project, detailed below, represent the first available field data on *blind sequential lineup* performance.

The participating police departments were all from Hennepin County, which includes Minneapolis and several dozen suburban communities, with a total population of over 1.1 million.<sup>20</sup> The Chiefs of Police from Minneapolis (approximate population 380,000) and three suburban communities—two larger (Bloomington, approximate population 86,000, and Minnetonka, approximate population 52,000), and one smaller (New Hope, approximate population 21,000)<sup>21</sup>—signed on to conduct the pilot project. Professor Nancy Steblay, an eyewitness scientist at Augsburg College in Minneapolis, was selected to analyze the results of the pilot project.

The Hennepin County Attorney's Office implemented the project with two primary research questions. The first was whether the number and quality of identifications would change with the blind sequential lineup procedure. Second, the office sought to determine whether police departments could smoothly and effectively implement the procedure. Analysis of the data and anecdotal responses from the participating police agencies led to the conclusion that the new protocol is both efficient to implement and effective in reducing the potential for misidentifications.

## II. LEGAL RATIONALE AND REVIEW

Eyewitness identification may be the oldest way of solving a case. As long as there have been eyewitness identifications, however, there has existed the risk of misidentifications. In the late 1960s, the United

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<sup>19</sup> *Id.* at 585.

<sup>20</sup> Hennepin County, Population Counts by City by Race/Ethnicity (2000), [http://www.hennepin.us/vgn/portal/internet/hcdetailmaster/0,2300,1273\\_1716\\_105146205,00.html](http://www.hennepin.us/vgn/portal/internet/hcdetailmaster/0,2300,1273_1716_105146205,00.html).

<sup>21</sup> *Id.*

States Supreme Court began creating safeguards to protect criminal defendants from wrongful convictions, including those that could result from misidentifications. In *United States v. Wade*,<sup>22</sup> the Court held that the Sixth Amendment right to counsel applies to critical stages of pre-trial proceedings,<sup>23</sup> which include a physical lineup procedure.<sup>24</sup> The Court recognized the "vagaries of eyewitness identification," and the "innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."<sup>25</sup> Having a defense attorney attend a physical lineup would be beneficial,<sup>26</sup> since witnesses, lineup participants, and lineup administrators would be unlikely to identify bias in traditional lineup procedures.<sup>27</sup> Not only might the presence of defense counsel deter prejudice at the lineup,<sup>28</sup> but counsel also would be able to reconstruct an unfair lineup at trial.

The same day as the *Wade* decision, the United States Supreme Court ruled in *Stovall v. Denno*<sup>29</sup> that an unduly suggestive lineup might constitute a due process violation if it could lead to an irreparably mistaken identification.<sup>30</sup> A defendant could move to suppress prejudicial identification testimony depending on the "totality of the circumstances" surrounding the testimony.<sup>31</sup> The next year, in *Simmons v. United States*,<sup>32</sup> the Court held that each alleged due process violation during a lineup must be examined on the facts of the individual case.<sup>33</sup> Lineups would be excluded from trial if the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."<sup>34</sup>

In the 1970s, the Court began retreating from the broader safeguards guaranteed in *Wade*, *Stovall* and *Simmons*. In *United States v. Ash*,<sup>35</sup> the Court refused to extend the Sixth Amendment right to coun-

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<sup>22</sup> 388 U.S. 218 (1967).

<sup>23</sup> *Id.* at 224-25.

<sup>24</sup> *Id.* at 236-37.

<sup>25</sup> *Id.* at 228.

<sup>26</sup> *Id.* at 236.

<sup>27</sup> *Id.* at 230.

<sup>28</sup> *Id.* at 236.

<sup>29</sup> 388 U.S. 293 (1967).

<sup>30</sup> *Id.* at 301-02.

<sup>31</sup> *Id.* at 302.

<sup>32</sup> 390 U.S. 377 (1968).

<sup>33</sup> *Id.* at 384.

<sup>34</sup> *Id.*

<sup>35</sup> 413 U.S. 300 (1973).

sel to photographic lineups, reasoning that the minimal risks presented in a display of photographs did not require such an extraordinary safeguard.<sup>36</sup> The Court also found that even extremely biased lineups were not *per se* excluded.<sup>37</sup> Instead, it was necessary to determine whether the admittedly suggestive lineup was nonetheless reliable.<sup>38</sup> In *Neil v. Biggers*,<sup>39</sup> the Court considered five factors for determining the dependability of eyewitness identifications: (1) the witness's opportunity to view the perpetrator during the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's initial description of the perpetrator, (4) the witness's certainty at the lineup, and (5) the length of time between the crime and the identification.<sup>40</sup> In *Manson v. Brathwaite*,<sup>41</sup> the Court concluded, "reliability is the linchpin in determining the admissibility of identification testimony. . . ."<sup>42</sup> This emphasized even more firmly that the important question was not whether the identification procedure was prejudicial to the criminal defendant, but whether the identification itself was reliable.

To varying degrees, these cases sought to remedy the effects of suggestive lineups, but they did nothing to discontinue the use of prejudicial procedures. About the same time the Court was considering these cases, psychologists began researching and positing solutions for the problem of eyewitness misidentifications.<sup>43</sup> The subsequent introduction of DNA testing led to the exoneration of wrongfully convicted individuals.<sup>44</sup> These recent scientific developments have invigorated interest in improving lineup procedures. New Jersey, however, is the only state to have adopted mandatory guidelines for the administration of eyewitness lineups.<sup>45</sup>

Before the new lineup procedures were mandated in New Jersey, a series of reports demonstrated perceptible race discrimination in the

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<sup>36</sup> *Id.* at 321.

<sup>37</sup> *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

<sup>38</sup> *Id.*

<sup>39</sup> 409 U.S. 188 (1972).

<sup>40</sup> *Id.* at 199.

<sup>41</sup> 432 U.S. 98 (1977).

<sup>42</sup> *Id.* at 114.

<sup>43</sup> Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *LAW & HUM. BEHAV.* 603, 604 (1998) [hereinafter *White Paper*].

<sup>44</sup> TARYN SIMON ET AL., *THE INNOCENTS* 8 (2003).

<sup>45</sup> See STATE OF NEW JERSEY, ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001) [hereinafter *NJ GUIDELINES*].



New Jersey criminal justice system.<sup>46</sup> In 1999, while these findings were being discussed, the New Jersey Supreme Court ruled in *New Jersey v. Cromedy*.<sup>47</sup> In 1992, a white female college student had been raped by an African American male.<sup>48</sup> Eight months later, the victim saw Cromedy across the street and identified him as her rapist.<sup>49</sup> Cromedy was convicted solely on the victim's eyewitness identification; the prosecution offered no corroborating physical evidence.<sup>50</sup>

On appeal, the New Jersey Supreme Court held that the cross-racial identification in that case required a special jury instruction due to the unreliability of such identifications in general and, specifically, the total lack of additional evidence supporting the eyewitness identification.<sup>51</sup> Consequently, the supreme court reversed Cromedy's conviction and remanded the case for a new trial.<sup>52</sup> Pending retrial, a DNA test of biological evidence collected from the victim exonerated Cromedy.<sup>53</sup>

In the wake of the *Cromedy* decision, New Jersey Attorney General John Farmer turned to the photographic lineup procedure reforms recommended by the researchers.<sup>54</sup> Professor Gary Wells, an eyewitness scientist, was invited to discuss the subject with New Jersey law enforcement and prosecutors.<sup>55</sup> Despite initial unfavorable reactions, Farmer created a new lineup procedure that included safeguards exceeding those recommended by the National Institute of Justice.<sup>56</sup> Exercising the unique authority granted to the Attorney General in that state, Farmer implemented mandatory statewide guidelines,<sup>57</sup> making New Jersey the first state to uniformly adopt improved lineup procedures.<sup>58</sup>

New Jersey's reforms have influenced other states to examine the possibility of adopting similar lineup protocols. In 2002, Illinois Gover-

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<sup>46</sup> JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* 192 (2005).

<sup>47</sup> 727 A.2d 457 (1999).

<sup>48</sup> *Id.* at 459.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 460.

<sup>51</sup> *Id.* at 467.

<sup>52</sup> *Id.* at 468.

<sup>53</sup> Ronald Smothers, *DNA Tests Free Man After 6 Years, Had Been Convicted of Rape of Student*, N.Y. TIMES, Dec. 15, 1999, at B6.

<sup>54</sup> DOYLE, *supra* note 46, at 193.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; see also NATIONAL INSTITUTE OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* iii (1999) [hereinafter NIJ GUIDE].

<sup>57</sup> DOYLE, *supra* note 46, at 193.

<sup>58</sup> See NJ GUIDELINES, *supra* note 45, at 1.

nor George H. Ryan's Commission on Capital Punishment, charged with ensuring the accuracy and justness of capital punishment in Illinois, recommended the implementation of eyewitness identification reforms.<sup>59</sup> The North Carolina Actual Innocence Commission created a series of recommendations in 2003 for state law enforcement officers, including a comprehensive lineup protocol.<sup>60</sup> In early 2005, the Avery Task Force made similar recommendations for the Wisconsin criminal justice system.<sup>61</sup> The Virginia General Assembly also instructed the Virginia State Crime Commission to create guidelines for improving lineup procedures in the commonwealth.<sup>62</sup> As reforms are implemented, it is imperative that evaluative data are collected. This Hennepin County project provides the first available field data.

### III. SCIENTIFIC RATIONALE AND REVIEW

#### A. *National Institute of Justice Lineup Protocol*

In 1999, the U.S. Department of Justice published its recommendations for eyewitness procedures. This document, the National Institute of Justice's *Eyewitness Evidence: A Guide for Law Enforcement (NIJ Guide)*,<sup>63</sup> was prepared in response to the high number of wrongful convictions revealed by DNA exoneration cases.<sup>64</sup> In the majority of these cases, mistaken identification was the primary evidence responsible for conviction.<sup>65</sup>

Psychological research has shown that some eyewitness reports are not reliable and that certain methods of conducting lineups can exacerbate witness tendencies toward erroneous lineup choices.<sup>66</sup> To remedy this problem, the *NIJ Guide* recommends that eyewitnesses be given an unbiased lineup instruction ("the perpetrator may or may not be in this lineup"),<sup>67</sup> that lineups be constructed fairly (e.g., fillers must match

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<sup>59</sup> REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 31-40 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html).

<sup>60</sup> NORTH CAROLINA ACTUAL INNOCENCE COMMISSION, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION 1-6 (2003).

<sup>61</sup> AVERY TASK FORCE, EYEWITNESS IDENTIFICATION PROCEDURE RECOMMENDATIONS 1-8 (2005).

<sup>62</sup> VIRGINIA STATE CRIME COMMISSION, MISTAKEN EYEWITNESS IDENTIFICATION 14-15 (2005).

<sup>63</sup> See NIJ GUIDE, *supra* note 56.

<sup>64</sup> See *From the Lab to the Police Station*, *supra* note 18, at 590.

<sup>65</sup> *Id.*

<sup>66</sup> *White Paper*, *supra* note 43, at 604.

<sup>67</sup> NIJ GUIDE, *supra* note 56, at 32.

perpetrator description),<sup>68</sup> and that officers record results in a prescribed manner.<sup>69</sup> The *NIJ Guide* also recognizes that “advances in social science and technology will, over time, affect procedures used to gather and preserve eyewitness evidence.”<sup>70</sup> Three procedures were specified by the *NIJ Guide* as possibilities for future exploration: the sequential method of lineup presentation, blind lineup administration, and the use of computer-based imaging systems.<sup>71</sup>

### B. *The Sequential Method of Lineup Presentation*

A sequential lineup presentation attempts to remedy what researchers describe as the tendency of an eyewitness to engage in *relative* judgment when evaluating photographs in a lineup.<sup>72</sup> Standard police lineups present the eyewitness with all lineup members—usually six individuals—at the same time.<sup>73</sup> In this simultaneous format, eyewitnesses tend to compare lineup members using a process called *relative judgment* to determine which most closely resembles the eyewitness’s memory of the perpetrator.<sup>74</sup> Even when the true perpetrator is absent from the lineup, it is likely that one of the fillers used in the lineup will provide a better relative match to the witness’s memory than the others.<sup>75</sup> This process can increase the risk of a misidentification.<sup>76</sup>

In contrast, the sequential procedure presents the eyewitness with one lineup member at a time, requiring the witness to decide whether that person is the perpetrator before moving to the next photo.<sup>77</sup> This format is intended to discourage the eyewitness from simply identifying the lineup participant who most resembles the perpetrator.<sup>78</sup> The result is a more absolute decision criterion and potentially enhanced witness discrimination between the culprit and a similar-looking innocent person.<sup>79</sup>

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<sup>68</sup> *Id.* at 29.

<sup>69</sup> *Id.* at 37.

<sup>70</sup> *Id.* at 8.

<sup>71</sup> *Id.* at 9.

<sup>72</sup> Gary L. Wells & Eric P. Seclau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL’Y & L. 765, 772 (1995).

<sup>73</sup> *From the Lab to the Police Station*, *supra* note 18, at 585.

<sup>74</sup> Wells & Seclau, *supra* note 722, at 768.

<sup>75</sup> *Id.* at 769.

<sup>76</sup> *Id.*

<sup>77</sup> *From the Lab to the Police Station*, *supra* note 18, at 586.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

The *NIJ Guide* only suggested the sequential method for lineups, presumably because existing research did not verify the advantages of the sequential lineup over a traditional simultaneous format. Since that time, a published review of laboratory research has confirmed the benefits of the sequential procedure.<sup>80</sup> Sequential and simultaneous formats produce dramatically different choice and accuracy outcomes, as will be discussed below.

### C. *Blind Lineup Administration*

Blind lineup administration was identified in the *NIJ Guide* "as a direction for future exploration and field testing."<sup>81</sup> Double-blind procedures, in which neither the experimenter nor the subject know the subject's treatment condition, are an essential part of good scientific method, used to prevent inadvertent contamination of research results.<sup>82</sup> Research conducted since publication of the *NIJ Guide* indicates that the double-blind (hereinafter more simply referred to as *blind*) procedure helps to secure accurate eyewitness accounts by eliminating the potential for inadvertent influence by the officer conducting the lineup.<sup>83</sup> A lineup administrator who does not know the identity of the suspect is unlikely to influence the witness through verbal or nonverbal cues.<sup>84</sup> A complement to this procedure, notifying the witness that the officer does not know which lineup member is the suspect, affords the additional advantage that the witness is less likely to seek or infer cues from the officer's behavior.<sup>85</sup>

When blind administration of the lineup is not used, there is also increased potential for the confidence level of an eyewitness in his or her

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<sup>80</sup> Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 *LAW & HUM. BEHAV.* 459 (2001) [hereinafter *Eyewitness Accuracy Rates*].

<sup>81</sup> *NIJ GUIDE*, *supra* note 56, at 9.

<sup>82</sup> Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 *ANN. REV. OF PSYCHOL.* 277, 289 (2003).

<sup>83</sup> See generally Amy Douglass et al., *A Problem with Double-Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence to Influence the Identification of Another Eyewitness*, 29 *LAW & HUM. BEHAV.* 543 (2005); see also Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 *J. OF APPLIED PSYCHOL.* 940, 941 (1999).

<sup>84</sup> Wells & Olson, *supra* note 82, at 289.

<sup>85</sup> *Id.*

lineup choice to be influenced by the investigator.<sup>86</sup> Research demonstrates a moderate correlation between witness confidence and accuracy.<sup>87</sup> However, this relationship is easily corrupted, because eyewitness confidence is highly malleable.<sup>88</sup> Factors that may increase witness accuracy (e.g., good viewing conditions, lengthy exposure, distinct perpetrator features) are not the same as those that affect confidence (e.g., confirmatory feedback from police, post-event information, and supportive influence of other witnesses).<sup>89</sup> An erosion of the relationship between confidence and accuracy occurs when an eyewitness is exposed to factors that inflate confidence but have little relationship to accuracy.<sup>90</sup> If confidence is to have any diagnostic value in determining accuracy—an important question for juries assessing eyewitness identifications—it will likely depend on conditions of blind administration and the prompt assessment of witness certainty. The Hennepin County pilot project made it possible to examine the real-world correspondence between confidence and eyewitness choice under blind sequential conditions.

A recent review of existing research underscored the need for lineup administrators to assess eyewitness confidence before providing any feedback.<sup>91</sup> Analysis of twenty laboratory tests demonstrated that confirmatory feedback immediately after the identification (i.e., “Good, you identified the actual suspect.”) significantly inflated the participant-witnesses’ retrospective confidence reports when compared with a control group that was told nothing about identification accuracy.<sup>92</sup> In other words, those witnesses whose choice was praised indicated they had been more certain of the identification from the outset.<sup>93</sup> Confirmatory feedback similarly influenced witnesses’ reports of the quality of their view of the perpetrator, their degree of attention, their ease of identification, and of the basis for their identification.<sup>94</sup> Participant-witnesses who received immediate confirmatory feedback were also

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<sup>86</sup> See Gary L. Wells & Amy Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. OF APPLIED PSYCHOL. 360 (1998).

<sup>87</sup> *White Paper*, *supra* note 43, at 619.

<sup>88</sup> *Id.* at 622.

<sup>89</sup> *Id.* at 621.

<sup>90</sup> *Id.*

<sup>91</sup> Amy Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. (forthcoming 2006).

<sup>92</sup> *Id.* at 3.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

more willing to testify about the identification and reported a greater ability to remember strangers.<sup>95</sup> These outcomes support the desirability of double-blind lineup administration and prompt, full recording of eyewitness certainty comments.

#### IV. SCIENTIFIC METHOD

##### A. *Sample*

The Hennepin County Attorney's Office pilot project focused on felony cases in four municipal police departments, including both *stranger* and *familiar perpetrator* lineups. The cities chosen represent four levels of population and include both urban and suburban locales. In Minneapolis, the largest of the four cities, the protocol was used exclusively by Central Investigations, which handles violent crimes. Ultimately, the project involved 280 lineups from 117 cases, representing 206 eyewitnesses over a twelve month period ending in November 2004 (see table 1).

##### B. *Reporting*

Investigators continued their prior reporting procedure, in which each investigator wrote a narrative report of the lineup process. The Minnetonka Police Department also developed a supplementary form for the witness that provided instructions, including the cautionary instruction that the perpetrator *may or may not* be in the collection of photos to be displayed, and response options. Minnetonka witnesses were requested to check one of two options: *I am unable to select any photo as the suspect in this case*, or, *I have selected photograph # \_\_\_ from the group*. The form also included a space for the witnesses to write comments.

Data were drawn directly from investigators' lineup reports. Incomplete reports were supplemented with data from the complete police file. The files provided a rich data set that included information regarding lineup structure and administration, lineup context (e.g., crime type), and eyewitness responses to the lineup task (see table 1).

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<sup>95</sup> *Id.*

TABLE 1. DEMOGRAPHICS

	Population	280 Lineups	117 Cases	206 Eyewitnesses
Minneapolis	382,618	138 (49%)	38	89
Bloomington	85,172	86 (31%)	48	69
Minnetonka	51,301	30 (11%)	14	26
New Hope	20,873	26 (9%)	17	22
<b>Result of 280 Lineups</b>				
<b>Most Frequent Crimes (of 27 Categories):</b>				
		Murder		30%
		Assault		24%
		Theft		12%
		Forgery/Check		8%
<b>Suspect Race:</b>		African American	163	58%
		Caucasian	75	27%
		Hispanic	16	6%
		Native American	8	3%
		Other	6	3%
		No Report	12	4%
<b>Witness Race:</b>		African American	77	28%
		Caucasian	63	22%
		Native American	8	3%
		Hispanic	5	2%
		Other	5	2%
		No Report	122	44%
		Cross-race IDs	38	14%
		Same-race IDs	113	40%
		No information	129	46%
<b>Suspect gender</b>		Male	249	89%
		Female	30	11%
<b>Witness gender</b>		Male	181	65%
		Female	96	34%
		No report	3	1%
<b>Weapon presence</b>		Gun	90	32%
		Knife	16	6%
		Other	13	5%
		No weapon	14	5%
		No report	147	53%
<b>Time between event and lineup</b>				<i>Cum %</i>
		Lineup within 1 week:		50%
		within 2 weeks:		64%
		within 3 weeks:		75%
		within 4 weeks:		82%

### C. Protocol and Training

The Hennepin County Attorney's Office employed the following five principles for its blind sequential lineup protocol (the first three were already part of the police departments' procedures):<sup>96</sup>

- *Effective use of fillers (foils).* A six-member lineup included one suspect and at least five fillers.
- *Cautionary instruction.* The witness was instructed that the perpetrator "may or may not be in the lineup."
- *Confidence statement.* A statement of witness confidence, in the witness's own words, was recorded at the time of the identification and before any feedback.
- *Blind Administration.* The lineup administrator did not know who the suspect was, and the witness was instructed that the administrator did not know which lineup member was the suspect.
- *Sequential presentation.* The witness was informed that he or she would be viewing a series of photos. Lineup photos were presented one at a time, with the witness making a decision about each photo before the next was presented. The witness was not allowed to compare photos side-by-side at any time. The full sequence was completed even if an early identification was made, and the witness was informed that this completion is required by the procedure. The Hennepin County procedure also allowed the witness to view the entire sequential lineup display as many times as desired.

Specifically, investigators were instructed as follows:

- Use existing Minnesota Repository of Arrest Photos parameters. These defaults include the use of photographs depicting suspects of similar age, skin color, complexion, hairstyle, and build. Consistency is also required as to backdrop, the use of color or black and white suspect photos, and distinguishing characteristics such as facial hair, scars, eyeglasses, and clothing.
- Use no less than six photographs.
- Preserve a copy of the photos in the order in which they were displayed. One way is to preserve the traditional simultaneous six-photo display.

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<sup>96</sup> Memorandum from Paul Scoggin, Managing Attorney, Violent Crimes Division, Hennepin County Attorney's Office to the Investigators and Detectives of the Minneapolis (Central Investigation Division), Bloomington, Minnetonka and New Hope Police Departments on the Hennepin County Pilot Program for the Sequential Identification Process (Oct. 27, 2003) (on file with author) [hereinafter Memorandum from Paul Scoggin].



- Assemble a different group of photos using new fillers for each suspect.
- Interview witnesses in private, separate from other witnesses.
- Do not tell the witness that the suspect is in a group of photos. Rather, the witness should be told the suspect "may or may not be" in the group of photos displayed.
- Tell the witness that the displaying officer does not know whether the suspect is in the group of photos.
- If a witness is able to recognize the suspect from the photos, a statement from that witness should include a description of how certain the witness is of the identification. Numerical certainty (percentages) should be avoided, but a description of why the photo resembles the suspect is encouraged. The witness should initial and date any photo identified.
- The officer displaying the photographs should report on how the identification was made, including the speed of the identification, statements of certainty made during the process, and any comments about why the photos do or do not look like the suspect. The officer should not encourage the witness to focus on any particular photo.
- Photos should be shown one at a time. While one photograph is being displayed, the other photographs should be face down or otherwise hidden.
- The witnesses may look through the photos more than once, but all the photos should be shown each time. The number of times the photos were shown should be reported. The witness may take as long as necessary to examine each photograph.
- If a witness identifies a suspect before looking at all the photos, the rest of the display should be shown and the witness asked to identify or eliminate each photograph.
- The officer showing the display should not know which photo depicts the suspect. The officer assembling the photos should not be in the witness's view during the display.
- A knowledgeable officer should be available to clarify questions that arise during the identification process and to provide support after the process is completed.

The Hennepin County protocol made the following exceptions:

- Sequential displays should not be used with witnesses of twelve years of age or younger.

- The blind examination requirement may be disregarded if necessary. Officers should document why an uninformed officer was not available (e.g., it is 3:00 a.m. and no uninformed officer is available).<sup>97</sup>

## V. QUANTITATIVE RESULTS: DO THE NUMBER AND QUALITY OF IDENTIFICATIONS CHANGE WITH THE BLIND SEQUENTIAL PROCEDURE?

### A. Overview and Comparative Data

The blind sequential lineup procedure is expected to lower eyewitness choosing rates.<sup>98</sup> Researchers believe this is due to the witness's movement from relative to absolute judgment, a process that also may involve an upward criterion shift.<sup>99</sup> The witness knows that there could be another person, a better match to memory, coming later in the sequence.<sup>100</sup> Thus, he or she is forced to dig a bit more deeply into memory.<sup>101</sup> Guessing should be reduced by the blind sequential procedure. This procedure is seemingly a more conservative test of memory, and, if this technique is working well, a low rate of filler choices is likely.

Investigators may be concerned about the reduction of correct identifications that appeared when sequential lineup laboratory results were compared to simultaneous lineup results (3% and 15% average decreases, for the subgroup of "choosers" and for all witnesses, respectively).<sup>102</sup> It is not known whether this difference represents a loss of true memory reports, of lucky guesses, or both. Ideally, the blind sequential lineup would yield no loss in accurate suspect identifications but a substantial drop in false identifications as guessing is reduced. In the field, however, we cannot assess ground truth—memory accuracy or error—only the proxy measures of suspect identifications and filler choices.

Assessment of any change in lineup outcomes resulting from the new lineup procedure would require suitable data from blind simultaneous field lineups against which to compare blind sequential lineup per-

<sup>97</sup> *Id.*

<sup>98</sup> *Eyewitness Accuracy Rates*, *supra* note 80, at 464. Note that in this discussion "choosing" includes any pick from the lineup, suspect or filler. "No choice" indicates that the witness did not pick any photo from the lineup.

<sup>99</sup> Wells & Olson, *supra* note 80, at 289.

<sup>100</sup> *From the Lab to the Police Station*, *supra* note 18, at 586.

<sup>101</sup> *Id.*

<sup>102</sup> *Eyewitness Accuracy Rates*, *supra* note 80, at 464, 463, 468.

formance. At present, there are no comparative baseline data for simultaneous lineups in Hennepin County. However, existing sources of relevant information from other venues can be examined.

### B. *Field Data from Simultaneous Lineups*

A California field study reported eyewitness decisions for fifty-eight simultaneous live lineups, with a suspect identification rate of 50%, filler choice of 24%, and no choice at 26%.<sup>103</sup> In 284 photo arrays, 48% of the identifications were of the suspect;<sup>104</sup> filler identifications were not recorded. Three teams of researchers from England provided responses of 3040 eyewitnesses to simultaneous live field lineups, including situations of suspects both known and unknown to witnesses.<sup>105</sup> The results of these studies are quite consistent: approximately 20% of witnesses identified a filler, thereby making a known mistaken identification; approximately 40% identified the suspect; and approximately 40% made no identification.<sup>106</sup>

### C. *Laboratory Data from Simultaneous and Sequential Lineups*

Another recent work summarized thirty laboratory comparisons of simultaneous and sequential lineup performance.<sup>107</sup> This review, representing 4145 test witnesses,<sup>108</sup> demonstrated that the sequential procedure reduced eyewitness choosing rates, with significant positive effects on accuracy (see table 2).<sup>109</sup> Regardless of whether the criminal was in the lineup (*perpetrator-present*) or not (*perpetrator-absent*), the simultaneous format produced a relatively even distribution between filler-choice and no-choice responses.<sup>110</sup> Across lineup type, sequential lineups generated a greater percentage of no-choice responses than filler selections. Therefore, in perpetrator-absent lineups there were significantly more errors produced from simultaneous lineups (51%) than from sequential

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<sup>103</sup> Bruce W. Behrman, & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 482 (2001).

<sup>104</sup> *Id.* at 481.

<sup>105</sup> Tim Valentine & Patricia Heaton, *An Evaluation of the Fairness of Police Lineups and Video Identifications*, 13 APPLIED COGNITIVE PSYCHOL. 559 (1999).

<sup>106</sup> Tim Valentine et al., *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 APPLIED COGNITIVE PSYCHOL. 969, 973 (2003); see also *id.* at S61.

<sup>107</sup> *Eyewitness Accuracy Rates*, *supra* note 80, at 461.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 462.

<sup>110</sup> *Id.* at 463.

lineups (28%).<sup>111</sup> Suspect identifications in sequential lineups are less frequent than in simultaneous lineups, but greater protection is afforded to the innocent suspect.<sup>112</sup>

TABLE 2. EYEWITNESS PERFORMANCE

Hennepin County (HC) Results				
	HC	SIM (lab)* Perp-Present	SEQ (lab)* Perp-Present	SIM (Field)**
Suspect ID	54%	50%	35%	50%
Filler ID	8%	24%	19%	24%
W/o Choice	38%	26%	46%	26%

  

In the laboratory*				
	Simultaneous Lineups		Sequential Lineups	
	Perpetrator present	Perpetrator absent	Perpetrator present	Perpetrator absent
Suspect ID	50%		35%	
Filler ID	24%	51%	19%	28%
W/o Choice	26%	49%	46%	72%

Notes to table:

\* Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001).

\*\* Bruce W. Behrman, & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 482 (2001).

#### D. Hennepin County Results

##### 1. Witness Decisions

For comparison purposes, the Hennepin County (HC) data is presented in the upper section of Table 2 alongside simultaneous (SIM) and sequential (SEQ) lineup laboratory data sets (perpetrator-present conditions). The Hennepin County suspect identification rate is com-

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

parable to that achieved with simultaneous lineups in the field and in the lab, and is higher than laboratory sequential rates, with a much lower filler choice rate (8%). These rates change somewhat as the context of the crime shifts, particularly the relationship between witness and perpetrator, as discussed below.

## 2. Witness Performance on Sequential Repetitions ("Laps")

Ideal blind sequential protocol calls for only one viewing of the lineup per witness.<sup>113</sup> One could speculate that a second review of the photos may produce a *de facto* simultaneous array, eliminating the sequential lineup's advantage. That is, subjects may begin to compare photos and lapse into relative judgment. However, due to concerns that some number of good identifications would be lost due to overly cautious eyewitnesses, witnesses in the pilot project were allowed multiple repetitions, or "laps," through the lineup, and lineup administrators were to record the details of this process. The details were not as thoroughly recorded as hoped, with 46% of lineup reports including the number of repetitions. The results in Table 3 are based on these 128 lineups, summarizing witness decisions for those who viewed a lineup just once, twice, three times, or more.

Repeated viewing of the lineup was associated with significantly increased likelihood of filler choices (errors).<sup>114</sup> For crimes involving perpetrators familiar to the witness, this is somewhat less evident. With familiar perpetrators, the suspect identification rate was 92% for witnesses who took either one or two laps through the lineup, and 50% for the few witnesses who requested a third viewing.<sup>115</sup> For lineups in which the perpetrator was a stranger to the eyewitness, a risk of additional laps was most apparent in the filler identification rate, which increased from 3% to 29%.<sup>116</sup>

Returning to the subset of 128 lineups in which lineup repetitions were reported, over half of the witnesses (53%) viewed the lineup just once. Another way to look at the impact of repeated viewing is to examine witness behavior in the remaining 47% of lineups—the sixty lineups in which witnesses requested additional laps. Complete infor-

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<sup>113</sup> *From the Lab to the Police Station, supra* note 18, at 595.

<sup>114</sup>  $\chi^2(10) = 31.23, p < .001$ . A statistically significant outcome is one in which  $p < .05$ , meaning that the obtained result is unlikely to be due to chance.

<sup>115</sup>  $\chi^2(4) = 7.34, p = .06$

<sup>116</sup>  $\chi^2(10) = 22.00, p = .007$

TABLE 3. WITNESS DECISIONS FOR REPEATED VIEWING OF THE SEQUENTIAL LINEUP

<b>Witness Decisions in Lineup Laps [Reporting Lineups = 128 (46%)]</b>				
<i>Laps</i>	<i>Lineups (n)</i>	<i>Suspect ID</i>	<i>Filler ID</i>	<i>No Choice</i>
1	68	66%	3%	31%
2	42	50%	10%	40%
3	14	50%	14%	36%
4, 5 or 6	4	25%	75%	

  

<b>Witness Decisions in Lineup Laps – Stranger Crimes Only [Reporting Lineups = 78]</b>				
<i>Laps</i>	<i>Lineups (n)</i>	<i>Suspect ID</i>	<i>Filler ID</i>	<i>No Choice</i>
1	33	42%	3%	55%
2	31	32%	13%	55%
3 or more	14	43%	29%	29%

mation was available in only thirty-six of these sixty lineups. In fifteen of the thirty-six lineups, witnesses indicated recognition of a photo during the first showing of the lineup, with nine jump-outs (i.e., the witness made an immediate choice or made comments, such as, "that's the guy") and six tentative identifications, but then requested a repeat of the display. The tentative identifications included comments such as, "hold that one," and, "that looks like him." The second lap (for two witnesses, a third lap) was the point at which the witness confirmed his or her choice; 100% (all fifteen) selected the suspect.

Although all of the additional twenty-one witnesses (for whom complete information regarding lineup repetitions was available) selected a photo from the lineup, they did not indicate recognition until after they viewed the lineup two or more times. In these cases, climbing error levels are apparent. Thirteen identifications made after two lineup showings produced 62% suspect and 38% filler choices; eight witnesses made a decision after three or more showings and generated more filler identifications (50%) than suspect identifications (38%).

### 3. "Jump-out" Identifications

Another concern was that sequential lineups might diminish the likelihood of "jump-out" identifications, inhibiting desirable witness ex-

pressions of absolute certainty. Of 175 choosers in this data set (i.e., those who actually selected a photo from the lineup), ninety-six (55%) were "jump-outs." The resulting choices produced 99% suspect identifications. Jump-out identifications do not appear to be inhibited by the sequential lineup format.

#### 4. Patterns of Eyewitness Response: Stranger Perpetrator v. Familiar Perpetrator

The Hennepin County program required blind sequential lineups for all felony cases, regardless of familiarity between eyewitness and perpetrator. The following analyses explore eyewitness responses as a function of familiarity and of the witness's opportunity to view the culprit. First is a comparison of situations in which the perpetrator was a stranger to the witness, based on the best knowledge of the case investigator, with those in which the culprit was at least familiar to the witness and sometimes known quite well. Not surprisingly, suspect identification rates were significantly lower for strangers than for familiar perpetrators (35% versus 90%, respectively (see table 4)),<sup>117</sup> with lower choosing rates (47% as opposed to 94% for familiar perpetrators (see table 5)). Filler rates were relatively low in both categories.

TABLE 4. EYEWITNESS RESPONSE: STRANGER VERSUS FAMILIAR PERPETRATOR

	<i>Stranger Perpetrator</i> (n = 178)	<i>Familiar Perpetrator</i> (n = 93)
Suspect ID	35%	90%
Filler	11%	3%
No Choice	53%	6%

The lower suspect identification rate in the stranger lineups may elicit concern from investigators. A finer distinction is perhaps useful. Crimes of brief duration committed by strangers (estimated as only a few minutes) produced 32% suspect identifications and 11% filler choices (see table 5). Crimes in which the witness viewed a stranger for a longer time (more than ten minutes) generated a 59% suspect identification and 14% filler choice rate. We do not know the accuracy of

<sup>117</sup>  $\chi^2 (2) = 74.68, p < .001$

suspect identifications, of course, but these rates suggest that witnesses are more willing to choose from the lineup when they have had longer exposure to the culprit. Lower suspect identification rates occur in situations where one might expect weaker witness memory, e.g, a short-duration crime committed by a stranger. An interesting ancillary finding is that twenty-nine (43%) of the sixty-eight witnesses who made a lineup selection after a very brief view of a stranger expressed some qualification of their identification (see table 5).

TABLE 5. STRANGER IDENTIFICATIONS AND FAMILIAR PERPETRATOR IDENTIFICATIONS

<i>STRANGER IDENTIFICATIONS</i>		
<b>Very Brief Interaction (157 Lineups)</b>		
<b>Eyewitness Decisions:</b>	50 Suspect	32%
	18 Filler	11%
	89 No Choice	57%
<b>Choosing Rate</b>		43%
<b>Jump-outs</b>		12%
<b>Reported qualifiers to the choice</b>		29 of 68 (43%)
<b>Reported qualifiers about other lineup members</b>		28 of 157 (18%)
<b>Eyewitness status:</b>	Observer	68%
	Victim	27%
	Other knowledge	4%
<b>Weapon involved (reported):</b>		29%
<b>Type of crime: (categories &gt; 8%)</b>	Assault	31%
	Theft	17%
	Murder	15%
	Forgery	10%
	Burglary	10%
<b>Longer Interaction (22 Lineups)</b>		
<b>Eyewitness Decisions:</b>	13 Suspect	59%
	3 Filler	14%
	6 No Choice	27%
<b>Choosing Rate</b>		73%
<b>Jump-outs</b>		32%
<b>Reported qualifiers to the choice</b>		6 of 16 (38%)
<b>Reported qualifiers about other lineup members</b>		4 of 22 (18%)



Eyewitness status:	Observer	67%
	Victim	33%
Weapon involved (reported):		9%
Type of crime: (categories > 8%)	Fraud	23%
	Assault	14%
	Forgery	9%
	Credit Fraud	9%
	Theft/swindle	9%
	Robbery	9%
	Theft	9%

**FAMILIAR PERPETRATOR IDENTIFICATIONS**

**"Regular Customer"/Multiple Views (45 Lineups)**

Eyewitness Decisions:	38 Suspect	84%
	3 Filler	7%
	4 No Choice	9%

Choosing Rate	91%
Jump-outs	60%

Reported qualifiers to the choice	12 of 41 (29%)
Reported qualifiers about other lineup members	4 of 45 (9%)

Eyewitness status:	Observer	62%
	Victim	33%
	Other	2%

Weapon involved (reported):	60%
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Type of crime: (categories > 8%)	Murder	42%
	Assault	24%
	Theft	9%

**Know Well (including gang associations) (48 Lineups)**

Eyewitness Decisions:	46 Suspect	96%
	2 No Choice	4%

Choosing Rate	96%
Jump-outs	90%

Reported qualifiers to the choice	1 of 46 (2%)
Reported qualifiers about other lineup members	5 of 48 (10%)

Eyewitness status:	Observer	44%
	Victim	31%
	Other	25%

Weapon involved (reported):	81%
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Type of crime: (categories > 8%)	Murder	71%
	Assault	19%

A similar breakdown of the familiar perpetrator category also shows intuitively consistent outcomes. Witnesses who reported some familiarity with the perpetrator (e.g., a face seen on multiple prior occasions) chose from the lineup at a very high rate (91%), selecting the suspect in 84% of the recorded lineups, fillers in only 7%, and making no choice in 9% of the lineups. However, witnesses who *knew* the perpetrator (often by a street name) made suspect identifications in 96% of the lineups, with only 4% making no choice. It should be noted that, in this latter group, persons making lineup choices were not limited to observers and victims of a crime; 25% of these witnesses were those involved through indirect knowledge of the crime, e.g., having been at the locale just prior to occurrence of the crime. This sub-category (witnesses who knew the perpetrator) thus included "confirmatory" lineups, and a higher level of suspect identifications and lower filler selections would be anticipated. Laboratory tests typically do not include familiar perpetrators, thus keeping suspect identification rates at a lower level.

Variables associated with these four categories are included in Table 1 to describe the correlates of these eyewitness decisions. The patterns of eyewitness response make sense, given the context in which the identifications were made. For example, brief interaction with a stranger produces the lowest choosing, jump-out, and suspect identification rates of the four groups. Also, greater levels of qualifiers to the choice occur with stranger crimes than with familiar perpetrators.

### 5. Confidence and Decision Outcomes

Lineup administrators were asked to record verbatim any eyewitness comments regarding confidence. However, this requirement led to specific comments in only 15% of lineup reports ( $n = 42$ ). Assuming that jump-out identifications also indicate a meaningful level of certainty, and can therefore be added to the analysis, a total of 125 out of 280 lineups (45%) yielded information regarding witness confidence. Witnesses expressed confidence in a decision *not* to choose from the lineup in only two of the 125 cases (1%). For analysis, the memorialized comments were sorted into four categories of decreasing certainty: (1) *jump-outs*; (2) *high confidence*—those not included as jump-outs but involving statements of 80% or greater certainty or phrasing such as "quite certain," "sure," and "positive"; (3) *moderate confidence*, involving statements like "pretty sure" and "fairly sure," and estimates between

60% and 80% certainty; and (4) *low confidence*, with phrasing like "not sure" and "not very," or "not too" and "low."

Within this subset of lineup data, witness confidence and decision outcomes were significantly related, with greater confidence associated with higher levels of suspect identifications.<sup>118</sup> This significant statistical relationship was largely due to the impact of jump-out decisions, 89% of which were suspect identifications. If the jump-out category is removed from analysis,<sup>119</sup> a significant relationship no longer appears. In each of the remaining three confidence categories (high, moderate, and low), witnesses selected fillers at a slightly higher rate than suspects (filler identification rates of 58%, 67%, and 63%, respectively).

## 6. Summary

Hennepin County blind sequential field tests produced suspect identification rates relatively comparable to those in prior laboratory and field tests. Repeated viewing of the lineup was associated with increased filler identifications (errors). The new procedures do not appear to have sacrificed jump-out identifications. Patterns of eyewitness response to stranger and familiar perpetrators were reasonable, with stranger suspect identifications at a lower level. Confidence and suspect identifications were significantly related, particularly for jump-out identifications. For other categories of expressed confidence (even *high*), confidence and decision outcome were not significantly related. A positive outcome of the project was the low filler identification rate, which demonstrates increased protection for innocent suspects.

## VI. IMPLEMENTATION RESULTS: CAN THE PROCEDURES BE EFFECTIVELY IMPLEMENTED IN THE FIELD?

### A. *Initial Reactions*

Field implementation effectiveness data from the Hennepin County pilot project consist largely of qualitative and anecdotal information. A group of thirteen investigators relayed their concerns and perspectives at a formal meeting with the researcher and a representative from the Hennepin County Attorney's Office. Additional feedback from the police agencies involved in implementation was fielded by the county attorney's office. Despite some initial misgivings, the four police

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<sup>118</sup>  $\chi^2(9) = 83.73, p = .0001$

<sup>119</sup> Leaving  $n = 26$

departments ultimately affirmed that the new protocol could be implemented smoothly and effectively.

At the outset, police chiefs registered apprehension toward the new protocol primarily because existing lineup procedures were working well. Nevertheless, discussions and training sessions sponsored by the Hennepin County Attorney's Office convinced the chiefs that the pilot was a worthwhile project. All four departments promptly agreed to participate in the project with the desire to improve the system. Bloomington Police Chief John Laux explained, "In my time since 1968 in law enforcement, I've always been willing to experiment, to try something new. I try to be open-minded and say just because it's working doesn't mean it can't work better."<sup>120</sup>

Of the five procedures included in the pilot project, three of them—the effective use of fillers, the cautionary instruction, and documentation of the witness's confidence statement—were already in practice throughout Hennepin County. The introduction of double-blind administration and sequential presentation to lineup procedures posed early problems for departments, but these problems proved to be less challenging than originally presumed.

### B. *Sequential Presentation*

Implementation of sequential identifications presented problems of a technical nature. Prior to the pilot project, lineups consisted of so-called "six-packs," six photographs presented on a single sheet of paper.<sup>121</sup> Filler pictures were randomly and electronically selected by choosing desired parameters to search online photograph repositories of arrested persons.<sup>122</sup> It took some experimentation and innovation to turn this single sheet of paper into a viewable sequence of photos.<sup>123</sup> To implement the sequential identification procedure, investigators had to enlarge the six pictures, while maintaining consistency of backgrounds

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<sup>120</sup> Interview by Kirstin Petersen with John Laux, Chief of Police, and Kevin Hinrichs, Commander, Bloomington Police Dep't, in Bloomington, Minn. (Aug. 9, 2005) [hereinafter Bloomington PD].

<sup>121</sup> Interview by Kirstin Petersen with Gary Link, Chief of Police, and Jim O'Meara, Captain, New Hope Police Dep't, in New Hope, Minn. (Aug. 5, 2005) [hereinafter New Hope PD].

<sup>122</sup> *Id.*

<sup>123</sup> Interview by Kirstin Petersen with Joy Rikala, Chief of Police, Steve Owens, Investigator, and Allen Ringate, Investigator, Minnetonka Police Dep't, in Minnetonka, Minn. (Aug. 3, 2005) [hereinafter Minnetonka PD]; Bloomington PD, *supra* note 120.

nd coloration.<sup>124</sup> The larger size of photos in the sequential display was considered a collateral benefit of the sequential format. However, as Chief Laux remarked, "a lot of people spent a lot of time at the Xerox machine."<sup>125</sup> The logistical problem was particularly noted for off-site lineups. The Minnetonka Police Department created a new photo template to remedy the logistical problem of constructing a workable photo display.<sup>126</sup> To make the process even more efficient, ongoing efforts are being made to create software and adapt the online photo repositories to the requirements of the new protocol.<sup>127</sup>

The introduction of sequential presentation of lineups brought to light for investigators the strong desire of eyewitnesses to form a judgment by comparing and contrasting. Even after being instructed about the new lineup procedure, witnesses still would ask to see two photographs simultaneously.<sup>128</sup> Now realizing the increased potential for misidentifications when eyewitnesses engage in relativism, investigators say they better understand and appreciate the new protocol. One investigator explained, "I like the format better. I like that the person is studying one picture. It's larger, and . . . you can see them reflecting back to whatever event they had. . . . From that alone, I think it's a success."<sup>129</sup>

Ultimately, this change in the lineup procedure caused few problems, none of them serious or enduring. Although New Hope investigators were initially reluctant to implement the sequential presentation requirement, "it took maybe two or three lineups before they realized that it wasn't that big of a deal,"<sup>130</sup> Captain Jim O'Meara remarked.

### C. *Blind Administration*

Police chiefs and investigators were significantly more concerned about implementing the blind administrator requirement. In a traditional lineup, an investigator would administer lineups as a regular and important part of conducting a thorough case investigation. No additional staff were required or involved. Thus, implementation of the double-blind requirement raised a number of issues.

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<sup>124</sup> Bloomington PD, *supra* note 120.

<sup>125</sup> *Id.*

<sup>126</sup> Minnetonka PD, *supra* note 123.

<sup>127</sup> New Hope PD, *supra* note 121.

<sup>128</sup> Bloomington PD, *supra* note 120.

<sup>129</sup> Minnetonka PD, *supra* note 123.

<sup>130</sup> New Hope PD, *supra* note 121.

In smaller departments, where there are few investigators, all officers may be focused on a single case and additional personnel are hard to come by.<sup>131</sup> Witnesses located at odd hours (e.g., in the middle of the night) or those in transient populations can make the coordination of a second investigator at the scene inconvenient or difficult. Even in larger departments, circumstances can produce logistical difficulties. Some departments may bring a near full force of officers to a significant crime just after it happens. This “all-hands” policy constrains the pool of officers available for displaying lineups who lack knowledge of the case. A related circumstance arises during investigations of great urgency (e.g., an “Amber Alert”) or of high profile crimes. A high level of collaboration and cooperation among investigators in the Bloomington Police Department make it difficult to find a truly blind administrator.<sup>132</sup> Chronic offenders presented a problem in Minneapolis, because their mere presence in a lineup would cause any administrator from the department to suspect that individual was the perpetrator.<sup>133</sup>

A desire to protect the relationship that develops between an investigator and a witness was another issue related to the double-blind aspect of the protocol.<sup>134</sup> This rapport is especially pivotal for lineups in which the witness is the victim of a violent crime.<sup>135</sup> Consequently, there was some apprehension about introducing a new, unknown officer into an emotional part of the investigation—the viewing of the lineup.<sup>136</sup>

In some departments, there were also worries about cases involving multiple witnesses. Since a blind administrator must sometimes travel with the main case investigator to meet witnesses, the administrator loses valuable time that would otherwise be spent working in a larger role on other cases.<sup>137</sup> Furthermore, one witness’s certainty about the identity of the perpetrator might cause the blind administrator to develop an opinion about who the suspect is. This would jeopardize the

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<sup>131</sup> Bloomington PD, *supra* note 120.

<sup>132</sup> *Id.*

<sup>133</sup> Interview by Kirstin Petersen with William McManus, Chief of Police, and Richard Czek, Captain, Minneapolis Police Dep’t, in Minneapolis, Minn. (Aug. 11, 2005) [hereinafter Minneapolis PD].

<sup>134</sup> Bloomington PD, *supra* note 120.

<sup>135</sup> Minnetonka PD, *supra* note 123.

<sup>136</sup> Bloomington PD, *supra* note 120.

<sup>137</sup> Minnetonka PD, *supra* note 123.

unbiased administration of lineups to other witnesses.<sup>138</sup> Requiring a separate blind administrator for each witness may be prohibitively expensive in terms of time, money, and energy.<sup>139</sup>

Like many initial concerns, real-life problems with the blind administrator requirement were less serious than anticipated. New Hope reported no problems with implementing the double-blind procedure despite employing only two investigators.<sup>140</sup> The other agencies were able to overcome most issues with minimal difficulty.<sup>141</sup> When they compared blind sequential lineup outcomes with past simultaneous lineup outcomes, investigators reported no perceived drop in effective suspect identifications or in their ability to "get the job done."<sup>142</sup>

The introduction of a new officer for lineup administration was not found to hinder investigations in any significant way.<sup>143</sup> No witness refused to view the lineup with an officer other than the main case investigator. On the contrary, witnesses in Minnetonka have said they appreciate the procedure and understand the reasoning behind it.<sup>144</sup>

To address the shortage of blind administrators, New Hope and Minnetonka turned to other department staff, such as patrol officers, captains, and sergeants.<sup>145</sup> Without greatly hindering collaboration, Bloomington used property crime investigators as blind administrators for investigations dealing with crimes against persons, and vice versa.<sup>146</sup> To address concerns about repeat offenders and multiple witnesses, the Minneapolis Police Department is working with the Hennepin County Attorney's Office to develop laptop computer lineup administration.<sup>147</sup> The laptop will randomly order six photos for viewing by the witness alone, out of sight of the administering officer.<sup>148</sup> In cases with multiple witnesses, the laptop will randomly shuffle the six pictures for each administration.<sup>149</sup> With this new procedure in place, investigators will be able to conduct a lineup administration without the aid of a second

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> New Hope PD, *supra* note 121.

<sup>141</sup> Minnetonka PD, *supra* note 123; Minneapolis PD, *supra* note 133.

<sup>142</sup> Minneapolis PD, *supra* note 133.

<sup>143</sup> Minnetonka PD, *supra* note 123.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; New Hope PD, *supra* note 121.

<sup>146</sup> Bloomington PD, *supra* note 120.

<sup>147</sup> Minneapolis PD, *supra* note 133.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

officer, dispelling any lingering concerns about the double-blind procedure.<sup>150</sup> As noted earlier, the National Institute of Justice guidelines were positioned as a "framework for innovation," in anticipation of technological developments like computer-based imaging, to add effectiveness and efficiency to lineup procedures.<sup>151</sup> Hennepin County is developing laptop lineup delivery to enhance sequential lineup presentation and facilitate the blind procedure.

#### D. Summary

Overall, police chiefs and investigators alike found the pilot project to be easier to implement and less work than anticipated. Implementation was extremely efficient. Minnetonka investigators came up with a new photo template in less than a week.<sup>152</sup> New Hope had the whole project underway in less than two weeks.<sup>153</sup> In the larger jurisdictions, Minneapolis and Bloomington, the process took less than a month.<sup>154</sup> Initial skepticism and unease faded and attitudes mellowed. "By the end of the project," Minneapolis Police Chief William McManus reported, "the burden on investigators was far less than my department had anticipated."<sup>155</sup>

The pilot project also involved minimal cost. From an administrative perspective, the police chiefs initially wondered whether the need for blind administrators would significantly increase work-hours. As Minnetonka Police Chief Joy Rikala noted, however, "There [are] no cost implications of this. It's negligible."<sup>156</sup>

Since the biggest hurdle in implementation was overcoming a general resistance to change, even fewer problems are expected the longer

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<sup>150</sup> *Id.*

<sup>151</sup> NIJ GUIDE, *supra* note 56, at 9.

<sup>152</sup> Minnetonka PD, *supra* note 123. The Minnetonka Police Department also developed a standardized script to facilitate the administration of the lineup:

You will be viewing a series of photographs. The suspect in this case may or may not be present in these photographs. Take as much time as you need but only look at one photograph at a time. Please remember that the photographs may NOT be current. Therefore, clothing, facial hair, length of hair, etc, may have changed. Each photograph is assigned a number that appears at the bottom of the photo. If you are able to identify the suspect from THIS offense inform me using the number assigned to that photograph.

*Id.*; Memorandum from Paul Scoggin, *supra* note 96.

<sup>153</sup> New Hope PD, *supra* note 121.

<sup>154</sup> Bloomington PD, *supra* note 120; Minneapolis PD, *supra* note 133.

<sup>155</sup> Minneapolis PD, *supra* note 133.

<sup>156</sup> Minnetonka PD, *supra* note 123.



he protocol is used. New investigators will be trained in the new procedures, and will not be tied to the old methods.<sup>157</sup> Allen Ringate, who became an investigator with the Minnetonka Police Department during the pilot project, confirmed that the protocol "was simple to pick up."<sup>158</sup>

Apart from the scientific data, agencies also saw perceptible positive effects on lineup results due to the new procedures. Anecdotally, the participants perceive that witnesses are now less likely to make a misidentification. As Chief Rikala observed, "We're not having a lot of people pick fillers."<sup>159</sup>

These changes ultimately reveal four police departments that are flexible and willing to make changes in traditional protocol if it will aid the cause of justice. Chief Link explained, "[O]ur objective is to identify perpetrators and not falsely accuse those who did not perpetrate a crime. And if we can reduce false positives and increase accurate identifications of the true perpetrators, then we're meeting our moral and legal obligations to do the best job we can."<sup>160</sup>

## VII. DISCUSSION OF FINDINGS AND FUTURE IMPLICATIONS

The key objective of the new blind sequential procedure is to secure better quality identifications based on what eyewitnesses actually remember. Identification decisions vary along a continuum from "jump-out" recognitions, to statements of lesser certainty ("this is really difficult"), to conditional identifications ("I thought the hair was longer and blond"), to rejection of the lineup ("I really don't know," or, "he's not there"). Whether an identification is made or not, this is all important information to the extent that it accurately portrays the status of the witness's memory.

The blind sequential procedure facilitates two important behaviors relevant to acquisition of the best possible information: the witness's independent judgment about each photo based on memory alone, and the investigator's objective documentation of those judgments. Thus, sequential procedures are more likely than traditional lineups to reveal what witnesses really remember and are trying to convey. This in turn allows attorneys, judges, and juries to be more confident when identifi-

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<sup>157</sup> *Id.*; Bloomington PD, *supra* note 120.

<sup>158</sup> Minnetonka PD, *supra* note 123.

<sup>159</sup> *Id.*

<sup>160</sup> New Hope PD, *supra* note 121.

cations are made and to appreciate the significance of conditional identifications.

Put another way, blind sequential identification procedures give us a clearer view of the truth. Blind sequential procedures also accrue practical advantages for the investigator. Better lineup screening devices allow police to move more quickly in their work, to find the right perpetrator without wasting time on false leads, and to remove perpetrators from the streets before additional offenses are committed. Additionally, the use of a blind administrator effectively removes the possibility of stringent cross-examination at trial regarding cues consciously or inadvertently sent to witnesses.

Hennepin County blind sequential field tests produced suspect identification rates comparable to laboratory and field tests, and not unlike those achieved with simultaneous lineups in other jurisdictions (see table 2). Investigators perceived no drop in number or quality of achieved suspect identifications.<sup>161</sup> Data are currently being collected to ascertain identification rates in the Hennepin County simultaneous lineups conducted just prior to implementation of the blind sequential protocol. Although this will by no means provide a perfect control group comparison, it will be helpful to ascertain the prior pattern of eyewitness decisions.

A positive outcome for Hennepin County is the low filler choice rate, suggesting a reduction in guessing and an increase in protection for innocent suspects. Of course, filler identifications, which are known errors, do not lead to criminal prosecutions. However, a filler choice may signal a witness's weak memory or an eagerness to choose with no firm memory basis for the selection. If the blind sequential lineup is working, its safeguards should diminish lineup choices by those witnesses with a poor memory for the perpetrator. Thus, a reasonable suspect identification rate, low filler rate, and associated rise in "no choice" represent a promising outcome. In addition to the central benefit of increased accuracy, the low filler rate has a practical advantage: prosecutors and investigators are less likely to spend time tracking down and clearing the filler as a suspect to avoid defense challenges at trial.

The Hennepin County pilot project also yielded new information regarding the effects of repeated lineup viewings. One can extrapolate from theory and existing laboratory data to the conclusion that a re-

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<sup>161</sup> Minneapolis PD, *supra* note 133.

peated sequential lineup will ease the witness into relative judgment, with predictable reduction in performance accuracy. However, this hypothesis has not been tested in the laboratory. Now the Hennepin County pilot project has provided field data about the effects of lineup repetition; these data indicate that identifications are likely to be more reliable when the witness has made a decision after a single lap.<sup>162</sup>

It is impossible to know the extent to which suspect identifications include misidentification of innocent persons; as noted earlier, suspect identifications are an imperfect indicator of memory accuracy.<sup>163</sup> On the other hand, repeated lineup laps are associated with increased likelihood of error in the form of filler choices. Interestingly, witnesses who made an initial comment of recognition during the first lap were highly likely to identify the suspect in the second lap. Perhaps these are cases of witnesses who have reasonably strong memory of the perpetrator, but simply need to "be sure" with a second, reinforcing lap. It remains important, however, that lineup administrators record procedural details and witness comments carefully and methodically, particularly if a witness opts for a repeated viewing of the lineup.

It is further noteworthy that a traditional simultaneous lineup format does not allow us to know the level of "comparison shopping" (relative judgment) employed by the witness prior to the witness's decision. In contrast, the sequential lineup with this repetition option affords an objective indicator of eyewitness laps through the lineup.

A concern of the police investigators, that jump-out identifications may be sacrificed, proved to be unfounded. Jump-outs occurred at a relatively high level, particularly for instances of familiar perpetrators. Jump-outs may be instances of absolute recognition. If so, we would not expect a reduction in jump-outs from a sequential lineup, the sequential lineup being a better test of absolute judgment than the traditional format.

Laboratory studies of blind sequential lineups typically deal with *stranger* crimes of short duration, which might be considered the most difficult test of memory. The subset of Hennepin County data that involved crimes committed by a stranger provides evidence that laboratory principles generalize well and productively to the field. In addition, the Hennepin County data afford a look at eyewitness responses to a lineup with a familiar perpetrator. Patterns of eyewitness response to

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<sup>162</sup> See *supra* Part V.D.2.

<sup>163</sup> See *supra* Parts III.B.-C, V.A.

stranger versus familiar perpetrators square well with what is known regarding eyewitness memory, with stranger suspect identifications occurring at a lower level. The Hennepin County data also indicate that blind sequential lineups work well in situations involving both familiar perpetrators and confirmatory lineups. Given that even a confirmatory lineup is still a test of memory (and the investigating officer is unlikely to know just how familiar the perpetrator is to the witness), sequential lineups provide an appropriate protocol.

The purpose of the project was to determine how recommended lineup procedures can best be brought into practice. The experience of the pilot project indicates that the double-blind sequential protocol is workable for police in both large and small departments without undercutting the ability to solve cases. At the same time, the protocol elicits valuable new information for the effective investigation and prosecution of criminal cases.

### VIII. CONCLUSION

Prosecutors are "ministers of justice," not merely zealous advocates. We have a fundamental duty to guarantee justice for everyone. We must strive to protect the rights of innocent people while prosecuting the guilty. Perfect justice may never be attained. Yet prosecutors, police, and other members of the criminal justice system must work tirelessly toward that goal. Improving eyewitness identification procedures is an important part of ensuring that the law is applied fairly and consistently to all.