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Eyewitness Identification—Model Protocols

Eyewitness misidentifications have contributed to more than 75% of the nation's wrongful convictions proven through DNA testing. In 1999, the National Institute of Justice, research arm of the U.S. Department of Justice, undertook the problem by forming the "Technical Working Group for Eyewitness Evidence (TWGEE)," composed of membership from the scientific, legal and criminal justice communities, which sought to identify best practices supported by rigorous social science research.

The TWGEE, comprised of stakeholders from all corners of the criminal justice community, recommended a series of protocols in a report and an attendant training manual. Based upon the findings of the TWEE and bolstered by thirty years of scientific research, much of which is footnoted throughout this document, the Innocence Project recommends the following "best practices" to those jurisdictions considering enhancements to their traditional procedures:

Blind Administration of the Identification Procedure¹

"Blind administration" of an eyewitness identification procedure refers to:

- When the person administering the eyewitness identification procedure does not know which photo array or live lineup member is the person suspected by the police of having committed the crime under investigation.

-OR-

- When the person administering the identification procedure knows which individual is the suspect, a procedure is employed that prevents the administrator from knowing which lineup member is being viewed by the witness at any given time. [As a practical matter, this method of blind administration can only happen in the context of a photo array.]

Instructing the Eyewitness²

"Instructions" are a series of statements issued by the identification procedure administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection, seek clues from the administrator about whom to (not) pick, or whether or not a selection was correct, and otherwise help minimize the likelihood of a misidentification.

The following instructions were explicitly recommended by the TWGEE:

¹ A wealth of research lends support to the supremacy of a procedure that incorporates blind administration, including: National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999). Wells & E. Seelau, "Eyewitness Identification: Psychological Research and Legal Policy on Lineups," 1(4) Psychology, Public Policy, & Law 765, 768-69 (1995).

² S. Malpass & P.G. Devine, "Eyewitness Identification: Lineup Instructions and the Absence of the Offender," Journal of Applied Psychology, Vol. 66, 482-89 (1981); National Institute of Justice, Eyewitness Evidence: A Trainer's Manual For Law Enforcement (October 2003).



1. Instruct each eyewitness without other persons present.
2. Describe the photo array to the eyewitness only as a “collection of photographs.”
3. Instruct the eyewitness that the person who committed the crime may or may not be present in the identification procedure.
4. Consider suggesting to the eyewitness to think back to the event and his/her frame of mind at the time.
5. Instruct the eyewitness to select a photo array or live lineup member if he/she can and to state how he/she knows the person if he/she can.
6. Assure the eyewitness that regardless of whether he/she makes an identification, the police will continue to investigate the case.
7. Instruct the eyewitness that the procedure requires the investigator to ask the eyewitness to state, in his/her own words, how certain he/she is of any identification.

In addition to the recommendations promulgated by the National Institute of Justice, **other jurisdictions have disseminated model instructions guidelines aimed at reducing the incidence of misidentifications.** These include:

- Advising the eyewitness that the administrator does not know who the suspect is.³
- Directing the eyewitness not to discuss the identification procedure or its results with other eyewitnesses involved in the case and discouraging contact with the media.⁴

Selection of Appropriate Lineup Members (or Fillers)⁵

In the United States, photo arrays containing six photographs (including one suspect and five non-suspect, or filler, photographs) are generally viewed as the minimally acceptable lineup size. Yet, in order for this array to be adequate and just, the five filler photographs must be reasonable alternatives for the description provided by the eyewitness. “Fillers” should be selected based on their resemblance to the description provided by the witness, yet should not stand out unduly from the suspect.

Obtaining a Confidence Statement⁶

A confidence statement is a declaration provided by the eyewitness *immediately upon identification and before any feedback is provided*, in which he articulates *in his own words*

3 This recommendation is informed by the Wisconsin Department of Justice’s model guidelines.

4 This recommendation is informed by the State of New Jersey’s Office of the Attorney General’s Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures.

5 Brigham, J. C., Meissner, C. A., & Wasserman, A. W. (1999) Applied issues in the construction and expert assessment of photo lineups. *Applied Cognitive Psychology*, 13, S73-S92. and Clark, S. E. & Tunnicliff J.L. (2001) Selecting lineup foils in eyewitness identification: experimental control and real-world simulation. *Law and Human Behavior*, 25, 199-216. and Wells, G. L., Seelau, E. P., & Rydell, S.(1993) On the selection of distractors for eyewitness lineups. *Journal of Applied Psychology*, 78., 835-844.

6 Bradfield, A. L., Wells, G. L., & Olson, E. A. (2002). The damaging effect of confirming feedback on the relation between eyewitness certainty and identification accuracy. *Journal of Applied Psychology*, 87, 112-120. and Wright, D. B., & Skagerberg, E. M. (in press, due Feb/Mar 2007). Post-identification feedback affects real eyewitnesses. *Psychological Science*. and Wells, G.L., Small, M., Penrod, S., Malpass, R.S., Fulero, S.M., & Brimacombe, C.A.E. (1998).



the level of confidence he has in the identification he has made.

Research has consistently shown that the eyewitness's *degree of confidence* in his identification at trial is the single largest factor affecting whether observers believe that the identification is accurate.

Recording the Lineup Procedure

In order to provide courts with access to the most reliable evidence of any possible eyewitness identification, identification procedures must be electronically recorded.

Ideally, the identification procedure will be electronically recorded, using video equipment. If a video record is impracticable, the officer conducting the identification procedure should document, in writing, the reason a video recording could not be made, and audio record the identification procedure. If neither a video nor audio record is possible, the officer conducting the identification procedure should document, in writing, the reasons why and a written record of the identification procedure should be made, and then closely document, in writing, all aspects of the identification procedure.

Regardless of the type of record undertaken, the entire identification procedure for each eyewitness, beginning when the eyewitness enters the identification room (or other venue for viewing identification procedures) and ending when the eyewitness has completed the eyewitness identification procedure and left the procedure room or location, should be preserved for the record.

Specifically, this should include:

1. All identification and non-identification results obtained during the identification procedure, including the eyewitness's confidence statement. (If in writing, these should be signed by the eyewitness);
2. The names of all persons present at the identification procedure;
3. The date and time of the identification procedure;
4. Any eyewitness identification(s) of (a) filler(s);
5. In a photo array or live lineup, identification information and the sources of all photographs or persons used; and
6. In a photo array, the photographs themselves; and in a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.

Optional: Sequential Presentation of Lineup Members⁷

When combined with a "blind" administrator*, presenting lineup members one-by-one (sequentially), rather than all at once (simultaneously) has been proven to significantly increase the accuracy of eyewitness identifications. While the sequential presentation has

⁷ Wells et al. (1998). Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads. *Law and Human Behavior*, 22, 605–08 and Steblay, N., Dysart, J., Fulero, S., & Lindsay, R.C.L. (2001). Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison. *Law and Human Behavior*, 25, 459-473.



been shown to significantly reduce the number of incorrect identifications, it has also been shown to reduce the number of correct identifications, albeit at a substantially lower rate. Therefore, the choice to present lineup members sequentially is a policy decision. The Innocence Project can provide all interested parties with substantial information on the scientific research about sequential presentation and the experiences of jurisdictions that are effectively using the practice, including studies, protocol, law enforcement references, and other information.

The consideration of this policy decision will be better informed by field studies of sequential lineup procedures, which will employ the use of laptop computers and blind administrators, to further clarify the relative benefits of sequential versus simultaneous procedures in actual practice and resolve any lingering questions. Such remaining questions do not exist for any of the other best practice reforms cited in this document, and therefore there is no reason to delay implementation of these other reforms.

* ***An important note about sequential lineups*** is that they can actually *decrease* the likelihood of a correct identification if they are not accompanied by a “blind administrator.” Therefore, *“sequentially” presenting lineups is only a reform when teamed with a blind administrator.*