

The Why and How of Blind Sequential Lineup Reform

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The Problem: Faulty Eyewitness Identification & DNA

Eyewitness identification evidence is often crucial in criminal investigations. In a growing number of well-publicized cases nationwide, however, DNA evidence has exonerated individuals who were convicted primarily on the basis of mistaken eyewitness identification. This has brought public scrutiny on law enforcement procedures and challenged law enforcement practitioners both to reexamine long-standing practices and to implement change that will reduce the likelihood of such misidentifications in the future. No one in law enforcement has any interest in convicting the innocent.

More than a decade ago, in the wake of early DNA exonerations, the U.S. Department of Justice's National Institute of Justice (NIJ), under then-Attorney General Janet Reno, formed an inter-disciplinary study group (including law enforcement, prosecutors, defense attorneys and scientists) to examine eyewitness identification procedures. Its landmark 1999 report¹ began the national law enforcement discussion of lineup reform. Already at that time, the scientific evidence from years of laboratory studies showed that eyewitness identification was more reliable when blind sequential procedures were used, but questions remained on whether the reform was practical in the field. Nonetheless, some states and local law enforcement jurisdictions throughout the country, convinced by the scientific evidence, successfully implemented lineup reform following the NIJ report.²

Now, ten years after the report, the scientific evidence supporting the reform has only grown, and a growing number of law enforcement agencies have adopted it and found it to be practical in the field.³ However, even in states like Minnesota and Wisconsin in which substantial headway has been made, there is a long way to go to achieve universal compliance with lineup reform.

¹ See, U.S. Department of Justice research report, *Eyewitness Evidence, A Guide for Law Enforcement* (October 1999). New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (August 2001); North Carolina's *Recommendations for Eyewitness Identification* (October 2003).

² Early reform jurisdictions include the states of New Jersey and North Carolina and the Northampton (MA) Police Department (its then Capt. Ken Patenaude was an NIJ panel member). See, New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (April 2001), www.njdcj.org/agguide/photoid.pdf and *North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification* (October 2003), www.ncids.org/New%20ID.pdf and that state's subsequent enactment in 2006 of sections 15A-284.50 to 15A-284.53 of the *North Carolina General Statutes*, adopting its recommendations.

³ These include, in Minnesota, the Minnesota Bureau of Criminal Apprehension, Ramsey County, Hennepin County and the Chaska Police Department; in Wisconsin, Milwaukee, Madison and more than 200 other Wisconsin agencies (following the Wisconsin Attorney General's 2005 recommendation that these changes be adopted statewide www.thejusticproject.org/reports/model-policy-and-procedure); others include: Suffolk County (MA) (Boston and suburbs), Denver (CO), Westfield (MA), Virginia Beach (VA), Santa Clara County (CA) and Dallas (TX).

Rationale for Change to Blind Sequential Lineups

The most widely used law enforcement eyewitness identification procedure nationwide has long been the simultaneous photo array. The typical photo array contains six photos. It is common practice for an investigator with knowledge of the case, and the identity of the suspect, to show the photo lineup to witnesses.

However, 25 years of scientific research on memory and interview techniques convincingly demonstrates that the likelihood of mistaken identification drops sharply if lineups⁴ are *blind*⁵ (that is, conducted by someone who does not know who the suspect is) and *sequential*. When (as occurred in the DNA exoneration cases), the real perpetrator's photo *is not* present in the lineup, witnesses shown the photos simultaneously are up to three times more likely to identify someone than are witnesses shown the same photos sequentially. When the real perpetrator's photo *is* included in the lineup, laboratory studies show some reduction in the number of correct identifications made using the sequential method. However, that somewhat lower identification rate is offset by the much larger risk of misidentification using the simultaneous method if the perpetrator is not present.

The first meta-analysis⁶ in 2001 of 30 laboratory tests comparing sequential and simultaneous photo displays⁷ over 16 years of research reveals this differential in numerical terms. Specifically, in perpetrator-absent lineups (the scenario most like the DNA exoneration cases), there is an aggregate error rate of 27 percent (incorrect identification of a specific filler photo, the designated innocent suspect who looked most similar to the real perpetrator) for the simultaneous method compared to a 9 percent error rate when the sequential method was used. The simultaneous method, in short, encouraged guessing. There is a trade-off: In perpetrator-present lineups, the 2001 meta-analysis showed a 15 percent drop in correct identifications (from 50 percent in simultaneous to 35 percent in sequential displays). See Nancy Steblay, et. al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentation: A Meta-analytical Comparison," *Law and Human Behavior* 25, no. 5 (October 2001): 459-473.

In the six years following the 2001 meta-analysis, there was an explosion of additional studies. A follow-up meta-analysis, now aggregating the results of 70 tests over 22 years, confirms the significantly greater risk of mistaken identification for simultaneous lineups when the perpetrator is absent. The larger sample, moreover, shows the trade-off drop in incorrect identifications when the perpetrator is present to be lower than it appeared in 2001 (8 percent rather than 15).⁸ Most scientists consider these results to be conclusive and the issue to be settled (as demonstrated by the lack of further studies since 2007).

⁴ The terms *lineup* and *photo display* are used interchangeably in this training bulletin.

⁵ This procedure is sometimes also referred to as "double blind" to include the fact that the witness likewise does not know the location of the suspect in the sequence (or even if the suspect is included at all). Since this is implicit in any lineup, the term *blind* in this bulletin should be construed to cover both.

⁶ Meta-analysis is a cumulative quantitative summary of outcomes across studies.

⁷ All of the studies were blind or blinded since that is a presumption in the scientific method.

⁸ Dr. Steblay presented this data at the John Jay College of Criminal Justice as "2001+6: An Updated Meta-analysis of Eyewitness Lineup Performance under Sequential versus Simultaneous Formats" (paper presented at conference entitled "Off the Witness Stand: Using Psychology in the Practice of Justice," March 1-3, 2007. This paper is pending publication.

This scientific data supporting the switch to blind sequential lineups as a means of increasing the accuracy of lineups and reducing the likelihood of misidentification is clear, as is the startling implication that the traditional law enforcement method of conducting photo lineups might have inadvertently increased the likelihood of mistaken eyewitness identifications.

On reflection, the reasons for this result also makes sense objectively: (1) Simultaneous photo display encourages *relative judgment* (i.e., a witness comparing photos side by side is more likely to pick a person who looks *most like* the perpetrator—regardless of whether the person is, in fact, the perpetrator). (2) The most professional and well-intentioned investigator who knows where the suspect is in the lineup cannot eliminate all possibility of unintentionally cueing the witness or responding to the witness's identification. Even the smallest response—like the investigator's eyes lighting up when the "right" person is picked—can artificially inflate the witness's level of confidence and convert a "looks like" into a positive identification. If the risk of administrator influence on lineup results (and, therefore, defense attack on those grounds) can be eliminated by having someone other than the investigator who knows the identity of the suspect conduct the lineup, why would we want to do it any other way?

The most common error in the DNA exoneration cases was the identification of a person the police suspected—a person who looked similar to the real perpetrator—but who turned out to be innocent. The typical simultaneous photo array shown in these cases did not contain the photo of the real perpetrator, and the mistaken eyewitness was, in effect, identifying a "filler" photo. Use of the blind sequential method removes, or at least greatly diminishes, the role of police error in the equation.

Essential Components: Sequential Display and Blind Administration (or Functional Equivalent)

Both sequential display and blind administration are necessary components of the reform. Switching from simultaneous to sequential photo displays alone could even increase misidentification, since there is a danger of inadvertently highlighting an individual suspect photo. On the other hand, in a law enforcement setting, an independent administrator may not always be available. The practical realities of conducting lineups under the time pressures and personnel constraints of a criminal investigation, especially in a small department, might mean only an investigator with knowledge of the case is available, or that other options would result in unacceptable delay. In these circumstances, an alternate method still maintaining the blind component may be used: Under this alternative, the investigator who knows the identity of the suspect may show the lineup—as long as it is done in a way that assures that he does not know and cannot see the order in which the photos are presented, and the witness knows this (and therefore will not be looking to the investigator for cues or validation). This is the functional equivalent of blind administration, sometimes referred to as the "blinded" method.

Practical Law Enforcement Experience with the New Method

In Minnesota, Hennepin County, Ramsey County, the Chaska Police Department and the Minnesota Bureau of Criminal Apprehension each have four or more years of experience with implementation of this reform. In each of these jurisdictions, the change has now become standard procedure and has proved no more difficult to administer than the old method.

Concerns that it would result in administrative complications or additional costs have turned out to be unwarranted.

In evaluating its program, Ramsey County discovered some surprising additional benefits: Although meta-analysis of laboratory studies showed some drop in correct identifications using the new methods (as the price paid for far fewer incorrect identifications), investigators using the new method in Ramsey County did not feel they were “losing” identifications and, moreover, felt more confident in identifications that were made. This perception is likely to be a consequence of less overall guessing by witnesses, as well as a reluctance to charge obviously marginal identification cases. Moreover, although Ramsey County investigators were trained on the alternative “blinded” method, in practice, most were able to find, and came to prefer using, an independent administrator. A concern widely expressed before implementation that lineups would be adversely affected if the administrator was not the investigator who had developed rapport with the witness turned out to be a nonissue. Finally, the bonus of adopting this reform has been that in court a major avenue of defense attack on the admissibility and reliability of eyewitness identification procedures used has been eliminated. Other jurisdictions that have adopted the change report a similar experience.

Elements of Eyewitness Lineup Protocol Change

Investigator training on the new method of doing lineups should include an explanation of the scientific data and rationale for change to blind sequential lineups (see above). Instruct that while blind administration by an independent administrator is the preferred route, alternative blinded procedures may be used. The key to implementing this reform is an understanding of what “blind” means and why it is important. Emphasize that this change in no way implies any doubt about the integrity and professionalism of the investigator but simply eliminates all possibility of even unintentionally cueing a witness or inflating a witness’s level of confidence in any identification. This, in turn, eliminates these as potential issues in subsequent court proceedings.

Some jurisdictions prefer to use a lineup form (with or without a supplemental report); others instead write a general supplemental report for lineups. Regardless of approach, the following elements are necessary:

- Instructions to the administrator on how to do a blind sequential lineup
- Instructions to the witness (including different language depending on whether an independent or “blinded” administrator is conducting the lineup)
- Documentation of any witness reaction to any of the photos (verbal, physical or emotional)
- If an identification is made, documentation of the witness’s level of certainty

A one page (two-sided) Sequential Photo Display Form, developed specifically for use by all Ramsey County law enforcement officers, is appended as an example of a form containing these elements. On the administrator side are all the instructions for the administrator, a section to be

filled out by the administrator during the photo display and a section to be filled out by the administrator after the photo display. On the witness side are the instructions to be read to the witness before the photo display (including alternative language, depending upon whether an independent administrator [IA] or “blinded” functional equivalent [FE] is used) and a section to be completed by the witness after the photo display. This form is designed to be self-explanatory so that an officer from the street with no knowledge of the case could be called in, if necessary, to be the independent administrator.

How to Do a Blind Sequential Lineup

There are several methods by which the photos may be displayed sequentially. All have in common that the witness sees only one photo at a time and must continue to view all photos even if a person is identified before all are shown.⁹ After each photo is shown, it must be removed from view before the next photo is shown. Regardless of which method is used, a record must be kept of which photos were shown in which order to which witness.

The low-tech version can be as simple as numbering the photos and placing each in a separate folder bearing the same number (or for the blinded method, having someone else, including another investigator who knows who the suspect is or even a civilian employee, do this for the administrator). The witness is then instructed to look at the folders one at a time (for blinded method, have the witness open the folders in such a manner that the investigator cannot see the photos). Return the folder to the bottom of the pile before handing the witness the next folder, or keep remaining folders out of sight, so the witness does not know how many there are.

The “box with 6 doors” method, developed and used in the state of New Jersey since 2001, has also been widely used in Ramsey County. The standard 6-person simultaneous display is inserted in a box with six numbered doors, built specifically for this purpose. Only one door at a time is opened, and the doors are opened in numerical order. The box is equally adaptable to the blinded method since someone else can prepare the standard 6-pack lineup sheet and insert it in the box. The box is easily transportable to the field.

The high-tech version would be to download lineup photos to a laptop to be shown to the witness one at a time.¹⁰ The witness must be instructed to continue forward only (i.e., may not go back to look at a prior photo). The display should start and end in black.

Do not repeat the display unless the witness requests it. If, after one rotation is completed, the witness requests to see the photos again, the entire array may be repeated. Even if the witness asks to see only one photo, the entire array must be shown. A record must be made of the

⁹ Continuing the photo display when the witness identifies a photo before all photos are shown avoids later legal criticism that the lineup was improperly truncated. In the circumstance that a witness makes an early “filler” pick without having seen the suspect’s photo, it also allows an answer to the question of what would have happened had the witness seen the suspect’s photo. Conversely, a witness may pick the suspect but then discredit this pick when a later photo is shown.

¹⁰ An elegant software program has been developed by SunGard OSSI (North Carolina) for this purpose. It randomly sorts photos, assigns a discrete number to each lineup shown, maintains a record of which version each witness saw, guides witnesses through a series of questions on each photo (with a beep to prompt the administrator to ask follow-up questions if an identification is made), preserves an audio recording of all questions and answers (downloadable to CD) and generates a report of results including the photos shown, identifying who the suspect was and whom the witness picked. (See Jerry Farris, “Remote Lineup Application,” *The Police Chief* 75, no. 8 (August 2008): 96-98.)

number of times the display was shown, and all photos must be shown each time in the same order as the original display. Since the scientific evidence establishes a sharp drop-off in the reliability of any identification made after two cycles, some departments will not allow more than two cycles. Certainly, no criminal charge should be based on an identification requiring more than two cycles. (All eyewitness identification cases should, in any event, have other corroborating evidence.)

Blind Administration

Emphasize the importance of using an independent administrator whenever possible. When the investigator has already interviewed and cultivated a relationship with the witness, he should simply explain that department policy requires another officer to conduct this procedure but that he will be available to talk to the witness as soon as the procedure is done. Whenever an independent administrator is used, the investigator who knows the identity of the suspect must remain out of sight of the witness when the photos are shown.

When no independent administrator is available, a functionally equivalent blinded method must be used to administer the lineup. "Blinded" means that the investigator administering the lineup who knows the identity of the suspect must (1) instruct the witness that he does not know the order of the photos or whether the person who committed the crime is in any of the photos and (2) have the witness view the photos in such a manner that the administrator cannot see which photo the witness is viewing.

Make clear that the blind component requirement is not because there is any question about their professionalism or integrity but because of human nature: It is natural for a witness to look to the investigator for validation, and it is natural for the investigator to be pleased the suspect is picked. The slightest reaction, such as seeing the investigator's eyes light up when the "right" person is picked, can instantly artificially inflate the witness's level of confidence in his or her selection. Blind administration eliminates this risk.

Instructions to the Witness

Before any photo display is shown, the witness should be instructed:

- The person who committed the crime may or may not be included
- I do not know whether any person being investigated is included (**blind**) *or* I do not know the order of the photos (**blinded**)
- Even if you identify someone during this procedure, I will continue to show you all photos in the series
- Keep in mind that a photo may be an old one; some things, like hair styles, can be changed, and skin tones may look slightly different in photos
- You should not feel you have to make an identification; it is just as important to clear innocent persons as it is to identify the guilty; whether or not you identify someone, the investigation will continue
- You will see only one photo at a time; they are not in any particular order; take as much time as you need to look at each one
- You should avoid discussing this procedure or the results with any other potential witness in the case

Role of Administrator During and After the Lineup

After the witness has looked at each photo, the administrator should ask, "Is this the person who [describe act committed]? If the answer is no, move on to the next photo. If the answer is yes, follow up with, "How certain are you of your selection?" The witness's exact answers must be documented for any yes answer. (If the witness asks whether you mean a percentage or on a scale of 1 to 10, tell him or her to use whatever method seems right to him or her.) Note also any physical or emotional reactions of the witness.

Be careful not to give the witness any feedback on his or her answer (such as "good work!" or "that's who we thought it was"). (Of course, an independent administrator who does not know who the suspect is will be unable to give such feedback.) Answers other than yes or no may also be helpful to the investigation and should likewise be documented. Even if an identification is made, continue showing the remaining photos in the array." After one cycle of the array has been completed, do not repeat the procedure unless requested by the witness. If requested, show all photos in the array, in the same order, and document any additional comments.

The administrator's report must indicate how many times the array was shown. Keeping track of the number of times photos are displayed before an identification is made provides an additional tool for evaluating the reliability of the identification. If the photo display is shown more than twice, the witness is likely to be "comparison shopping"—i.e., guessing. Documenting this alone is an improvement over the simultaneous display procedure, in which comparing photos to find the person most like the perpetrator (regardless of whether it is, in fact, the perpetrator) was always an inherent, but usually immeasurable, risk.

Many departments (including Ramsey County) complete their eyewitness identification procedure by asking the witness to fill out a form confirming the oral result in the witness's own handwriting. The portion of the Ramsey County form to be completed by the witness indicates how many photos were shown, a check-off that the witness either was or was not able to identify any person, a space to answer in the witness's own words the question, "How certain are you of your identification?" and a signature and date line. If the witness refuses to sign the form, the administrator writes "refused." The entire form, including the witness advisory and the portions completed by the administrator and the witness, is placed in the case file regardless of whether any identification is made. Ramsey County also has an alternate version of its form in simplified language as an option for use with young children, mentally impaired persons or persons with limited knowledge of English. (Both forms are available online at: www.co.ramsey.mn.us/attorney/SPDNA.asp.)

The administrator must also preserve the photo display used, including the order of photos. The 6-person template for simultaneous photo displays may be used for this purpose. If an identification is made, have the witness sign and date the photo.

Follow-up Interview by the Investigator

In cases in which an identification is made, after the witness has answered the level of certainty question, the case investigator who knows who the suspect is may follow up with a supplemental interview as needed. This is the time to develop as many additional facts as possible about

details of any identification made, including exploring what it was about the photo (or photos) selected that made the witness pick it, any follow-up on the witness's level of certainty or confidence in the selection or, in the case of multiple perpetrators, what each individual did.

It continues to be important that the investigator not provide any information that could artificially inflate the level of confidence the witness expressed in any selection. If a witness asks whether he or she has picked the "right" person, that question should not be answered (if at all) until the investigator has asked all follow-up questions and the investigation is complete. Especially if other potential eyewitnesses are yet to be questioned, witnesses may simply be told the investigation is ongoing and needs to be concluded before that question can be answered. If the person picked is ultimately charged with a crime, the witness will eventually find this out. However, being careful not to reinforce the witness's selection, and documenting this, will strengthen any case ultimately charged by eliminating any defense claim that the witness was manipulated into making a positive identification. If witnesses are concerned for their safety and want to know if the suspect is in custody, that question may be answered at the end of the interview.

Selecting Photos for the Lineup

As has typically been the practice in the past, the investigator with knowledge of the case and the identity of the suspect may continue under the new protocol to be involved in assembling the photo lineup. Training on the new protocol is a good opportunity to review lineup photo selection. Use M-RAP descriptors given by the witness to find fillers (*unless* the witness's description does not match the suspect's: in that event, use descriptors matching the suspect's description). Select at least 5 fillers (a larger number may be used). Before finalizing the photo group, look at them together to make sure the suspect does not stand out. Number the photos. Do not make the suspect Number 1. If the blinded method is used, the investigator simply has someone else number the photos and insert them in folders, the box or the laptop.

When there are multiple perpetrators, the same ratio of fillers to suspects should be used (at least 5:1). Typically separate photo displays are prepared for each suspect. If all suspects have similar characteristics (such as in gang cases with multiple perpetrators of the same age and ethnicity), one large lineup containing all suspects could be done containing the same filler-to-suspect ratio.

If more than one witness views the photo display, consider placing the suspect in different positions in each. However, be sure to preserve a photo record of the order of photos shown to each witness and to have each witness sign and date any photo selected. (A good way to preserve the record of the order of photos shown is to print a copy of the 6 photos used in the simultaneous display 6-pack format.)