



*The Judiciary, State of Hawai‘i*

**Testimony to the Senate Committee on Public Safety,  
Intergovernmental, and Military Affairs**

Senator Clarence K. Nishihara, Chair  
Senator Glenn Wakai, Vice Chair

Thursday, February 2, 2017 1:15 PM  
State Capitol, Conference Room 229

**WRITTEN TESTIMONY ONLY**

by  
Judge Glenn J. Kim  
Chair  
Supreme Court Standing Committee on  
the Hawai‘i Rules of Evidence

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**Bill No. and Title:** Senate Bill No. 674, Relating to Criminal Procedure.

**Purpose:** Senate Bill 674 creates procedural and administrative requirements for law enforcement agencies for eyewitness identification of suspects in criminal investigations. It also mandates jury instructions which must be given by the court if eyewitness identification evidence is admitted at trial.

**Judiciary's Position:**

The Standing Committee on the Hawai‘i Rules of Evidence was established by the Chief Justice on 15 July 1993 “to study and evaluate proposed evidence law measures referred by the Hawai‘i Legislature, and to consider and propose appropriate amendments to the Hawai‘i Rules of Evidence.” The Committee believes that Section 3 of Senate Bill 674 regarding proposed mandatory jury instructions is an issue that should be addressed by the Committee, as it involves the admission of evidence at trial and mandated jury instructions as a result.

The Committee is scheduled to meet on date of this hearing, February 2, 2017, and plans to discuss and evaluate the proposed legislation at that time, with a view toward developing a position for the current legislative session. Accordingly, although the Committee is not yet able



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to present testimony to you in this regard, the Committee is confident that it will be able to set forth a considered position on the proposed legislation in very short order. Due to the scheduling conflict, the Evidence Committee would like to note its upcoming review of Senate Bill 674 and reserve its comments until future hearings before other legislative committees with an interest in the bill, such as the Judiciary and Labor and Ways and Means Committees.

Thank you for the opportunity to testify on Senate Bill No. 674.

# COMMUNITY ALLIANCE ON PRISONS

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## COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL & MILITARY AFFAIRS

Sen. Clarence Nishihara, Chair

Sen. Glenn Wakai, Vice Chair

Thursday, February 2, 2017

1:15 p.m.

Room 229

### SUPPORT WITH COMMENTS ON SB 674 – EYEWITNESS ID

Aloha Chair Nishihara, Vice Chair Wakai and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for two decades. This testimony is respectfully offered on behalf of the approximately 6,000 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day. We are always mindful that approximately 1,400 of Hawai'i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

Mahalo for proposing statewide standards for eyewitness identification. Eyewitness misidentification is one of the main factors in the exonerations around the nation – more than 70%!

Community Alliance on Prisons supports this measure and offers some comments to strengthen the bill so it comports with national standards recently released by the National Academy of Sciences.

Page 4, line 1 reads: *(1) The suspect may or may not be among the persons in the identification procedure;*

This would be better if it read: The **perpetrator** may or may not be among the persons or photos featured in the identification procedure.

Page 4, lines 9-17 reads: *The identification procedure requires the administrator to ask the eyewitness to state, in the eyewitness' own words, how certain the eyewitness is of any identification, including but not limited to the conditions under which the eyewitness observed the suspect, including location, time, distance, obstructions, lighting, weather conditions, and other impairments, such as alcohol, drugs, stress, and visual or auditory impairments;*

We ask that this section be separated: 1. eyewitness statement and 2. Viewing conditions.

A confidence statement is only a statement of relative certainty expressed by the eyewitness. That level of confidence may be based upon some of the factors that follow but the eyewitness's explanation of the conditions of observation should be separate from the confidence statement. Immediately after the identification is made, the eyewitness should be asked, "In your own words, tell me how certain you are in the identification you just made."

**The instructions speak to the confidence statement but does not require it anywhere.** We would similarly recommend that fillers should be selected to match the description provided by the eyewitness of the perpetrator of the crime.

While the instructions to the witness indicate that the administrator doesn't know the suspect's identity, **nowhere in the bill is there a requirement that a live lineup be conducted by a blind administrator and that in a photo lineup, it should be conducted by a blind administrator or blinded administrator. This is the single most important reform.**

The eyewitness should separately be asked about viewing conditions.

Page 7, Section 4 describes the creation of a statewide policy. We would recommend that this section require that the statewide policy include provisions relating to blind/blinded administration, proper fillers (match to description provided by eyewitness), instructions to the witness and confidence statements.

Another important element that should be included is recordation of the eyewitness process. A possible fix is to require video and if impracticable, audio. If audio is also unviable, an option is a list of important elements documented in a written format.

Community Alliance on Prisons respectfully asks the committee to include our suggestions in your committee report so that the Judiciary and Labor and Ways and Means committees are alerted to the best practices developed by the National Academy of Sciences.

Mahalo for this opportunity to testify.



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S.B. No. 674  
Relating to Criminal Procedure  
Senate Committee on Public Safety, Intergovernmental, and Military Affairs  
Public Hearing – Thursday, February 2, 2017  
1:15 PM, State Capital, Conference Room 229  
by  
Senator Clarence K. Nishihara, Chair  
Senator Glenn Wakai, Vice Chair

February 1, 2017

S.B. No. 674 creates eyewitness identification procedures and administrative requirements for law enforcement agencies statewide. Hawai'i Innocence Project submits this statement in general support of S.B. No 674, but with our support, we respectfully ask the Committee to consider our concerns, proposed changes, and other considerations.

Hawai'i Innocence Project is a non-profit legal clinic with the goals of exonerating the wrongfully convicted, reforming the criminal justice system which failed the innocent, and ultimately seeking justice for the victim by determining the real perpetrator of the crime. Hawai'i Innocence Project supports the intent of this bill to establish a consistent practice and procedure for conducting eyewitness identifications of criminal suspects, as eyewitness misidentifications are one of the leading causes of wrongful convictions. While we support the intent of the bill, we submit these recommendations so that the bill may comply more fully with social science research (NAS Report, 2017), U.S. Department of Justice protocols (*See* attached "U.S. DOJ Memo"), nationwide successful reform policies, and the practical experience of the many attorneys and experts who work to reform the criminal justice system.

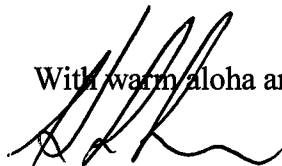
The collaborations of Innocence Projects, law enforcement, and social science research have determined the best practices that provide the most credible eyewitness identification must include: blind administration, proper composition of fillers and instructions, obtaining confidence statements, and recording the procedure. (*See* attached Innocence Project "Eyewitness Identification Reform"). While S.B. 674 includes nearly all of the necessary best practices representing both current research and reform efforts, the Hawai'i Innocence Project respectfully asks the Committee to consider these additional recommendations in order to enhance the procedures outlined in the bill and ensure that it complies with best practices, policies, and reform.

Hawai'i Innocence Project respectfully requests that the Committee consider the following changes, clarifications, or additions to S.B. 674 as follows:

1. Page 4, Section (1) states: "The suspect may or may not be among the persons in the identification procedure."
  - a. Hawai'i Innocence Project recommends amending this section to read: "The perpetrator may or may not be among the persons or photos featured in the identification procedure."
2. Page 4, Section (2) mentions that "the administrator does not know the identity of the suspect" the bill does not require that the administrator be "blind" or "blinded".
  - a. Hawai'i Innocence Project requests that when referring to the live lineup and photo lineup that both be conducted by a blind administrator or blinded administrator.
3. Page 4, Section (5) states: "The identification procedure requires the administrator to ask the eyewitness to state, in the eyewitness' own words, how certain the eyewitness is of any identification, including but not limited to the conditions under which the eyewitness observed the suspect, including location, time, distance, obstructions, lighting, weather conditions, and other impairments, such as alcohol, drugs, stress, and visual or auditory impairments."
  - a. Hawai'i Innocence Project recommends amending this section into two parts as the conditions of the observation should be separate from the confidence statement. Immediately after making an identification, the eyewitness should be asked: "In your own words, tell me how certain you are in the identification you just made." This confidence statement should also be required. Once the eyewitness provides a confidence statement, the eyewitness should then be asked about the viewing conditions.
4. Page 5, Section (c) does not establish requirements for the appearance of the fillers, it only refers to the number of fillers to be used.
  - a. Hawai'i Innocence Project asks that the following be added: "Fillers should be selected to match the description provided by the eyewitness of the perpetrator of the crime."
5. In addition to the above additions and changes, Hawai'i Innocence Project requests that the procedures be recorded by video, and if impracticable that they be audio recorded.

Hawai'i Innocence Project believes that incorporating the above changes will ensure that eyewitness identifications in Hawai'i are reliable, promote justice for all victims, and prevent the innocent from being wrongfully convicted. Thank you for your time and the opportunity to provide testimony regarding S.B. 674.

With warm aloha and gratitude,



Kenneth Lawson  
Co-Director, Hawai'i Innocence Project  
and Law Professor, William S. Richardson School of Law



U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 6, 2017

MEMORANDUM FOR HEADS OF DEPARTMENT LAW ENFORCEMENT COMPONENTS  
ALL DEPARTMENT PROSECUTORS

FROM:

Sally Q. Yates   
Deputy Attorney General

SUBJECT:

Eyewitness Identification: Procedures for Conducting Photo Arrays

Eyewitness identifications play an important role in our criminal justice system, both by helping officers and agents identify suspects during an investigation and by helping juries determine guilt at trial. It is therefore crucial that the procedures law enforcement officers follow in conducting those identifications ensure the accuracy and reliability of evidence elicited from eyewitnesses.

There are several ways for law enforcement officers to test whether an eyewitness can identify a perpetrator, and the appropriate method for administering such a test varies depending on the circumstances. When the perpetrator is a stranger to the witness, the most common method involves the use of a "photo array," whereby a law enforcement officer displays a photograph of the suspect along with images of similar looking individuals for comparison.<sup>1</sup> This type of identification procedure has become particularly popular in recent years, in part because it can be assembled quickly and does not require the physical presence of the suspect or other individuals for a live line-up.

The Department of Justice last addressed procedures for photo arrays in its 1999 publication, *Eyewitness Evidence: A Guide for Law Enforcement*. Research and practice have both evolved significantly since then. For example, a growing body of research has highlighted the importance of documenting a witness's self-reported confidence at the moment of the initial identification, in part because such confidence is often a more reliable predictor of eyewitness accuracy than a witness's confidence at the time of trial. Similarly, there has been an evolution in views on whether the "sequential" administration of a photo array (presenting the witness one photo at a time) results in more accurate identifications than a "simultaneous" administration (presenting all of the photos at once). At the end of this memorandum is a summary of these and other recent developments in the field of eyewitness identification.

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<sup>1</sup> A "photo array" is distinct from other law enforcement techniques involving photographs used to obtain investigative leads, such as "mug books" and single confirmatory photographs, which are outside the scope of this memorandum.

Over the past year, a team of Department experts—including prosecutors, law enforcement personnel, and social scientists—have worked together to study the research and identify best practices. Their work culminated in the attached document, which outlines procedures for the administration of photo arrays. These procedures are not a step-by-step description of how to conduct photo arrays, but rather set out principles and describe examples of how to perform them.

The heads of the Department's law enforcement components should review these procedures and, to the extent necessary, update their own internal policies to ensure that they are consistent with the procedures described in this document. In addition, all Department prosecutors should review these procedures and take them into consideration when deciding whether to charge a case involving an eyewitness identification. Although nothing in this memorandum implies that an identification not done in accordance with these procedures is unreliable or inadmissible in court, it is important that prosecutors identify potential issues in the administration of a photo array early in an investigation and take any such issues into account when evaluating the overall strength of the evidence in their case.

These procedures are designed to promote sound professional practices and consistency across the Department's law enforcement efforts. As stated in several sections, the principles may be adjusted in light of specific circumstances—including, but not limited to, exigent circumstances, limitations on personnel or other resources, concerns for a witness's fears and safety, and sensitivity to victims—and each identification must be evaluated on its own merits.

Thank you for your attention to this issue and for everything you do at this Department to ensure the administration of justice.



## **U.S. DEPARTMENT OF JUSTICE**

### **EYEWITNESS IDENTIFICATION PROCEDURES FOR CONDUCTING PHOTO ARRAYS<sup>1</sup>**

#### **Location of the Photo Array**

- 1.1 Unless impracticable, the witness should view the photo array out of earshot and view of others and in a location that avoids exposing the witness to information or evidence that could influence the witness's identification, including information about the case, the progress of the investigation, or the suspect.
- 1.2 Neither the suspect nor any photographs of the suspect (including wanted posters) should be visible in any area where the witness will be present.

#### **Photograph of the Suspect**

- 2.1 When selecting a photograph of the suspect for the photo array, the administrator should include only one suspect in each photo array regardless of the total number of photographs and regardless of whether multiple suspects fit the same description.
- 2.2 Unless impracticable, the administrator should select a photograph of the suspect that resembles the witness's description of the perpetrator or the perpetrator's appearance at the time of the incident.
- 2.3 The administrator should avoid using a photo that is several years old or has different characteristics (for example, hair style, or facial hair) than those described, unless a current photograph cannot be taken or procured.

#### **Selection of Filler Photographs**

- 3.1 A photo array should include at least five filler, or non-suspect, photographs.
- 3.2 Fillers should generally fit the witness's description of the perpetrator, including such characteristics as gender, race, skin color, facial hair, age, and distinctive physical features. They should be sufficiently similar so that a suspect's photograph does not stand

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<sup>1</sup> This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nothing in these procedures implies that an identification not done in accordance with them is unreliable or inadmissible in court.

out, but not so similar that a person who knew the suspect would find it difficult to distinguish him or her. When viewed as a whole, the array should not point to or suggest the suspect to the witness.

- 3.3 Where the suspect has a unique feature, such as a scar, tattoo, or mole, or distinctive clothing that would make him or her stand out in a photo array, filler photographs should include that unique feature either by selecting fillers who have such a feature themselves or by altering the photographs of fillers to the extent necessary to achieve a consistent appearance. If the suspect's distinctive feature cannot be readily duplicated on the filler photographers, then the suspect's feature can be blacked out and a similar black mark can be placed on the filler photographs. The administrator should document any alterations to either the fillers or the suspect's photograph as well as the reason(s) for doing so.
- 3.4 Photographs should be of similar size, background, format, and color. Photographs should be numbered or labeled in a manner that does not disclose any person's identity or the source of the photograph. No other writing or information should be visible.
- 3.5 Nothing should appear on the photos that suggests a person's name, his or her inclusion in a previous array, or any information about previous arrests or identifications.
- 3.6 If there are multiple perpetrators or multiple suspects, the administrator should inform the witness in advance that more than one array will be shown.
- 3.7 Fillers should not be reused in arrays for different suspects shown to the same witness.

#### **Method of Presenting Photographs**

- 4.1 Administrators may employ either sequential or simultaneous procedures. Under a sequential procedure, the witness looks at one photograph at a time in a finite number of photographs until he or she has seen all in the array (with each photo being taken back before the next one is shown). In a simultaneous procedure, the witness observes all of the photos in the array at once.

#### **Administrator's Knowledge of the Suspect**

- 5.1 The administrator must ensure that he or she does not suggest to the witness – even unintentionally – which photograph contains the image of the suspect. Oftentimes, the best and simplest way to achieve this is by selecting an administrator who is not involved in the investigation and does not know what the suspect looks like.

- 5.2 There are times when such “blind” administration may be impracticable, for example, when all of the officers in an investigating office already know who the suspect is, or when a victim-witness refuses to participate in a photo array unless it is administered by the investigating officer. In such cases, the administrator should adopt “blinded” procedures, so that he or she cannot see the order or arrangement of the photographs viewed by the witness or which photograph(s) the witness is viewing at any particular moment.
- 5.3 “Blinded” administration can be accomplished by:
- 5.3.1 *If simultaneous administration:* Randomizing the order of photographs and shielding the administrator from the photographs (for example, by displaying the images on a computer screen between the witness and the administrator, so that the witness can see it but the administrator cannot).
- 5.3.2 *If sequential administration:* Putting each photograph in its own physical folder, shuffling the order of the folders, and standing where the administrator cannot see which photographs the witness is viewing.
- 5.4 There may be exceptional circumstances in which it is not practicable to conduct either a blind or blinded photo array. In those instances, the administrator should document the reasons for the non-blind(ed) procedure and be prepared to explain the reasons for conducting such an alternative procedure.

### **Instructions to Witness**

- 6.1 The administrator should read instructions to the witness and then permit the witness to read them and ask any questions. The witness and administrator should sign and date the instructions.
- 6.2 The administrator should not interrupt the witness so long as she or he is looking at the array. However, when it becomes apparent that the witness is finished and no longer looking at the array, the administrator should end the procedure.
- 6.3 Instructions should use language similar to that below:
- 6.3.1 “In a moment, you will be shown a group of photographs. The group of photographs may or may not contain a photograph of the person who committed the crime of which you are the victim [*or witness*].”

- 6.3.2 “Sometimes a person may look different in a photograph than in real life because of different hair styles, facial hair, glasses, a hat, or other changes in appearance. Keep in mind that how a photograph was taken or developed may make a person’s complexion look lighter or darker than in real life.”
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- 6.3.3 “Please let me know if you recognize the person who committed the crime [*or the actions you witnessed*]. If you do recognize someone, please tell me how confident you are of your identification.”
- 6.3.4 “You may not recognize anyone. That is okay. Just say so. Whether or not you select someone, we will continue to investigate the case.”
- 6.3.5 “Do not assume that I know who committed this crime.”
- 6.3.6 “Pay no attention to any marking or numbers on the photographs or any differences in the type or style of the photographs. They are not relevant to identifying anyone in the photographs.”
- 6.3.7 “Please do not discuss this procedure or any photograph that you may pick with any other witness in this case.”
- 6.3.8 “Please let me know if you do not understand these instructions or if you have any questions.”
- 6.3.9 *If sequential administration:* “You are going to look at the photographs one at a time. You may make a decision at any time. If you select a photograph before you get to the end, our protocol requires that you look at the rest of the photographs anyway. If, after seeing all the photographs, you want to see one or more photographs again, you should look at the entire array again.”

### **Multiple Witnesses**

- 7.1 If multiple witnesses are to be presented with photo arrays, each witness should be instructed and view the photo array separately.
- 7.2 A witness should not be able to hear or observe other witnesses during an identification procedure.
- 7.3 A witness who has seen the array should not return to the same area when other witnesses are waiting to see the array.

- 7.4 For each suspect, the administrator should use the same photo array for multiple witnesses. However, the order of appearance in the photo array should be changed if possible.

### **Administrator Feedback**

- 8.1 The administrator must avoid any words, sounds, expressions, actions or behaviors that suggest who the suspect is. Before, during, or after conducting the photo array, the administrator should not:
- 8.1.1 Volunteer information about the suspect or the case;
  - 8.1.2 Indicate that the administrator knows who the suspect is;
  - 8.1.3 Indicate to the witness that he or she has picked the “right” or “wrong” photograph; or
  - 8.1.4 Tell the witness that any other witness has made an identification.
- 8.2 If the witness makes an identification, the administrator should ask the witness to state in his or her own words how confident he or she is in the identification (known as a “statement of confidence”).
- 8.3 If the witness is vague in his or her answer, such as, “I think it’s #4,” the administrator should say: “You said [I think it’s #4]. What do you mean by that?”

### **Documentation<sup>2</sup>**

- 9.1 The witness’s identification of a photo, if any, and the corresponding statement of confidence should be clearly documented by:
- 9.1.1 Video- or audio-recording the photo array;<sup>3</sup> or
  - 9.1.2 The administrator immediately writing down as close to verbatim as possible the witness’s identification and statement of confidence, as well as any relevant

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<sup>2</sup> This section assumes the use of printed photographs. If the photo array is presented on a computer screen, the administrator should ensure that the same information described in this section is captured and saved electronically.

<sup>3</sup> Electronic recording serves several important purposes: it preserves the identification process for later review in court, it protects officers against unfounded claims of misconduct, and it allows fact finders to directly evaluate a witness’s verbal and nonverbal reactions and any aspects of the array procedure that would help to contextualize or explain the witness’ selection.

gestures or non-verbal reactions. The witness should confirm the accuracy of the statement.

9.2 The witness should indicate his or her identification in writing.

9.2.1 *If simultaneous administration:* The witness should circle the photograph chosen and then sign and date the photograph.

9.2.2 *If sequential administration:* The witness should sign and date the front or back of the photograph chosen.

9.2.3 If a witness fails to make an identification, the administrator should record so in writing.

9.3 The administrator should document the following elements of the identification procedure:

9.3.1 The approximate amount of time it took the witness to make an identification;

9.3.2 The presentation method and order of the photographs displayed;

9.3.3 The names of all persons present during administration; and

9.3.4 Any other facts or circumstances that would help contextualize or explain the witness's selection.

9.4 In addition to documenting information about an identification, the administrator should preserve as evidence:

9.4.1 The written copy of the instructions signed and dated by the witness and the administrator; and

9.4.2 All photographs shown to the witness, including any identified, signed, and dated by the witness.

## PROCEDURES FOR CONDUCTING PHOTO ARRAYS

### APPENDIX

For decades, law enforcement agencies at the federal, state, and local levels have used varying practices for the identification of suspects by eyewitnesses to crimes, while researchers have studied the science of human perception underlying eyewitness identification. In recognition of advancements in scientific knowledge and changes in practice, the National Academies of Science (NAS) convened a committee of experts to evaluate eyewitness identification procedures and, in 2014, published a report summarizing its findings entitled, *Identifying the Culprit: Assessing Eyewitness Identification*.<sup>1</sup> Although acknowledging that more research is still needed, the committee concluded that “a range of [identification] practices has been validated by scientific methods and research and represents a starting place for efforts to improve eyewitness identification procedures.”<sup>2</sup>

This appendix provides a brief explanation of both the research and practical experience behind several of the procedures outlined earlier in this memorandum. This summary is not meant to be exhaustive, in part because research continues to advance on eyewitness identification procedures, including photo arrays. Furthermore, the described procedures are only exemplary and do not create an enforceable right in any civil or criminal matter. The intent of this summary is to provide law enforcement agents and prosecutors an understanding of the reasons behind several of the procedures that either are not widely known or were not addressed in a prior publication on eyewitness identification from the National Institute of Justice.<sup>3</sup>

#### Sequential vs. Simultaneous Identification Methods

Historically, many law enforcement agencies employed simultaneous identification procedures, in which an eyewitness views all of the photos in an array at once. In the late 1980s, psychological research began to suggest that sequential methods, in which witnesses are shown one photo at a time, would be better at preventing erroneous identifications without reducing the rate of correct identifications.<sup>4</sup> As a result, several police agencies, including those in North Carolina<sup>5</sup> and Massachusetts,<sup>6</sup> turned to the sequential method for photo arrays. More recently,

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<sup>1</sup> National Academies of Science, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), available at: <https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

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

<sup>3</sup> National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999).

<sup>4</sup> Roderick Lindsay & Gary Wells, “Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation,” 70 *Journal of Applied Psychology* 556 (1985); Nancy Steblay, Jennifer Dysart, Solomon Fulero & R.C.L. Lindsay, “Eyewitness Accuracy rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytical Comparison,” 25 *Law and Human Behavior* 459 (2001).

<sup>5</sup> N.C. Gen. Stat. § 15A-284.52 (2007).

<sup>6</sup> See Massachusetts Supreme Judicial Court Study Group on Eyewitness Identification, *Report and Recommendations to the Justices* (2013).

however, some research has raised questions about the superiority of sequential methods. Those studies tested techniques in the field<sup>7</sup> as well as in the laboratory<sup>8</sup> and employed different statistical tests to evaluate the accuracy of an eyewitness' identification. This research reached different conclusions, suggesting that simultaneous procedures may result in more true identifications and fewer false ones.<sup>9</sup> Until additional research is conducted, however, it is not possible to say conclusively whether one identification method is better than the other. Indeed, the NAS recommended "that caution and care be used when considering changes to" sequential or simultaneous procedures "until such time as there is clear evidence for the advantages of doing so."<sup>10</sup> For this reason, this document does not take a position on which procedure should be used.

### **Investigator Influence and Blind vs. Blinded Procedures**

An investigator's statements when administering an identification procedure can influence a witness' selection of a suspect in a photo array as well as his or her confidence in the choice.<sup>11</sup> Influence can occur, for example, when the investigator suggests in advance that the perpetrator is in the array ("We found the guy with your credit cards" or "We arrested someone we want you to identify"), when the investigator confirms or disconfirms the witness's pick ("Good work! You picked the right guy"), or when the administrator communicates such messages through nonverbal gestures.<sup>12</sup> In either case, witnesses may be more inclined to select a photograph from the array or to be more confident in their selection than they otherwise would be. "Suggestiveness during an identification procedure can result in suppression of both out-of-court and in-court identifications and thereby seriously impair the prosecution's ability to prove

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<sup>7</sup> Karen Amendola & John Wixted, "The Role of Site Variance in the American Judicature Society Field Study Comparing Simultaneous and Sequential Lineups." *Journal of Quantitative Criminology* (2015), doi:10.1007/s10940-015-9273-6.

<sup>8</sup> David Dobolyi & Chad Dodson, "Eyewitness Confidence in Simultaneous and Sequential Lineups: A Criterion Shift Account for Sequential Mistaken Identification Overconfidence," *Journal of Experimental Psychology: Applied* 345 (2013).

<sup>9</sup> John Wixted, Laura Mickes, John Dunn, Steven Clark & William Wells, "Estimating the Reliability of Eyewitness Identifications from Police Lineups," 113 *Proceedings of the National Academy of Sciences*, 304 (January 12, 2016); John Wixted, Laura Mickes, Steven Clark, Scott Gronlund & Henry Roediger, "Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy," 70 *American Psychologist* 515 (September 2015).

<sup>10</sup> National Academies of Science, *supra* note 1, at 118. See also International Association of Chiefs of Police, *Model Policy* (2016).

<sup>11</sup> Amy Bradfield Douglass & Nancy Steblay, "Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect," 20 *Applied Cognitive Psychology* 859 (2006); Carla Maclean, C.A. Elizabeth Brimacombe, Meredith Allison & Helena Kadlec, "Post-Identification Feedback Effects: Investigators and Evaluators," 25 *Applied Cognitive Psychology* 739 (2011); Gary Wells & Amy Bradfield, "Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience," 83 *Journal of Applied Psychology* 360 (1993); Nancy Steblay, Gary Wells, & Amy Bradfield Douglass, "The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications," 20 *Psychology, Public Policy & Law* 1 (2014).

<sup>12</sup> National Academies of Science, *supra* note 1.



its case beyond a reasonable doubt.”<sup>13</sup>

There are several recommended approaches to avoid inappropriate investigator influence or an allegation of inappropriate investigator influence. First, as the procedures in this document outline, administrators of photo arrays must consciously “avoid any words, sounds, expressions, actions or behaviors that suggest who the suspect is.” Second, feedback is virtually impossible when the administrator does not know who the suspect is or which photograph is that of the suspect. As the NAS explains, “if administrators are not involved with the construction of the lineup and are unaware of the placement of the potential suspect in the sequence, then they cannot influence the witness.”<sup>14</sup>

Although the NAS recommends blind procedures, it acknowledges that such procedures may not be feasible in some circumstances because of “financial costs and human resource demands.”<sup>15</sup> In these situations, investigators should at least use “blinded” procedures in which the administrator cannot see the order or arrangement of the photographs viewed by the witness or which photograph(s) the witness is viewing at any particular moment. However, even in these circumstances the NAS believes that law enforcement should consider “new technologies” such as “computer-based presentation technology” to prevent inadvertent suggestiveness.<sup>16</sup> If neither blind nor blinded procedures are practicable under certain circumstances, administrators should document the steps they took to avoid any influence before or after the array was shown and a confidence statement was taken.

### Confidence Statements

When the Supreme Court decided *Manson v. Brathwaite*,<sup>17</sup> establishing criteria to evaluate the reliability of eyewitness identification, it premised admissibility in part on the witness’s self-reported confidence at the time of the initial identification procedure. After decades of research investigating and even questioning the science behind the Court’s holding,<sup>18</sup> new research finds that a witness’s confidence at the time of an initial identification is a reliable indicator of accuracy.<sup>19</sup> For this reason, the NAS has recommended “that law enforcement document the witness’ level of confidence verbatim at the time when she or he first identifies a

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<sup>13</sup> *Id.* at 107.

<sup>14</sup> *Id.* at 106.

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

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

<sup>17</sup> *Manson v. Brathwaite*, 432 U.S. 98 (1977).

<sup>18</sup> *See., e.g.*, Gary Wells, Elizabeth Olson & Steve Charman, “The Confidence of Eyewitnesses in their Identifications from Lineups,” 5 *Current Directions in Psychological Sciences*, 151 (2002); Steven Penrod & Brian Cutler, “Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation,” 1 *Psychology, Public Policy & Law* 817 (1995); National Academies of Science, *supra* note 1.

<sup>19</sup> John Wixted & Gary Wells, “The Relationship between Eyewitness Confidence and Identification Accuracy: A New Synthesis,” *Psychological Science in the Public Interest* (in press); Wixted, et al., *supra* note 9.

suspect . . . .”<sup>20</sup> Further, to prevent any undue suggestion and to ensure that investigators and fact-finders fully understand the level of the witness’ confidence, the NAS recommends that the “witness’ self-report . . . should be given in the witness’ own words.”<sup>21</sup>

### Recording the Photo Array

A witness’s identification and assessment of certainty cannot be easily challenged if law enforcement agencies electronically record the identification procedure and the witness’s response. Electronic recording preserves the identification process for later review in court and also protects officers against unfounded claims of misconduct. Video-recording is helpful because it allows fact finders to directly evaluate a witness’s verbal and nonverbal reactions and any aspects of the array procedure that would help to contextualize or explain the witness’ selection. As of 2013, approximately one-fifth of state and local law enforcement agencies had instituted video-recording of photo arrays.<sup>22</sup> The NAS recommended “that the video recording of eyewitness identification procedures become standard practice,”<sup>23</sup> and the practice continues to expand as legislation<sup>24</sup> and model policies<sup>25</sup> urge its implementation. If video is impracticable, however, an audiotape may be useful because it allows judges and jurors to hear exactly what was said by both the administrator and the witness rather than relying exclusively on an oral or written report about the procedure.

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<sup>20</sup> National Academies of Science, *supra* note 1, at 108.

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

<sup>22</sup> Police Executive Research Foundation, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* (2013).

<sup>23</sup> National Academies of Science, *supra* note 1, at 108.

<sup>24</sup> Ill. Comp. Stat. 725 § 5/107A-2 (2015); N.C. Gen. Stat. §15-284.52 (2007).

<sup>25</sup> See International Association of Chiefs of Police, *Model Policy: Eyewitness Identification* (2010); Municipal Police Training Council of New York, *Identification Procedures: Photo Arrays and Line-ups Model Policy* (2015); Attorney General of Wisconsin, *Model Policy and Procedure for Eyewitness Identification* (2010).



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## EYEWITNESS IDENTIFICATION REFORM

### **Mistaken Identifications Are the Leading Factor in Wrongful Convictions**

Mistaken eyewitness identifications contributed to approximately 70% of the 349 wrongful convictions in the United States overturned by post-conviction DNA evidence.

- Inaccurate eyewitness identifications can confound investigations from the earliest stages. Critical time is lost while police are distracted from the real perpetrator, focusing instead on building the case against an innocent person.
- Despite solid and growing proof of the inaccuracy of traditional eyewitness ID procedures – and the availability of simple measures to reform them – traditional eyewitness identifications remain among the most commonly used and compelling evidence brought against criminal defendants.

### **Traditional Eyewitness Identification Practices – and Problems**

- In a standard lineup, the lineup administrator typically knows who the suspect is. Research shows that administrators often provide unintentional cues to the eyewitness about which person to pick from the lineup.
- In a standard lineup, an eyewitness is shown individuals or photographs *simultaneously*. Research shows that this tends to lead eyewitnesses to choose a lineup member based upon a relative judgment (i.e., who *looks most like* the perpetrator?), rather than basing the identification on his or her own mental image of the perpetrator.
- In a standard lineup, without instructions from the administrator, the eyewitness often assumes that the perpetrator of the crime is one of those presented in the lineup. This often leads to the selection of a person despite doubts.

### **How to Improve the Accuracy of Eyewitness Identifications**

The Innocence Project endorses a range of procedural reforms to improve the accuracy of eyewitness identification. These reforms have been recognized by police, prosecutorial and judicial experience, as well as national justice organizations, including the National Institute of Justice and the American Bar Association. The benefits of these reforms are corroborated by over 30 years of peer-reviewed comprehensive research.

**1. The “Double-blind” Procedure/ Use of a Blind Administrator:** A “double-blind” lineup is one in which neither the administrator nor the eyewitness knows who the suspect is. This prevents the administrator of the lineup from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect.



**2. Instructions:** "Instructions" are a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection. They also prevent the eyewitness from looking to the lineup administrator for feedback during the identification procedure. One of the recommended instructions includes the directive that *the suspect may or may not be present in the lineup.*

**3. Composing the Lineup:** Suspect photographs should be selected that do not bring unreasonable attention to him. Non-suspect photographs and/or live lineup members (fillers) should be selected based on their *resemblance to the description provided by the eyewitness* – as opposed to their resemblance to the police suspect. Note, however, that within this requirement, the suspect should not stand out from among the other fillers. (More detailed recommendations can be provided upon request by the Innocence Project.)

**4. Confidence Statements:** Immediately following the lineup procedure, the eyewitness should provide a statement, in his own words, that articulates the level of confidence he has in the identification made.

**5. The Lineup Procedure Should Be Documented:** Ideally, the lineup procedure should be electronically recorded. If this is impracticable, an audio or written record should be made.

### **Jurisdictions Utilizing the Innocence Project's Reform Package:**

The entire states of Colorado, Connecticut, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Montana, New Jersey, Nebraska, Nevada, North Carolina, Ohio, Oregon, Rhode Island, Texas, Vermont, West Virginia & Wisconsin have implemented the reform package promoted by the Innocence Project either through legislation, court action, or substantial voluntary compliance. The U.S. Department of Justice and an additional twelve states (Arkansas, Delaware, Kansas, Kentucky, Michigan, Mississippi, New Hampshire, Oklahoma, Pennsylvania, Virginia & Washington) possess advisory policies endorsing the same.

Many jurisdictions across the country ranging in size have implemented the same reform package as standard procedure. Some examples of such jurisdictions include: San Francisco, CA, Boise, ID, Oklahoma City, OK, and St. Louis, MO.

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**Cc:** clarice.forsyth@gmail.com  
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**SB674**

Submitted on: 1/30/2017

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<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Clarice	Individual	Support	No

Comments:

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