MEMORANDUM

TO: Ronnie Abrams

FROM: Zeke Edwards

RE: Response to the New York State Police/DA Identification Guidelines

DATE: 5/27/10

RESPONSE TO NEW YORK STATE GUIDELINES FOR IDENTIFICATION PROCEDURES

INTRODUCTION

Comment:

The purported goal of the Guidelines is to promote "neutral, fair, and reliable identification procedures." Yet there are numerous instances where the justification articulated for a proposed procedure is merely trial tactics – to deflect defense claims of impropriety or suggestion – as opposed to scientific or related to reducing wrongful convictions.

For instance, when defining "blind administrator," the Guidelines state that "a significant benefit of the double blind procedure is its ability to negate the defense contention that the administrator in some unspecified way guided or cued the witness into picking the suspect." A more significant benefit, however, is that it eliminates inadvertent and advertent cues as well as immediate confirming feedback. Regarding witness warnings, the Guidelines state that they will "minimize any allegations that the investigator provided cues to the witness." The principle reason (though unstated in the Guidelines) for providing warnings to witnesses is that they have been proven to reduce the rate of mistaken identifications. On the administration of photo arrays: "Where practicable, the administrator should … remain out of the witness' line of sight while the witness views the array. This will avoid claims of inadvertent cueing by the administrator …" Again, the Guidelines could read, "This will avoid inadvertent cueing by the administrator. Moreover, it will avoid claims regarding the same …"

DEFINITIONS

"Depending on the jurisdiction and the circumstances of the case," a lineup administrator "may" be blind or not blind.

Comment:

Although double-blind administration is, as Dr. Wells indicated, the most important reform, the Guidelines are equivocal about it, at best. In fact, the Guidelines never acknowledge the actual dangers of non-blind administration or the research supporting double-blind administration. Double-blind administration not only prevents the administrator from giving the witness advertent and inadvertent cues, it discourages the witness from seeking such cues, eliminates the immediate confirming feedback (which is particularly damaging if it occurs before a statement of certainty is obtained from the witness), and avoids the dilution of other important reforms, such as warning the witness that the perpetrator may not be present and creating a lineup of fair fillers (since, if a non-blind administrator cues a witness as to whom the suspect is, the effect of those other reforms is diminished, if not entirely negated).

A non-blind administrator "can often provide significant case information as the investigator has knowledge about the case and the witness, which will be helpful in evaluating the witness' identification or lack of identification."

Comment:

This is vague and, frankly, perplexing. First, assuming we all agree that the lineup should be a fair test of the witness's memory, free from suggestion and contamination, what case information would be necessary for the lineup administrator to convey to the witness during the identification procedure? What "significant case information" could the administrator impart to enhance the identification's reliability? How does the administrator's "knowledge about … the witness" increase the chance that the identification is the sole product of the witness's independent memory? Double-blind does not prohibit the lead investigator from having contact with the witness generally, but only during the identification procedure.

What does is meant by "evaluating" the ID or non-ID? Why cannot an independent administrator "evaluate" these? If "evaluation" refers literally to an after-the-fact determination regarding whether the witness identified the suspect, a filler, or no one, this can obviously be done by the case investigator after the procedure. If this "evaluation" is meant to occur during the procedure, such as assessing the witness's demeanor, or degree of confidence or hesitation, or how long the witness deliberates,

an independent administrator can assess this as easily as the case investigator. While the issue of video recording is not on the table at present (i.e., not simply because it is not in the Guidelines, but I would anticipate vociferous opposition on the purported basis of cost and resources), this would be the most effective way to document the procedure, the witness's demeanor, what is said during the procedure, etc., and thus provide an effective means of evaluating the identification many times over.

"The presence of the case investigator can also provide some assurance to a nervous or reluctant witness."

Comment:

The case investigator is not the only member of the police department who can provide "some" assurance to a witness. Police officers deal with nervous or reluctant witnesses on a daily basis. A blind lineup administrator can anticipate and is free to respond to a witness's trepidation. Moreover, there should be no prohibition against the case investigators speaking to the witness before and after the procedure (I think it would be unwise, however, to allow a witness to speak to the case investigator at any point during the procedure, even assuming it is outside of the lineup viewing room, as this would increase the potential for suggestion).

This issue has not been a problem, as far as I am aware, in jurisdictions that use double-blind (though it is part of the facts of the Henderson case in New Jersey, where the lead investigators interrupted a double-blind procedure to speak to the witness after the witness had narrowed down his choice to two lineup members, but was not making any decision between the two, and the police thought it was fear, not memory, that was preventing the witness from making an identification).

"It is crucial that the investigator remain neutral throughout the identification procedure."

Comment:

While indeed true, this admonishment is insufficient to safeguard adequately the unintentional (and often unnoticed by administrator and witness alike), yet corrupting influence that research has proven non-blind administrators can and do exert over eyewitnesses. This directive, and the concern underlying it, would be eliminated if the administrator were blind.

"A blind administrator will be less likely to remember individual identification procedures and may rely solely on documentation when called to testify."

Comment:

There does not appear to be any support for this proposition, either empirically or anecdotally. The reality is that police officers, whether having been the lead investigator or only peripherally involved, often rely heavily or solely on documentation when called to testify and recall events from months or sometimes years past. I have conducted numerous hearings and trials when police officers' testimony was largely based on notes or paperwork prepared months before. While it may be true that police officers in certain cases will be more likely to have a stronger memory for the lineup procedure, and the witness, if they had also been assigned to the case, this does not justify using a more suggestive procedure. Again, videotaping the procedure would likely go far in assisting the testifying lineup administrator's memory.

I would note that none of the jurisdictions that use double-blind lineups have raised this issue, and prosecutions, including lineup evidence put forth at hearings and trials, appear to be proceeding normally.

"In some instances, the blind administrator may have previously known the suspect or some of the fillers."

Comment:

If this is the case, obviously the lineup is not blind, since just as the administrator should not know which lineup member is the suspect, nor should he or she know which lineup members are fillers. If possible, the administrator should review the lineup beforehand to avoid this problem. At the very least, if this occurs, the lineup administrator should document it, and the lineup should proceed (unless the administrator recognizes numerous fillers, in which case another lineup should be assembled). This concern is not mentioned in the photo lineup guidelines, but I assume this is just an oversight.

"In cases of multiple witnesses, the blind administrator may quickly learn the identity of the suspect, if the suspect is selected by one or more witnesses."

Comment:

It is true that in cases with multiple witnesses, a blind administrator conducting live lineups might be influenced in later procedures by witnesses' choices from earlier procedures. In large jurisdictions, in live lineups, the solution would be to use a blind administrator for each lineup. In small jurisdictions, if this is not feasible, the problem may be unavoidable for live lineups. But even then, the administrator's knowledge will still be based only on an earlier witness's identification, which the administrator may not necessarily know is of the suspect (depending how far apart the lineups occur, and what the administrator is told).

For photo arrays involving multiple witnesses, in any size department, the folder shuffle method or laptop computers can be used (or, in larger departments, a new administrator can be used for each array). Using these alternatives (particularly if the procedures occur in succession), the administrator should only know the number of the folder containing the photo the witness identified, not the photograph itself.

I would note that notwithstanding unique challenges that might arise in cases involving multiple eyewitnesses in smaller jurisdictions, these have no bearing on the use of double-blind lineups in cases involving a single eyewitness.

Blind administration is a "significant strain on resources."

Comment:

There is no question that double-blind requires greater resources. Indeed, Dr. Wells conceded this point during his presentation. As Dr. Wells noted, however, sometimes reforms to enhance fairness and reliability are more expensive than maintaining the status quo. But currency can be measured in myriad ways, and there is a greater non-monetary price paid when less reliable procedures are employed: the wrongful convictions of innocent people (and the accompanying non-convictions of guilty people, which can and have resulted in additional crimes). While it is possible to quantify an increase in expenditures that would accompany double-blind, it is impossible to measure the gains that would result from enhancing the reliability of evidence, promoting the fairness of the criminal justice system, and reducing the number of wrongful convictions based on mistaken identification.[1]

[1] There is also the potential cost, in millions of dollars, of lawsuits brought by the wrongfully convicted.

But as for the increased cost of double-blind procedures, while the "significant strain on resources" claim is thrown around with frequency by many prosecutors and police when first confronted with double-blind administration, those jurisdictions that have adopted double-blind administration have not only done so successfully and continued using them (not one jurisdiction that I am aware of which switched from non-blind to double-blind have gone back to using non-blind), but have not reported pecuniary problems or complained of being ill-equipped to investigate and respond to other crimes (I do not know whether they have had to hire additional officers, though I suspect not). There has been no study or assessment by a police department that has switched to double-blind – that I am aware of – laying out with specifics the cost of double-blind lineups or comparing the cost difference between double-blind and non-blind. While it appears that increased cost (be it in money, resources, or personnel) would be an inevitable consequence of double-blind administration, the complaints about this rarely, if ever, detail or itemize the extent of those cost increases, nor do other departments' experiences seem to support it.

INVITING A WITNESS TO AN IDENTIFICATION PROCEDURE

The police should not inform the witness that an arrest has been made or that the witness will be viewing a suspect "unless the witness asks."

Comment:

It is not clear why disclosure of this information should be contingent on whether the witness asks for it. If the witness should not be told, the witness should not be told regardless of what the witness requests. If asked by the witness, the officer can simply repeat the instruction and/or say that they are not able to discuss those issues at that time.

FILLERS FOR LINEUP

"The fillers should be similar in appearance to the suspect in the lineup." Also see under Computer Generated Arrays: "The computer can generate a photo array based on the characteristics of the suspect."

Comment:

While this is an area that needs further study, most research that has been done in this area suggests that the fairest way to select fillers, and the method that most strongly minimizes the chance that the suspect will unfairly stand out, is by selecting fillers that resemble the eyewitness' description of the perpetrator in significant respects. Failure

to select fillers who fit the descriptive characteristics of the perpetrator provided by the witness can cause an innocent suspect to stand out unfairly and thus increase the chance of an erroneous identification. In other words, assuming the suspect is innocent, if using "suspect-match" criteria, where the innocent suspect will often match the witness's description and the fillers will match the suspect, there is an increased chance that the innocent suspect will look most like or share the most characteristics with the perpetrator (as described by the witness). If a lineup member does not match the description given by the witness, that lineup member is an implausible foil and might as well not be in the lineup. Thus, selecting fillers who fit the witness's description of the perpetrator in significant features will lessen the likelihood that an innocent suspect looks most like the perpetrator.

Clark and Tunnicliff found that when an innocent suspect moderately resembled the perpetrator, though no more so than the foils resembled the suspect, the false identification rate in lineups where the fillers were selected to match the suspect was five times greater than lineups where the fillers were selected to match the description of the perpetrator.[2] Wogalter et al found that lineups in which fillers were chosen based on their similarity to the target were significantly more suggestive than when fillers were selected based also on their familiarity to one or more additional lineup members.[3]

Of course, even when fillers are initially selected to match the witness's description, there is still a chance that the lineup might be biased, and thus, at that point, officers should ensure that no lineup member stands out unfairly. In cases where the witness's description is vague or incomplete, it may not be possible to rely primarily on the witness' description as the basis for selecting lineup members, but even then the fillers should match whatever descriptors the witness has provided for the perpetrator.

As for the computer-generated arrays, most programs, included Photo Imaging Mugshot System (PIMS) (which was used, and I believe is still used, by the NYPD) generates photos based on descriptors entered into the program, and thus fillers can be generated based on their match to the witness's description.

As an example of the best practice discussed above, see the NIJ Guide (1999)[4] and Manual (2003)[5]:

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[2] Steven E. Clark & Jennifer L. Tunnicliff, *Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real-World Simulation*, 25 LAW. & HUM. BEHAV. 199 (2001).
[3] Michael S. Wogalter et al., *Suggestiveness in Photospread Line-ups: Similarity Induces Distinctiveness*, 6 APPLIED COGNITIVE PSYCHOL. 443 (1992).
[4] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 29-30 (1999).

> "Select fillers who generally fit the witness's description of the perpetrator. When there is a limited/inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features."

"Fillers from a photo array previously viewed by the witness should not be used as fillers in the lineup."

Comment:

My understanding is that the police do not preserve the photographs (or the descriptors used in PIMS to generate such photographs) viewed by a witness during a PIMS procedure (which is utilized when the police do not have a suspect yet and the witness is viewing multiple photographs to see if the witness recognizes anyone), despite the fact that the program permits preservation. Therefore, it is impossible for the police to honor this provision if no record is preserved regarding the photographs previously viewed (and rejected) by the witness. The Innocence Project is working with Sullivan & Cromwell currently to prevent the NYPD from destroying this evidence.

INSTRUCTIONS TO WITNESSES

"Instructions should be given to the witness *before* the identification procedure begins and not while the witness is in the process of viewing the lineup. This will alleviate confusion and minimize claims that the investigator somehow, even inadvertently, provided cues to the witness. Witnesses should also be told to take whatever time they will need when they view the lineup."

Comment:

This provision opens up the section on Instructions to Witnesses in the photo guidelines but is the third section in the live lineup guidelines, and is differently worded. Moreover, the last sentence ("take the time they need") is not included in the photo guidelines. The section applies with equal force to photo and live lineups and thus should be consistent.

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[5] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT 33, 36 (2003).

While the Guidelines seem most concerned with minimizing claims of inadvertent cues, they should instead be prioritizing the elimination of the cues themselves through the use of double-blind administration.

"Until the information about the identification procedure is documented, the investigator should not comment about the procedure or the next steps in the case. Stray comments that could potentially focus a witness' attention to one lineup member over the others, such as: 'Are you sure you got a good look at number 2?' or 'Can you take another look at number 6?' should not be made before, during or after the procedure."

Comment:

The Guidelines should be more explicit and forceful by recommending that the lineup administrator refrain from giving the witness any confirming feedback regarding the administrator's perceived accuracy of the witness's identification. The prohibition against feedback is especially critical prior to the administrator's documentation of the witness's statement of certainty (which the Guidelines specifically reject – see below). While some "comments" may be inevitable after the procedure (i.e., there is no expectation that the administrator refrain from communicating in any way with the witness), there is no reason the administrator should be commenting to the witness about either the procedure or the identification.

Again, double-blind lineups would render this provision unnecessary, as a double-blind administrator would not be in a position to make suggestive comments during the procedure or provide confirming feedback after.

One of the proposed instructions: "I was not present at the crime, so do not assume I know who the perpetrator is."

Comment:

In a non-blind lineup, wording to this effect might be appropriate, though even then it seems a bit confusing, and almost seems to leave the question open (in this way, it could be construed as somewhat suggestive, especially if the witness was not assuming that the administrator knew who the perpetrator was. A better instruction would be: "I was not present at the crime, therefore I do not know who the perpetrator is."

If the lineup is double-blind, however, the administrator should instruct the witness more simply that: "I do not know the suspect's identity." A double-blind procedure using this instruction would also render the third proposed instruction in the

Guidelines unnecessary: "I want you to focus on the lineup and not to look to me or anyone else in the room for guidance during the procedure." If the witness knows that the procedure is double-blind, and thus understands that the officer does not know who the suspect is, the witness will not look to the officer for guidance.

A better and more comprehensive set of instructions can be found in legislation passed in North Carolina in 2008[6]:

a. The perpetrator might or might not be presented in the lineup,
b. The lineup administrator does not know the suspect's identity,
c. The eyewitness should not feel compelled to make an identification,
d. It is as important to exclude innocent persons as it is to identify the perpetrator,
e. The investigation will continue whether or not an identification is made.

MULTIPLE WITNESSES

Comment:

This section does not contain the most critical safeguard when conducting lineup procedures (including showups) in cases involving multiple witnesses – that witnesses not be permitted to view a lineup or photos together. While it prohibits allowing witnesses speak to each other and requires separating them before and after the procedure, it says nothing about separating witnesses during the procedure. A better example is in the Wisconsin Department of Justice Guidelines: "No Communication Between Witnesses. To the extent possible, prevent witnesses from conferring with each other before, during, and after the photo array procedure."[7]

PROCEDURES FOR VIEWING A LINEUP

"To protect the integrity of the identification procedure, the administrator must remain neutral throughout the procedure so as not to, even inadvertently, suggest a particular lineup member to the witness."

[6] N.C. GEN. STAT. § 15A-284.52(b)(3) (2009).
[7] Office of the Attorney Gen., Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification (2005).

Comment:

This reveals either a fundamental misunderstanding or an outright rejection of the phenomenon of the experimenter expectancy effect, which is the central basis upon which double-blind lineups rest. If a simple one-line directive to non-blind testers to "remain neutral" were a sufficient safeguard, blind testing would not be a staple across scientific testing. The idea that someone can control inadvertent cues – cues that, by definition, are unintended, not to mention often undetected by conveyer and recipient alike – is illogical. It is like telling someone: do not do anything you do not realize you are doing.

"The administrator of the lineup should stand away from the witness during the lineup, in a neutral manner, while still being in a position to observe the witness."

What, specifically, is "in a neutral manner?" (See comment above.) What, specifically, is meant by "stand away?" Does "observe the witness" include seeing their full face? Partial face? Just their body language? While there may be no bright line rules for each lineup, it is important to be more specific here.

"The key is for the administrator to stand outside the witness' line of sight while the witness is viewing the lineup. This will reduce any inclination by the witness to look at the administrator for guidance."

Comment:

If the administrator is meant to be able to view the witness's face, it would seem that, at least peripherally, the administrator would be within the witness's line of sight. If the administrator is next to the witness or within the witness's peripheral vision (because if too far behind the witness the witness's face would not be visible), it is not clear whether or why the witness would be disinclined to look to the administrator for guidance. In fact, I am not sure what evidence exists establishing that if the administrator were to stand behind the witness, the witness would thus be less likely to seek guidance.

"When coupled with the type of instructions discussed above, this procedure will create a neutral environment, free of inadvertent cues from the administrator."

Comment:

One research study has shown that the position of the administrator can increase or decrease the suggestive impact of non-blind administration (when the non-blind administrator stood next to the witness, 1-2 feet away, the number of identifications of innocent suspects increased, whereas when the administrator stood 3-5 feet to the side of the witness, and a few steps back, outside of the witness's direct view, there was no increase in mistaken identifications).[8] However, it seems presumptuous, in light of the body of research on experimenter expectancy effect, and the fact that any non-blind lineup increases the chance of cuing immeasurably in comparison to a double-blind lineup, to suggest that the directive to "stand away" from the witness "in a neutral manner" while "still being in a position to observe the witness" takes care of the dangers of non-blind, and that this alone is sufficient to create a "neutral environment, free of inadvertent cues." These rules could be open to wide interpretations, easily violated (even unintentionally) or, in unfortunate instances, manipulated. This is of particular concern in light of the fact that the Guidelines do not call for videotaping identification procedures.

DOCUMENTING THE LINEUP

"Comments made by the witness during the identification should be written down word for word."

Comment:

Ideally, for the most pristine and accurate record, ID procedures should be video- and or audio recorded.

[8] Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106 (2004).

CONFIDENCE STATEMENTS

"Record the Witness' Statements Rather than 'Confidence Statements: 'Confidence statements' where the administrator asks a witness to provide a numeric value or a certainty level to their identification, e.g., 'On a scale of 1 – 10, how sure are you?' or 'Are you 100% sure?' can be problematic. Most witnesses do not spontaneously offer a numeric confidence level at the time of viewing the lineup. Forcing a witness to attach a numeric value or level to their identification, or lack of identification, could lead to an artificial assessment and may prove to be misleading. The better practice is for the administrator to memorialize each of the witness' statements, comments or other reactions made during the identification procedure."

Comment:

A critical shortcoming of the Guidelines is its failure to require – and, worse, explicitly prohibiting – witness certainty statements in the words of the witness at the time of the identification. A vast amount of scientific research has proven that witnesses' confidence levels are malleable, and can be easily inflated by confirming feedback, whether explicit ("good, you identified the suspect") or implicit (the case moves forward against the suspect identified). Immediate assessments of confidence help buffer, in part, the artificial enhancement of confidence caused by confirming feedback. In addition to establishing the ease with which confidence can be manipulated, studies have also revealed that jurors are heavily influenced by witness confidence levels, irrespective of identification accuracy. Thus it is important that juries be aware of whether witnesses' testimonial confidence is consistent with the confidence expressed at the time of the identification. Confidence assessments made by witnesses at the time of the identification provide judges and jurors access to more meaningful expressions of confidence than those provided months or years later at trial. As long as prosecutors intend to continue eliciting confidence assessments from witness at trial (or at pre-trial hearings), confidence levels must be assessed at the time of the identification. If prosecutors are willing to forego asking witnesses about their confidence on the stand, or to concede motions in limine precluding a witness's testimonial confidence from coming into evidence, then, perhaps, contemporaneous confidence statements would be less critical. But given that eyewitnesses almost always testify in court regarding their certainty that the defendant is the perpetrator, juries should be in a better position to evaluate the reliability of such testimony.

It is also incongruous that on the one hand the Guidelines state that "comments or reactions [indicating to the witness that he or she made an accurate identification] may

subsequently affect the witness' confidence in his or her identification," and yet on the other hand forbid instantaneous confidence assessments.

Strangely, the Guidelines read as if the only way to document a witness's confidence is through numeric quantification. In fact, best practices require not that the police ask for a confidence percentage or 1-10 rating, but rather simply that the police ask witnesses how confidence they are in their identifications. For instance, the NIJ Manual states: "Obtain and document a statement of certainty for both identifications and nonidentifications."[9] It continues:

> "It is not necessary for the witness to give a number to express his/her certainty. Some witnesses will spontaneously include information about certainty (e.g., 'That's him, I KNOW that's him,' or, 'It could be him'). If the witness does not volunteer information about certainty, then the witness can be asked to state certainty in his/her own words. A question such as, 'How do you know this individual?' will often lead the witness to express his/her certainty. If a statement of certainty is not obtained, then the investigator can follow up with the question, 'How certain are you?'"[10]

Again, double-blind administration will assure both that certainty assessments are taken prior to any confirming feedback, since the administrator will not know whether the witness has identified the suspect or a filler, and that the certainty statements themselves are free from taint. For example, one study found that eyewitness identification confidence was malleable as a function of interviewers' beliefs about the perpetrator's identity.[11]

"Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be, *e.g.* we will continue to search for the perpetrator (where there has been no identification), or we will contact you about meeting with the Assistant District Attorney next week, etc. After the identification procedure, witnesses frequently have questions about the case. It is entirely appropriate for the investigator to accurately answer questions about the case, including whether an arrest will be made."

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[9] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT 33, 36 (2003).
[10] Id.
[11] Lynn Garrioch & C.A. Elizabeth Brimacombe, *Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence*, 25 LAW & HUM. BEHAV. 299 (2001).

Comment:

It is particularly disturbing that the Guidelines shun confidence statements and yet include the preceding paragraph encouraging a conversation between the police and the witness about the case moving forward (this could be construed as implicit confirming feedback). To permit, even encourage, feedback without insisting on first obtaining a statement of certainty immediately following the identification is unacceptable and flies in the face of scientific study and well-accepted best practices.

SPEAKING WITH THE WITNESS AFTER THE IDENTIFICATION PROCEDURE

"The administrator should remain neutral about the identification when speaking with the witness."

Comment:

Again, this simple directive reveals a lack of understanding of, or disagreement with, the fact that interviewers, like lineup administrators, can inadvertently convey information to witnesses. There are numerous ways an officer who is aware that the witness identified the suspect might convey that information, or other types of feedback, unwittingly, during an interview, either verbally or non-verbally. If the procedure is conducted double-blind, this provision would not be necessary.

PHOTO ARRAYS

"The investigator should record, if possible, how many photographs were shown to the witness."

Comment:

Why would it not always be possible to record the number of photographs shown to the witness? Computer programs such as the Photo Imaging Mugshot System (PIMS), if it is still what the NYPD and other departments are using, have the capacity to save every photograph shown to the witness, well as every descriptor entered into the program to generate images. Currently, the police usually do not save either of these critical pieces of evidence --- usually only preserving the six-pack from which the witness makes an identification --- which raises Brady issues as well as deprives defendants from assessing potential suggestion in the procedures. If an actual mugbook is used, assuming a set number of photographs per page, the officer could determine the number of photographs viewed by a witness. Perhaps there is a practical problem I am unaware of.

"Where possible, computer-generated photo arrays should be used. E-Justice provides an automatic photo array system, which eliminates the claim that the investigator assembled an intentionally biased array."

First, regardless of the photos the computer selects for the lineup, the lineup might still be biased against the suspect. There are mock witness tests developed by Dr. Wells, Dr. Malpass, and Dr. Tredoux, to determine the functional and effective size of both photo and live lineups. Moreover, even with computer-generated arrays, the administrator must still either approve of the generated lineup, or often will tinker with it (select other photos, move photos, etc.) depending on the photographs generated, before showing it to a witness. If that administrator is not blind, then even with computer-generated arrays, there is the opportunity for bias, intentional or inadvertent, in the arrangement of fillers.

Instruct the witness to: "Pay no attention to any markings that may appear on the photos, or any other differences in the type or style of the photographs."

Comment:

Telling witnesses to "pay no attention to any markings" is an insufficient safeguard. That is almost akin to telling a witness to "pay no attention to any ways in which the lineup is biased against a particular member." Instead of allowing disparities in the photos and simply hoping the witness disregards them, the Guidelines should eliminate the possibility of bias or suggestion by reflecting the relevant provisions of the NIJ Guide and other published best practices: "Ensure that no writings or information concerning previous arrest(s) will be visible to the witness."

"The photo array should be handed to the witness in an envelope, or in a folder, so neither the witness nor the officer can see the pictures. This will avoid the possibility of any inadvertent influence by the administrator."

Comment:

It is good that the Guidelines contain some reference/recommendation regarding the use of the folder method to administer photo lineups, as the folder shuffle method is an attempt to "blind" administrators who, in fact, know who the police suspect is. However, the folder shuffle was designed to be administered sequentially, where the witness is handed individual folders and instructed to go through one at a time, making a judgment about each one (with blank folders at the end so the witness is not aware when he or she is viewing the last photo). This procedure is detailed in the new

omnibus crime legislation signed into law this year in Ohio[12], which mandates double-blind (and sequential) lineups or, when impractical, "blinded" lineups using the folder shuffle method.

"Where practicable, the administrator should be positioned to see and hear what the witness says as the witness views the array, but should remain out of the witness' line of sight while the witness views the array. This will avoid claims of inadvertent cueing by the administrator and it reduces any inclination by the witness to look at the administrator for guidance. The administrator should neither crowd the witnesses nor interrupt the concentration of the witness. The administrator should never tell the witness to look at a particular photograph."

A critical element of the folder shuffle method, which again is designed to be done sequentially, is that the administrator not be able to see which photograph the witness is viewing, not just that the witness not be able to see the administrator. In theory, audible cues can be conveyed even when not accompanied by visual cues.

CONCLUSION

Overall, the Guidelines read rather defensively, appearing more as an effort to block certain reforms, and seemingly adopted for the primary purpose of minimizing defendants' claims of suggestiveness. Most disturbing are that the Guidelines (1) dismiss the critical reform of double-blind, and indeed treat inadvertent cuing as if a figment only of defense motions to suppress evidence, not as a scientifically studied factor that can impugn the reliability of identification evidence, and (2) refuse to require contemporaneous statements of certainty from the witness.

There is little scientific support for the Guidelines' deviations from the best practices recommended by social scientists and embraced by other jurisdictions. Unlike the best practices endorsed by the Innocence Project and others, many suggestions in the Guidelines do not appear to be based on empirical research (i.e., controlled studies published in peer-reviewed journals) but rather intuition, or convenience.

For example, there is a wealth of evidence to support the experimenter expectancy effect, and studies that show that a lineup administrator's knowledge regarding the suspect in a lineup can influence a witness's identification, even when the suspect is innocent. Therefore, there is empirical support for the proposition that double-blind

[12] S. Sub. S.B. No. 77, 128th Gen. Assem. (Ohio 2010).

lineups reduce mistaken identification. However, there is no support for the proposition that non-blind lineups enhance the reliability of an eyewitness's memory, protect witness's independent recollections, decrease the risk of wrongful conviction, or even increase the rate of accurate identifications. In fact, the evidence establishes the opposite.

Similarly, while there is ample study on the inflatable nature of confidence and other aspects of memory, as well as the persuasive power of an eyewitness' confidence over jurors, where is there scientific support for not taking confidence statements in the words of the witness at the time of the identification, particularly if witnesses are going to be permitted to testify as to their confidence levels at trial? What research has been done that would justify not separating witnesses during the identification procedure? What evidence exists that lineup fairness is enhanced if fillers are selected based only on their similarity to the suspect, but not based on the witness's description of the perpetrator? Opponents of reform spend a lot of time, albeit not that successfully, attacking the scientific research, but rarely have any of their own to offer in support of their propositions (with simultaneous lineups as an exception, to an extent).

The Guidelines are also deficient as a result of certain omissions. First, there is nothing in the Guidelines requiring (prior to confirming feedback following an identification) documentation of witnesses' self-reports regarding their opportunities to view the perpetrator and their degrees of attention during the incident. Dr. Wells has shown that confirming feedback in the accuracy of the identification not only inflates confidence, but can distort witnesses' memories for the event itself. Therefore, it is important to gather this information before the identification and eventual feedback.

Similarly, the Guidelines do not stress the importance of documenting the witnesses' descriptions of the perpetrator as close in time to the event and as thoroughly as possible. Given that memory does not improve over time and that we tend to fill in gaps in our memory with post-event visual and verbal information, it is the initial description by the witness of the perpetrator which carries the greatest weight. Subsequent descriptions, made further in time from the incident and after potential exposure to post-event information, are less reliable, and descriptions given after the witness has viewed the suspect in an identification procedure are worthless, as it is impossible to know subsequently whether the description is based on the witness' memory or on having viewed the suspect under pristine conditions. Changes or enhancements (i.e., additional or greater detail) in descriptions as the witness moves further in time from the event are evidence of contamination, which is another reason to document carefully the witness's initial description.

The Guidelines are also silent about improved techniques for interviewing eyewitnesses (while this might be considered outside the purview of Guidelines on the identification procedures themselves, they are an important part of any eyewitness case, can have a substantial impact on witness memory and subsequent identification accuracy, and, I suspect, are not adequately covered elsewhere in various police departments' procedures), the use of composites, and sequential presentation.

Lastly, the Guidelines do not contain a section on showups, despite the fact that showups are an extremely common procedure which, if done improperly, can be highly suggestive and increase the chance that a witness will identify an innocent suspect.