

**REPORT TO THE LEGISLATURE  
OF THE STATE OF ILLINOIS:  
THE ILLINOIS PILOT PROGRAM ON  
SEQUENTIAL DOUBLE-BLIND IDENTIFICATION  
PROCEDURES**

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## **EXECUTIVE SUMMARY**

Pursuant to recommendations by the Illinois Governor's Commission on Capital Punishment, in 2003 the Illinois legislature passed legislation regarding lineup instructions and lineup construction, and further charged the Illinois State Police with conducting a year-long pilot program to test the effectiveness of the sequential, double-blind procedure in the field. This recommendation was based upon a body of research experiments on eyewitness identification showing that photo array identifications conducted by the sequential, double-blind method produced fewer false identifications than the simultaneous, or traditional, photo array procedures. Though the protocols for the sequential double-blind procedure are not yet standardized, this method generally involves showing the photos one at a time rather than side-by-side, with the witness required to make a decision on each photo before viewing the next one. The "double-blind" component requires that the lineup be conducted by an administrator who does not know which photo or live participant is the suspect and which are the fillers or "foils."

Researchers generally have attributed the reduction in false identifications associated with the sequential method to elimination of "relative judgement," which is described as comparing the photos to each other rather than to the witness's memory and then picking the one closest to the offender, even if it is not the actual offender. Some researchers later attributed the reduction to a higher standard of judgement employed by witnesses viewing a sequential lineup. There is now some agreement among researchers that both of these factors lead to the lower rate of false identifications associated with the sequential photo arrays in the research experiments.

The experiments also show that the sequential, double-blind method results in a loss of accurate identifications when compared to the simultaneous method. The research experiments

further indicate that there are five categories in which the sequential, double-blind method may not be superior to the simultaneous procedure and may even produce a higher rate of false identifications: (1) child witnesses; (2) older witnesses; (3) cross-racial identifications; (4) multiple perpetrators; and (5) suspects who do not match the description because of a change in appearance.

In 1999, the Department of Justice assembled a task force on eyewitness identification, which produced a research report, *Eyewitness Identification: A Guide for Law Enforcement*. This report did not advocate adoption of the sequential, double-blind method but instead recommended, among other things, further study of the sequential, double-blind method. Since that time, a handful of jurisdictions has adopted the method for law enforcement lineups based upon the research experiments, but none have conducted a field study of the procedure to determine if it produces a lower rate of false identifications compared to simultaneous lineups. The Illinois Pilot Program is the first field study to collect data on the sequential method according to the scientific protocol, the first field study to concurrently collect data for comparative purposes on simultaneous lineups and the first field study to examine both photo arrays and live lineups.

Three Illinois law enforcement jurisdictions of differing sizes participated in the pilot program: the Chicago Police Department, the Joliet Police Department and the Evanston Police Department. The Illinois State Police appointed this author as the Program Director. Dr. Roy Malpass of the University of Texas, El Paso, a well-recognized expert in the area of eyewitness identification, agreed to act as advisor to the Program and to analyze the data. Another well-known expert, Dr. Ebbe Ebbesen of the University of California, San Diego, also agreed to consult and to analyze the data independently. Other eyewitness identification experts were consulted throughout the course of the Pilot Program.

The Program Director trained approximately 476 officers from the three jurisdictions on the procedures, in addition to holding training sessions for prosecutors and public defenders. The year-long data collection began in late 2004, resulting in data on approximately 700 photo arrays and live lineups from both simultaneous and sequential procedures from the three jurisdictions.

The Illinois Pilot Program sought to determine whether the sequential, double-blind method of identification was superior to the simultaneous method, by measuring whether and to what extent the sequential, double-blind method resulted in a lower rate of known false identifications when compared to the simultaneous method, and to assess any costs in terms of loss of accurate identifications and implementation issues. The Illinois Pilot Program used filler identifications as the measure of known false errors, and used suspect identifications as an indication of accurate identifications. Unlike classroom studies, the errors in suspect identifications in both simultaneous and sequential lineups are often unknown in real life and therefore represent an unknown component inherent in every field study. Nevertheless, suspect identifications have been accepted by the social scientists as a useful measure of accurate identifications for purposes of field studies. Hence, a recent Minnesota field study on sequential lineups relied upon the same measures as the Illinois Pilot Program. Moreover, many suspect identifications recorded in the Illinois Pilot Program were corroborated by independent evidence and no suspect identifications were repudiated by forensics during the course of the study.

The Pilot Program showed a substantially lower overall rate of known false identifications than that predicted by the research experiments. This low rate of known false identifications is consistent with field data collected in other jurisdictions, including data collected over a five-year period in New York City. The reason for the low rate of filler identifications is unknown. Probable

cause, legislatively-mandated model instructions and other real-life factors may contribute to the lower rate of filler identifications in the Illinois data when compared with the classroom experiments. A Minnesota collection of field data also showed a low rate of filler identifications, leading the analyst to conclude that the data suggests “increased protection for innocent suspects” in real life.

There has been some speculation that poor fillers in the field lead to easy identification of suspects, but the anecdotal evidence and current research discounts this theory. There also has been some speculation that the police “lead” witnesses to suspect identifications, lowering the rate of filler identifications. There is no evidence to support this theory. Moreover, if this were the cause of the low filler rate, the rate of “no identifications” also should be significantly lower for simultaneous lineups, rather than the 10% differential seen in the Illinois data. Perhaps future studies will determine the actual reasons for the low filler rate in the field.

Surprisingly, the Illinois data did not bear out the research experiments that sequential, double-blind lineups produce a lower rate of known false identifications. Instead, the sequential, double-blind procedures resulted in an overall *higher* rate of known false identifications than did the simultaneous lineups. When broken down among the three jurisdictions, Chicago and Evanston, which both conduct photo and live lineups, experienced a higher rate of filler identifications with the sequential, double-blind procedures; Joliet, which conducts only photo arrays, showed no statistical difference in the filler identification rates of the two methods, although the absolute number of filler identifications was slightly higher in Joliet’s simultaneous photo arrays. All three jurisdictions showed a loss of suspect identifications using the sequential, double-blind method, comparable to the loss of actual known accurate identifications observed in the research

experiments. In other words, the Illinois data showed that the sequential, double-blind lineups, when compared with the simultaneous method, produced a higher rate of known false picks and a lower rate of “suspect picks.”

The Pilot Program also revealed implementation issues, in which the sequential procedure and the blind administrator presented separate challenges. The sequential procedure was relatively easy with photo arrays, but more difficult with live lineups. The sequential procedure proved particularly difficult with live lineups in multiple perpetrator cases, resulting in a mid-program suspension of sequential lineups with multiple perpetrators. This implementation issue proved significant because multiple offender cases ultimately accounted for 40% of the cases in the Pilot Program.

The suspect’s position in the sequential presentation also raised concerns over whether the procedure had converted to a “show up” if the suspect was identified early in the process, or if it resulted in a lower judgement criterion as the witness’s options narrowed if the suspect appeared later in the presentation. There were concerns over the unknown effect of the suspect standing alone rather than with other members of a lineup. Witnesses’ requests for second rounds of the sequential presentation also raised issues of the effectiveness of the sequential procedure and its use of relative judgment.

Finding blind administrators proved to be a challenge for law enforcement, creating delays in investigations and inconveniences to witnesses. The delays in the investigations adversely affected relationships between the investigator and the victims and witnesses. Some victims and/or witnesses complained about the wait for a blind administrator and threatened to leave, causing the investigators to switch to the simultaneous procedure in those instances. The delays also

occasionally caused concern over the limited time permitted law enforcement before charging a suspect who is in custody.

The delays in investigations also caused concerns about additional police time in the stations, particularly in light of the continuing efforts to increase police resources on the streets. The concern over police resources may be amplified as law enforcement continues to develop technology which allows officers to conduct identification procedures and other functions from the car in order to increase officer time on the street. In fact, finding blind administrators for identification procedures in the Pilot Program which occurred outside the police station (such as in hospitals, witnesses' homes or on the street) presented special challenges. The officers overall found that the blind administrator concept was contrary to their focus on collaboration and information-sharing. This discomfort with the process led Joliet to change their protocol several months into the program to promote more collaboration between the blind administrator and the case investigator.

A survey of the officers who participated in the Pilot Program revealed that the majority did not perceive the sequential, double-blind procedures as superior to the simultaneous procedures, and that the vast majority preferred not to use the sequential, double-blind procedures. The overall sentiment expressed by the officers after the Program ended was that a witness who can identify the offender can do so under either procedure. The officers who would continue to use the sequential, double-blind procedures cited liability and perception issues as the main reasons, but still expressed concern over the blind administrator aspect.

The concerns of Illinois law enforcement echo the concerns expressed in the Minnesota field study using blind administrators for a sequential presentation of lineup photos. As a result of these concerns, the Minnesota program has "de-emphasized" blind administrators. The jurisdictions

which adopt the sequential, double-blind procedures also make the use of the blind administrator recommended but not mandatory.

The data collected from the Pilot Program also shed light upon other aspects of eyewitness identification. The data showed that witnesses who knew the offender were overwhelmingly likely to identify the suspect and did not once make a known false error (i.e., a filler identification). Witnesses identifying a stranger were more likely to identify a filler than were witnesses who had prior familiarity with the offender. Analysis also showed that the rates of suspect and filler identifications did not vary according to age or cross-race. This appears to conflict with the classroom studies showing that cross-racial identifications are problematic. The data also showed no difference between identification rates when injury or violence occurred, nor any difference when a weapon was present or absent, contrary to the studies showing “weapon focus.”

This Report concludes with 10 recommendations for areas of further exploration:

(1) instructions; (2) technology; (3) training; (4) witness certainty; (5) blind administrators; (6) sketches; (7) reporting and record keeping; (8) expanded field studies; (9) filler selection programs; and (10) study of additional lineup methods.

The Pilot Program has contributed significantly to the area of eyewitness identification and undoubtedly will promote a meaningful continuing dialogue on this important subject. In conjunction with the release of this Report, Loyola University School of Law is hosting a conference on April 20-21, 2006, *New Policies, New Practices: Fresh Perspectives on Eyewitness Identification*, at which experts and practitioners from around the country will gather to dialogue on the issues raised by this Report, as well as other eyewitness identification issues.

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## I. INTRODUCTION

The acceptance of deoxyribonucleic acid (DNA) evidence by the judiciary revolutionized the criminal justice system, allowing police and prosecutors to determine with certainty the guilt or innocence of suspects in crimes where the offender left behind probative biological evidence, such as those involving sexual assault. See *People v. Miller*, 173 Ill. 167 (1996), in which the Illinois Supreme Court first held that DNA met the criteria for admissible scientific evidence. The acceptance of DNA also opened the door to exoneration for the innocent who had been wrongfully convicted prior to the availability of DNA. The first wave of these DNA exonerations shook the faith in and foundations of the criminal justice system, leaving law makers, lawyers and law enforcement to search for the answers to what had gone awry and to seek safeguards to prevent such miscarriages of justice in the future.

In 1998, the National Institute of Justice (“NIJ”), the research arm of the United States Department of Justice, issued the report *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, a study of 28 cases in which DNA had resulted in the exoneration of a convicted person. This report identified a variety of contributing causes to the wrongful convictions, with an emphasis on mistaken eyewitness identification. Of the 28 exonerations studied, 23 involved mistaken eyewitness identification. Since that study, DNA exonerations have reached 174,<sup>1</sup> with more than 20 in Illinois.<sup>2</sup> These exonerations, many of which repudiated eyewitness identifications, propelled the

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<sup>1</sup>As of January 30, 2006. The Innocence Project: [www.innocenceproject.org](http://www.innocenceproject.org).

<sup>2</sup>As of September 1, 2004, the number of DNA exonerations in Illinois had reached 20. Center on Wrongful Convictions, [www.law.northwestern.edu](http://www.law.northwestern.edu)

criminal justice system to examine how eyewitness identification is obtained, preserved and, most important, how it can be improved for reliability.<sup>3</sup>

The Illinois Pilot Program on Sequential, Double-Blind Lineups is a product of the efforts to improve eyewitness identifications. This Report will first review the social science that led to the pilot study. This Report then will then recap the history behind the Illinois legislation that created the pilot study. Next, this Report will inform the Illinois legislature of how other jurisdictions are addressing this issue. This Report then will explain how the pilot study was conducted, including protocols, training and data collection. This Report then will provide the data and data analysis of the pilot program, followed by an analysis of practical aspects of the pilot program. Finally, the Report will conclude with recommendations for future direction.

## **II. THE SCIENCE OF EYEWITNESS IDENTIFICATION**

Social scientists have made a variety of recommendations to law enforcement for changes to eyewitness identification procedures, including that: (1) the person who conducts the lineups should not know which member of the lineup is the suspect; (2) the photo array or live lineup should be shown in a sequential manner, rather than simultaneously; (3) the instructions to eyewitnesses should include that the offender might not be in the lineup and the witness should not feel compelled to make an identification; (4) fillers should match the description, but the suspect should not stand out in the lineup; and (5) a clear statement should be taken at the time of the identification as to the confidence level of the witness regarding the identification. *See, e.g., Wells, G., Turtle, J. & Lindsay, R., Best Practice Recommendations for Eyewitness Evidence*

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<sup>3</sup>Estimates of the number of DNA exonerations repudiating eyewitness identification differ, but the Innocence Project claims that mistaken eyewitness identification contributed to 75% of the convictions later resulting in DNA exonerations. [www.innocenceproject.org](http://www.innocenceproject.org).

*Procedures: New Ideas for the Oldest Way to Solve a Case* (2003), *The Canadian Journal of the Police and Security Services* (“*Best Practices 2003*”); Wells, G., et. al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Human Behav.* 603 (1998)(“*1998 Recommendations*”).

In a traditional eyewitness identification procedure, a law enforcement official shows the witness a set of photographs or live participants, side-by-side, at the same time. Hence, social scientists have dubbed the traditional eyewitness identification procedure the “simultaneous” method. Ideally, the photographs or live participants contain one suspect and four or five “fillers” or “foils,” i.e., people who are not suspected of committing the crime. The witness then makes an identification decision or rejection upon viewing the entire array or lineup. In a sequential procedure, the witness views the photographs or live participants one at a time, and the witness must make a decision as to each photograph or lineup member before viewing the next photograph or lineup member in the sequence.<sup>4</sup> Wells, G., Malpass, R., et. al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 *Am. Psychol.* 581 (2000) (“*From Lab to the Police Station*”); Wells, G., *Mistaken Eyewitness Identification: Scientific Findings and the Case for Improvements in How Lineups are Conducted*, (internet paper) (circa 1999) (“*Mistaken Eyewitness*”).

A blind administrator means that the law enforcement officer administering the lineup

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<sup>4</sup>There are variations of both methods. Officers using the simultaneous method have shown photographs sequentially, with the identification decision occurring after the witness has viewed all the photographs; have handed the photographs to the witness to view according to the witness’s preference; and have had live lineup participants sit on a bench, with each member sequentially stepping up to the viewing window. The sequential method also varies, depending, for instance, upon whether photographs continue to be shown following an identification and whether additional “laps” through the photographs are permitted.

does not know the identity of the suspect. This is known as a “double-blind” procedure, because neither the administrator nor the witness knows who is the suspect. The purpose of the blind lineup administrator is to avoid purposeful or inadvertent influence of the witness through verbal or nonverbal cues or feedback as to the identity of the suspect. The blind administrator is essential to the sequential procedure, because a sequential procedure has a greater potential for suggestion – the administrator can see exactly which photograph or lineup participant the witness is viewing, making any cues as to a particular target clear. Wells, G., Small, M., Penrod, S., Malpass, R., *1998 Recommendations*; Wells, G. & Olson, E., *Eyewitness Testimony*, 54 Ann. Rev. Of Psychol. 277-295, at 289 (2003) (“*Eyewitness Testimony*”); Phillips, M. & McAuliff, Et. al., *Double-blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. of Applied Psychol. 940-51 (1999); *Mistaken Eyewitness*.

Early staged crime research comparing the simultaneous identification procedure with the sequential double-blind method concluded that the sequential method reduces the number of false identifications with little or no loss in the number of accurate identifications.<sup>5</sup> Lindsay, R. & Wells, G., *Improving Eyewitness Identifications From Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. of Applied Psychol. 556-564 (1985); Cutler, B. and

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<sup>5</sup>The research experiments generally involve students viewing a staged crime by video (or occasionally live) and then identifying the culprit through photographic arrays. Some students are shown a simultaneous lineup and others are shown a sequential lineup, and the identification results are compared. The research uses photographs only, but the scientists believe that the same principles apply to live lineup procedures. Wells, G. & Seelau, E., *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol., Pub. Pol’y & L. 765, 766 (1995); Wells, G., *You Asked About The Sequential Lineup: Could You Read This First?* (Internet paper) (December 2001), acknowledging the concern that the experiments have been restricted to photographs, but stating that “there is no reason to expect a live versus photograph lineup difference for the sequential-superiority effect.”

Penrod, S., *Improving the Reliability of Eyewitness Identification: Line-up Construction and Presentation*, 73 J. of Applied Psychol. 281-290 (1988); Lindsay, R. *et al.*, *Sequential Line-up Presentation: Technique Matters*, 76 J. of Applied Psychol. 741-745 (1991); Lindsay, R. *et al.*, *Biased Line-up: Sequential Presentation Reduces the Problem*, 76 J. of Applied Psychol. 796-802 (1991). Subsequent research acknowledged that the sequential method reduces the number of false identifications but also reduces the number of accurate identifications. Wells, G., *Does the Sequential Lineup Reduce Accurate Identification in Addition To Reducing Mistaken Identifications? Yes, but...* (Internet paper) (2004); *Eyewitness Testimony*; Steblay, N. *et al.* *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: a Meta-Analytical Comparison*, 25 Law & Human Behav. 459-473 (2001) (“2001 Meta-Analysis”).

The majority of researchers attribute the decrease in false identifications associated with sequential procedures to the theory that witnesses employ relative judgment in simultaneous identification procedures, but shift to absolute judgment in sequential lineups. Relative judgment means that a witness viewing a simultaneous lineup compares the lineup members to each other rather than to the witness’s memory of the actual culprit. *Mistaken Eyewitness Identification*; Wells, G. & Seelau, E., *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol., Pub. Pol’y & L. 765 (1995). According to these researchers, relative judgment presents a problem when the real culprit is not in the lineup, because the eyewitness simply will choose the person who most closely resembles the culprit. *Id.*

When the photographs are shown in a sequential order with the witness required to make a decision on each photograph before moving to the next, the researchers explain that the witness employs “absolute judgement”: comparing each photograph only to his own actual memory of

the culprit, rather than to the other photographs. *Id.* The witness viewing a sequential procedure does not have the opportunity to compare the photographs to each other because the witness must make a decision on each photograph individually before seeing additional photographs.

According to the researchers, the shift from relative judgement to absolute judgement dramatically reduces the number of false identifications of those who simply look like the culprit but are not.<sup>6</sup> *See 1998 Recommendations*, pp. 613-14; *2001 Meta-Analysis*. As James Doyle, author of *True Witness: Cops, Courts, Science and the Battle Against Misidentification* (2005) has stated:

Showing the photographs all at once is like giving the victims one multiple-choice test where ‘none of the above’ is not really an option. Showing the photographs one at a time is like giving the victims six true-or-false tests.

*Police lineup methods often flawed, experts say*, Miami Herald, August 4, 2005.<sup>7</sup>

Some researchers have offered another explanation for the sequential superiority shown in classroom experiments. Research shows that the sequential method causes witnesses to use a stricter or higher standard before making an identification, which accounts for fewer identifications overall, both false and accurate. *See Ebbesen & Flowe (2001), Simultaneous v. Sequential Lineups: What Do We Really Know?* (Internet Paper); Meissner, C., Tredoux, C.,

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<sup>6</sup>This theory is derived from “Removal without Replacement” experiments. After a staged crime, half of the students viewed culprit-present photo arrays and other half viewed culprit-absent photo arrays. When the actual culprit was absent from the lineup, a number of students viewing the simultaneous arrays picked the person who most closely resembled the culprit. *1998 Recommendations*, p. 615.

<sup>7</sup>This legislative body has ensured that in Illinois, instructions to the witness make clear that “none of the above” is an option. *See 725 ILCS 5/107A*. Research shows that such instructions effectively have reduced false identifications. *See 1998 Recommendations*, showing a drop in the false identification rate from 78% to 33% when eyewitnesses were explicitly warned that the culprit might not be in the lineup.

Parker, J. and MacLin, O., *Eyewitness Decisions in Simultaneous and Sequential Lineups: A Dual-Process Signal Detection Theory Analysis*, 33 *Memory and Cognition* 783-792 (2005).

Even initial proponents of the relative/absolute judgement theory now accept that the sequential classroom experiment results could be attributable at least in part to a shift in judgment criterion.

Wells, G., *You Asked About The Sequential Lineup: Could You Read This First?* (Internet Paper) (December 2001) (“the difference between the simultaneous and [sequential] procedures is likely due to *both* a criterion difference *and* a change in discrimination”) (emphasis in original).

Other researchers suggest that witnesses actually use absolute judgement in both simultaneous and sequential identification procedures. According to this research, accurate identifications and rejections are associated with the use of absolute strategies, regardless of whether the lineup presentation was simultaneous or sequential. Kneller, W., Memon, A., and Stevenage, S., *Simultaneous and Sequential Lineups: Decision Processes of Accurate and Inaccurate Eyewitness*, 15 *Applied Cognitive Psychology* 659-671 (2001).

Regardless of the reason for the decrease in false identifications in sequential lineup research, subsequent experiments show that sequential lineups may not be superior, and may actually be associated with a *higher* rate of false identifications, in five categories: (1) child witnesses; (2) older witnesses; (3) cross-racial identifications; (4) multiple perpetrators; and (5) suspects who do not match the description because of a change in appearance. As a result, experts recommend against using the sequential double-blind in cases involving any of these five circumstances. Memon, A. and Gabbart, F., *Improving the Identification Accuracy of Senior Witnesses: Do Pre-lineup Questions and Sequential Testing Help?* 88 *J. of Applied Psychol.* 341-347 (2003); Memon, A. and Barlett, J., *Effects of Verbalization on Face Recognition in*

*Young and Older Adults*, 16 *Applied Cognitive Psychology*, 635-650 (2002). See also 2001 *Meta-Analysis; Best Practices 2003*. Some experts have advised against adopting a policy change to sequential testing “until we have a full understanding of the conditions under which the sequential-superiority effect may be observed.” Memon, A. and Gabbart, F., *Unraveling the Effects of Sequential Presentation in Culprit-present Lineups*, 17 *Applied Cognitive Psychology* 703-714 (2003).

### **III. THE ILLINOIS LEGISLATION**

On March 9, 2000, then-Governor of Illinois George Ryan appointed the Commission on Capital Punishment “to determine what reforms, if any, would ensure that the Illinois capital punishment system is fair, just and accurate.” Report of the Governor’s Commission on Capital Punishment, April 2002 (Preamble) (“Capital Punishment Report”). In April 2002, the Commission released the Capital Punishment Report with 53 recommendations, including six recommendations applicable to eyewitness identifications taken in homicide cases: (1) the implementation of blind administrators;<sup>8</sup> (2) specific instructions that the perpetrator might not be in the lineup, that the witness is not required to make an identification and that the witness should not assume that administrator knows which person is the suspect;<sup>9</sup> (3) adoption of the

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<sup>8</sup>Recommendation 10 reads: “When practicable, police departments should insure that the person who conducts the lineup or photospread should not be aware of which member of the lineup or photo spread is the suspect.” Capital Punishment Report, p. 32. The Commission recognized that the use of blind administrators “poses special challenges to law enforcement.” *Id.* at p. 33. Still, members in the Minority View remained convinced that the use of blind administrators should be mandatory. *Id.*

<sup>9</sup>Recommendation No. 11

sequential procedure;<sup>10</sup> (4) the fillers should be selected according to the eyewitness's description of the offender, but the suspect should not stand out in the lineup;<sup>11</sup> (5) a clear statement of the eyewitness's confidence should be taken at the time of the identification;<sup>12</sup> and (6) when practicable, the police should videotape the lineup procedures.<sup>13</sup> Capital Punishment Report, pp. 31-40. The specific instructions required under Recommendation No. 11 and the criteria for picking the fillers under Recommendation No. 13 became law effective November 19, 2003. *See* 725 ILCS 5/107A-5.

This Legislature mandated a Pilot Study on the adoption of blind administrators and sequential procedures. 725 ILCS 5/107A-10. This law required a Pilot Study on "the effectiveness of the sequential method for photograph and live lineup procedures," and provided broad protocol for a one-year study involving three Illinois police departments. Although other jurisdictions have considered the sequential, double-blind procedures, and some have adopted these procedures, Illinois is the first state to collect data on these procedures.

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<sup>10</sup>Recommendation 12 states "If the administrator of the lineup or photospread does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member or photograph at a time and makes a decision (that is the perpetrator or that is not the perpetrator) regarding each person before viewing another lineup member or photograph." Capital Punishment Report, p. 34. The Minority View expressed concern that the procedure had not yet been tested or approved by the courts, that the DOJ Guidelines had recommended further study on this issue and that New Jersey, in implementing these procedures, had acknowledged that they may not be suitable in every case. *Id.* at p. 36.

<sup>11</sup>Recommendation No. 13

<sup>12</sup>Recommendation No. 14

<sup>13</sup>Recommendation No. 15

#### **IV. EYEWITNESS IDENTIFICATION INITIATIVES AROUND THE NATION**

##### **A. The United States Department of Justice**

The 1998 NIJ report *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, highlighted the fallibility of mistaken eyewitness testimony presented at trial in the majority of the 28 studied cases. *See* p. 1, *supra*. Following the release of that study, NIJ created the Technical Working Group for Eyewitness Evidence (TWGEYE),<sup>14</sup> a multi-disciplinary group of psychologists, law enforcement officials and lawyers to recommend procedures for law enforcement use of eyewitness evidence. In October 1999, NIJ issued a report, *Eyewitness Identification: A Guide for Law Enforcement* (“NIJ Guide”), setting forth recommended practices for eyewitness identification. The NIJ Guide can be found at [www.ojp.usdoj.gov/nij](http://www.ojp.usdoj.gov/nij).

The NIJ Guide includes sequential procedures, but expressly states that it does not indicate a preference for sequential procedures. NIJ Guide at p. 9. Blind procedures are not included in the NIJ Guide but are identified as a direction for future exploration and field testing. *Id.* The NIJ Guide further recognized that “[a]dvances in social science and technology will, over time, affect procedures used to gather and preserve eyewitness evidence” and specifically suggested that further research be conducted into computer technologies for use in lineup procedures. *Id.* at p. 8.<sup>15</sup>

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<sup>14</sup>TWGEYE was one of a series of Technical Working Groups created to address various issues. For instance, TWGDAM was created to set standards for the use of DNA.

<sup>15</sup> In keeping with the NIJ Guide’s recommendations, TWGEYE developed training materials in 2000 which offers the option of, but does not advocate, the sequential double-blind procedure.

## **B. New Jersey**

In 1999, while the New Jersey criminal justice system was mired in claims of racial discrimination, the case of *New Jersey v. Cromedy*, 727 A.2d 457 (1999), reached the New Jersey Supreme Court. In that case, an African-American male had been convicted of the rape of a white female college student, based solely on her eyewitness identification at a chance encounter on the street eight months after the crime. There was no corroborating evidence. The issue before the state supreme court was whether a special jury instruction should have been given on cross-racial identification, due to the alleged unreliability of such identifications and the lack of corroborating evidence. The New Jersey Supreme Court reversed the conviction and remanded for a new trial, threatening to modify the evidentiary rules to limit the use of eyewitness identifications in the absence of physical corroborating evidence. While the case was being prepared for a retrial, DNA exonerated the defendant.

On April 18, 2001, in response to the threatened restriction of eyewitness identification in the courts, the Office of the Attorney General for the State of New Jersey issued *Attorney General Guidelines for Preparing and Conducting Lineup Identification Procedures* (“New Jersey Guidelines”),<sup>16</sup> a copy of which is attached as Exhibit 1.<sup>17</sup> The New Jersey Guidelines recommended (among other practices) that, when possible, lineups should be conducted by the sequential, double-blind procedure, with the witness being required to make a

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<sup>16</sup>Unlike in Illinois, the New Jersey Attorney General has the authority to direct the local prosecutors and police chiefs to follow certain policies, procedures and guidelines.

<sup>17</sup>All Exhibits referred to herein are contained in a separate Appendix, filed herewith.

decision on each photograph prior to moving to the next photograph.<sup>18</sup> The State Attorney General recognized that “this is a significant change from current practice and will not be possible or practical in every case.” *Id.* Specifically, the State Attorney General cautioned that “[t]he issuance of these Guidelines should in no way be used to imply that identifications made without these procedures are inadmissible or otherwise in error.” *Id.*

New Jersey has not collected data nor conducted an analysis regarding the sequential double-blind procedure, including whether it has produced fewer false identifications than the simultaneous method.<sup>19</sup> In response to requests for such an analysis from law enforcement around the country, the State Attorney General issued a survey in May 2003 to its police and prosecutor agencies, which does not collect actual data but instead asks for estimates and impressions on the implementation of the sequential double-blind procedure. A copy of that survey is attached as Exhibit 2. New Jersey has not yet published the survey results but hopes to do so soon. However, the Office of the New Jersey Attorney General has generously shared with this author some preliminary analysis of law enforcement’s responses to the survey.

Almost 300 law enforcement agencies responded to the survey. The agencies range in

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<sup>18</sup>See specifically, New Jersey Guideline IIB2c. Although the New Jersey Guidelines apply to all identification procedures, as a practical matter, New Jersey law enforcement conducts only photo arrays. (According to the Office of the State Attorney General, most of New Jersey law enforcement agencies do not have the physical facilities to run a live lineup.)

<sup>19</sup>The Office of the Attorney General points out that the State has not experienced any wrongful convictions based upon identifications using the sequential double-blind method. This is not proof, necessarily, that the sequential method produces fewer false identifications than the simultaneous method, because many other facets of law enforcement also have changed since New Jersey adopted the sequential method (including the expanded use of DNA) and because wrongful convictions often are not discovered for years. It also does not address the rate of false identifications of known innocent fillers who are never charged.

size from two person agencies to almost 2000 person departments. The following charts show some of the survey responses from these agencies:

**Table 1.1: Number of Photograph Arrays per Year By New Jersey Agency**

<b>Photo Arrays Per Year</b>	<b>Number of Agencies</b>
500 +	1
251 - 500	4
101 - 250	9
51 - 100	20
25 - 50	28
11 - 24	53
6 - 10	55
1 - 5	99 (1/3 of the respondents)

**Table 1.2: Number Of Responding Agencies Using The Sequential Method:**

<b>In Every Case</b>	<b>In Almost Every Case</b>	<b>Not Using It At All</b>
233 (84%)	10 (4%)	3 %

**Table 1.3: Number Of Responding Agencies Using Blind Administrators:**

<b>In Every Case</b>	<b>In Almost Every Case</b>	<b>In Half the Cases</b>	<b>Never</b>
175 (62%)	43 (15%)	6 %	5 %

The survey reveals a discrepancy between the consistent use of the sequential method (233 agencies) and the consistent use of blind administrators (175 agencies) in New Jersey. Taking into account the next category (“almost all the time”), there still are 243 agencies using the sequential method in every case or almost every case, and 218 agencies using the blind administrator in every case or almost every case. It is unknown whether the drop-off of blind

administrators correlates to the size of the agency, is due to difficulty in finding a blind administrator, is due to resistance to the concept of having a blind administrator, or whether there is some other reason for the drop-off. It also is unknown whether there are different results stemming from those sequential lineups which were not also double-blind. The reason for and the effect of this drop-off is relevant to any assessment of the sequential, double-blind procedures.

The New Jersey experience illustrates that law enforcement can adapt to a new method of lineup procedures. New Jersey, however, does not answer whether the sequential double-blind procedures produce fewer false identifications, whether the procedures work with live lineups or how the practicalities of finding a blind administrator affect the procedures.

### **C. Hennepin County, Minnesota**

In the fall of 2003, the prosecutor's office in Hennepin County, Minnesota initiated a one-year pilot program to examine the sequential, double-blind method of identification procedures for photo arrays in felony investigations. Hennepin County encompasses Minneapolis and its suburban communities, with a total population of approximately 1.1 million. Police departments from four jurisdictions agreed to participate in the pilot program: Minneapolis Police Department's Central Investigation Division, which investigates violent crime (approximate population 380,000); Bloomington (approximate population 86,000); Minnetonka (approximate population 52,000); and New Hope (approximate population 21,000). The Hennepin County prosecutor's office engaged Dr. Nancy Steblay to analyze the data.<sup>20</sup>

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<sup>20</sup>Dr. Steblay is a Professor of Psychology at the University of Augsburg in Minneapolis, who has studied and published extensively in the area of eyewitness identifications. Dr. Steblay also provided input into the Illinois Pilot Program.

The Hennepin County program concluded that the sequential, double-blind method of lineups is superior to the simultaneous method.<sup>21</sup> However, this conclusion must be examined in light of the Hennepin County protocols, which called for a sequential procedure significantly different from that recommended by the experts, and which did not provide for the collection of any simultaneous lineup data to compare with the sequential lineup data.

The Hennepin County protocol contemplated that a witness would view the photographs one at a time, but would not make an identification decision until seeing all of the photographs in the array, rather than making a separate decision on each photograph individually. *See* Hennepin County Attorney's Office Memorandum, dated October 27, 2003, attached as Exhibit 3. This procedure differs from that advocated by the social scientists, in that the social scientists recommend not just showing the photographs sequentially, but requiring an identification decision on each individual photograph before seeing the next one, to avoid any comparison resulting in relative judgement.

According to the Hennepin County prosecutors, this protocol was developed to address the concern that an identification made prior to viewing all the photographs would be considered unreliable in court, because an identification made after viewing only one photograph, or even two or three photographs, would be vulnerable to a court challenge. To prevent this potential problem, the Hennepin County protocol did not instruct police or witnesses that a witness should

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<sup>21</sup>For an analysis of the Hennepin County data, *see* Klobuchar, A., Steblay, N. and Caligiuri, H. (2006), *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, *Cardozo Law School Journal Public Law, Policy and Ethics* (2006)(in press) ("*Cardozo Article*"); Klobuchar, A. and Caligiuri, H., *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 *Wm. Mitchell L. Rev.* 1 (2005).

decide “yes or no” after each photograph. Rather, according to the Hennepin County prosecutors, the protocol contemplates an identification decision only after seeing all of the photographs. *See* Protocol, no. 15, advising what to do in the event that a witness identifies a photograph before looking at all of the photographs.<sup>22</sup> *See also Cardozo Article*, manuscript p. 31, n.135, setting forth the Minnetonka Police Department’s “script,” which did not refer to any identification choice after each individual photograph.

The Hennepin County study also did not collect data on simultaneous lineups for comparison purposes, although that collection is being undertaken subsequent to the study. Instead, the current conclusions are drawn from a comparison to simultaneous lineup data garnered from classroom experiments, as well as limited field data reported from other jurisdictions. *See* n. 21, *supra*. The conclusions must be approached with caution, because they are based at least in part upon inapposite comparisons of field data, which includes identifications of both strangers and suspects known to the witnesses, with classroom data, which includes solely stranger identifications. *Id.*

The Hennepin County pilot program offered analyses of eyewitness identification beyond the sequential, double-blind method, which confirmed the difference between stranger identifications and identifications of an offender previously known to the witness. The analyst

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<sup>22</sup>It has been suggested that the protocol retained absolute judgment because the witnesses did not actually compare the photographs side-by-side. However, research specifically indicates that a witness should make a decision after each photograph to exercise absolute judgement. It also has been suggested that the protocol did not *prevent* a witness from making a decision after a specific photograph, but the Hennepin County prosecutor’s office was clear that the protocols and training called for an identification after all photographs were shown. If there were occasions where, contrary to protocol and training, a witness made a definitive decision after a specific photograph, those cases should be analyzed separately from the cases where the witness made an identification only after viewing all the photographs.

categorized the reports into four groups based upon two factors: the brevity or length of the duration of the interaction and whether the offender was a stranger or someone known or familiar to the witness. Not surprisingly, of the four groups, a crime involving brief interaction with a stranger resulted in the lowest rate of identifications overall, the lowest rate of suspect identifications and the lowest rates of immediate recognition (“jump out”) identifications. *Id.*

In addition, the Hennepin County study demonstrated a correlation between the number of times that the witness needed to review the photographs before making an identification and the rate of known false identifications. The protocol permitted a witness to view the photo array in a sequential order as many times as desired before making an identification, resulting in up to six rounds for some witnesses. An analysis of the 128 reports documenting the number of times that a witness reviewed the photographs before making an identification<sup>23</sup> showed that the more times a witness viewed the photo array before making a decision, the more likely the result was a known false (filler) identification.<sup>24</sup>

The Hennepin County study also demonstrated an overall lower rate of known false identifications, i.e., filler choices, than exhibited in the classroom experiments. The analyst on the Hennepin County pilot program concluded that in real life, the data suggests “increased protection for innocent suspects.” *See Cardozo Article* (manuscript at p. 25).

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<sup>23</sup>The Hennepin County study collected 280 lineups total (138 from Minneapolis, 86 from Bloomington, 30 from Minnetonka and 26 from New Hope), involving 206 eyewitnesses. However, the police lineup reports did not capture consistent information and, therefore, some of the conclusions are based on subsets of the data.

<sup>24</sup>Research suggests that prolonged viewing in the simultaneous lineup setting also is more likely to lead to a false identification. *See Eyewitness Testimony, supra.*

#### **D. Additional Jurisdictions**

A number of other jurisdictions have considered or are considering changes to eyewitness identifications, including adopting instructions and methods of picking fillers similar to those adopted by this body under 725 ILCS 107A. These jurisdictions also are evaluating the sequential double-blind identification procedure. These jurisdictions are conducting their evaluations based upon any or all of the following: reviews of the literature, testimony of those who have written the literature and testimony from New Jersey.<sup>25</sup> In addition to Hawaii, Texas and other jurisdictions where legislation has been introduced on eyewitness identification, the following is a short list of notable developments around the country in this area:

##### ***1. North Carolina***

In November 2002, the Chief Justice of North Carolina commissioned a working group to study the issue of wrongful conviction of the innocent, which became the North Carolina Actual Innocence Commission. In October 2003, the Commission issued recommendations for “Best Practices” on eyewitness identifications. *See* Exhibit 4. In addition to many of the changes already adopted in Illinois (under 725 ILCS 107A), the Commission recommended as “best practices” use of the sequential double-blind identification procedure, in order to “eliminate relative judgment.” These recommendations, which do not have the force of law, were sent to law enforcement in May 2005 for voluntary implementation statewide as of January 1, 2006. According to a member of the Commission, some North Carolina law enforcement agencies already have abandoned, and others plan to abandon, the simultaneous methods of identification procedures *in toto*.

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<sup>25</sup>None of these jurisdictions have collected and analyzed their own field data.

## ***2. Virginia***

DNA exonerations led the Virginia General Assembly to direct the Virginia State Crime Commission to “examine the procedures used in traditional police lineups or photographic review; and...consider the sequential method as a procedure for identifying subjects.” Virginia General Assembly House Joint Resolution 79. The Virginia State Crime Commission has recommended that training for law enforcement be changed “to include only use of sequential method.” *See* Exhibit 5.

## ***3. Washington DC***

In November 2004, the Judiciary Committee of the Council of the District of Columbia held hearings on a proposed law that, among other things, would have adopted the sequential, double-blind method as mandatory. Under the bill, any identification made through a procedure other than a sequential, double-blind lineup would be excluded from evidence. *See* Exhibit 6. The Bill remains pending but the Metropolitan Police Department voluntarily has decided to implement the procedures in one of its districts on an experimental basis.

## ***4. Wisconsin***

In Wisconsin, the Avery Task Force was created to address concerns over wrongful convictions after the DNA exoneration of Steven Avery, who had been convicted of rape based on eyewitness evidence and a hair comparison. The Avery Task Force recommended a number of laws to improve the Wisconsin criminal justice system, many of which already are law in Illinois. With respect to eyewitness identification, The Avery Task Force proposed legislation requiring law enforcement to adopt procedures “designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases” and to “consider model policies and policies

adopted by other jurisdictions.” The legislation also requires law enforcement to consider: “(a) To the extent feasible, having a person who does not know the identity of the suspect administer the eyewitness's viewing of individuals or representations; [and] (b) To the extent feasible, showing individuals or representations sequentially rather than simultaneously to an eyewitness...” The legislation became effective on December 30, 2005. *See* Exhibit 7.

### **5. Boston**

After suffering through a series of DNA exonerations, the Boston Police Department commissioned the Suffolk County Task Force on Eyewitness Evidence. In July 2004, that Task Force recommended that the Boston Police Department adopt, among other things, the sequential double-blind identification procedure. The Boston Police Department amended their internal rules to provide for showing photo arrays and live lineup participants in a sequential manner, and that “[b]ind’ administration procedures should be used whenever possible to eliminate accusations of influencing the witnesses.” *See* Exhibit 8. Training and implementation was completed by the end of 2004.

### **6. New York City**

New York City has taken a different path than the rest of the country. In 2001, a legal aid defense group began seeking court orders in specific cases for law enforcement to employ the sequential, double-blind method of identification for the contemplated live lineups.<sup>26</sup> Most of the courts declined to issue such orders for a variety of reasons. *See, e.g., People v. Martinez*, NYLJ, January 8, 2002 (Sup. Ct. NYC) (noting that simultaneous lineups are constitutional, the

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<sup>26</sup>New York City, like most of Cook County, employs live lineups on a regular basis. The courts in New York City permit identification testimony based only upon a prior corporeal identification; witnesses are not permitted to testify to identifications based upon photo arrays.

court held that its role is to review the identification for due process considerations and not to manage the identification procedure); *Matter of Taylor*, NYLJ, October 4, 2002 (Crim Term Bronx Co.) (the court questioned the applicability of the scientific studies to actual identification procedures, noted controversy within the scientific community on this issue and held that it was not within the authority of the court to decide the issue). Other courts were persuaded by the literature to order the sequential double-blind method. *Matter of Rahim Thomas*, NYLJ, November 15, 2001 (Sup. Ct. Kings Co.).<sup>27</sup> With most courts denying the requests for a sequential, double-blind procedure, the legal defense group has reduced the number of such requests. The New York legislature's law enforcement committee currently is examining information available on this topic, holding round-table discussions on issues associated with changes in eyewitness procedures. Expressing a desire to refrain from being "reactionary and disbanding with due consideration on the topic," the committee is continuing to review the relevant information.

#### ***7. Santa Clara County, California***

The Santa Clara County District Attorney's Office issued a protocol to the law enforcement agencies in its jurisdictions (San Jose being the largest) for sequential, double-blind lineups. According to a Santa Clara Assistant District Attorney, the protocol was not issued in reaction to any eyewitness problem in Santa Clara, but was initiated when he discovered the NIJ Guide on the internet and it led him to consult with one of the professors who served on

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<sup>27</sup>The judge who ordered a sequential lineup in *Matter of Rahim Thomas* subsequently stated that he "has read more about the lineup issue since his ruling and is now unsure whether sequential lineups are superior." *Newsday, Moving to Stop Wrongful Convictions*, Dec. 11, 2002.

TWGEYE. The Santa Clara jurisdictions responding to a telephone survey all conduct only photo arrays, no live lineups. Each responding jurisdiction stated that they find blind administrators within their ranks. Each emphasized that the protocol recommends, but does not require, blind administrators, although no department keeps any statistics on the frequency of the use of blind administrators.

#### ***8. Northhampton, Massachusetts***

Northhampton, Massachusetts, a town of about 30,000 served by 64 officers, had no murders in 2005. A Lieutenant of the Northhampton Police Department sat on TWGEYE and became convinced of the superiority of the sequential, double-blind procedure. As a result, the Northhampton Police Department, which conducts photo arrays only, has used the sequential, double-blind procedure since 2000 and has used it exclusively since 2001. Although it has not eliminated filler choices, the Department prefers the sequential, double-blind method and has encountered no problems using it.

### **V. THE ILLINOIS PILOT PROGRAM**

#### **A. The Program Director and The Program Analysts<sup>28</sup>**

In early 2004, the Illinois State Police, charged with responsibility for the Pilot Program under the statute, appointed this author to be the Program Director for the Illinois Pilot Program. A biographical sketch is included as Exhibit 9.

The Program Director selected Roy Malpass, Professor of Psychology at the University of Texas-El Paso, to be the analyst. Dr. Malpass coauthored the article primarily relied upon both

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<sup>28</sup>Neither the Program Director nor any analyst associated with this Pilot Program received any remuneration for this project. All work on this project was voluntary.

by the Governor's Commission on Capital Punishment in recommending the sequential, double-blind procedures, and by the New Jersey Attorney General in adopting such procedures.<sup>29</sup> Dr. Malpass also was a member of TWGEYE. Dr. Malpass has been qualified in courts as an expert in the area of eyewitness identification and has spoken and written extensively on eyewitness issues. Dr. Malpass's resume is attached as Exhibit 10.

The data also was sent for independent analysis to Professor Ebbe Ebbesen, Professor of Psychology at the University of California San Diego. Dr. Ebbesen also has been qualified in courts as an expert in the area of eyewitness identification and has spoken and written extensively on eyewitness issues. Dr. Ebbesen's resume is attached as Exhibit 11.

As with all scientific study, the integrity of the Pilot Program required that the analyst approach the study without preconceived expectations. Many eyewitness researchers already had committed to the superiority of the sequential double-blind method, thereby demonstrating biased expectations in the outcome of the Pilot Program. The analyst selected for the Pilot Program had neither committed to nor ruled out the sequential double-blind method as a matter of policy but, like the NIJ Guide, advocated the further research and analysis provided by the Pilot Program. This Report is based upon Dr. Malpass's analysis, although Dr. Ebbesen independently reached the same conclusions.<sup>30</sup>

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<sup>29</sup>Wells, G., Malpass, R., et. al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Human Behav. 603 (1998)(“1998 Recommendations”).

<sup>30</sup>There was some concern expressed that Dr. Ebbesen, a “prosecution expert” was reviewing the data. The issue addressed by the Pilot Program, however, could not be characterized as a prosecution or defense issue, but whether the sequential procedures lead to more reliable eyewitness identifications. Presumably, all involved in the criminal justice system advocate more reliable eyewitness identifications. Nevertheless, in light of the expressed concern, it is worth noting both that Dr. Malpass, the primary analyst, is widely regarded as a

## **B. The Participating Jurisdictions**

The Law required that three jurisdictions of differing populations participate in the Pilot Program: a jurisdiction with a population in excess of 500,000, a jurisdiction with a population between 100,000 and 500,000, and a jurisdiction with a population of less than 100,000. The only jurisdiction in the State of Illinois with a population in excess of 500,000 is Chicago. The other two participants, chosen by the Illinois State Police, were Joliet and Evanston. All three jurisdictions select fillers for photo arrays based upon a computer program. Chicago and Evanston conduct live lineups; Joliet conducts only photo arrays.<sup>31</sup>

### ***1. Chicago***

Chicago is the largest city in Illinois, with a population exceeding 3,000,000. The Chicago Police Department has approximately 13,500 sworn officers. During the time of the Pilot Program, 892 of these officers were detectives. During the time of the Pilot Program, Chicago had implemented a number of aggressive anti-violence measures which had reduced the murder rate by an unprecedented 25% in one year, from 599 in 2003 to 448 in 2004, holding steady at 449 in 2005.

### ***2. Joliet***

Joliet, a town with a diverse population of just less than 130,000, is approximately 45 miles southwest of Chicago. Joliet has 282 sworn officers, 49 of whom are investigators. In

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“defense expert,” and that none of the concern was directed toward either analysts’ qualifications as experts in the field.

<sup>31</sup>In assessing the reliability of an eyewitness identification, Illinois courts prefer a live lineup identification over a photographic identification when the suspect is in custody and a live lineup therefore is feasible. *People v. Holiday*, 47 Ill.2d 300, 307, 265 N.E2d 634, 637 (1970).

Joliet, there were nine homicides in 2004 and 13 homicides in 2005. Joliet had 189 aggravated batteries in 2004 and 223 in 2005.

### ***3. Evanston***

Evanston, bordering Chicago on the north shore, has a diverse population of just less than 75,000. Evanston has 161 sworn officers, 27 of whom are investigators. Evanston had one murder in 2003, three murders in 2004 and two murders in 2005. Evanston had 148 aggravated batteries/assaults in 2003 and 117 aggravated batteries/assaults in 2004.

## **C. The Program Protocols**

### ***1. Selecting the database***

The jurisdictions were tasked with collecting data on both the sequential, double-blind lineups and, for comparative analysis, simultaneous lineups. Each jurisdiction determined on its own how to designate which cases would use the sequential double-blind procedure and which cases would continue to use simultaneous identification procedures, provided that the designation satisfied three scientific principles. First, the selection had to be random and predetermined, i.e., it could not be at an officer's discretion or within an officer's control. Second, it had to be a system under which the same officers would be conducting both the simultaneous and sequential identification procedures for the data collected, so that to the extent possible, there was some control for officer skills, abilities and practices in comparing the two procedures. Third, it had to be random in terms of crime committed, so that the comparison of simultaneous and sequential procedures was not biased or weighted by any particular type of crime.

Evanston chose to designate cases ending in an odd number as those in which any identification procedure, photograph or live, would be conducted by the sequential double-blind

procedure. Evanston continued to use the simultaneous identification procedures for cases ending in even numbers. Evanston submitted all lineup reports, both odd and even numbers, for analysis.

Joliet took a geographical approach. The Joliet Police Department operationally divides itself into four geographical areas. Joliet decided to use the sequential procedure for all cases occurring in Areas 1 and 2. Joliet continued to use the simultaneous procedure for all cases occurring in Areas 3 and 4. Joliet submitted lineup reports from all four Areas for analysis.

Chicago chose Area 4 Detective Division for the site of its pilot participation. Chicago has five Detective Division areas, with each Area assigned to investigate crimes arising in five of the 25 geographic patrol districts. Area 4 Detective Division is located on the west side of Chicago and includes districts which generate a large caseload for the Area 4 detectives. One of the considerations in favor of picking Area 4 as the site of participation was the physical layout of the Area, which provided three rooms in close proximity necessary to conduct live sequential lineups without compromising witness integrity or officer safety: one for the witness to view the lineup through a window or one-way mirror, a second for a lineup participant to be displayed and, for the sequential procedure, a third room where lineup participants could be placed until it was their turn to appear. Area 4 encompasses the 11<sup>th</sup> District, which historically has been the busiest district in Area 4. Chicago decided to use the sequential procedures for all crimes arising in District 011, and collect data for comparison purposes from the simultaneous procedures used for the remainder of Area 4, so that all data were generated by the same group of detectives in the same Area.

## *2. Blind Administrators*

Like most law enforcement, the participating jurisdictions had raised concerns about where to find blind administrators. In fact, the challenge of the protocol was ensuring that blind administrators were available to conduct the sequential identification procedures.

When law enforcement first raised concerns over finding blind administrators in response to the Capital Punishment Report's recommendation of the double-blind procedure, some scientists suggested that it would be easy to use officers from neighboring jurisdictions as blind administrators. Prior to setting the protocol for the Pilot Program, police departments neighboring the three participating jurisdictions were surveyed about providing blind administrators to the participating jurisdictions. Each neighboring police department expressed a desire to help, but could not commit to send personnel on any regular basis. Each neighboring police department cited its own crime, manpower and budgetary problems, raising concerns that such a commitment could leave them short on personnel in their own jurisdictions.

Other sources suggested using civilian employees to act as blind administrators, but the experts, law enforcement and prosecutors all agreed that civilians had neither the experience to conduct lineups nor the credibility to testify in court about police matters. Presumably, if administering a lineup is important to preserve witness identification, then it is important to have trained, experienced sworn law enforcement conducting the identification procedures.<sup>32</sup>

Other suggestions included designating patrol officers to act as blind administrators. This option was not feasible both because the training of detectives in the area of eyewitness

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<sup>32</sup>Moreover, it is a consideration for law enforcement management that the police unions object to civilians performing the work of members of the represented bargaining units.

identification far exceeds the training provided to patrol officers and also because effective crime control required that patrol officers be on the street as much as possible. Adding lineup administration to the beat officers' duties would adversely affect policing in the neighborhoods. The Departments ruled out the use of command staff as blind administrators, due to the necessity of testifying; the command staff's other duties would not permit them to testify on any regular basis regarding lineups.

Some also advocated "professional lineup administrators," creating a new job for persons specifically trained in identification procedures whose duties would be to administer photo arrays and lineups. The jurisdictions rejected this option due to budgetary constraints, noting that if they could hire additional employees, they would use those funds to hire additional sworn police officers to work the streets.

In the end, the participants agreed that, at least for the limited selection of sequential lineups contemplated for the Pilot Program, they would have to look within the ranks of their trained investigators to find blind administrators. Given the protocols narrowing the number of cases utilizing blind administrators and the limited duration of the Pilot Program, the jurisdictions agreed that stretching their resources for a year of limited data collection was feasible. However, the jurisdictions noted that a more efficient solution would be required if, in the future, every identification procedure required a blind administrator.

Joliet and Evanston looked within their investigators for blind administrators, such as investigators assigned to other areas of crime, e.g., juvenile crimes. Due to the volume of identification procedures anticipated at Area 4, the Chicago Police Department also designated detectives from Areas 3 and 5, geographically contiguous to Area 4, to serve as blind

administrators when required. Although this protocol would be chaotic if the requirement of a blind administrator went citywide in Chicago, the Chicago Police agreed that they could tolerate the disruption during the limited Pilot Program.

### ***3. What to Measure***

The purpose of the Pilot Program was to measure both the effectiveness and the practicality of conducting the sequential double-blind identification procedure. In other words, the goal of the Pilot Program was to answer both the questions “*should we do it?*” and “*can we do it?*”

#### *(a) Should we do it?*

The main goal of the Pilot Program was to determine whether the sequential, double-blind process was superior to the simultaneous method, i.e., whether, as the research science predicted, it would result in fewer known false identifications than did the simultaneous photo arrays and live lineups. In order to answer this question, data from both sequential double-blind identification procedures and simultaneous procedures had to be compared, with the latter group being referred to as “the control group” of lineups. Although it is impossible to control for all factors in field studies, the data from both categories was generated by the same groups of detectives over the same time period, in order to account for human factors.<sup>33</sup> Thus, the simultaneous data presented a useful field control group.

Once the two groups were defined, it was necessary to determine measures of comparison for purposes of analysis. To compare the rate of identification errors between the two methods,

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<sup>33</sup>Joliet presents less of a mix, because during the pilot, some of Joliet’s investigators worked only in an Area using one of the procedures. Nevertheless, Joliet’s data compares the investigators from the same department during the same time period.

the measure accepted was “known false identifications” i.e., filler identifications. Although filler identifications do not lead to criminal charges in the real world, such identifications represent known errors which provide a useful measure for assessment of eyewitness identification procedures. *See Eyewitness Testimony*, pp. 290-91, stating that although identification of a suspect in actual cases may not be definitively accurate, “identification of a filler is a known error in actual cases and the rate at which these known errors occur can be informative.”

In addition to the rate of filler identifications, the analysis also would compare the number of suspect identifications between sequential and simultaneous methods. In any field data, the erroneous suspect identifications are the significant errors, in that these can lead to false convictions. Although probable cause and corroborating evidence present safeguards against erroneous suspect identifications in the real world, the actual rate of suspect identification errors remains unknown.<sup>34</sup> It is important to recognize this shortcoming in this, and any, field study, and balance it against the advantages of field studies giving a real world scenario; the classroom studies have the advantage of all errors being known, but lack the advantage of capturing real world factors. Presuming unknown errors in the suspect identifications applies to both the simultaneous and sequential procedures; the rate of these unknown errors for either procedure is

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<sup>34</sup>The Hennepin County Study similarly used identifications of fillers and suspects as measures, respectively, of false and accurate identifications. *See Cardozo Article*. Although a suspect identification may be a false identification, it was impractical to determine if each suspect identification was confirmed by conclusive forensics. This inability to prove the accuracy of every suspect identification is, of course, inherent in *all* field work. Nevertheless, inculpatory evidence existed for many suspects before being put into a lineup, such as suspects caught in the act, suspects caught in the victim’s car or with the victim’s property, suspects apprehended through license plates taken at the scene and suspects brought in due to fingerprints being processed from the scene. Notably, no suspect identification in the Pilot Program was repudiated by forensics.

speculation, although the research studies, where all accurate identifications are known, show a 15% higher rate of known accurate identifications in simultaneous procedures over sequential procedures. *See 2001 Meta-Analysis.* Therefore, accepting that a suspect identification in either procedure may be an erroneous identification, a *comparison* of suspect picks between the two methods, with the 15% research difference as a barometer, still indicates whether the lineup procedure affects the rate of accurate identifications.

The analysis also would compare the rate of “no picks” in the sequential double blind procedures with the rate of “no picks” in the simultaneous lineups. This comparison would indicate whether witnesses in simultaneous procedures in fact used relative judgement to pick the person most closely resembling the suspect or instead understood that “no choice” was an option.

In addition, the analysis would measure the number of sequential procedures where the witness required a second viewing before making an identification. A witness who held off on making an identification until the second viewing, having then seen all of the photographs or live lineup participants, defeated the purpose of using absolute judgement. If a high number of witnesses required a second viewing, then the sequential method might not be the most practical method to address the perceived issue of “relative judgement” in real life.

Finally, given the value of this real-life data, the analysis would include any other valuable correlations relating to eyewitness identifications, such as patterns in the lapse of time between the crime and the identification, duration of the crime, stranger crime versus prior knowledge of or familiarity with the offender, type of crime, cross-racial identifications, the age of the witness and the effect of multiple offenders.

*(b) Can we do it?*

In addition to studying wither the sequential double-blind method of identification proved superior to the simultaneous method by reducing the number of known false identifications, the Pilot Program presented an opportunity to study the practical aspects of implementation.

Measuring the practicalities is not an exact science. Taking a lead from New Jersey, the Illinois Pilot Program developed a survey to be completed by all investigators who participated in the program as either an investigator or an administrator. To ensure against the possibility of bias in the survey, Professors Malpass, Ebbesen, Wells and Steblay all reviewed the survey. A copy of the survey is Exhibit 12. The surveys were distributed at the close of the collection of data, so as to measure the officers' overall view of the program. In addition, the lineup reports and oral reviews of the program provided invaluable insight into the overall assessment of the sequential double-blind procedures.

***4. Actual Lineup Protocols and Procedures***

The Program protocols and forms, like the surveys, were reviewed and approved by Professors Malpass, Ebbesen, Wells and Steblay. Due to the literature's warnings that the sequential method could be more suggestive than the simultaneous method if not conducted by a blind administrator, the Illinois Pilot Program protocol required that every sequential lineup be conducted by a blind administrator, no exceptions. If a blind administrator could not be found or was unavailable for other reasons, then that would be documented and the identification procedure would be conducted by the simultaneous method.

Illinois law requires law enforcement to provide the following instructions in writing to a witness regarding all identification procedures, and have the witness sign that he/she received

these instructions:

1. I understand that the offender may or may not be in the lineup;
2. I understand that I am not required to make an identification;
3. I do not assume that the lineup administrator knows who is the suspect

725 ILCS 5/107A. For a sample form, *see* Chicago Police Department's "Lineup/Photospread Advisory Form," Exhibit 13.

For the Illinois Pilot Program, the protocol required that the administrator of the identification procedure (photo array or live lineup) provide the witness with the following *additional* instructions:

1. I am going to show you each photograph/person separately. Upon seeing each photograph or person, you will tell me if it is or is not the offender before I can show you the next photograph/person.
2. If you make an identification, I am required to continue showing you all the photographs/people in the lineup.
3. If you would like to view a photograph/lineup participant again, I can do that, but I am required to show you all of the photographs/lineup participants again in the same order.

Under the protocol, the witness was limited to two viewings of the sequential lineup, due to the concern that more than two viewings would adversely reflect on the reliability of the identification, just as an extended time for making an identification in a simultaneous procedure reflects adversely upon the reliability of the identification.<sup>35</sup> Thus, after two viewings without an identification, the sequential procedure would be terminated and reported as a "no identification." The protocol also required that all photographs or lineup members be shown, regardless of an early identification.

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<sup>35</sup>Both classroom research and the Hennepin County data support this view. *See* n. 24, *supra* and *Cardozo Article*. Exceptions occur, such as a witness who is reluctant due to fear, gang loyalty or the desire for "street justice" instead of prosecution.

The protocol further provided that for a sequential identification procedure, just as in a simultaneous procedure, each photograph would be assigned a number and, in a live lineup, each participant would carry a numbered placard. The blind administrator would then conduct the identification procedure showing the photograph or lineup participant one at a time. The protocol expressly required the witness to make an identification decision about each photograph or lineup participant before viewing the next photograph or lineup participant. The blind administrator would record one of the following options: 1) that an identification was made, the number of the photograph or lineup participant identified and any comments made by the witness upon identification; or 2) that the witness was unable to make an identification; or 3) that the witness excluded all the persons depicted in the photographs or lineup as being the offender. These latter two options were documented separately due to the third being potential exculpatory material.<sup>36</sup>

### ***5. Data Collection Forms***

The Pilot Program instituted standardized forms for the jurisdictions to ensure that the detectives consistently captured certain information. The first form was the “Investigator’s Lineup Report” form, used for every lineup, sequential and simultaneous, which was part of the program.<sup>37</sup> An example of the Investigator’s Lineup form is Exhibit 14. This form recorded the date, the case number, the witness’s name, the type of crime, the district where the crime occurred and whether the identification procedure was a photo spread or a physical lineup. The

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<sup>36</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963), requiring that any actual or potential exculpatory information be disclosed to the defendant.

<sup>37</sup>For Joliet and Evanston, this was every identification procedure. For Chicago, this was every identification procedure in Detective Division Area 4.

form asked whether the sequential procedure was employed and, if so, the detective had to identify the blind administrator. If the sequential procedure was not employed, the detective had to document why it was not employed, the simplest reason being that it was not a case requiring a sequential procedure under the protocol.<sup>38</sup>

The form required that the detective record the suspect's name and position in the array or lineup. The form further required that the detective capture the witness's age and race, the suspect's age and race, whether the crime involved multiple offenders and, if known, whether the suspect had changed his appearance since the crime. This data was captured to track the rate of known false identifications in those five circumstances where research has warned that sequential procedures may produce a higher rate of false identifications.<sup>39</sup>

The second form instituted under the Pilot Program was the "Sequential Administrator's Form," to be filled out by the blind administrator in a sequential procedure. An example of the Sequential Administrator's Form is Exhibit 15. This form required that the blind administrator record the date, case name and the witness's name. Then, the administrator indicated for the first viewing one of the three options set forth in the protocol: (1) the witness made an identification and, if so, the *number* associated with the photograph or person identified; or (2) the witness could not make any identification; or (3) the witness excluded all lineup participants as the offender. If the administrator checked that an identification was made and filled in a position

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<sup>38</sup>For example, a Chicago Area 4 detective could document that the case was a District 010 crime, and therefore no sequential was required, an Evanston investigator could document "even numbered case" and a Joliet investigator could document "Area 3 [or 4] case."

<sup>39</sup>The forms also requested the time required to find a blind administrator, but recording of this element proved too inconsistent for an analysis.

number, it was not until the lineup was completed and the administrator gave the form to the investigator that the investigator could compare it with the suspect's assigned position number on the Investigator's Form and know if the witness picked the suspect. The Administrator's form also had a field for documenting at the time of the identification the certainty of the witness in making an identification, including "any words used by the witness in making an identification." The Administrator's form required the same documentation for any second viewing. The form also captured any request for a third viewing, which under the protocol would be refused.

#### **D. Pilot Program Training**

The Program Director conducted 17 training sessions for law enforcement for the Pilot Program, training approximately 476 officers (49 at Joliet) (27 at Evanston) (400 at Chicago). In addition to the police training, because both Chicago and Evanston are located in Cook County, the Program Director conducted a training session for the Office of the States Attorney in Cook County and another for the Office of the Public Defender in Cook County. Joliet is located in Will County, and prosecutors from Will County attended the police training in Joliet. The Office of the Public Defender in Will County, the Chief Judge of the Criminal Division of the Circuit Court in Cook County and the Chief Judge of the Circuit Court in Will County also were advised of the Pilot Program.

#### **E. Data Collection Procedures**

On October 1, 2004, the Chicago Police Department, Area 4 Detective Division, commenced data collection for the Pilot Program. The Chicago Police Department continued to collect the data through September 30, 2005. On November 1, 2004, the Evanston Police Department commenced data collection for the Pilot Program, which continued through October

31, 2005. On November 18, 2004, the Joliet Police Department commenced data collection for the Pilot Program, continuing through November 17, 2005.

During the Pilot Program, the participating jurisdictions forwarded their lineup reports for the Pilot Program to the Program Director (both simultaneous and sequential) roughly on a weekly basis. The Program Director reviewed and logged each lineup report and forwarded the reports to the Program Analysts in seven “data drops,” starting in January 2005 and continuing through the end of the program.

## **VI. DATA ANALYSIS OF THE ILLINOIS LINEUPS**<sup>40</sup>

### **A. Data Tables**

Dr. Malpass’s coding reduced the number of reports in his analysis to 616. *See* Dr. Malpass’s Coding and Methodology, Exhibit 16. *See also* Dr. Malpass’s Narrative and Analysis, Exhibit 17, Table 1, “Identification Procedure Frequencies by Jurisdiction.” The Pilot Program involved identification procedures from a variety of crimes, from homicide to petty theft. *See* Exhibit 17, Table 2 for crime frequencies associated with the Illinois Pilot Program data. Dr. Malpass conducted a hiLog statistical analyses of the data, but the statistical analysis is not included in this Report due to the complexity of that analysis, except that non-statistical differences are noted where appropriate in this Report. The hiLog statistical analysis is available directly from Dr. Malpass.

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<sup>40</sup>This data represents the analysis by Dr. Malpass. Dr. Malpass’s methodology is set forth in Exhibit 16. Dr. Malpass’s analysis of the data, both in narrative form and tables, is set forth in Exhibit 17. Dr. Ebbesen independently came to the same conclusions regarding the comparative analysis between sequential and simultaneous methods. *See* Exhibit 18. Any differences in actual numbers between the sets of data were the result of coding differences between the analysts but did not affect the conclusions.

The analysis showed that 71 of the identification procedures involved witnesses who previously knew the offender. *See* Exhibit 17, Table 6, Effect of Familiarity With Suspect on Identification Rates. Of the 71 witnesses who knew the offender, 95.2% identified the offender, 4.2% made no identification and not one identified a filler. Due to the fact that these witnesses knew the offender, these 71 lineups were removed from the remaining analysis so as not to cross-impact the effect of the sequential and simultaneous procedures with the fact that these witnesses knew the offender.

After removing these 71 witnesses from the data, Dr. Malpass compared the effects of the simultaneous and sequential presentations on the identification rates. Table 3.a (of Exhibit 17) sets forth the following data:

**Table 3.a. Effects of Simultaneous v. Sequential Presentation on Identification Rates.**

	Total	
	Simultaneous	Sequential
<b><u>n=548</u></b>	<b>(319)</b>	<b>(229)</b>
<b>Suspect</b>		
<b>ID</b>	<b>59.9</b>	<b>45</b>
<b>Filler ID</b>	<b>2.8</b>	<b>9.2</b>
<b>No ID</b>	<b>37.6</b>	<b>47.2</b>

In Table 3.b, Dr. Malpass broke down the effects of simultaneous and sequential presentations on identification rates by jurisdiction, with Chicago and Evanston showing the same pattern of

fewer suspect identifications and a higher rate of filler identifications in sequential lineups than in simultaneous lineups. Joliet showed statistically the same rate of suspect identifications and the same rate of filler identifications for both simultaneous and sequential lineups.

Dr. Malpass further analyzed the differences in identification rates between those photo arrays shown inside the police station and those shown outside the police station, broken down by both the simultaneous and sequential procedures. *See Exhibit 17, Table 4.* This analysis omitted live lineups, because no live lineups were conducted outside the station. Table 4 shows that both in the police station and outside of the police station, sequential procedures result in a higher rate of filler identifications than simultaneous procedures. However, the rate of filler identifications increased for both simultaneous and sequential procedures conducted outside the station, compared to simultaneous and sequential procedures conducted at the police station. In comparing only the simultaneous procedures conducted in the police station and the simultaneous procedures conducted outside of the police station, the rate of suspect identifications outside the police station was lower than the rate of suspect identifications inside the police station, and the rate of no-picks was higher for simultaneous procedures conducted outside the police station than those conducted in the police station. *See Table 4 of Exhibit 17.*

Dr. Malpass also analyzed the data for the effects of race of both the witness and the lineup members. *See Exhibit 17, Table 5.* For cross-race identifications, the known false identifications were statistically the same in both simultaneous and sequential procedures, with the rate of suspect identifications higher in simultaneous than sequential and the rate of no-picks higher in sequential than simultaneous, just as in the overall identifications. For same-race identifications, the rate of known false identifications was higher in the sequential lineups

(12.6%) than in simultaneous lineups (2.0%). The rate of no picks for the same-race identifications was the same in both simultaneous and sequential lineups. The rate of suspect picks for same-race identifications was higher in the simultaneous procedures than in the sequential procedures.

Dr. Malpass also compared photo procedures to live lineups. For sequential procedures, there was no statistical difference between photo procedures and live lineups. For simultaneous procedures, the live lineups resulted in more suspect identifications and fewer (although not statistically significant) filler identifications, and fewer no-picks, than the simultaneous photo arrays. *See Exhibit 17, Table 7.*

The effects of a second viewing of the sequential presentation is contained in Exhibit 17, Table 8. Dr. Malpass presents in his narrative the specific differences between the first and second viewing. Table 8 shows that those witnesses requesting a second viewing made fewer suspect choices, slightly more filler choices and, mostly, more no-picks than those witnesses who made their final decision after one viewing.

Multiple offender crimes were nearly 40% more frequent than single offender crimes. Exhibit 17, Table 13. Multiple offender crimes led to a substantial difference between simultaneous and sequential procedures not observed for single-offender crimes. Simultaneous lineups viewed by witnesses to multiple offender crimes resulted in more suspect identifications (71.4%) than witnesses to multiple crimes who viewed sequential lineups (40.2%). The rate of filler identifications also increased for witnesses to multiple offender crimes shown sequential lineups (11.1%) than for such witnesses shown simultaneous lineups (3%). Witnesses to

multiple crimes also were more likely to make a no-identification when shown a sequential lineup (50.4%) than when shown a simultaneous lineup (26.3%).

Dr. Malpass analyzed the effects of the number of suspects appearing in the identification procedures. *See* Exhibit 17, Table 9. For simultaneous lineups, the patterns of identification did not differ whether there were 1 or 2 suspects in the lineup. In contrast, sequential lineups containing two suspects resulted in fewer suspect identifications, increased filler identifications and increased no-identifications, compared with both 1-suspect sequential identifications and simultaneous lineups with 1 or 2 suspects.

Overall, there were no significant differences between identifications by victims and those by bystanders. Exhibit 17, Table 10. In the simultaneous procedures, victims were more likely than bystanders to identify the suspect. No significant differences were observed between victims and bystanders for sequential lineups. Both victims and bystanders were more likely to identify fillers in the sequential procedures than in the simultaneous procedures, in keeping with the overall pattern of identification rates between the two procedures.

The data also showed no overall effect of a delay in the identification process upon identification rates. Exhibit 17, Table 11. However, the overall pattern of differences between simultaneous and sequential lineups occurred at each degree of delay.

The age of the witness did not affect the patterns of identification in simultaneous and sequential procedures. Exhibit 17, Table 12. Identification rates were not affected by whether or not the witness was injured in the crime. Exhibit 17, Table 14. Identification rates were not affected by whether there was violence involved in the crime. Exhibit 17, Table 15. No

differences were found in identification rates based upon the presence or absence of a weapon during the crime. Exhibit 17, Table 16.

## **B. Discussion**

The data and Dr. Malpass's analysis stand on its own. However, two areas of analysis have generated discussion and therefore are further addressed here.

### *1. Overall low rates of known false identifications*

The Illinois field data documents a rate of known false identifications in traditional, i.e., simultaneous lineups which is lower than the social scientists had predicted. Illinois field data shows a known false identification rate of 2.8% for simultaneous lineups, compared with predicted false identification rates of 20%-25%.<sup>41</sup> Illinois field data is not an anomaly in this respect. Hennepin County data showed a known false identification rate in sequential lineups of 8%, and specifically noted that the rate of known false identifications was significantly lower than the 20%-25% expected. *See pp. 17-18, supra. See also Woolnough & MacLeod (2001), Watching The Birdie Watching You: Eyewitness Memory for Actions Using CCTV Recording Of Actual Crimes, 15 J. of Applied Cognitive Psychol. 395-411 (showing a 96% accuracy rate in*

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<sup>41</sup>*See Meta-Analysis 2001, summarizing classroom experiments showing a 51% filler choice rate in perpetrator-absent simultaneous lineups. See also Behrman, B. & Davey, S., Eyewitness Identification in Actual Criminal Cases: An Archival Analysis, 25 Law & Hum. Behav. 475, 482 (2001)(a retrospective review of 58 simultaneous live lineups in California reported a 50% suspect identification rate, a 24% filler choice rate and 26% no choice rate); Valentine, T. & Heaton, P., An Evaluation of Fairness of Police Lineups and Video Identifications, 13 Applied Cognitive Psychol. 59 (1999) (data from England of 640 witnesses viewing 314 simultaneous live lineups, presumably adhering to the English Code requirement of a blind administrator, showed a 44% suspect identification rate, a 19% filler identification rate and a 37% no identification rate). At least one researcher believes that these filler rates are "conservative," hypothesizing that some filler identifications are recorded as no identification. See Wells, G., Frequently Asked Questions (internet paper) (captured 12/16/2//5).*

collecting a limited pool of incidents of criminal assaults in England captured on closed circuit video and comparing them to witness identification statements in police reports).

An analysis of simultaneous live lineups conducted during a five-year period in Queens, New York (“Queens data”) shows a filler identification rate in the field ranging from an annual low of .58% to an annual high of 5.62%. The Queens District Attorneys Office, which requires that an Assistant District Attorney be present for all live lineups, collected the following data on the trial division lineups, which accounts for about 90%-95% of all live lineups conducted in Queens:

**QUEENS (NEW YORK) LINEUP DATA**

<b>Year</b>	<b>Total Lineups</b>	<b>Suspect Identifications</b>	<b>No Identifications</b>	<b>Filler Picks</b>
2005	599	318 (53.09%)	250 (41.74%)	31 (5.17%)
2004	690	368 (53.33%)	292 (42.32%)	30 (4.35%)
2003	95	44 (46.31%)	46 (46.42%)	5 (5.62%)
2002	691	367 (53.11%)	320 (46.31%)	4 (.58%)
2001	602	340 (56.48%)	253 (42.08%)	9 (1.49%)

Due to the standard for charging, the Queens data recorded an identification only if it was based upon a high level of confidence, so that all tentative identifications were recorded as “no identification.”

The actual reason for the low known false identification rate is unknown. Any attempt to explain it is speculative. There is some evidence that proper instructions, like those now mandated by law in Illinois and also given in other jurisdictions, reduce the overall false identification rate to the same level achieved by the sequential, double-blind classroom

experiments.<sup>42</sup> In addition, the classroom experiments may have created an expectation of higher false identification rates in real life because the classroom experiments all involve stranger identifications in staged crimes of short duration, which the data shows are the least likely to produce an accurate identification. The classroom experiments also use a 50% “target absent” rate, meaning that the actual offender is absent in half the lineups that these experiments present, a rate equal to “chance.” The high number of false identifications recorded in these classroom experiments are associated with the high rate – 50% – of target absent lineups. *See 2001 Meta-Analysis*. In real life, probable cause and other safeguards presumably should lead to a much lower rate of target absent lineups.<sup>43</sup> Moreover, the lower false identification rates may be attributable in part to the differences between the effects of staged or video crimes and real crimes, as well as the differences between students participating in classroom experiments and actual witnesses’ experience, memory and understanding of the seriousness of the consequences of an identification.<sup>44</sup>

Some researchers have argued that the lower false identification rates in real life are attributable to poor fillers, making the suspect an easy pick in almost every lineup. There is no

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<sup>42</sup>*See* n. 7, *supra*. *See also* Meissner, C., Tredoux, C., Parker, C., and MacLin, O. (2005), *Eyewitness decisions in simultaneous and sequential lineups: A dual-process signal detection theory analysis*, 33 *Memory and Cognition* 783-792 (certain instructions equalized the false identification rates in simultaneous and sequential lineups).

<sup>43</sup>As one scientist privately stated, “if you had a 50% target absent rate in real life, you would be out of business.” The real world ratio of “target absent” lineups to target present lineups “is one of the most powerful variables effecting the chances of misidentification.” Wells & Olson, *supra*, *Eyewitness Identification*.

<sup>44</sup>More than one witness in the Pilot Program predicated an identification on the condition that “it was not strong enough for an arrest.”

scientific basis for this claim and, in fact, some law enforcement officials consider it more common that fillers, at least in photo arrays, too closely resemble the suspect.<sup>45</sup> Although there is always room for improvement in picking fillers, this view appears to disregard both the computer method employed by law enforcement for picking photo array fillers and the safeguards placed upon construction of the lineup by the courts. Moreover, research currently underway in Hennepin County refutes the view that fillers are too poor to represent a real choice.

Researchers also speculate that a low filler rate is due to police leading the witness in the direction of the suspect. There is no scientific basis for this speculation. Moreover, it is just as easy to speculate that if this were the cause of the low filler rate, the rate of “no identifications” would be lower and the “suspect identifications” would be higher. Instead, the overall difference between suspect identifications in simultaneous lineups and suspect identifications in sequential lineups is about 15%, which is what the classroom experiments also show. Perhaps future studies will examine the actual reasons for the low filler rate in the field.

## *2. Simultaneous and Sequential Lineups: Comparing the Rates of Filler Identifications*

Quite surprisingly, the overall rate of filler identifications in the Pilot Program were *higher* using the sequential, double-blind method than using the simultaneous method.<sup>46</sup> Both

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<sup>45</sup>As Lieutenant Ken Patenaude of Northhampton, Massachusetts explained, detectives often use fillers so closely resembling the suspect that “even the suspect’s mother couldn’t tell them apart.” Lt. Patenaude further explained that this leads to witnesses only being able to narrow the identification to two possible offenders, even with the use of the sequential procedure.

<sup>46</sup>Although this result is contrary to the classroom results, we do not yet know if it is contrary to the Hennepin County data. Hennepin County collected the false identification rates for only the sequential procedures, but has not yet compared them to the false identification rates for simultaneous field data. It is entirely possible that when this is done, the simultaneous lineups will yield even lower false identification rates than did the sequential lineups, as in Illinois. In addition, of course, the Hennepin County sequential data represents not the sequential

Evanston and Chicago recorded a statistically higher rate of known false identifications using the sequential, double-blind method than using the simultaneous method. Joliet did not show a statistically significant difference for known false identifications between the two methods, although the actual number of filler identifications was slightly higher in the lineups using the simultaneous method. The Illinois data also showed an overall loss of suspect identifications using the sequential, double-blind method, mirroring the same 15% loss in known accurate identifications found in the scientific research experiments. *See 2001 Meta-Analysis.*

In preparation for this Report, the analyst for the Hennepin County program compared sequential data from that program (the only data available at this time) against comparable Illinois sequential data. Removing witnesses who knew the offender from the analysis, the Hennepin County sequential lineup data is similar to the sequential lineup data in Illinois: 45.1% suspect identifications, 10.3% filler identifications and 44.2% no choice. These numbers, compared to the Illinois field data and the Queens field data, show a lower number of suspect identifications and a higher number of filler identifications using the sequential method.

It has been suggested that we should be willing to accept this higher rate of known errors associated with the sequential, double-blind procedures because those procedures guard against police misconduct. The scientific premise of advocating the superiority of sequential, double-blind procedures is a lower rate of false identifications; to now claim that a higher rate of known

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lineups advocated by the research, but a third type of lineup procedure which also should be studied further.

errors in the sequential process is acceptable to combat police misconduct is an entirely new justification, one based upon neither science nor any other evidence.<sup>47</sup>

The Illinois data shows that the sequential, double-blind method as proposed by the scientific research did not prove to be a superior lineup procedure when compared to the simultaneous method as currently employed by law enforcement and, in fact, proved to be inferior under the measure of known errors. “A good lineup task is one that minimizes the likelihood that an innocent suspect will be [falsely] identified and maximizes the likelihood that a guilty suspect will be [accurately] identified.” Wells, Rydell, S. Seelau, E., *The Selection of Distractors for Eyewitness Lineups*, 78 J. of Applied Psychol. 835 (1993).<sup>48</sup>

## VII. IMPLEMENTATION ANALYSIS

### A. The Survey Responses

The program collected a total of 113 surveys from the participating jurisdictions as follows: Chicago - 68; Joliet - 25; and Evanston - 20. A copy of the survey and a tabulation of

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<sup>47</sup>This claim first seeks to minimize the rates of filler identifications in the sequential lineups by adopting the lower rate shown for 1-suspect sequential lineups in Table 9. In fact, there are no statistical differences between the identification rates of simultaneous lineups in Table 3a and the 1-suspect simultaneous lineups in Table 9, or between the identification rates of sequential lineups in Table 3a and the identification rates of 1-suspect sequential lineups in Table 9. Nor are the relative positions of the two procedures statistically different. The statistical differences emerge in the 2-person suspect lineups.

<sup>48</sup>The loss of accurate identifications has been a source of debate over whether sequential lineups should be considered superior, with some asking whether we simply are losing identifications in general and others citing the proposition put most artfully by Benjamin Franklin, in a letter to Benjamin Vaughn, March 14, 1795, *The Writings of Benjamin Franklin*, ed. Albert H. Smyth, vol. 9, p. 293 (1906): “That it is better 100 guilty Persons should escape than that one Person should suffer, is a maxim that has been long and generally approved.” Given that the data here shows both a higher rate of filler identifications and a lower rate of suspect identifications, this Report does not address that debate.

the responses is contained in Exhibit 19. The discussion below provides certain highlights but the tabulation is intended as the accurate summary of the responses.

### *1. The Overall View*

A majority of the respondents characterized the sequential, double-blind procedure for photo arrays as “easy.” The respondents indicated that the sequential, double-blind method for live lineups was more difficult.

### *2. The Sequential Presentation*

When asked about presenting photos in a sequential manner without regard to the blind administrator, the majority of respondents characterized the process as “easy” or “very easy.” Only 10.7% characterized it as “difficult” and only 3.6% characterized it as “very difficult.” When asked about conducting a live lineup in a sequential manner without regard to the blind administrator, the respondents indicated an increased level of difficulty.

### *3. Blind Administrator*

When asked to characterize “finding a blind administrator for a photo array,” the majority characterized it as “difficult” to “very difficult.” Just under 20% characterized it as “easy,” and less than 1% characterized it as “very easy.” When asked to characterize “finding a blind administrator for a live lineup, most respondents characterized this task as “difficult” to “very difficult.” Just over 10% responded that it was “easy” and not one respondent characterized it as “very easy.”

### *4. Effect on ability to perform job*

Not one responding officer perceived that the sequential, double-blind procedure “improved” or “substantially improved” the ability to perform his/her job. The majority felt that

the procedure had no effect on the ability to perform the job, about one-third felt that the procedure interferes with the ability to perform the job and 15% felt that the procedure “substantially interferes” with the ability to perform the job.

*5. Witness Understanding of the Sequential Double-blind Procedure*

Almost half of the respondents perceived that the witnesses appeared to have “no trouble” understanding the sequential, double-blind procedure. Just over 40% observed that the witnesses appeared to have “some trouble” understanding the procedure. Only 8.7% perceived that the witnesses “appeared to have substantial trouble understanding the procedure.”

Forty-five percent of the respondents felt that the witnesses understood the sequential, double-blind and the simultaneous procedures “about equally.” Just over half (52.9%) of the respondents believed that the witnesses had more difficulty understanding the sequential, double-blind procedure than the simultaneous lineup procedure. Only 1.9% felt that the witnesses had an easier time understanding the sequential, double-blind method than the simultaneous method.

*6. Officer Views on Sequential Double-Blind Procedure*

An overwhelming majority of the responding officers (75%) preferred the simultaneous procedure over the sequential, double-blind procedure. Still, 23% had no preference for one method over the other. Only 1.9% preferred the sequential, double-blind method over simultaneous lineups.

One-third of the respondents stated that their opinion of the sequential, double-blind procedure changed for the worse as the Pilot Program progressed. Only 4.6% had a better view of the sequential, double-blind procedure as the Pilot Program progressed. The majority (62.4%) had no change in their opinion through the course of the Pilot Program.

The majority of the respondents (almost 75%) felt that there was no difference in the reliability of identifications obtained between the sequential, double-blind procedure and the simultaneous procedure. In fact, officers repeatedly expressed the perception during the course of the Pilot Program was that “if a witness can identify an offender, the witness can do it under either procedure.” Just over 20% felt that identifications obtained through the sequential, double-blind procedure were less reliable than those obtained through the simultaneous lineup procedures. Only 4.9% perceived the identifications obtained through the sequential, double-blind procedure as more reliable than those obtained through the simultaneous methods.

Almost 80% of the respondents indicated that if the sequential, double-blind procedure is optional, they will not use it again. Just over 12% said that they would continue to use the procedure if it was optional and 8.5% said that they “might use it” if it were optional. Of those who would or might use it again, respondents indicated as reasons “if detective impartiality was a concern” “if the offender was known,” and “without blind administrators.”

## **B. Implementation Analysis**

Regardless of the data, it is important to examine the implementation issues associated with the Pilot Program for consideration in future development of improved eyewitness identification procedures. Because the sequential presentation and the use of the blind administrator often presented different challenges, these two elements are discussed separately.

### *1. Implementation of the Sequential Process*

Overall, the officers found the sequential presentation of lineup photographs to be a simple process. The sequential presentation of live lineups with a single suspect prompted minor concerns over manpower and officer safety, due to the need for an a third officer to stay with the

lineup members and also the additional movement of the lineup members, but these concerns proved readily manageable. However, use of the sequential procedure with live lineups involving offenses of multiple offenders proved difficult and confusing to implement and, therefore, had to be suspended mid-way into the program.

In conducting live lineups with multiple offenders, law enforcement occasionally is forced to place more than one offender in the same lineup and correspondingly increase the number of fillers in that lineup, due to a lack of a sufficient number of fillers for two completely separate lineups. For instance, two separate lineups might require a total of ten fillers, five for each lineup, whereas one lineup with two suspects may be reliable with eight fillers.<sup>49</sup> In March 2005, five months into the program, it appeared that adequate fillers were not regularly available for separate lineups and that conducting a sequential lineup with multiple offenders was confusing;<sup>50</sup> therefore, the use of sequential lineups with multiple offender cases was discontinued. The implementation of procedures compatible with multiple offender cases is significant to any policy consideration, given the high number of crimes committed by multiple offenders. *See* Exhibit 17, Table 13.

In addition, there was concern from all parties to the criminal justice system over the how the suspect's position in the sequential procedure affected the identification, an issue that has

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<sup>49</sup>Although the social scientists have raised valid objections to placing two suspects in one lineup, practicalities sometimes dictate otherwise. Fillers for live lineups are not always easy to find. For lineups containing two suspects, the suspects still should resemble each other in terms of race, age, height and weight so that the fillers are appropriate for both suspects. In many crimes involving multiple offenders, the offenders are members of the same gang or otherwise affiliated in a manner in which a similar race, age and physical appearance is not unusual.

<sup>50</sup>In one sequential lineup with two suspects, the witness still identified a filler as the offender.

been raised in both the science and in other jurisdictions. If the offender is in the first position in a photo or live lineup, any identification of that offender is subject to the concern that the identification occurred after presentation of only one photograph or person, a “show up” of sorts. Even if the suspect is in the second or third position, the concern over an unreliable identification remains. Both prosecution and defense share these concerns.

Law enforcement has attempted to address this concern in several ways. The Hennepin County study simply held off any choice until the witness had seen all the photographs. Although this approach addresses the issue of an early choice, it diminishes (and possibly eliminates) the absolute judgement advantage claimed by the sequential procedure.

Other jurisdictions, such as North Carolina, have adopted a protocol prohibiting the suspect to be placed in the first position. However, this protocol in effect serves to eliminate position number one as a viable choice, which not only shifts the concerns of position number one to position number two, but also effectively reduces the size of the lineup and makes later positions subject to greater concern.<sup>51</sup>

Law enforcement also has attempted to address this concern by directing that, after the witness makes an identification, the administrator continue to show the witness all remaining photos or members of the lineup. This procedure is not based upon the science, but has been adopted to address concerns over court challenges that the total number of photos shown fell

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<sup>51</sup>A police protocol which deems that the first position of every lineup be a filler will, like most police protocols, become generally known, so that witnesses will not consider the first person as a viable choice and instead will begin the identification process in earnest upon being shown the second photo or person.

short of the standard protocol.<sup>52</sup> Questions remain, however, as to how this procedure affects a witness in terms of feedback, confidence, willingness to consider a photo or lineup member subsequent to identification and willingness to change an identification.

Concerns over placing a suspect in a latter position in the sequential procedure also have been raised. If a witness believes that he is running out of options after seeing several photographs or live participants, that witness may lower his criteria for making an identification as he views later positions.<sup>53</sup> This concern can be addressed to some degree by a protocol which does not reveal to the witness the total number of photographs or participants in the lineup, but after viewing several photographs or lineup members, a witness will assume that options are running out.

The effect of additional rounds in a sequential process also needs to be addressed. It is generally acknowledged that a second round converts the sequential process into a simultaneous lineup, because an identification is made only after seeing all the participants in the lineup. See Cutler & Penrod, *Assessing The Accuracy of Eyewitness Identifications*, Handbook of Psychology in Legal Contexts (the beneficial effects of sequential are reduced if subjects are given a second chance, due to comparison and knowing the number of photographs); *From Lab to Police Station*, p. 595 ( a second run through transforms a sequential procedure into a simultaneous procedure, eliminating its effective advantage); Turtle, Lindsay, Wells, *et al.*, *Best*

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<sup>52</sup>Initially, the social psychologists warned against showing a witness more photographs after the witness had made an identification, because this could lead the witnesses to revert back to relative judgement. Wells, et. al., *From the Lab to the Police Station*, p. 594.

<sup>53</sup>See Ebbesen & Flowe (2001), *Simultaneous v. Sequential Lineups: What Do We Really Know?* (Internet Paper).

*Practices 2003*, calling the second round “dangerous.” The Illinois pilot program recorded 51 sequential lineups where the witness asked to see a second round of the lineup. *See also Cardozo Article*, discussing the increased number of known false identifications in Hennepin County associated with increased rounds or “laps” through the sequential lineup.

Finally, there has been very little study of the effects in a live lineup of having a guilty suspect stand alone in a room, to be viewed by a witness. There is some concern that the guilty cues sent by a guilty suspect, if any, would be magnified when the suspect is standing alone rather than blending in with others in a lineup. On the other hand, guilty cues might be minimized when the suspect is alone and not compared with the behavior of innocent fillers in a live lineup. Without knowing the effect of a guilty party standing alone in front of a witness, however, some criminal defense attorneys have expressed a concern over having a client stand alone instead of as a member of a lineup.<sup>54</sup> This is another area ripe for future exploration.

One of the potential advantages of showing the photos or lineup members sequentially was not focused upon in the Pilot Program, but should be noted for training purposes. The sequential presentation of photos or lineup members appears more likely to minimize a difference which might otherwise make the suspect stand out. For instance, if the background of the suspect photograph is slightly different than the other photographs because the suspect’s photograph was obtained from a driver’s license and the fillers’ photos were obtained from mugshots, the difference would be less noticeable in a sequential process than in a side-by-side

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<sup>54</sup>Limited study in this area shows that a suspect shows more signs of loss of control than non-suspects. *See Fabian, T., Stadler, M. & Wetzels, P., The “Authenticity Error” in Real Lineup Procedures. Effects of Suspect-Status and Corresponding Psychological Dissimilarities between Target Person and Distracters: An Experimental Study*, In G. Davies, S. Lloyd Bostick, M. McMurrin & C. Wilson, eds, *Psychology, law and criminal justice* (pp. 29-38)(1996).

simultaneous presentation. If the clothing color of the suspect makes him stand out from the fillers, it might not be as noticeable in a sequential procedure. Similarly, height differences should be less noticeable when the participants are not viewed side-by-side, a difference now addressed in simultaneous live lineups by keeping the participants seated and allowing them to step forward only one at a time. This potential advantage of the sequential presentation could be achieved without an identification being made until the end of the presentation, thereby eliminating the concerns raised by the position of the suspect.

## 2. *Implementation of the Blind Administrator*

### a. The Feedback Issue

The studies involving a blind administrator usually have been bundled with a number of other factors, including the sequential method, leading to limited scientific study of the blind administrator in conjunction with the simultaneous procedure.<sup>55</sup> Nevertheless, the social scientists advocate the use of a blind administrator for reasons applicable to both types of lineup procedures: to prevent inadvertent cues which affect the witness's choice and to prevent inadvertent feedback which affects the witness's confidence in his identification. Wells, G. & Bradfield, A. (1998), "*Good, You Identified the Suspect: Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience*", 83 J. Of Applied Psychol. 360 (1998); Bradfield, A,

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<sup>55</sup>Although it is generally accepted that the need for a blind administrator is more compelling for a sequential procedure than a simultaneous process, a blind administrator may be more compatible with a simultaneous procedure. See e.g., Phillips, M. & McAuliff, Et. al., *Double-blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. of Applied Psychol. 940-51 (1999)(when an observer is present, witnesses apparently follow perceived cues to a greater degree in a sequential procedure than in a simultaneous procedure).

Wells, G., & Olson, E. (2002), *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, (internet paper) (captured 1/8/02).<sup>56</sup>

In real life, the issue of feedback may not be as simple as implementing a blind administrator. The witness still returned to the investigator after the investigator learned from the administrator who the witness identified, providing an opportunity for feedback. In felony cases, the witness also usually met with a felony review prosecutor at the station, which further provided feedback to the witness about the accuracy of his choice. Feedback can come from a variety of sources other than the investigator, from which the witness simply cannot be isolated, such as media coverage or fellow witnesses in the neighborhood or place of employment where the crime occurred. Thus, it should be explored whether, and to what extent, undue feedback can be eliminated in the context of the criminal justice system, by any or a combination of blind administrators, improved training, instructions that the witness should not assume that the administrator knows who in the lineup is the suspect and capturing the witness's confidence at the time of the identification to assess the effect of any subsequent feedback.<sup>57</sup>

Even if the issue of feedback can be addressed in a manner other than the use of a blind administrator, there still are perceived advantages to the use of a blind administrator. The use of

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<sup>56</sup>But see Dixon, S. & Memon, A. (1998), *The Effect of Post-Identification Feedback on the Recall of Crime and Perpetrator Details*, [www.abdn.ac.uk/~psy282](http://www.abdn.ac.uk/~psy282) (in press) (post-event feedback affected the witnesses' confidence but not accuracy); Flowe, H. (2002), *The (Mis)information Effect: Trace Alteration or Coexistence?* (Internet paper) (captured 8/30/2005) (misleading post-event information may co-exist with, rather than alter, the original memory).

<sup>57</sup>The issue of feedback may actually be less related to accuracy or reliability, and more related to credibility in testifying, which could be adequately addressed by recording the confidence of the witness at the time of the identification. See Bradfield, Wells & Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Certainty and Identification Accuracy* (internet paper) (captured 1/8/02).

a blind administrator should increase public confidence that the eyewitness identification is not the product of suggestion by law enforcement. The use of a blind administrator also should reduce claims of officer misconduct, a fact not lost on the survey respondents who cited protection from lawsuits as a welcome advantage of the blind administrator.<sup>58</sup>

b. The Practical Concerns: Relationships and Resources

Law enforcement in the Illinois Pilot Program as well as other jurisdictions have raised practical concerns over implementing blind administrators. Law enforcement has expressed concern over whether it is in the best interests of the overall investigation to have the lineup administered by someone who is unfamiliar with the facts of the case and the people involved. Police, as well as prosecutors, have expressed concern that a blind administrator will not be in a position to recognize relevant information during the identification procedure, which could result in a failure to recognize potential exculpatory information required to be disclosed to the defense. Law enforcement officers worry about disrupting the relationship built between an investigator and a witness, particularly at the pivotal moment when the victim of a sex offense or other violent crime or a hate crime faces the offender. The investigators believe that an investigator who has interviewed the witness is more likely than a blind administrator to recognize a reluctant or frightened witness. An investigator who has developed a rapport with the witness also may be more likely to allay the witness's fear or reluctance to make an identification.

Law enforcement also expresses a concern about the resources necessary to implement the blind administrator and the impact that diverting those resources to blind administrators will have on street crime. It is recognized that successful crime reduction requires more police officer

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<sup>58</sup>Challenges to the actual blindness of the administrator likely would become common.

time on the street and, in the absence of increased budgets for additional officers, police departments need to be innovative at keeping the existing officers on the street and out of the stations.<sup>59</sup> The use of blind administrators in the Illinois Pilot Program required more officer time in the station, both for the investigators (to find and wait for a blind administrator) and for the officer acting as a blind administrator.<sup>60</sup> Moreover, a big case in a small jurisdiction can consume all resources, making location of a blind administrator impractical. During the Pilot Program, Evanston had a homicide to which all seven investigators on duty were assigned, so that they could not find a blind administrator. In another case in Evanston, there were multiple witnesses requiring multiple lineups and the department simply did not have the resources to conduct all the lineups using the sequential, double-blind method.

In addition to the concern over officer downtime, some witnesses reacted adversely to their own wait for a blind administrator. A little more than twenty witnesses left or announced their intention to leave while waiting for a blind administrator, causing the investigator to conduct a simultaneous lineup rather than having the witness leave without *any* identification procedure. One witness attributed the use of a blind administrator to the investigator's "laziness." Several victims complained that the wait for a blind administrator made them feel

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<sup>59</sup>The pilot program coincided with anti-violence strategies initiated by Chicago, which concentrated more officer time on the street and utilized technology to share information on a broader and faster basis. In 2004, these initiatives led to an unprecedented 25% decline in the number of murders, with Chicago leading the decrease in the national murder rate. *See Homicide Capital becomes role model*, Philadelphia Inquirer (Feb. 3, 2005), noting that "what was once the nation's murder capital...is the nation's role model..." reporting that Chicago is "combining street intelligence with technology and flooding the neighborhoods [with police]..."

<sup>60</sup>This delay is also significant in light of the limited time permitted to hold an arrestee in the police station before a probable cause hearing is required. *See County of Riverside v. McLaughlin*, 500 U.S.44 (1991) and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

further victimized. The officers felt that the delay adversely impacted their ability to persuade witnesses to cooperate, as well as their relationships with witnesses and victims. Thus, any policy decisions regarding implementation of a blind administrator must consider law enforcement resources, particularly in light of the time limitations at the police station and the impact of any delay upon the victims and other witnesses.<sup>61</sup>

Any policy decisions also should take into account the fact that identification procedures do not always take place in the police facility. The lineup reports collected in the Pilot Program show that the officers conducted photographic identification procedures in witnesses' homes, places of employment, on the street, at the hospitals and at the jail. As technology develops, identification processes will take place more quickly and more often outside the police facility.<sup>62</sup> This immediate identification procedure should lead to increased reliability in identifications. In these instances, the use of a blind administrator exacerbates the concerns over delay, adversely affecting the advantage that immediate identifications have for reliable identifications, police resources and witness convenience.

In addition to the time factor, officers expressed concern about finding a blind administrator for lineups involving chronic offenders, whose mere presence would cause an

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<sup>61</sup>According to Lieutenant Carl Riley of the Union County Prosecutor's Office in New Jersey, law enforcement there will postpone an identification process until a shift change and then have a patrol officer, designated as the blind administrator, delay the start of his street shift to wait until the witnesses arrive. This assumes that the witnesses are not already waiting, that the clock on the *Gerstein* hearing is not in jeopardy of expiring and that the delay in covering the officer's street shift presents no problem.

<sup>62</sup>For example, in Chicago, CLEAR in the car is moving toward allowing officers to access mugshots in the car, allowing for an immediate identification procedure on the street where appropriate.

investigator to assume that individual was the suspect. There might also be difficulty finding a truly blind administrator for cases involving multiple witnesses, because after the first witness makes an identification, the blind administrator may have expectations similar to a non-blind administrator. See Douglass, A., et al, *A Problem with Double Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence to Influence Another Eyewitness*, Law and Hum. Behav. (2005) (attributing the tendency of the blind administrators to use one identification to influence a second identification, particularly in low-confidence situations, to the desire to help the witness complete a difficult task).

Finally, another major aspect of successful crime reduction is collaboration and information sharing. The departments involved in the Pilot Program felt that the use of blind administrators was adverse to the close collaboration and information sharing that they generally encouraged within their own department and with other agencies. Joliet in particular felt a lack of comfort with the process, leading Joliet to change its form about two months into the program to allow for increased communication between the blind administrator of the lineup and the investigator on the case.<sup>63</sup>

Illinois law enforcement is not alone in expressing these concerns about blind administrators. See *Cardozo Article*, noting these same concerns by Hennepin County law enforcement. Recently, the Office of the Hennepin County Prosecutor explained that in implementing the sequential double-blind procedure beyond their pilot program, they had “de-emphasized” the use of blind administrators for the same reasons discussed in this report.

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<sup>63</sup>Joliet changed its sequential lineup administrator form to record the identification after the administrator had consulted with the investigator over whether the witness had identified a suspect or a filler.

Instead, Hennepin County is suggesting to law enforcement the use of self-administered photo arrays, preferably through computer laptop administration. There has been little study of self-administered photo arrays, and prosecutors have expressed the concern that if nobody observes the photo array administration, we could lose Brady information or other information potentially valuable in assessing the reliability of the eyewitness identification. Nevertheless, computer technologies appear to be an area in which adjustments can readily address feedback concerns (except, of course, that computerized self-administration is not an option for live lineups in Illinois). As the NIJ Guide noted, this is an area for further study before implementation.

As a result of these concerns, most jurisdictions using the sequential procedure adopt blind administrators only as a recommended, rather than a mandatory, practice.<sup>64</sup> See Section IV, *supra*. English law, however, requires that an investigator who has no knowledge of the identification of the suspect conduct the lineup. See Exhibit 20. Certainly, further study of the English experience could offer guidance on implementation issues of blind administrators.

## VIII. CONCLUSIONS/RECOMMENDATIONS

The Illinois Pilot Program represents the first field study of the sequential, double-blind identification procedure using the recommended scientific protocol and comparing that data to a control group of simultaneous lineups. The data collected shows that the sequential double-blind method led to a lower rate of suspect identifications as well as a higher rate of known false errors. The Illinois Pilot Program also identified implementation issues which need to be addressed in any policy changes to eyewitness identification procedures.

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<sup>64</sup> This, of course, raises further questions about whether a sequential procedure should be conducted without a blind administrator.

The results of this study should reinvigorate the criminal justice system to explore other areas of improvement to eyewitness identification. Even the originator of the sequential, double-blind process, has expressed concern that the attention on this procedure has resulted in a lack of sufficient study of other areas which would have a positive impact on eyewitness identification:

[I]t is unfortunate that the sequential procedure has come to dominate so much of the discussion regarding lineup procedures...Regardless of whether one uses a simultaneous or sequential procedure, there are other important problems with lineups that have to be addressed:...instructions to the eyewitnesses, the selection of lineup fillers, how witness certainty is assessed, how to eliminate inadvertent influences from the lineup administrator, what records must be kept and so on. Fixation on the sequential procedure is creating a certain degree of myopia with regard to seeing the broad problems with lineups.

Wells, *You asked about the sequential lineup: can you read this first?*

As field studies contribute to the body of scientific knowledge, and as technology evolves along with the science, best practices of eyewitness identification are subject to change. Some of the areas ripe for future study include:

**1. Instructions.** Research indicates that proper instructions can have substantial impact on the identification process. This legislature made a significant advancement in this area with its 2003 legislation mandating certain instructions, but there may be other instructions which should be studied and implemented, even if not mandated by law.

**2. Technology.** Evolving technology may be the best way to address feedback from the administrator of the lineup. Computer programs presented through self-administered laptops, rather than blind administrators, and other technological options should be explored for proper protocol to ensure that relevant information is not lost in the identification process.

**3. Training.** Training on eyewitness identification should be extensive. Unfortunately, the training often depends upon the instructor, the jurisdiction and the time allotted. Training can

vary from simply how to conduct a lineup to training on actual mistaken eyewitness identifications, the psychology of eyewitness identification, feedback issues and actual report writing. Uniform standards for training should be developed and continually updated and adapted to changing science and technologies.

4. **Witness certainty.** The Illinois Pilot Program showed that not all witnesses spontaneously state their certainty in making an identification. Further study as to how to assess, inquire and record witness certainty at the time of the identification would be invaluable for law enforcement training and protocols.

5. **Blind Administrators.** The advantages of blind administrators as a recommended practice should be further explored and compared to optimal instructions and technological procedures to prevent feedback. Also, the implementation issues raised both by the Illinois Pilot Program and the Hennepin County study should be thoroughly addressed.

6. **Sketches.** Sketches are a necessary tool of law enforcement and often lead to apprehension of the offender. However, a review of the wrongful conviction cases shows that a notable number of these cases involved sketches, resulting in tips to the police of *people who look like the offender*. These innocent “look-alikes” were, not surprisingly, more likely to be identified in lineups. This is an area for more caution, more training and more study.

7. **Reporting and Record Keeping.** Often the issue is not necessarily the lineup procedure but rather the report and record keeping. The lineup report is crucial because it allows the criminal justice system to capture the circumstances of the initial identification, to compare with in-court identification. Better record keeping is a matter of training, protocol and supervision. The forms used in the Pilot Program were helpful in setting a standard to capture

certain specific fields of information, but the Pilot Program revealed weaknesses in the capturing relevant information in the lineup reports. Standards for report writing of identification procedures should be developed, trained on and implemented. Particularly, many lineup reports simply state either “no id” or “negative id.” Law enforcement training and forms should require recording of one of four options, because each has a different meaning for purposes of the criminal justice system: (1) identification of a suspect; (2) identification of a filler; (3) unable to make an identification; and (4) exclusion of all participants in the lineup.

**8. Expanded studies of other aspects of eyewitness identification: Beyond A Reasonable Doubt (“BARD”) studies.** Most of the studies of eyewitness concentrate on the cases where the eyewitness identification was mistaken, but studies of accurate eyewitness identifications also could lead to improved procedures. False identification stories are more compelling, but the scientists should not focus on one set of data to the exclusion of the other. These studies may be able to shed additional light on the factors that affect eyewitness identification, including: the type of crime, the type of witness, cross-racial identifications, the degree of prior relationship between the witness and the offender, the duration of crime and the conditions of the crime.

**9. Improved Filler Selection Programs.** Many jurisdictions now use a computer program to select fillers for photo arrays. These programs could be improved. In addition, in jurisdictions which conduct live lineups, finding live fillers is a challenge. Ways to address this challenge should be explored.

**10. Continued study of additional lineup methods.** In light of the data collected here, the sequential, double-blind method cannot be regarded as superior to the simultaneous method.

Nevertheless, we should not abandon improvements to develop other procedures which improve upon current methods. One method which bears further study is the sequential presentation with an identification decision at the end of the presentation, as used in Hennepin County.

Citizens, policy makers, judges, scholars, law enforcement, prosecutors and defense all share in the concerns over eyewitness identifications raised by the DNA exonerations in recent years. Law enforcement is acutely aware of the consequences of misidentifications: lost faith in a system in which they are deeply invested, lost resources in chasing misidentifications and unsolved crimes, real offenders remain free to commit other crimes, crippling liability and attacks on their own integrity.<sup>65</sup> Improvements to eyewitness identification procedures benefits everyone in the criminal justice system – police, prosecutors and defense. The Illinois Pilot Program has been invaluable in identifying areas of potential improvement to the reliability of eyewitness identification.

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<sup>65</sup>In remarks at a press conference announcing a settlement of a wrongful conviction claim, Chicago Police Superintendent Philip J. Cline stated, “We are always concerned when an innocent person has been wrongfully convicted, and at the same time, the real offender remains on the street... As a cop, that bothers me.” January 27, 2006.