

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

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Response to Opposition Letters to S.B. 756 (Ridley-Thomas) Eyewitness Identification Guidelines.

The opposition letters filed by the California Peace Officers Association [CPOA] and the California Police Chiefs Association [CPCA], San Bernardino County Sheriff Gary Penrod [SBCS], San Diego County Sheriff William B. Kolender [SDCS] and the California State Sheriffs' Association [CSSA] raise numerous objections to specific identification procedures that have been recommended by the California Commission on the Fair Administration of Justice in our Report and Recommendations Regarding Eyewitness Identification Procedures (April 13, 2006). Many of these objections miss the point of S.B. 756, which is to enlist broad participation in the process of developing guidelines. The bill does not mandate wholesale endorsement of the procedures recommended by the Commission, but merely requires that those recommendations be considered. S.B. 756 assures that local law enforcement agencies will be consulted by the Department of Justice in developing the guidelines, and requires legislative approval before the guidelines can be enforced. There is a great deal of credible and persuasive research available that addresses the risks of erroneous eyewitness identification and how those risks can be reduced. To stick our heads in the sand and refuse even to convene a consultative process to examine what best practices should be implemented in California would be to ignore the enormous risks of wrongful convictions.

1. POST suggests that, while one misidentification resulting in a criminal conviction in California is one too many, the incidence of wrongful conviction caused solely by one-on-one identifications is extremely rare, thus the reform of eyewitness procedures contemplated by S.B. 756 "does not address a significant public policy issue."

Essentially, this objection argues that since misidentifications are uncommon, it is foolish to expend resources on the problem. At first glance, this is a very reasonable objection. After all, funding is limited, and peace officers have extra-ordinarily difficult jobs, so any additional cost or burden needs strong justification. While eyewitness identifications are accurate and trustworthy overall, they are a leading cause of false convictions. The hundreds of DNA and other exonerations over the last decade have taught us a lot about why sometimes an innocent person is wrongly convicted of a crime. According to numerous studies, sincere but mistaken identification is a leading contributing cause of such false convictions. Therefore, while eyewitness identification is trustworthy overall, it is a crucial problem to address if we want to reduce the rate of innocent people being

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convicted for crimes they didn't commit. A useful analogy is to consider the problem of drunk driving. We all know that most people drive sober. If one considers every driving event that happens daily – parents driving their children to school, people commuting to work, going out for groceries, and, so on – it is clear that the incident of drunk driving is vanishingly small. However, we also know that in approximately one-third of all traffic fatalities, alcohol was a contributing factor. We don't ignore drunk driving just because it is rare overall; we focus upon it because it is central to reducing traffic deaths. Similarly, we shouldn't ignore the problem of misidentifications because it is rare overall; we must focus upon it if we are to reduce criminal justice "fatalities" where an innocent is convicted while the guilty go free. In sum, while eyewitness identification is trustworthy overall, it is the leading contributing cause of false convictions. Therefore, if we want to prevent the conviction of innocent people, then we must address misidentifications.

A comprehensive compilation of all exonerations in the United States from 1989 through 2003 was recently published by a group of researchers at the University of Michigan led by Professor Samuel R. Gross.¹ The researchers confined their study to cases in which there was an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted, such as a pardon based upon evidence of innocence, or a dismissal after new evidence of innocence emerged, such as DNA testing. They identified 340 such cases, 27 of which occurred in the State of California.

The study by Professor Gross' researchers identified seven California exonerations involving mistaken eyewitness identifications during the fifteen year period ending in 2003. In four of those cases, exoneration came via subsequent DNA testing. Additional claims of mistaken identifications leading to wrongful conviction were called to the attention of the Commission, but we undertook no independent investigation to verify these claims. The Commission was satisfied that the risk of wrongful conviction in eyewitness identification cases exists in California, as elsewhere in the country, and that reforms to reduce the risk of misidentification should be immediately implemented in California.

In 1998, U.S. Attorney General Janet Reno assembled 34 professionals from throughout the United States and Canada to form a Technical Working Group for Eyewitness Evidence. Drawing upon the research of psychologists as well as the practical perspectives of prosecutors, defense lawyers and police investigators, the Working Group produced a comprehensive guide for law enforcement to increase the accuracy and reliability of eyewitness evidence and decrease the numbers of wrongful

¹ Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. of Crim. Law & Criminology 523 (2005).

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identifications.² Though the guidelines were not mandated, the Department of Justice recommendations have been very influential in other states. In the State of New Jersey, for example, Attorney General John J. Farmer promulgated Guidelines for identification procedures based upon the U.S. Department of Justice recommendations, for implementation by all law enforcement agencies in the state.³

Many of the Commissions established in other states to carry out a mission similar to our Commission, examining the causes of wrongful convictions and recommending reforms to avoid wrongful convictions in the future, have recommended the adoption of guidelines for the conduct of lineups, show-ups and photo spreads similar to the U.S. Department of Justice Guidelines. This includes the Governor's Commission on Capital Punishment established in Illinois,⁴ the North Carolina Actual Innocence Commission,⁵ the Innocence Commission for Virginia,⁶ and the Wisconsin Innocence Task Force.⁷ In addition, the American Bar Association adopted a Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures in August, 2004, and urged all state and local governments to adopt detailed guidelines for conducting lineups and photo spreads in a manner that maximizes their likely accuracy, and to provide periodic training to implement them.

Thus, to reject out-of-hand any effort to reexamine the procedures used for eyewitness identification in California is to ignore the tragic miscarriages of justice that have occurred in California in recent years and turn a blind eye to the latest research and the recommendations of widely respected bodies at both the federal and state level throughout the United States, including the International Association of Chiefs of Police.

2. POST notes the “concerns of increased operational costs among law enforcement agencies to follow procedures unlikely to be the sole cause or significant contributing factor to wrongful convictions.”

The cost of implementing improvements in eyewitness identification procedures must be balanced against the fiscal cost of wrongful conviction, including resources wasted in

² U.S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, NCJ 178240 (October, 1999).

³ New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001).

⁴ Report of the Governor's Commission on Capital Punishment, State of Illinois, Recommendations 1-16 (April 2002). The Commission also considered Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (March 7, 2006).

⁵ North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification.

⁶ Innocence Commission for Virginia, *A Vision for Justice*, pp. 25-42.

⁷ Avery Task Force, *Eyewitness Identification Procedure Recommendations*.

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prosecution of the innocent, additional crimes committed by the actual perpetrators who escape punishment while the wrong person is prosecuted, and the settlement packages awarded to the wrongfully convicted (e.g. the recent \$2 million award to Herman Atkins in Riverside County).

In addition, the experience of Santa Clara County, California, the entire State of New Jersey and every other jurisdiction that has actually implemented the double-blind sequential protocol has found that the additional costs and burdens are negligible. Training costs are low because the changes are minor. While many feared that the double-blind requirement would require significant additional personnel costs, this has just not turned out to be true. An officer or other department employee unfamiliar with the case is almost invariably available to conduct the line-up, and while that line-up officer or other employee is busy, the detective that is relieved is free to do other work. In other words, it is a zero sum problem with little practical costs.

3. SBCS, SDCS and CSSA assert that “the current procedures that law enforcement uses for lineups are time-tested and court approved,” and there is no need to change the investigative procedures for identifying an alleged suspect.

In issuing its Training Key #600, the International Association of Chiefs of Police concluded:

“Of all investigative procedures employed by police in criminal cases, probably none is less reliable than eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.”

The “proper precautions” suggested in the IACP Training Key are nearly identical to those recommended by the California Commission on the Fair Administration of Justice. For example:

“To prevent these suggestive techniques and avoid any tip-offs about the suspect’s identity, police lineups should be administered by an officer who does not know which person in the lineup is the actual suspect.”

“Therefore, studies suggest that sequential presentation of suspects in both photo arrays and lineups is the better approach because witnesses tend to make absolute rather than comparative judgments when viewing suspects individually.”

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“Time-tested” must mean something more than just old. It must mean that over time a protocol has proved to be the best one available. Unfortunately, the DNA exonerations have forced all of us in the criminal justice system to recognize that sometimes innocent people are convicted. The DNA exonerations have shown incontrovertibly that while traditional line-up procedures work well most of the time, they are the leading contributor to wrongful convictions. Therefore, if one wants to prevent innocent people from being convicted and guilty people from going free, then one must address the weakness in the current method that time has revealed. In other words, time has tested the traditional method and has revealed that it can and must be improved.

Fortunately, we don’t need to make blind changes, because agencies and jurisdictions throughout the country have been using double-blind, sequential protocols for years. Consequently, we can fairly say that the double-blind, sequential protocol is now itself, time-tested and court approved. If, in the future, time reveals that other protocols are better, then it is the hope of the Commission that we will change again. If one believes in “time tested” procedures, then one must reject procedures that time has proved wanting. Criminal justice is a dynamic, challenging, and essential function of any democratic society, and as such, we must make changes when time reveals we can do things better.

4. CPOA, CPCA, SBCS and CSSA suggest that the double-blind procedures recommended by the Commission will be difficult to implement, because in many departments all officers on duty will know the description and identity of the suspect, and thus be disqualified from conducting the identification procedure.

First, S.B. 756 does not mandate adoption of double-blind procedures. It merely requires that the recommendations of the Commission be considered.

The Commission recommendation was that double-blind procedures be used “whenever practicable.” In the consultative process which S.B. 756 establishes, the practical difficulties which individual departments might encounter can be addressed, and guidelines can be drafted which take those difficulties into consideration.

Second, this objection ignores the experience of many departments that have already adopted a policy requiring double-blind administration of identification procedures. Santa Clara County, under the leadership of recently retired District Attorney George Kennedy, adopted a lineup protocol requiring double-blind and sequential identification procedures.⁸ The Commission learned from Deputy District Attorney David Angel of the Santa Clara County District Attorneys Office that all law enforcement agencies in

⁸ Police Chiefs’ Association of Santa Clara County, *Line-up Protocol for Law Enforcement*, Sept. 12, 2002.

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Santa Clara County agreed to the protocol without dissent, and the protocol has been successfully implemented for nearly four years without complaint. The entire State of New Jersey, much of Wisconsin and North Carolina, and a host of other jurisdictions have reformed their procedures to include blind administration, and have found ways to accommodate these logistical concerns.

Third, a blind administrator does not necessarily mean that the administrator is not familiar with the witness' description of the suspect. Rather it means that he does not know who the suspect is in the lineup. Even if the administrator knows the description, if the lineup is fair, the administrator will have no way of knowing which participant is the suspect. The lineup should be composed of individuals who all resemble the description of the suspect by the witness.

5. SBCS and CSAA object to the Commission recommendation that where single subject show-ups are used in the field, "where there are multiple witnesses they should be separated, and lineups or photo spreads should be used for remaining witnesses after an identification is obtained from one witness." It is suggested that this "increases the chances that an innocent person might be wrongly arrested, because a mistaken identification by the first witness was not allowed to be promptly disclaimed by the other witnesses."

Again, S.B. 756 does not mandate the adoption of this or any other procedure recommended by the Commission. It simply requires that these recommendations be "considered."

The recommendation that a single witness make the initial identification only applies at "show-ups". Everyone within the criminal justice system knows that "show-ups" are an essential tool for officer's on the streets to quickly narrow down an investigation. However, everyone also knows that "show-ups" are problematic since they are so suggestive. When a procedure, such as a show-up, plays an important role but comes at a price, then a compromise is generally advisable. The Commission's recommendation provides just such a compromise.

Furthermore, the Commission's recommendation is that once a witness, or witnesses, have provided the police with probable cause to make an arrest, then the remaining witnesses, if any, are taken down to the station to view a line-up. Thus it is incorrect to state that the Commission's recommendation mandates an arrest after a single identification. If the single witnesses identification is weak, law enforcement would remain empowered to run a second show-up. It is only once the investigation has crossed

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the probable cause threshold, that all further identifications are conducted with the full safeguards of a line-up.

This protocol protects both the innocent suspect and increases the likelihood of apprehending the true suspect. We all know that if a witness picks out the wrong person at a show-up, that witness is essentially useless at any subsequent line-up containing the true suspect.

The objection is correct in noting that in a small number of cases, an innocent suspect might be arrested only to be later cleared at the station. However, the Commission's recommendation will significantly reduce the chance that an innocent person is actually convicted of crime for which he or she is innocent. Similarly, the Commission's recommendation increases the chances of apprehending the true criminal. As with many aspects of criminal justice, any policy must balance different concerns. While the concern expressed is valid, when it is weighed against the goal of preventing the conviction of the innocent and the conviction of the guilty, the recommendation makes sense.

6. CPOA and CPCA suggests that "reliance on the procedures outlined by the California Commission on the Fair Administration of Justice may be placing too much faith in protocols that have achieved dubious results. In fact the opposite may be true. A year-long Illinois pilot project in 2004 in the police departments of Chicago, Joliet and Evanston demonstrated that 'the sequential double-blind method led to a lower rate of suspect identifications as well as a higher rate of false errors.'"

Some law enforcement groups express a concern that the double-blind, sequential method might be inferior to the older single-blind, simultaneous method. This fear is based upon a study conducted with the Chicago, Joliet and Evanston police departments. If the only study one knew about was the Illinois study, this fear would be very understandable. However, a more complete knowledge of the actual state of the research should put this concern to rest.

There is well over twenty years of research and study on the double-blind, sequential line-up. There was a veritable ocean of research before the Chicago study, and there has been research since. In all this research and study, all the results point to the same conclusion: the double-blind, sequential method is the most accurate. There is a single exception in all this research – the Illinois study. Accordingly, even if the Illinois study was beyond reproach, it remains a tiny, anomaly pitted against a vast compendium of independent research that unanimously supports the use of double-blind, sequential line-ups. There is probably not a single other criminal justice protocol that doesn't have some

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critic, or some potential disadvantage somewhere. For example, there are plenty of academics who believe fingerprints are invalid. There are those who believe the Miranda admonitions free criminals. Nonetheless, we use fingerprints, and we give Miranda warnings, because overwhelmingly the data supports their use. Based in part upon this reasoning, the Attorney General of the State of Wisconsin recently published a paper considering the Illinois study and re-affirming their use of the double-blind, sequential method.

Finally, while this is not the time to exhaustively discuss the limitations of the Illinois study, it must be noted that since 2004, the Illinois study has not fared well when reviewed by fellow scientists. In fact, the Illinois study was recently reviewed by seven prominent scientific scholars, including Nobel Laureates.⁹ None of these scholars had any prior history with the issues relating to eyewitness identification, and consequently none of the scholars can be accused of having a pre-existing bias towards one procedure or another. These scientists were merely asked to evaluate the methodology of the Illinois study. They uniformly concluded that the Illinois study was centrally flawed and as a result “do not inform everyday practices in a useful matter.”

In sum, if one only knew about the Illinois study, then this objection is understandable. However, the Illinois study is deeply flawed and has not stood up to peer review. Even without wading into the academic debate, it is beyond doubt that the vast weight of the evidence supports the use of the double-blind, sequential protocol.

7. CPOA and CPCA note that “A similar program in Minnesota came to the same conclusion, and adoption of the “new” procedures was subsequently rejected on the basis of the demonstrated results.

This statement is inaccurate. Hennepin County in Minnesota, where this study was conducted, is still using double-blind sequential identification procedure with excellent results. See “Protecting the Innocent / Convicting the Guilty: Hennepin County’s Pilot Project in Blind Sequential Eyewitness Identification,” 32 Wm. Mitchell Law Review 1 (2005), which concludes:

As a follow-up to . . . the success of the pilot project, the Hennepin County Attorney’s Office plans to encourage voluntary adoption of the blind sequential protocol throughout the county, as well as in other jurisdictions within the state.

⁹ Pre-publication copy, *Studying Eyewitness Investigations in the Field*, Law and Human Behavior, by Daniel Schacter, Harvard University; Robyn Dawes, Carnegie Mellon University, Larry Jacoby, Washington University, Daniel Kahneman, Woodrow Wilson School, Princeton University, Richear Lempert, University of Michigan Law School, Henry Roediger, Washington University, Robert Rosenthal, University of California-Riverside.

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Likewise, there is good reason to expect that new eyewitness identification procedures will help improve police investigations, strengthen prosecutions and better protect the rights of innocent people while convicting those who are guilty. The new lineup protocol will give everyone in the criminal justice process, not only police and prosecutors, but also judges and jurors, a clearer view of the truth of what the eyewitness observed. This leads to more confidence in the result, which is good for public trust and accountability in the criminal justice system.

8. CPOA and CPCA suggest an unintended consequence of double blind procedures may be reduced cooperation and information sharing among officers, for fear of “tainting” a double blind administrator.

It is highly unlikely that officers will be inhibited in discussing cases or sharing information. No such result has been reported in any of the jurisdictions that have implemented double blind procedures. In some small jurisdictions where officers are more likely to be familiar with more cases, or where they have less manpower, assistance can be sought from neighboring departments. At least one department which has instituted this reform does this routinely at no extra cost. If this is not possible, there may be a small percentage of cases where double-blind administration is “not practicable,” and would not be required. However, the option of effecting blind administration through a folder shuffle method, emerging laptop technology, or through a dedicated administrator who need not be an officer can prevent this from being an issue. The collaborative process of developing guidelines with full participation by law enforcement can address unintended consequences, and ways to alleviate or prevent them.

9. CPOA and CPCA object that officers and prosecutors would have to be retrained in the new procedures, and face new objections by defense attorneys.

Concerns about resources and expense are always legitimate in this time of scarcity. Nonetheless, the double-blind, sequential procedure has been implemented in many jurisdictions throughout the country. The training required is fairly minimal since the changes are relatively small. As was discussed earlier, the benefit in preventing an innocent person from being convicted is almost beyond calculation. Finally, the double-blind, sequential procedure has not been successfully challenged in any jurisdiction. In Santa Clara County, not a single defense motion has even been made challenging the new procedure, in no small part because they are so widely considered the best.