

April 12, 2006

Commissioners
California Commission on the Fair Administration of Justice

Dear Commissioners:

With respect to the views of the Commission, we feel compelled to dissent to two of the recommendations listed in the April 13, 2006, Interim Report.

First, we object to recommendation number two. We do not agree that sequential lineup procedures should be designated as the preferred method. The debate over the effectiveness of sequential lineups is not settled. The Commission reviewed reports on several laboratory studies which provided early indications that the sequential method might provide more reliable results. Later studies, however, including a recent yearlong in field study conducted by police departments in Illinois, have cast doubt on the reliability of sequential lineups.¹ The report on the Illinois study data was based on the analysis performed by Roy Malpass, Professor of Psychology at the University of Texas-El Paso, who co-authored the article on which the governor of Illinois relied when recommending sequential lineups.² Professor Malpass, along with Professors Ebbesen and Wells, both of whom testified before this Commission, reviewed and approved the protocols for the Illinois study.³

There appears to be agreement among the experts that the sequential method “reduces the number of accurate identifications.”⁴ More troubling though is the possibility that sequential lineups might actually increase the likelihood of a false identification. Witnesses in the Illinois study made more known false identifications using the sequential method than the traditional, simultaneous method.⁵ Five areas have been identified where the sequential method is particularly less reliable than the simultaneous method. They are: 1) child witnesses; 2) older witnesses; 3) cross-racial identifications; 4) multiple perpetrators, and 5) suspects who have changed their appearance.⁶ Some

¹ Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures, March 17, 2006 (Illinois Study).

² *Id.*, at p. 22-23; see Wells, G., Malpass, R., et.al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Human Behav.* 603 (1998).

³ Illinois Study at p. 32.

⁴ *Id.*, at p. 5, citing Wells, G., *Does the Sequential Lineup Reduce Accurate Identification in Addition to Reducing Mistaken Identifications? Yes, But . . .* (Internet paper) (2004); *Eyewitness Testimony*; Stelblay, N. et. al. *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: a Meta-Analytical Comparison*, 25 *Law & Human Behav.* 459-483 (2001).

⁵ Illinois Study at p. 38.

⁶ *Id.*, at p. 7. citing , 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).

experts have recommended against using sequential lineups in these situations.⁷ Others have advised that more research is needed before the sequential method is adopted as a matter of policy.⁸

One important finding of the Illinois study was that false identifications occurred at a substantially lower rate than that predicted by laboratory experiments. This finding, which is consistent with findings in other jurisdictions, suggests that real-life circumstances lead to more accurate lineup results and “increased protection for innocent suspects.”⁹

This is not to say that lineup procedures cannot be improved. For example, at least one study has concluded that witnesses who are admonished that the perpetrator may or may not be in the lineup were less likely to make false choices.¹⁰ However, it is premature to hold out as “preferred” a method for presenting lineups that has not been proven in the field, and that might, in reality, increase the number of false identifications.

Second, we object to recommendation number eleven. We do not believe this Commission should be interjecting itself into the development of jury instructions. This task has been delegated to the Judicial Council of California by the Chief Justice, and the criminal jury instructions that are in use now were promulgated over an eight-year period that included numerous levels of review by all interested parties. Additionally, there is more than adequate authority for a trial judge to issue a special instruction in any case when the facts and evidence warrant a deviation from the standard instruction.¹¹

Moreover, instructions should be neutral, favoring neither party. Trial courts are advised to refuse an instruction that analyzes specific evidence on a disputed question of fact to the benefit of one party or another or one that informs jurors that particular evidence is in fact true – or untrue.¹² Thus, we do not believe altering the standard instruction in order to deal with a special situation represents sound public policy.

We have raised these concerns with the Commission, but recognize we are in the minority on these points. Thus, we request that our objections be noted in the Commission’s report. Specifically we would like the following footnote inserted:

We respectfully dissent from this Commission’s recommendations numbers two and eleven.

⁷ *Ibid.*

⁸ Illinois Study at p. 8, citing Memon, A. and Gabbart, F., *Unraveling the Effects of Sequential Presentation in Culprit-present Lineups*, 17 *Applied Cognitive Psychology* 703-714 (2003).

⁹ Illinois Study at p. 17, 17, citing 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), manuscript p. 25; and at pp. 42-45, analyzing data from the Queens District Attorney’s Office in New York.

¹⁰ Illinois Study at p. 62..

¹¹ See California Rules of Court, Rule 855(e);

¹² See *People v. Hines* (1997) 15 Cal.4th 997, 1067-1068; 938 P.2d 388; 64 Cal.Rptr.2d 594; *People v. Carter* (2003) 30 Cal.4th 1166, 1225, n. 22; 135 Cal.Rptr.2d 553; *People v. Moore* (1954) 43 Cal.2d 517, 527; 275 P.2d 485.

The debate over the effectiveness of sequential lineups is not yet settled. Many experts agree that this method produces fewer accurate identifications. Even more disturbing is new research out of Illinois which suggests that the sequential lineup procedures may result in more false identifications. The sequential method appears to be particularly problematic in cases involving children and the elderly, cases involving cross racial identifications, cases involving multiple perpetrators, and cases where a suspect has altered his or her appearance. Given the uncertainty involving the sequential lineup method, we feel it is premature to recommend these procedures be adopted by California's law enforcement officers.

We further object to this Commission's recommendation calling for changes to the standard jury instructions. The drafting of criminal jury instructions has been delegated to the Judicial Council of California by the Chief Justice which developed the current instructions with input and review by all interested parties. Instructions should be neutral, favoring neither party, and the law requires trial courts to refuse an instruction that analyzes specific evidence on a disputed question of fact to the benefit of one party or another or one that informs jurors that particular evidence is in fact true – or untrue. Thus, we do not believe altering the standard instruction in order to deal with a special situation represents sound public policy.

We have lodged a letter with this Commission which presents our objections in more detail.

Finally, we encourage the Commission to delay issuing any report on the subject of lineup identification until it has had the opportunity to research and study other areas of our criminal justice system, and particularly to further research the issue of sequential lineups.

Respectfully submitted,

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