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2022

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# Science-Based Recommendations for the Collection of Eyewitness Identification Evidence

Margaret Bull Kovera, Jacqueline Katzman, Jennifer M. Jones & Melanie B. Fessinger

For almost 70% of the wrongfully convicted defendants who have been exonerated by new DNA evidence, one or more mistaken eyewitness identifications played a role in their wrongful convictions.<sup>1</sup> In recognition of the significant role that mistaken identifications play in miscarriages of justice, social scientists have spent the last 40 years studying which police practices can be improved to increase the reliability of eyewitness identification evidence, including instructions to witnesses,<sup>2</sup> selecting fillers (i.e., known innocent persons) for lineups or photo arrays who do not cause the suspect to stand out,<sup>3</sup> and eliminating possible feedback from administrators who know which lineup member is the suspect.<sup>4</sup> Based on this body of research, the American Psychology-Law Society (AP-LS)<sup>5</sup> commissioned a panel of eyewitness scholars to review the extant literature and make evidence-based recommendations about the best police practice for enhancing the reliability of eyewitness identification evidence.<sup>6</sup>

After reviewing the scientific literature on eyewitness identification accuracy, the panel produced a manuscript describing nine recommendations for the collection and preservation of eyewitness identification evidence and the scientific evidence supporting those recommendations. The manuscript went through an extraordinarily rigorous vetting process. The relevant scientific community was invited twice to provide comment on the draft of the recommendations posted on a public website and at two public presentations of the recommendations at psychological conferences. After each round of comments, the panel revised the manuscript before it was sent for further public comment. The Executive Committee of the AP-LS selected three anonymous reviewers with rel-

evant scientific expertise to comment on the manuscript. After the reviewer's comments were incorporated into the draft recommendations, the manuscript was submitted for the regular review process at *Law and Human Behavior*, where it was eventually accepted after two more rounds of revisions. Finally, the AP-LS Executive committee voted to accept this final version as an official position paper of the organization—only the third paper in the organization's 54-year history to receive this designation.<sup>7</sup>

With this background in mind, we present the nine expert-panel recommendations to improve the reliability of eyewitness identification accuracy. We present the recommendations in the order in which they become relevant through the course of a police investigation.

Specifically, the recommendations describe the importance of:

- 1) documenting in a pre-lineup interview the witness's memory of the suspect and the conditions under which the witness viewed the crime;
- 2) evidence-based suspicion that the suspect committed the specific crime that the witness saw;
- 3) selecting fillers that do not make the suspect stand out among the lineup<sup>8</sup> members;
- 4) lineup administrators who do not know which lineup member is the suspect (i.e., blind administration);
- 5) providing proper pre-lineup instructions to the witness;
- 6) memorializing the witness's confidence in the accuracy of their identification decision immediately after it has been made;
- 7) video recording the identification procedure from start

## Footnotes

1. As of January 2022, the Innocence Project reports that 69% of the 375 DNA exonerations have involved mistaken eyewitness identifications. *Eyewitness Identification Reform*, INNOCENCE PROJECT, <https://innocenceproject.org/eyewitness-identification-reform/> (last visited July 10, 2022).
2. Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 L. & HUM. BEHAV. 395 (2005); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & HUM. BEHAV. 283 (1997).
3. Ryan J. Fitzgerald et al., *The Effect of Suspect-Filler Similarity on Eyewitness Identification Decisions: A Meta-Analysis*, 19 PSYCHOL. PUB. POL'Y & L. 151 (2013); Steve D. Charman et al., *The Dud Effect: Adding Highly Dissimilar Fillers Increases Confidence in Lineup Identifications*, 35 L. & HUM. BEHAV. 479 (2011).
4. Margaret Bull Kovera & Andrew J. Evelo, *The Case for Double-Blind Lineup Administration*, 23 PSYCHOL. PUB. POL'Y & L. 421 (2017); Nancy M. Steblay et al., *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 PSYCHOL. PUB. POL'Y & L. 1 (2014).
5. The American Psychology-Law Society is an organization whose members are social scientists and legal professionals who are committed to conducting research at the intersection of psychology and law and educating others about the results of this research. *Vision Statement*, AMERICAN PSYCHOLOGY-LAW SOCIETY, <https://www.ap-ls.org/about/> (last visited July 10, 2022).
6. Mark Costanzo & Lora M. Levett, *The American Psychology-Law Society Scientific Review Paper on the Collection and Preservation of Eyewitness Identification Evidence*, 44 L. & HUM. BEHAV. 1 (2020).
7. *Id.*
8. For ease of exposition, will use the term "lineup" to refer to an identification procedure that includes live lineups and photo arrays in which there is a single suspect and some number of known innocent people (i.e., fillers). There is a body of research demonstrating that identification decisions do not differ depending on whether the procedure used to elicit them is a live lineup or photo array. See e.g., Ryan Fitzgerald et al., *Eyewitness Identification: Live, Photo, and Video Lineups*, 24 PSYCHOL. PUB. POL'Y & L. 307 (2018).

- to finish;
- 8) avoiding repeated identification attempts; and
- 9) conducting lineups rather than showups.<sup>9</sup>

Although space limitations preclude us from fully reviewing the science underlying these recommendations in this paper, we present the scientific rationale underlying each of these recommendations below and refer the interested reader to the scientific review paper for a more complete analysis of the evidence base.

**CONDUCT A PROPER PRE-LINEUP INTERVIEW TO DOCUMENT WITNESS’S DESCRIPTION OF THE CULPRIT AND THE WITNESSING CONDITIONS**

Acquiring complete, accurate statements from witnesses can function as a crucial piece of evidence for locating a suspect and furthering an investigation.<sup>10</sup> Consequently, researchers have expended substantial energy identifying the most effective techniques for interviewing witnesses.<sup>11</sup> It is important to conduct thorough interviews with eyewitnesses to document the witnesses’ descriptions of the culprit (including the extent of the witnesses’ familiarity with the culprit—from total stranger to close relation)<sup>12</sup> and the quality of the conditions under which they viewed the crime. These interviews should be conducted as soon as possible after the crime but before conducting the identification procedure. The immediacy of this interview is important because the viewing of possible suspects (e.g., in media reports, mugshot searches, or searches of social media), discussions with co-witnesses,<sup>13</sup> or feedback about whether they identified the suspect<sup>14</sup>

could contaminate their descriptions of both the culprit and the witnessing conditions. Police also should avoid suggestive interviewing practices that could contaminate witnesses’ memories.<sup>15</sup>

**“The entire pre-lineup interview should be videorecorded . . . ”**

The entire pre-lineup interview should be videorecorded so that triers of fact can review whether the procedures were unduly suggestive or misleading. The video recording also serves the purpose of memorializing the witnesses’ reports.<sup>16</sup>

Several factors influence the quality of a memory report. The police have no control over some of these factors, like the quality of the witness’s viewing conditions. However, the police can adjust the timing and nature of their interviews to improve the accuracy and completeness of an eyewitness account. For example, extensive delays between witnessing the crime and providing a memory report can reduce the amount of detail witnesses are able to provide.<sup>17</sup> Thus, conducting a pre-lineup interview soon after the witnessed incident can increase the amount of accurate detail reported. On the other hand, pushing witnesses to provide more complete descriptions of the event or culprit could actually increase the number of incorrect details included in the report.<sup>18</sup> In cases with multiple eyewitnesses, investigators should instruct witnesses to not discuss their memory for the crime with each other so that their reports remain independent and uncontaminated by another witness’s memory errors. Further, investigators should refrain from sharing any information provided by other

9. Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 L. & HUM. BEHAV. 3 (2020).
10. Charity Brown et al., *Eliciting Person Descriptions from Eyewitnesses: A Survey of Police Perceptions of Eyewitness Performance and Reported Use of Interview Techniques*, 20 EUR. J. COGNITIVE PSYCHOL. 529 (2008); Mark R. Keibell & Rebecca Milne, *Police Officers’ Perceptions of Eyewitness Performance in Forensic Investigations*, 138 J. SOC. PSYCHOL. 323 (1998).
11. Coral J. Dando et al., *Interviewing Adult Witnesses and Victims*, in COMMUNICATION IN INVESTIGATIVE AND LEGAL CONTEXTS: INTEGRATED APPROACHES FROM FORENSIC PSYCHOLOGY, LINGUISTICS AND LAW ENFORCEMENT (Gavin Oxburgh et al., eds. 2015); Ronald P. Fisher, Nadia Schreiber Compo, Jillian Rivard & Dana Hirn, *Interviewing Witnesses*, in THE SAGE HANDBOOK OF APPLIED MEMORY (Timothy J. Perfect & D. Stephen Lindsay eds. 2014).
12. Judgments of familiarity are not always accurate. See Kathy Pezdek & Stacia Stolzenberg, *Are Individuals’ Familiarity Judgments Diagnostic of Prior Contact?* 20 PSYCHOL. CRIME & L. 302 (2014). However, witnesses who are more familiar with the culprit are generally better able to provide more accurate descriptions and identifications. See Jonathan P. Vallano et al., *Familiar Eyewitness Identifications: The Current State of Affairs*, 25 PSYCHOL. PUB. POLY & L. 128 (2019).
13. Fiona Gabbert et al., *Memory Conformity: Can Eyewitnesses Influence Each Other’s Memories for an Event?*, 17 APPLIED COGNITIVE PSYCHOL. 533 (2003); Fiona Gabbert et al., *Say It to My Face: Examining the Effects of Socially Encountered Misinformation*, 9 LEGAL & CRIMINOLOGICAL PSYCHOL. 215 (2004); Mitchell L. Eisen et al., *“I Think He Had a Tattoo on his Neck”: How Co-Witness Discussions about a Perpetrator’s Description Can Affect Eyewitness Identification Decisions*, 6 J. APPLIED RESEARCH IN MEMORY & COGNITION 274 (2017).
14. Steblay et al., *supra* note 4.
15. See Charles J. Brainerd & Valerie F. Reyna, *THE SCIENCE OF FALSE MEMORY* (2005); Elizabeth F. Loftus, *Eavesdropping on Memory*, 68 ANN. REV. PSYCHOL. 1 (2017); Eryn J. Newman & Maryanne Garry, *FALSE MEMORY* (2013).
16. Research has uncovered failures in investigators’ ability to accurately record and recall essential details of interviews. See, e.g., Saul M. Kassir et al., *Police Reports of Mock Suspects Interrogations: Accuracy and Perception*, 41 L. & HUM. BEHAV. 230 (2017); Michael E. Lamb et al., *Accuracy of Investigators’ Verbatim Notes of their Forensic Interviews with Alleged Child Abuse Investigations*, 24 L. & HUM. BEHAV. 699 (2000).
17. Hayden D. Ellis et al., *Identification of Familiar and Unfamiliar Faces from Internal and External Features: Some Implications for Theories of Face Recognition*, 8 PERCEPTION 431 (1980); Christian A. Meissner, *Applied Aspects of the Instructional Bias Effect in Verbal Overshadowing*, 16 APPLIED COGNITIVE PSYCHOL. 911 (2002); Michelle R. Tuckey & Neil Brewer, *The Influence of Schemas, Stimulus Ambiguity, and Interview Schedule on Eyewitness Memory Over Time*, 9 J. EXPERIMENTAL PSYCHOL.: APPLIED 101 (2003); Peter J. van Koppen & Shara K. Lochun, *Portraying Perpetrators: The Validity of Offender Descriptions by Witnesses*, 21 L. & HUM. BEHAV. 661 (1997).
18. Michael S. Wogalter, *Effects of Post-Exposure Description and Imaging on Subsequent Face Recognition Performance*, PROCEEDINGS OF THE HUMAN FACTORS SOCIETY 35TH ANNUAL MEETING (1991); Michael S. Wogalter, *Describing Faces from Memory: Accuracy and Effects on Subsequent Recognition Performance*, PROCEEDINGS OF THE HUMAN FACTORS SOCIETY 35TH ANNUAL MEETING (1996); Jennifer K. Ackil & Maria S. Zaragoza, *Memorial Consequences of Forced Confabulation: Age Differences in Susceptibility to False Memories*, 34 DEVELOPMENTAL PSYCHOL. 1358 (1998); Christian A. Meissner et al., *The Influence of Retrieval Processes in Verbal Overshadowing*, 29 MEMORY & COGNITION 176 (2001).

**“This self-administered protocol may be particularly useful for obtaining witness statements when an oral interview cannot be practicably conducted soon after the crime . . .”**

witnesses. Learning that a co-witness made a confident identification from the lineup could increase the likelihood that another witness will also make an identification (which may have otherwise been rejected) and express inflated confidence in that decision.<sup>19</sup>

When interviewing witnesses, investigators should ask non-suggestive questions that elicit open-ended responses (i.e., narratives rather than simple yes or no responses) from witnesses. Caution should be used when moving to closed-ended questions (e.g., those that can be answered yes or no), as the use of specific probes may increase the number of details provided by wit-

nesses, but at the expense of accuracy. Interviewers should abstain from asking suggestive or leading questions altogether to avoid introducing information into witnesses' memories of the culprit. Instead, interviews that are conducted by investigating officers who have been trained in an empirically based interviewing protocol should provide higher quantity and quality information that can be used to further the investigation.

Three interviewing protocols are notable for their ability to improve the information provided by witnesses. The first, known as the *Cognitive Interview*,<sup>20</sup> is more effective than a standard police interview for eliciting large numbers of correct details that could assist in locating a guilty suspect.<sup>21</sup> Two features of the *Cognitive Interview* that set it apart from a standard police interview are:

- a) the interviewer encourages witnesses to report all of the information they can recall but to refrain from guessing and capitalizes on context reinstatement (i.e., recreating the conditions under which the memory was encoded for ease of retrieval) by asking witnesses to close their eyes and imagine themselves at the scene of the crime; and
- b) the *Person Description Interview* is also effective for increasing the quantity of culprit characteristics that witnesses report without sacrificing accuracy.<sup>22</sup> Inter-

viewers who use this protocol instruct witnesses to first provide general information about the person, before moving to describing specific facial features. Eventually interviewers ask for descriptions of specific characteristics but have witnesses start by describing the bottom of the culprit's face (e.g., chin, jawline, facial hair, lips), continuing up the face (e.g., nose, cheeks) until they reach the upper region (e.g., eyes, hair) of the face.

Finally, the *Self-Administered Interview*<sup>23</sup> includes the encouragement to report and context reinstatement features of the *Cognitive Interview* but allows the witness to record their own responses to interview prompts in writing. Although some research suggests that oral interviews may produce more information from witnesses than written statements,<sup>24</sup> the *Self-Administered Interview* successfully elicits more descriptive details than a standard free recall prompt, and this increase in descriptors is comparable with that of the orally-conducted *Cognitive Interview*.<sup>25</sup> This self-administered protocol may be particularly useful for obtaining witness statements when an oral interview cannot be practicably conducted soon after the crime, such as in cases that involve several witnesses to crimes committed in the jurisdictions of departments with too few or under-trained staff.

To close the interview, investigators should instruct the witness to not discuss the event with others and admonish them against attempting to identify the culprit on their own (e.g., via social media searches). Once a witness makes an initial identification of a suspect through an Internet search, any subsequent identification procedure will inevitably be contaminated.

#### **HAVE EVIDENCE-BASED SUSPICION BEFORE INITIATING AN IDENTIFICATION PROCEDURE**

To increase the ratio of correct to mistaken identifications of suspects, officers should have extrinsic evidence of a suspect's guilt (i.e., evidence-based suspicion) before placing him in an identification procedure. Requiring evidence-based suspicion before placing suspects at risk of misidentification increases the ratio of culprit-present (i.e., the suspect is guilty) to culprit-absent (i.e., the suspect is innocent) procedures, otherwise known as the base-rate of suspect guilt. Admittedly, there is no legal standard on the quantity or quality of evidence connecting a particular person to a particular crime before the police can make that person a suspect in an identification procedure. Mis-

19. Lora M. Levett, *Co-Witness Information Influences whether a Witness Is Likely to Choose from a Lineup*, 18 *LEGAL & CRIMINOLOGICAL PSYCHOLOGY* 168 (2013).

20. Ronald P. Fisher & R. Edward Geiselman, *MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW* (1992).

21. Geri E. Satin & Ronald P. Fisher, *Investigative Utility of the Cognitive Interview: Describing and Findings Perpetrators*, 43 *L. & HUM. BEHAV.* 491 (2019).

22. Samuel Demarchi & Jacques Py, *A Method to Enhance Person Description: A Field Study*, in *HANDBOOK OF PSYCHOLOGY OF INVESTIGATIVE INTERVIEWING: CURRENT DEVELOPMENTS AND FUTURE DIRECTIONS* (Ray Bull et al., eds. 2009); Samuel Demarchi et al., *Describing a Face without Overshadowing Effect: Another Benefice of the Person Description Interview*, 58 *PSYCHOLOGIE FRANÇAISE* 123 (2013); Neil Brewer et al.,

*Interviewing Witnesses: Eliciting Coarse-Grain Information*, 42 *L. & HUM. BEHAV.* 458 (2018).

23. Lorraine Hope et al., *From Laboratory to the Street: Capturing Witness Memory using the Self-Administered Interview*, 16 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 211 (2011).

24. Uta Kraus et al., *Comparing the Quality of Memory Reports in Different Initial Eyewitness Questioning Approaches*, 4 *COGENT PSYCHOL.* 1 (2017); Melanie Sauerland & Siegfried L. Sporer, *Written vs. Spoken Eyewitness Accounts: Does Modality of Testing Matter?* 29 *BEHAVIORAL SCI. & L.* 846 (2011).

25. Fiona Gabbert, Lorraine Hope & Ronald P. Fisher, *Protecting Eyewitness Evidence: Examining the Efficacy of a Self-Administered Interview Tool*, 33 *L. & HUM. BEHAV.* 298 (2009); Lorraine Hope et al., 28 *APPLIED COGNITIVE PSYCHOL.* 304 (2014).

taken identifications of innocent suspects cannot happen when there is only one suspect in an identification procedure and that suspect is guilty. So, increasing the base rate of culprit-present identification procedures (relative to culprit-absent procedures) by requiring that an officer have evidence-based suspicion before administering the identification procedure does more to increase the reliability of witnesses' positive identifications of suspects than does any other recommendation for best practice.<sup>26</sup>

A mere hunch that the suspect is guilty does not constitute evidence-based suspicion. However, a significant proportion of suspects may be subjected to identification procedures with little more than a hunch of a police officer connecting the suspect to the crime under investigation. Forty percent of law enforcement officers responding to a survey reported that they would place a person in a lineup with no articulable evidence of guilt beyond a hunch.<sup>27</sup> The survey included reading one description of evidence that police had against a suspect before placing him in a lineup—evidence that did not connect the suspect to the specific crime that the witness had seen in any way. The majority of police indicated that they would ask the witness to attempt an identification of the suspect anyway.<sup>28</sup> In addition, police officers consistently overestimated the strength of the evidence against the suspect when the evidence was weak.<sup>29</sup> Thus, officers are likely placing suspects in lineups without collecting sufficient evidence, which results in a low *prior probability* that they are guilty. For cases in which suspects have a very low probability of guilt before the identification procedure, they also have a low *posterior probability* of guilt, even if witnesses positively identified them. Thus, even if the witness identifies the suspect in the lineup, the identification is far less reliable if it is obtained under circumstances that produce a low base rate of culprit-present lineups, even for highly confident witnesses.<sup>30</sup> Overall, it is important for triers of fact to consider how a defendant became a suspect so that they can make appropriate judgments about the reliability of identification evidence.

The amount and quality of evidence that justifies an officer asking a witness to attempt an identification with a particular suspect will vary on a case-by-case basis. However, the authors of the AP-LS scientific review paper (see footnote 10) provided several examples of patterns of evidence that would provide sufficient suspicion to support placing a suspect at risk of misidentification,<sup>31</sup> including a suspect who:

- fits a unique description given by the eyewitness (e.g., a specific tattoo on a specified body part);
- makes self-incriminating statements;
- was in possession of fruits of the criminal act in combination with matching the witness's description of the

suspect;

- presence in the vicinity of the crime; and
- matches the witness's specific physical description of the suspect.

It is important to note that what police may believe is good evidence linking a suspect to the crime in question may not be good evidence at all, because police overestimate the strength of the evidence connecting a suspect to a specific crime when the evidence is weak.<sup>32</sup>

In consultations, the first author has come across numerous examples of cases in which the police did *not* have evidence-based suspicion<sup>33</sup> but used the evidence to place suspects in lineups nonetheless. For example, if a search of police records reveals that the suspect was convicted of a similar crime in the same jurisdiction, has been released from prison, and is now living in the neighborhood where the crime was committed, there is no connection of that suspect to the crime under investigation. Also, if the suspect resembles a composite sketch or rendering of the culprit made with the assistance of the witness, the evidence does not clear the threshold of reasonable, articulable suspicion because composites do not reliably represent a recognizable representation of the culprit.<sup>34</sup> Finally, consider a suspect who was apprehended in the vicinity of one crime happens to match the description of the culprit not only for that crime but also for several other, similar crimes recently committed elsewhere in the community. If a witness to the crime committed in the vicinity of the suspect's apprehension does not identify the suspect, then there is no evidence to support placing that suspect in lineups shown to witnesses to the other similar crimes committed elsewhere in the community.

These examples are certainly not exhaustive. However, they illustrate an important point: evidence supporting the placement of a suspect in an identification procedure must be evaluated for whether it provides a sufficient connection between the suspect and the witnessed crime. Even if other best practice procedures are used during a lineup's administration, in the absence of evidence-based suspicion, any identification obtained is less likely to be accurate.

### **LINEUP FILLERS SHOULD NOT CAUSE THE SUSPECT TO STAND OUT**

For an eyewitness identification to have evidentiary value, there should only be one suspect per lineup and the lineup should contain at least five viable known-innocent fillers. If a

**“Overall, it is important for triers of fact to consider how a defendant became a suspect . . . .”**

26. Gary L. Wells, Yueran Yang & Laura Smalarz, *Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect-Equivalency Curves, and Reasonable Suspicion*, 39 L. & HUM. BEHAV. 99 (2015).

27. Richard A. Wise et al., *What U.S. Law Enforcement Officers Know and Believe about Eyewitness Factors, Eyewitness Interviews and Identification Procedures*, 25 APPLIED COGNITIVE PSYCHOL. 488 (2011).

28. Jacqueline A. Katzman & Margaret Bull Kovera, *Evidence Strength (Insufficiently) Affects Police Officers' Decisions to Place Suspects in Lineups*, 46 L. & HUM. BEHAV. 30 (2022).

29. *Id.*

30. Amber M. Giacona et al., *Estimator Variables Can Matter Even for High Confidence Lineup Identifications Made Under Pristine Conditions*, 45 L. & HUM. BEHAV. 256 (2021).

31. Wells et al., *supra* note 9.

32. Katzman & Kovera, *supra* note 28.

33. Wells et al., *supra* note 9.

34. Margaret Bull Kovera et al., *Identification of Computer-Generated Facial Composites*, 82 J. APPLIED PSYCHOL. 235 (1997).

**“... the officer who builds the lineup should ask at least two other people who do not know who the suspect is to review the witness’s description . . .”**

lineup contained all suspects and no fillers, it would function like a multiple-choice test with no wrong answers.<sup>35</sup> By buffering a suspect (whose guilt status is unknown) with fillers who are known to be innocent, innocent suspects will be protected against unreliable witnesses who are compelled to make a guess, with fillers siphoning off guesses from the suspect.<sup>36</sup> Ideally, a fair six-person lineup administered to people who did not witness the

crime and were only provided a description of the culprit should result in only one-sixth of these mock witnesses making a positive identification of the suspect. We do not expect officers to conduct this mock witness test with every lineup they create. However, the officer who builds the lineup should ask at least two other people who do not know who the suspect is to review the witness’s description of the suspect and evaluate the lineup for bias.

Biased lineups in which the suspect stands out among the innocent fillers do not adequately protect the suspect’s due process rights. Known-innocent fillers who are not similar in appearance to the suspect—in contrast with fillers who are highly similar in appearance—significantly increase the likelihood of eyewitnesses making mistaken identifications of innocent suspects.<sup>37</sup> There are two dominant strategies for selecting lineup fillers: match-to-description and resemble-suspect.<sup>38</sup> In the match-to-description strategy, officers choose fillers who match the features included in the verbal description of the culprit provided by the eyewitness but vary on features not mentioned in the description. In the resemble-suspect strategy, officers select fillers who physically resemble the suspect (who may or may not be the culprit). Although on its face, the resemble-suspect strategy for selecting fillers may seem reasonable, it has several limitations. When constructing fair lineups, officers must be careful to not make the task impossibly difficult by picking lineup fillers who are *too* similar, essentially creating a lineup of near clones. This problem of too similar fillers may become more common with new technology allowing for the selection of fillers

from extremely large face databases.<sup>39</sup> Moreover, the resemble-suspect strategy provides no stopping point for how similar the suspects should be, whereas selecting fillers based on the witnesses’ description of the culprit provides a natural stopping point. A large-scale study comparing fillers selected through the match-to-description strategy versus the resemble-suspect strategy found the former reduced inaccurate identifications of the innocent suspect without reducing accurate identifications of the guilty culprit.<sup>40</sup>

However, in cases when eyewitnesses are unable to give detailed descriptions of the perpetrator, the match-to-description method may result in lineups with fillers who are not similar enough. The match-to-description method may also not be useful for making a fair lineup when the police’s suspect does not match the witness’s description (e.g., when someone becomes a suspect for reasons other than their appearance). Thus, we suggest a blended approach. The match-to-description method should be reserved for cases when the description is complete and detailed. If there is a discrepancy between the description of the culprit and the appearance of the suspect included in the lineup, the fillers should match the suspect’s appearance (the resemble-suspect strategy). Similarly, if a suspect is selected based on resemblance to a forensic sketch or surveillance image, choosing fillers based on the witness’s description of the culprit could cause the suspect to stand out among the fillers. Thus, fillers should be chosen based on their similarity to that same facial composite or surveillance footage.<sup>41</sup> If the suspect has a unique feature (e.g., tattoo, scar), investigators may choose to either duplicate this feature onto the fillers or cover the feature on the suspect and cover the same location on the fillers. These methods are equally effective in reducing lineup bias resulting from the suspect having a unique feature that is not shared with the fillers.<sup>42</sup>

In addition to physical features of the fillers, factors such as the background, size, brightness, source, and clothing could cause a suspect to stand out in a photographic lineup. Photo lineups should be electronically edited to eliminate these biasing features. Gathering images from the same source (e.g., DMV vs. employment ID vs. social media vs. mugshots) can also reduce discrepancies in the photographs. Not every aspect of the photographs needs to match perfectly—the goal is for the suspect to not stand out among the fillers.

35. Gary L. Wells & John W. Turtle, *Eyewitness Identification: The Importance of Lineup Models*, 99 *PSYCHOL. BULL.* 320 (1986); John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 *PSYCHOL. SCI. PUB. INTEREST* 10 (2017).

36. Andrew M. Smith, Gary L. Wells, Rod C. L. Lindsay & Steven D. Penrod, *Fair Lineups are Better than Biased Lineups and Showups, but not Because They Increase Underlying Discriminability*, 41 *L. & HUM. BEHAV.* 127 (2017).

37. Ryan J. Fitzgerald, Heather L. Price, Chris Oriet & Steve D. Charman, *The Effect of Suspect-Filler Similarity on Eyewitness Identification Decisions: A Meta-Analysis*, 19 *PSYCHOL. PUB. POL’Y & L.* 151 (2013).

38. Elizabeth C. A. Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distractors for Lineups*, 15 *L. & HUM. BEHAV.* 43 (1991).

39. Amanda N. Bergold & Paul Heaton, *Does Filler Database Size Influ-*

*ence Identification Accuracy?* 42 *L. & HUM. BEHAV.* 227 (2018).

40. Curt A. Carlson, Alyssa R. Jones, Jane E. Whittington, Robert F. Lockamy, Maria A. Carlson & Alex R. Wooten, *Lineup Fairness: Propitious Heterogeneity and the Diagnostic Feature-Detection Hypothesis*, 4 *COGNITIVE RE.: PRINCIPLES & LIMITATIONS* 1 (2019); Gary L. Wells, Sheila M. Rydell & Eric P. Seelau, *The Selection of Distractors for Eyewitness Lineups*, 78 *J. APPLIED PSYCHOL.* 835 (1993); Peter Juslin, Nils Olsson & Anders Winman, *Calibration and Diagnosticity of Confidence in Eyewitness Identification: Comments on What Can Be Inferred from the Low Confidence-Accuracy Correlation*, 22 *J. EXPERIMENTAL PSYCHOL.* 1304 (1996).

41. Wixted & Wells, *supra* note 35.

42. Melissa F. Colloff, Kimberley A. Wade & Deryn Strange, *Unfair Lineups Make Witnesses More Likely to Confuse Innocent and Guilty Suspects*, 27 *PSYCHOL. SCI.* 1227 (2016).

## USE DOUBLE-BLIND LINEUP ADMINISTRATION PROCEDURES (OR THEIR EQUIVALENT)

Lineups should be conducted using a double-blind procedure (i.e., neither the administrator nor the witness knows which lineup member is the suspect). Because a lineup is a test of the hypothesis that the suspect is the culprit,<sup>43</sup> and because people tend to test hypotheses in ways that confirm their expectations,<sup>44</sup> a lineup administrator should conduct their experiment in a way that prevents their own expectations from contaminating the results.<sup>45</sup> Double-blind administration of identification procedures, wherein the lineup administrator does not know which person is the suspect and which are the fillers, is the best way of ensuring that any information that administrators have about which lineup member is the suspect will not influence witnesses' identification decisions or their self-reported confidence in those decisions. In contrast, single-blind administration of identification procedures, wherein the administrator knows which lineup member is the suspect and which are the fillers, allows for the possibility that the administrator will communicate the identity of the suspect to the witness through intentional or unintentional verbal or nonverbal behaviors.<sup>46</sup>

A large body of research supports the recommendation for double-blind lineup administration.<sup>47</sup> When lineup administrators know who the suspect is they send cues to witnesses that result in witnesses choosing the suspect from the lineup at higher rates,<sup>48</sup> irrespective of whether the suspect is the culprit or is innocent. Nonblind administrators also react to witness identifications,<sup>49</sup> which provides feedback to witnesses about their decisions. Administrator feedback to witnesses that they "correctly" identified the suspect inflates witnesses' confidence in the accuracy of their identification; this feedback effect is particularly apparent among eyewitnesses who have identified innocent suspects.<sup>50</sup> Thus, single-blind administration not only reduces the reliability of the identification itself but also strips the confidence statement of its investigative value.<sup>51</sup>

The double-blind recommendation extends beyond simply withholding knowledge about the suspect from the administrator. No one in the room where the identification procedure is conducted should know which lineup member is the suspect, because it is possible that they can communicate that information

to the witness even if they are not the administrator. Additionally, if a crime has multiple witnesses, a different blind administrator should conduct the lineup with each witness because the witness's behavior could provide the administrator with clues about which lineup member is the suspect. These clues could show how the administrator interacts with later witnesses, increasing the rate at which they identify the suspect.<sup>52</sup>

Although the double-blind recommendation has a strong theoretical and empirical basis, there have been arguments against its implementation. First, critics argue that some police departments are so small that every officer knows who is suspected of which crime, making it impossible to obtain a blind administrator.<sup>53</sup> However, eyewitness scholars have recommended a variety of methods to circumvent this issue, including (a) making cooperative agreements that loan officers to nearby departments, (b) using photo lineup software that allows the witness to self-administer, and (c) placing lineup photos in a sealed envelope for the witness to examine without the officer present.<sup>54</sup> Second, critics argue that double-blind procedures lead to a reduction in suspect identifications.<sup>55</sup> Although this second point is true, double-blind procedures reduce suspect identifications by eliminating the opportunity for administrators to cue the witness to which lineup member is the suspect, resulting in an identification that is not solely the product of a witness's memory as is required by law.<sup>56</sup> Thus, suspect identifications made under single-blind conditions may sacrifice a suspects' due process rights.<sup>57</sup>

**"When lineup administrators know who the suspect is, they send cues to witnesses . . ."**

## PROVIDE PRE-LINEUP INSTRUCTIONS DESIGNED TO IMPROVE IDENTIFICATION RELIABILITY

A lineup procedure's evidentiary value decreases if the police officers suggest that the culprit will be present in the identification procedure or that a suspect has already been arrested. Before attempting an identification, the administrator should instruct the witness that (a) the lineup administrator does not know which lineup member is the suspect; (b) the culprit might not be

43. Andrew M. Smith, Yueran Yang & Gary L. Wells, *Distinguishing Between Investigator Discriminability and Eyewitness Discriminability: A Method for Creating Full Receiver Operating Characteristic Curves of Lineup Identification Performance*, 15 PERSP. ON PSYCHOL. SCI. 589 (2020).

44. Robert Rosenthal, *Covert Communication in Classrooms, Clinics, Courtrooms, and Cubicles*, 57 AM. PSYCHOLOGIST 839 (2002).

45. Kovera & Evelo, *supra* note 4; Wells et al., *supra* note 9.

46. *Id.*

47. Margaret Bull Kovera & Andrew J. Evelo, *Improving Eyewitness-Identification Evidence Through Double-Blind Lineup Administration*, 29 CURRENT DIRECTIONS IN PSYCHOL. SCI. 563 (2020).

48. Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 L. & HUM. BEHAV. 70 (2009); David M. Zimmerman, Jacqueline Austin Chorn, Lindsey M. Rhead, Andrew J. Evelo & Margaret Bull Kovera, *Memory Strength and Lineup Presentation Moderate Effects of Administrator Influence on Mistaken Identifi-*

*cations*, 23 J. EXPERIMENTAL PSYCHOL.: APPLIED 460 (2017).

49. Steve D. Charman & Vanessa Quiroz, *Blind Sequential Lineup Administration Reduces Both False Identifications and Confidence in Those False Identifications*, 40 L. & HUM. BEHAV. 477 (2016).

50. Steblay et al., *supra* note 4.

51. Wixted & Wells, *supra* note 35.

52. Amy Bradfield Douglass, Caroline Smith & Rebecca Fraser-Thill, *A Problem with Double-Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence to Influence the Identification of Another Eyewitness*, 29 L. & HUM. BEHAV. 543 (2005).

53. Wells et al., *supra* note 9.

54. Wells et al., *supra* note 9.

55. Steven E. Clark, *Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy*, 7 PERSP. ON PSYCHOL. SCI. 238 (2012)

56. *Perry v. New Hampshire*, 565 U.S. 228 (2012)

57. Wells et al., *supra* note 9.

**“. . . we suggest that witnesses are explicitly told that the lineup administrator does not know who the suspect is . . .”**

in the lineup at all, so the correct answer might be “not here” or “none of these”; (c) if they are unable to make a decision, they have the option of responding “I don’t know”; (d) after making a decision, they will be asked to state how confident they are in that decision; and (e) the investigation will continue regardless of whether they make an identification. These instructions should be provided in writing, as well as read

aloud to the witness by the lineup administrator, pausing after each point to check for understanding and to answer any questions.

Receiving an invitation to make an identification may be enough in and of itself to lead witnesses to believe that the police have a convincing suspect and that their task as witnesses is to simply determine which lineup member is the culprit.<sup>58</sup> Witnesses will likely assume that the lineup administrator knows who the suspect is, even when the department is using a blind administrator. This assumption may lead witnesses to look toward the lineup administrator for cues to guide their identification decision, even though the administrator has no informed cues to give. Consequently, we suggest that witnesses are explicitly told that the lineup administrator does not know who the suspect is, nor which lineup members are known-innocent fillers.

Additionally, if witnesses assume that the culprit is present, they will likely treat the lineup like a multiple-choice test, in which the task is to select the best answer from among the available options, losing sight of the possibility that the correct option may be that the culprit is not present.<sup>59</sup> Identification procedures that fail to warn witnesses about the possible absence of the culprit tend to result in more mistaken identifications of innocent suspects, compared to procedures that include this admonition.<sup>60</sup> Thus, we recommend that administrators instruct witnesses that the culprit may or may not be present in the lineup. In addition, administrators should provide witnesses with the explicit instruction that “not present” and “don’t know” are acceptable response options. A witness responding with “I don’t know” may be more appropriate than “not present” in cases when a witness is having a hard time choosing between lineup members or is uncertain as to whether the culprit is in the lineup.

The availability of an explicit “don’t know” option will likely reduce tentative identifications made with low confidence, which are often inaccurate.<sup>61</sup>

Finally, witnesses may erroneously infer when a lineup administrator asks for their confidence in their decision that the administrator is assessing their confidence only because the administrator believes they chose incorrectly. To prevent these inferences, administrators should include, in their pre-lineup instructions to witnesses, that they will ask the witness to provide a confidence statement if there is an identification. Another misconception widely held by witnesses is the belief that the investigation hinges on their identification decision. Thus, lineup administrators should reassure witnesses that the investigation will continue regardless of whether they make an identification. Although some jurisdictions have adopted an instruction included in the guidelines developed by the U.S. Department of Justice (DOJ) that cautions witnesses that the appearance of the culprit may have changed since commission of the crime,<sup>62</sup> research conducted since the DOJ made this recommendation suggests this instruction increases false identifications of innocent suspects without increasing accurate culprit identifications.<sup>63</sup> Therefore, there is no scientific evidence to support an instruction on a culprit’s possible change of appearance.

#### **OBTAIN A CONFIDENCE STATEMENT IMMEDIATELY AFTER THE IDENTIFICATION**

An administrator who is blind to which lineup member is the suspect should ask witnesses to report how confident they feel in their identification decision immediately after an identification decision has been made and before there is any chance for feedback from anyone who knew which lineup member was the suspect. These confidence statements can be collected on a numeric scale (i.e., 0% confident to 100% confident), a verbal scale (e.g., “completely certain,” “pretty sure,” “uncertain”), or by recording a verbatim record of the witnesses’ verbal statement. Confidence statements should be recorded for suspect identifications, filler identifications, and “not here” responses. For witnesses who indicate that they “don’t know,” a confidence statement should only be recorded if the witness spontaneously provides one. It may also be worthwhile to ask the eyewitness to explain the basis for their “don’t know” response (e.g., did not get a good view of the culprit).

Eyewitnesses’ reported confidence can be very useful for predicting the accuracy of an eyewitness identification, but only when

58. Indeed, previous studies have suggested that many witnesses enter identification procedures with the expectation that the culprit must be present in the lineup. See, e.g., Amina Memon, Fiona Gabbert & Lorraine Hope, *The Aging Eyewitness*, in FORENSIC PSYCHOLOGY: DEBATES, CONCEPTS AND PRACTICE (Joanna R. Adler ed. 2004).

59. Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89 (1984).

60. Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 L. & HUM. BEHAV. 575 (2005); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & HUM. BEHAV. 283 (1997); Nancy M. Steblay, *Lineup Instructions*, in REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES (Brian L. Cutler ed. 2013).

61. Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in*

*Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity and Target-Absent Base Rates*, 12 J. EXPERIMENTAL PSYCHOL. 11 (2006); Wixted & Wells, *supra* note 35.

62. The DOJ recommends that eyewitness be instructed that “individuals depicted in lineup photos may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.” National Institute of Justice, 178240, *Eyewitness Evidence: A Guide for Law Enforcement* at 32 (2002).

63. Steve D. Charman & Gary L. Wells, *Eyewitness Lineups: Is the Appearance-Change Instruction a Good Idea?* 31 L. & HUM. BEHAV. 3 (2007); Peter F. Molinaro et al., *Appearance-Change Instruction Effects on Eyewitness Lineup Identification Accuracy Are Not Moderated by Amount of Appearance Change*, 37 L. & HUM. BEHAV. 432 (2013).



the lineup instructions do not imply the presence of a culprit,<sup>64</sup> double-blind administration is used,<sup>65</sup> fair lineups are presented,<sup>66</sup> and confidence statements are reported immediately after the identification.<sup>67</sup> When collected under these pristine conditions, high confidence is associated with high accuracy. However, we know from DNA exonerations that innocent people are mistakenly identified in court by a highly confident eyewitness. In many of these cases, the eyewitness was significantly less confident at the time of the initial identification, but their confidence became inflated by the time they were asked to testify in court.<sup>68</sup>

Following the identification decision, witnesses face external factors that could influence their subsequent confidence reports. For example, the receipt of feedback from the lineup administrator confirming that the witness selected the suspect can artificially bolster witness confidence.<sup>69</sup> Simply asking a witness to testify in court can function as a form of confirming feedback, as it confirms that the witness correctly identified the police's suspect. This feedback may cause witnesses to forget the initial uncertainty they felt during the lineup procedure and express extreme confidence during their in-court testimony. Moreover, confirming feedback has a greater effect on inaccurate witnesses' confidence compared to accurate witnesses. Inaccurate witnesses who do not provide immediate confidence statements and receive post-identification confirming feedback will likely report inflated confidence levels, similar to the confidence reported by accurate witnesses. This inflation of inaccurate witnesses' confidence impairs fact finders' ability to use expressed confidence to distinguish accurate from inaccurate witnesses.<sup>70</sup> Courts have recognized that post-identification feedback artificially inflates witness confidence.<sup>71</sup> Obtaining a confidence statement immediately following the identification decision is the only way to prevent contamination of subsequent confidence reports by information the witness encounters following the identification procedure.

## VIDEO RECORD ALL IDENTIFICATION PROCEDURES START TO FINISH

The entire identification procedure—from the officers' initial contacts with witnesses inviting them to participate in an identification procedure through the witnesses' confidence state-

ments—should be video recorded. Regardless of whether the procedure is conducted live or by using a photo-array, the video should capture interactions between the witness and the administrator, as well as interactions between the witness and the lineup members. Video recording the procedure secures a record that can help to assess the quality of the identification and the procedure.<sup>72</sup> Specifically, the video record can help evaluators to predict the likely accuracy of the identification by documenting diagnostic behavioral cues (e.g., decision time, confidence),<sup>73</sup> and whether police followed proper procedure.<sup>74</sup>

There are two primary reasons why video-recording identification procedures should be considered best practice. First, creating a video record is important because police reports of what happened during an identification procedure may be incomplete or even inaccurate if they are solely based on an officer's memory.<sup>75</sup> Officers' memories from previous lineup administrations or officer knowledge about what is supposed to happen can interfere with what an officer actually remembers and eventually writes in a report. Additionally, video recording the procedure will make it more difficult for officers to intentionally fabricate reports of what occurred during the lineup administration,<sup>76</sup> as there is evidence that some officers misrepresent case-related events.<sup>77</sup> A video record of the administration documents what actually happened during the identification process and serves to protect against both intentionally and unintentional errors in officers', witnesses', and (in the case of live lineups) suspects' reports of what occurred.

Second, video recording all lineup administrations from start to finish could encourage officers to adhere more carefully to best practice guidelines when administering lineups.<sup>78</sup> For example,

**“Officers’ memories from previous lineup administrations or officer knowledge about what is supposed to happen can interfere with what an officer actually remembers and eventually writes in a report.”**

64. Deah S. Quinlivan et al., *Do Pre-Admonition Suggestions Moderate the Effect of Unbiased Lineup Instructions?* 17 LEGAL & CRIMINOLOGICAL PSYCHOL. 165 (2012).

65. Kovera & Evelo, *supra* note 4.

66. Wixted & Wells, *supra* note 35.

67. Brewer & Wells, *supra* note 61; Matthew A. Palmer et al., *The Confidence-Accuracy Relationship for Eyewitness Identification Decisions: Effects of Exposure Duration, Retention Interval, and Divided Attention*, 19 J. EXPERIMENTAL PSYCHOL.: APPLIED 55 (2013); James Sauer et al., *The Effect of Retention Interval on the Confidence-Accuracy Relationship*, 34 L. & HUM. BEHAV. 337 (2010).

68. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

69. See Steblay et al., *supra* note 4.

70. Amy Bradfield Douglass et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002); Laura Smalarz & Gary L. Wells, *Post-Identification Feedback to Eyewitnesses Impairs Evaluators' Abilities to Discriminate Between Accurate and Mistaken Tes-*

*timony*, 38 L. & HUM. BEHAV. 194 (2014).

71. See, e.g., *State v. Henderson*, 27 A.3d 872 (N.J. 2011); *State v. Lawson*, 291 P.3d 673 (Or. 2012).

72. Siegfried L. Sporer, *Post-Dicting Eyewitness Accuracy: Confidence, Decision-Times and Person Descriptions of Choosers and Non-Choosers*, 22 EUR. J. SOC. PSYCHOL. 157 (1992); Wells et al., *supra* note 9.

73. Kristina S. Kaminski & Siegfried L. Sporer, *Discriminating Between Correct and Incorrect Eyewitness Identifications: The Use of Appropriate Cues*, 23 J. EXPERIMENTAL PSYCHOL. 59 (2017)

74. Wells et al., *supra* note 9.

75. Wells et al., *supra* note 9.

76. Wells et al., *supra* note 9.

77. Myron W. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987); Christopher Slobogin, *Dangerousness as a Criterion in the Criminal Process*, in LAW, MENTAL HEALTH, AND MENTAL DISORDER (Bruce D. Sales & Daniel W. Shuman eds. 1996).

78. Saul M. Kassin, *Eyewitness Identification Procedures: The Fifth Rule*, 22 L. & HUM. BEHAV. 649 (1998)

**“Repeating an identification procedure with the same suspect and same eyewitness should be avoided . . . ”**

in a mock interrogation paradigm, police officers who knew that they were being recorded were significantly less likely to use tactics that are known to increase rates of false confessions.<sup>79</sup> Video recording the procedure may incentivize officers to follow best practice guidelines because the easily reviewed record will show it if

they do not.<sup>80</sup>

There should rarely (if ever) be a legitimate reason as to why an administrator does not video record the entire procedure. Most adults have cell phones that can capture high-quality video records.<sup>81</sup> Additionally, an increasing number of officers now have access to body cameras that can be positioned to make video recordings of identification procedures.<sup>82</sup> Thus, those tasked with evaluating eyewitness evidence should assume that non-recorded lineup administrations were not conducted using best practice guidelines. For instance, without a video record, trial judges should not assume that a lineup administration was conducted using double-blind procedures. Indeed, it is worth considering whether the burden of proving that a lineup administration was *not* suggestive should shift to the prosecution when the police fail to video record the procedure.

#### **AVOID REPEATED IDENTIFICATIONS**

Repeating an identification procedure with the same suspect and same eyewitness should be avoided regardless of whether the eyewitness identified the suspect in the initial identification procedure. This guideline holds true no matter how convincing the argument for conducting a second procedure (e.g., the original photo of the suspect was not as good as it could have been; the witness was nervous during the identification test and is calmer now; the initial identification was made from a social media profile, but it would be more desirable to have an identification made using proper police procedure).<sup>83</sup> Unlike other kinds of forensic evidence for which repeated testing may be desirable (e.g., fingerprint comparisons), there is only one uncontaminated opportunity for an eyewitness to make an identification of a particular suspect.<sup>84</sup>

Repeated identification tests refer to a situation in which an eyewitness is given a subsequent identification test (or more) with the same suspect that appeared in an earlier test. It is *not* considered a repeated identification when an eyewitness is shown a lineup, and then, after rejecting it, is given a different lineup with a different suspect and different fillers. Additionally,

it is *not* considered a repeated identification test when there were multiple culprits, and the eyewitness is given a separate identification test for each culprit. Repeated identification involves an eyewitness viewing a procedure that includes the same suspect as a prior procedure.<sup>85</sup> There are several situations which could lead investigators to push for a repeated identification test, like when a witness views a mug book that contains the suspect, views a showup,<sup>86</sup> views a lineup with the suspect and makes a tentative pick or no pick, views a photo lineup rather than a live lineup, or makes an out-of-court identification that the prosecution wishes to follow with an in-court identification.<sup>87</sup>

It is also important to note that when witnesses make identifications on their own accord (i.e., outside of police procedure), any subsequent identification procedure conducted by the police is a second identification attempt.<sup>88</sup> Sometimes witnesses spontaneously identify someone as the culprit when they come across them in their day-to-day lives.<sup>89</sup> Alternatively, witnesses could hear the culprit referred to by a nickname during the witnessed event and, as a result, decide to conduct their own social media search using that name.<sup>90</sup> Witnesses may even use their own social media connections to search for the culprit if someone they know was present during the crime. Thus, regardless of whether the first identification was made through a witness's self-directed search or through police procedure, any subsequent identification conducted by the police is contaminated.<sup>91</sup>

There are a variety of reasons why repeated identification procedures are problematic. First, repeated identification tests present the opportunity for witnesses to experience a “memory-source error.” Memory-source errors occur when the eyewitness perceives the suspect in the second identification procedure as familiar because he was in the original identification procedure but misattributes this familiarity as familiarity from the original witnessed event.<sup>92</sup> Memory-source errors can occur regardless of whether the witness picked the suspect in the first viewing procedure or they can be the result of viewing the suspect in a mug book. Second, repeated identification tests in which a witness is shown the same suspect with a different set of fillers can lead to commitment effects, a powerful tendency for people to stick with their prior decisions.<sup>93</sup> When witnesses see the suspect that they have already identified once, they are even more likely to identify that suspect again. Last, it is possible for witnesses who make no identification in the first procedure to then realize that there was only one person in the second procedure who was also in the first procedure.<sup>94</sup> In this situation, police are explicitly indicating to the witness which person is the suspect (i.e., the person in common between the two procedures), which contaminates the second identification test.<sup>95</sup>

79. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3 (2010).

80. Wells et al., *supra* note 9.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See discussion *infra* “Showups and Other Confirmatory Identification Procedures Should Be Avoided.”

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

Although there are clear theoretical issues associated with repeated identification tests, it is sometimes difficult for officers to understand this in practice. Officers may conclude that if the witness identifies the suspect in the first identification procedure, then there is no harm in repeating the identification procedure.<sup>96</sup> After all, the identification has already been made and the second procedure is merely a confirmatory process. However, besides the fact that the witness is then more likely to pick the same suspect in the second test, there is also good evidence that repeated testing of eyewitnesses leads to artificially elevated levels of eyewitness confidence.<sup>97</sup> Thus, it is important for evaluators of eyewitness evidence to be wary of situations in which a repeated identification test occurred.

### **SHOWUPS AND OTHER CONFIRMATORY IDENTIFICATION PROCEDURES SHOULD BE AVOIDED**

Rather than conducting a lineup with one suspect surrounded by known-innocent fillers, some identification procedures employ what is known as a *showup* by simply presenting a single individual to the eyewitness and asking whether this person committed the crime in question. In other words, a showup contains no fillers, and only presents the suspect to the witness. This type of identification procedure has been heavily criticized as extremely suggestive for over 110 years.<sup>98</sup> In 1967 the U.S. Supreme Court recognized that “it is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed to be guilty by the police” than the use of showups.<sup>99</sup> However, despite this seemingly strong condemnation of showups, the U.S. Supreme Court has consistently supported their admissibility in court.<sup>100</sup> However, the scientific evidence suggests that showups should be avoided and reserved only for situations when conducting a lineup is not possible.

Experiments comparing lineups to showups have consistently demonstrated that lineups are superior in their ability to distinguish guilty suspects from innocent suspects.<sup>101</sup> Although fillers in a lineup function as a safeguard against false identifications of innocent suspects, showups—which by definition do not contain fillers—do not afford this protection. Additionally, showups cannot be double-blind. In fact, because both the showup administrator and the eyewitness know that the person being presented is the suspect, showups are not even single-blind. Thus, any protections provided by

double-blind lineup procedures do not apply to showup procedures.

In practice, showups are conducted when the police detain someone who matches the description of a culprit in the general vicinity of the crime shortly after the crime has taken place. Although police can detain individuals for being near the crime scene and fitting the description, this evidence is not adequate grounds for arrest. Without grounds for arrest, the suspect can only be detained for a relatively short period of time, restricting police’s ability to construct and conduct a lineup procedure. Unless there is probable cause for arresting the detained person, officers may have to choose between conducting a showup or setting their suspect free, potentially creating a public safety issue.

A showup can be avoided and substituted with a lineup if there is probable cause for arresting a detained person. When the police arrest their suspect, they will have adequate time to compose a lineup. In the absence of evidence linking the detained suspect to the crime, officers turn to the most suggestive identification procedure (showups) when the likelihood of guilt is its lowest. Investigating officers can also avoid showups in cases with multiple witnesses by conducting a showup with one witness and using their identification as grounds for arrest. Once the arrest has been made and evidence has been collected to connect the suspect to the crime, the remaining co-witnesses can make more reliable identifications from a lineup.

If a more reliable lineup procedure cannot feasibly be conducted, there are methods for reducing the suggestiveness of showups. Many features of a good lineup procedure can be applied to showups, including the use of pre-showup instructions, recording confidence in identification decisions, and video recording the entirety of the procedure. The inclusion of an instruction that the witness will have additional opportunities to view other suspects if they do not identify this one reduces mistaken identifications without negatively impacting accurate iden-

**“In 1967, the U.S. Supreme Court recognized that ‘it is very hard to imagine a situation more clearly conveying the suggestion . . . that the one presented is . . . guilty’ than the use of showups.”**

96. *Id.*

97. John S. Shaw III et al., *Co-Witness Information Can Have Immediate Effects on Eyewitness Memory Reports*, 21 L. & HUM. BEHAV. 503 (1997).

98. HANS GROSS, *CRIMINAL PSYCHOLOGY: A MANUAL FOR JUDGES, PRACTITIONERS, AND STUDENTS* (1911).

99. *United States v. Wade*, 388 U.S. 218, 226 (1967).

100. *See, e.g., Manson v. Braithwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972).

101. Clark, *supra* note 60; Dawn J. Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1 (1996); Scott D. Gronlund et al., *Showups Versus Lineups: An Evaluation Using ROC Analysis*, 1 J. APPLIED RE. IN MEMORY & COGNITION 221 (2012); Laura Mickes,

*Receiver Operating Characteristic Analysis and Confidence-Accuracy Characteristic Analysis in Investigations of System Variables and Estimator Variables that Affect Eyewitness Memory*, 4 J. APPLIED RE. IN MEMORY & COGNITION 93 (2015); Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & HUM. BEHAV. 523 (2003); Stacy A. Wetmore et al., *Effect of Retention Interval on Showup and Lineup Performance*, 4 J. APPLIED RE. IN MEMORY & COGNITION 8 (2015); Daniel A. Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & HUM. BEHAV. 523 (1996); *see meta-analysis by Jeffrey S. Neuschatz et al., A Comprehensive Evaluation of Showups*, in *ADVANCES IN PSYCHOLOGY AND LAW* (Monica K. Miller & Brian H. Bornstein eds. 2016).

tifications.<sup>102</sup> When videorecording a showup procedure, the recording should start before any pre-showup instructions and end only after the witness gives their confidence statement and the identification procedure is concluded. The witness, officer, and suspect should all be captured in-frame.

Beyond replicating these features of a quality lineup, additional considerations must be given to showups. Because showups are conducted in the field during active search-and-detain operations, officers should take special care to prevent witnesses from overhearing police radio conversations that could jeopardize the integrity of the showup procedure.<sup>103</sup> The suspect's clothing may also produce additional suggestibility, particularly when the person was detained based on the witness's description of the culprit's clothing.<sup>104</sup> In these cases, officers may consider covering the person's clothing (e.g., with a blanket) during the showup identification procedure. Finally, placing a detained person in handcuffs or in the back seat of a patrol car may provide the misleading suggestion that the person has been arrested. To avoid the insinuation that there is evidence-based suspicion against the detained person, restraints should be reserved only for cases when there is reason to believe that the detained person is a flight risk.

An in-court identification is closely analogous to a showup, and arguably even more suggestive. Indeed, when an eyewitness takes the stand and is asked if they can identify the culprit in the courtroom, the defendant is not sat among fillers. Rather, the defendant sits at the defense table, already indicted. Furthermore, an initial identification has typically already been secured before trial, thus violating the recommendation to avoid repeated identifications. In cases when the eyewitness has not already identified the defendant, an in-court identification should not be considered an acceptable alternative to a proper lineup.

## CONCLUSION

Over forty years of behavioral science research has tested a variety of procedures that maximize the identification of guilty suspects while minimizing the misidentification of innocent suspects. After reviewing this body of research, an independent body of scholars with a variety of theoretical viewpoints concluded that there was substantial evidence to support the recommendation of nine best practices for the collection of eyewitness identification evidence. Although some of these practices are well-known (e.g., fillers should not cause suspects to stand out among fillers) or not new (e.g., instructions that warn a culprit may not be present in the lineup, double-blind lineup administration), others may be less known to or understood by practitioners, including the importance of evidence-based suspicion, avoiding repeated identifications, or the lack of evidentiary value associated with confirmatory identification procedures like showups or in-court identifications. We urge judges to familiarize themselves with these best practices to assist them in their evaluations of the suggestiveness of identification procedures and the reliability of eyewitness identifications.



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102. Mitchell L. Eisen et al., *An Examination of Showups Conducted by Law Enforcement using a Field-Simulation Paradigm*, 23 *PSYCHOL. PUB. POL'Y & L.* 1 (2017); Andrew M. Smith et al., *Eyewitness Identification Performance on Showups Improves with an Additional-Opportunities Instruction: Evidence for Present-Absent Criteria Discrepancy*, 42 *L. & HUM. BEHAV.* 215 (2018).

103. See e.g., Mitchell L. Eisen et al., *Pre-Admonition Suggestion in Live Showups: When Witnesses Learn that the Cops Caught "the" Guy*, 31 *APPLIED COGNITIVE PSYCHOL.* 520 (2017).

104. Rod C. L. Lindsay et al., *Do the Clothes Make the Man? An Exploration of the Effect of Lineup Attire on Eyewitness Identification Accuracy*, 19 *CANADIAN J. BEHAVIOURAL SCI.* 463 (1987).