



New York State Justice Task Force

Recommendations for Improving Eyewitness Identifications

Introduction

The New York State Justice Task Force was convened on May 1, 2009, by Chief Judge Lippman of the New York Court of Appeals. Its mission is to eradicate the systemic and individual harms caused by wrongful convictions, and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future. Because it is a permanent task force, it is charged not only with the task of implementing reforms but monitoring their effectiveness as well. The Justice Task Force is chaired by Janet DiFiore, Westchester County District Attorney, and the Honorable Theodore T. Jones, Associate Judge, New York Court of Appeals. Task Force members include prosecutors, defense attorneys, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts and victims' advocates. The differing institutional perspectives of Task Force members allow for thorough consideration of the complex challenges presented by the occurrence of wrongful convictions and the evaluation of recommendations to decrease the incidence of wrongful convictions in the future, while remaining mindful of the need to maintain public safety.

Recognizing that mistaken eyewitness identification is the leading contributor to wrongful convictions, the Task Force made the examination of eyewitness identifications its first priority. Although misidentifications can occur for a host of reasons, the Task Force, through its Identifications Subcommittee, concentrated primarily on the manner in which identifications are, and should be, administered by law enforcement. As part of this process, the Subcommittee's examination was informed by a range of sources: it heard from over a dozen speakers from throughout the state and country on issues relating to identification procedures; reviewed reports, best practice guidelines and legislation from states and local jurisdictions that have instituted identification procedure reform, as well as those recommendations from the Department of Justice's National Institute for Justice, various bar associations, the Innocence Project, and other entities; read dozens of academic studies and literature on factors affecting the accuracy of eyewitness identifications; conducted a state-wide survey on existing identification practices; and examined cases involving wrongful convictions in New York.

After seven months of examination by the Identifications Subcommittee, the full Task Force began its consideration of possible reforms proposed by the Subcommittee. The Task Force's extensive discussion and robust debate covered topics ranging from preliminary instructions given to witnesses before viewing a suspect in a photo array or lineup to factors that should be addressed in jury instructions given at trial. Many of the Task Force's recommendations are already included in the current version of the New York State Identification Procedure Guidelines established earlier this year by the New York State District

Attorneys Association and police agencies around the state.¹ The Task Force has also proposed a number of reforms that go beyond those guidelines.

The twenty-one voting members of the Task Force strived to reach consensus wherever possible, and did so on most of the recommendations in this Report. However, several of the recommendations were approved over considerable dissent. Among the most debated issues were those surrounding the recommendations that double-blind administration of photo arrays be deemed a best practice to be employed wherever practicable and that double-blind administration be included in proposed legislation that would render photo identifications admissible at trial. Although all agreed that double-blind administration was one valid way to show a photo array to a witness, dissenters argued that there were other equally effective methods of administering photo arrays that required fewer resources. A significant number of Task Force members also challenged the wisdom of eliciting explicit confidence statements in place of having the administrator ask more general and open-ended follow-up questions of a witness if his or her identification seemed vague or unclear.

Aside from these and a few other issues, the Task Force is pleased to announce that it reached consensus on a majority of recommendations. Accordingly, based on its examination of the issues related to mistaken eyewitness identifications, the Task Force makes the following recommendations with respect to identification procedures in New York.²

Recommendations³

Best Practices for the Administration of Identification Procedures

It is recommended that law enforcement offices throughout the state adopt the following best practices for the administration of identification procedures in order to increase the accuracy and reliability of witness identifications.

¹ The Best Practices Committee of the New York State District Attorneys Association developed best practice guidelines for photo identifications and live lineups in May 2010 after consultation with the New York City Police Department, the New York State Police, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York State Division of Criminal Justice Services and the New York State Municipal Police Training Council. Until their creation, there had been no uniform guidelines for the administration of identification procedures throughout New York State, although many individual law enforcement agencies had their own internal written guidelines. Revised Guidelines were issued on August 17, 2010.

² There are two issues in particular that the Task Force decided to revisit at a later date. It agreed to further examine the issue of sequential presentation of photos in arrays and participants in lineups after ongoing studies into the effects of such presentations (in contrast to simultaneous ones) are completed, which is likely to be in approximately 12-18 months. It also agreed to further examine the issue of preservation of photographs viewed on computer programs when certain updates in the technology utilized are completed.

³ For definitions of select terms used in this section, please see the attached glossary to this report.

I. Instructions to the Witness

Preliminary instructions given to a witness by the administrator of an identification procedure before the procedure begins, should include the following:

- a. Instructing the witness orally or in writing about the details of the identification procedure (including that they will be asked about their confidence in the identification if any identification is made).
- b. Advising the witness that the person who committed the crime may or may not be in the photo array or lineup.
- c. Advising the witness that individuals may not appear exactly as they did on the day of the incident because features such as hair are subject to change.
- d. Advising the witness as follows:
 - i. If an array or lineup is conducted double-blind, the administrator shall inform the witness that he does not know who the suspect is; and
 - ii. If the array or lineup is not conducted double-blind, the administrator shall inform the witness that he should not assume that the administrator knows who the perpetrator is.
- e. Advising the witness that he or she should not feel compelled [or obligated] to make an identification.

After the identification procedure is completed, the administrator of the identification procedure should:

- f. Instruct the witness not to discuss what was said, seen or done during the identification procedure with other witnesses involved in the case.

II. Witness Confidence Statements

- a. In every case in which an identification is made, the administrator should elicit a statement of the witness' confidence in the identification, by asking a question to the effect of, "in your own words, how sure are you?" Witnesses should not be asked to rate their confidence in any identification on a numerical scale.
- b. All witnesses should be instructed in advance that they will be asked about their confidence in any identification made.
- c. Witness confidence statements should be documented before any feedback on the identification is given to the witness by the administrator or others.

III. Documentation of Identification Procedures

Documentation of identification procedures should include:

- a. Documentation of all lineups with a color photograph of the lineup as the witness viewed it and preservation of all photo arrays viewed by a witness.
- b. Documentation of the logistics of the identification procedure, including date, time, location and people present in the viewing room with the witness and/or the

- lineup room with the suspect, including anyone who escorted the witness to and/or from the procedure.
- c. Documentation of any speech, movement or clothing change the lineup members are asked to perform.
 - d. Verbatim documentation of all statements and physical reactions made by a witness during an identification procedure.
 - e. Ensuring that the witness sign and date the written results of the identification procedure, including a photograph of the live lineup if one is available.

IV. Photo Arrays

- a. Photo arrays should be conducted double-blind whenever practicable.
- b. If a photo array is conducted with a non-blind administrator, the procedure should be conducted blinded (as defined herein), whenever practicable.
- c. Photo array administrators must ensure that the photos in the photo array do not contain any writing, stray markings or information about the suspect such as information concerning previous arrests.
- d. At least five fillers should be used in each photo array, in addition to the suspect. There should be only one suspect per array.
- e. Fillers should be similar in appearance to the suspect in the array. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.
- f. If there is more than one suspect, photo array administrators should avoid reusing fillers when showing an array with a new suspect to the same witness.
- g. The position of the suspect should be moved or a new photo array (with new fillers) should be created each time an array is shown to a different witness.

V. Live Lineups

- a. Lineups may be conducted double-blind and if not, should be conducted in accordance with the procedures outlined by the NYS Identification Procedure Guidelines mentioned above, which include instructions on how to remain neutral and stand out of the witness' line of sight while the witness is viewing the lineup, and which when coupled with appropriate preliminary instructions are intended to create a neutral environment free of inadvertent cues.
- b. There should be five fillers in addition to the suspect, where practicable, but in no case fewer than four fillers. There should be only one suspect per lineup.
- c. Fillers should be similar in appearance to the suspect in the lineup. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.
- d. If there is more than one suspect, the lineup administrator should avoid reusing fillers when showing a lineup with a new suspect to the same witness.
- e. The position of the suspect should be moved each time the lineup is shown to a different witness, assuming the suspect and/or defense counsel agree.

- f. If an action is taken or words are spoken by one member of the lineup, all other members of the lineup must take the same action or speak the same words.
- g. All members of the lineup should be seated, if necessary, to eliminate any extreme variations in height.
- h. Fillers from a photo array previously viewed by the witness should not be used as fillers in the lineup.
- i. In those jurisdictions that regularly use live lineup procedures, consideration should be given to running lineups after the first witness makes an identification from the photo array. Where practicable, additional witnesses can view only the lineup and not the photo array.

Legislation

- I. Legislation should be enacted to amend CPL 60.25 and 60.30 to allow photo identifications to be admissible at trial in light of technical advances that have rendered such identifications both fair and reliable. Such legislation should also include provisions indicating that photo arrays shall be administered double-blind, where practicable, and if impracticable, shall be administered blinded (as defined herein).

Pattern Jury Instructions

- I. The Task Force endorses the substance of the existing New York pattern jury instructions regarding identifications, and further recommends that the jury instructions be revised to include an instruction on cross-racial identifications in cases in which cross-racial identification is an issue.
 - a. A suggested instruction is:
 - i. [If applicable] “If you think it is appropriate to do so, you may consider whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness’ original perception or the accuracy of a later identification. You should consider that some people may have greater difficulty in accurately identifying members of a different race than in identifying members of their own race.”
 - b. This instruction should be given in cases in which cross-racial identification is an issue, regardless of whether an expert testifies on the topic of cross-racial identification.

Training

- I. Training on showups, photo arrays, and lineups should be provided for police officers, judges, prosecutors and defense attorneys. In particular, the training should discuss the risks inherent in eyewitness identification and the fact that mistaken identifications can lead, and have led, to wrongful convictions. Victims’ advocates should be included as trainers on the issue of how to best work with victims and should be trained on identification procedures so they can advise witnesses about what to expect from the procedures.

Conclusion

In order to improve the accuracy of evidence from eyewitness identification procedures and reduce the occurrence of wrongful convictions in New York State, the Justice Task Force urges all those involved in administering and reviewing identification procedures to adopt these recommendations.

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Glossary of Select Terms Regarding Identification Procedures

For purposes of the recommendations contained in this Report, the following terms have the following meanings:

- **Administrator of the Identification Procedure:** The person who is conducting the identification procedure such as a photo array or live lineup.
- **Blinded Photo Array:** A blinded procedure is one that is conducted by an administrator who may know which person in an array is the suspect, but does not know where that person is in the array and/or which photograph is being viewed by the witness at a given time during the procedure. This administration can be accomplished, for example, by having someone other than the administrator create a photo array and enclose it in a folder to be given to an eyewitness, so that while the eyewitness is viewing the array, the administrator does not know the position of the suspect within the array.
- **Confidence or Certainty Statement:** A statement from an eyewitness immediately following his identification regarding his confidence or certainty about the accuracy of his identification.
- **Double-Blind Identification Procedure:** An identification procedure that is administered double-blind is one in which neither the administrator of the identification procedure nor the witness know which person in the identification procedure is the suspect.
- **Filler:** A person who is in a lineup or photo array, but is not a suspect in the crime.
- **Lineup:** A collection of individuals, including a suspect and several fillers, either sitting or standing, which is viewed by an eyewitness to determine if the eyewitness can recognize a person involved with a crime.
- **Photo Array:** A collection of photographs, including one of a suspect and several fillers, which is viewed by an eyewitness to determine if the eyewitness can recognize a person involved with the crime.
- **Sequential Procedure:** A procedure in which an eyewitness examines one photograph or lineup member at a time, and is asked if he can identify that person as the one who committed the crime, before seeing the next photograph or lineup participant.
- **Simultaneous Procedure:** A procedure in which an eyewitness examines the full set of photographs in an array (usually in “six pack” form) or lineup participants at the same time.