CAPITAL PUNISHMENT REFORM STUDY COMMITTEE

Minutes of meeting December 13, 2006

The sixteenth meeting of the Capital Punishment Reform Study Committee was held at the Illinois Criminal Justice Information Authority, 120 S. Riverside Plaza, Chicago, Illinois from 1 to 4 P.M.

Those present	Not present
Leigh B. Bienen	Kirk W. Dillard
James R. Coldren, Jr.	James B. Durkin
Theodore A. Gottfried	Geoffrey R. Stone
Jeffrey M. Howard	Randolph N. Stone
Boyd J. Ingemunson (via teleconference)	
Gerald E. Nora (via teleconference)	
Edwin R. Parkinson (via teleconference)	
Thomas P. Sullivan	
Richard D. Schwind	
Arthur L. Turner (via teleconference)	
Michael J. Waller (via teleconference)	

Also present: Peter G. Baroni, Special Counsel; David Olson, Loyola University; Regan McCullough and Pat McAnany, Illinois Coalition to Abolish the Death Penalty; and Jordan Mandelberg, graduate student from Columbia College.

The minutes of the October 23, 2006 meeting were approved unanimously.

1. Public hearing on November 13, 2006 in Springfield.

Members of the Committee were pleased with the media coverage, the testimony given, and the process governing the hearing. A great deal of informative and helpful information was developed. The Secretary of the House of Representatives recorded the hearing, and will send the recording to Mr. Baroni, which Mr. Sullivan agreed to have his office transcribe.

2. Second public hearing to be held in Chicago.

The second public hearing will be held on Monday, February 26, 2007, at 10 A.M. in the James R. Thompson Center. Mr. Baroni will send notices to interested parties, similar to those sent before the November 13th hearing. Mr. Schwind will obtain a room in the Thompson Center to accommodate the hearing.

3. Retention of social science research assistant.

The Committee went into private session to discuss the responses to the Committee's RFP for a social science research assistant. The Committee then resumed its public session. A motion was made to retain David Olson of Loyola University as the Committee's social science research assistant; the motion was seconded and approved unanimously. The Committee also unanimously approved the contract suggested for Mr. Olson by Mr. Baroni, subject to Mr. Sullivan's final

review. The "Services Required" section of the proposed contract, Section 3.3 is attached hereto as Appendix 1 (Mr. Olson/Loyola University is Vendor, and the Committee is Buyer).

4. Governor's appointment.

Mr. Turner agreed to speak again to the Governor or the Governor's staff about appointing a person to fill the vacancy on the Committee.

5. Reports of subcommittees.

(1) Report of Subcommittee 1 – Police and investigations.

Mr. Coldren reported that the subcommittee met on December 4 and 11, 2006. At the December 4 meeting, the minutes of the October 20, 2006 subcommittee meeting (attached as Appendix 1 to the full Committee's minutes of October 23, 2006) were approved.

(a) Subcommittee 1 meeting on December 4, 2006 – Part 1.

Subcommittee 1 met on December 4, 2006 in Belleville, Illinois. The first part of the meeting was held at the St. Clair County State Attorney's Office, with personnel from the area law enforcement community (including members of the St. Louis Area Major Crimes Task Force) and an Assistant State's Attorney from St. Clair County. The focus of discussion was on videotaping custodial interrogations and eyewitness identification procedures.

The St. Clair County State's Attorney has required the videotaping of homicide suspects in custody interrogations since 2002. All police present described their initial responses to that mandate as from cautious to hostile. Over the last four and one-half years, however, they have come to embrace the mandate; both law enforcement and prosecutors view videotaping of custodial interrogations, from the *Miranda* warnings to the end, as a vast improvement in law enforcement procedures, for a variety of reasons.

Prosecutors and law enforcement representatives explained that videotaping interrogations presented a large unfunded financial burden, because of the additional hours required to review and assess videotaped evidence, and the cost of videotaping equipment. They urged the subcommittee to seek a statewide funding source for law enforcement and prosecutors. They also urged the subcommittee to suggest a new pattern jury instruction to explain the role of law enforcement in eliciting information from suspects, including especially the use of deceitful tactics that may lawfully be employed by law enforcement personnel during the interrogation process.

As to lineup procedures, most area agencies currently use traditional simultaneous lineups and photo spreads. However, the St. Clair Sheriff's Office uses the sequential lineup method, and also videotapes all lineup and photo array procedures.

(b) Subcommittee 1 meeting on December 4, 2006 – Part 2.

The second meeting of subcommittee 1 on December 4, 2006 was held in Belleville, Illinois, at the law offices of John O'Gara, with representatives from the area capital litigation trial bar, as well as a capital litigation trial bar investigator. The discussion focused on the defense lawyers' experience with videotaping mandate. They generally endorsed the new mandate as a means of insuring reliable information about what takes place during custodial questioning. One defense attorney said his client was cleared of murder charges based on the videotaped confession of another suspect. The lawyers agreed that constitutional objections to custodial interrogations have been largely removed from pretrial proceedings.

The defense attorneys reported that the cost of defending capital cases involving videotaped interrogations has increased, owing primarily to the need to transcribe recorded interrogations.

(c) Subcommittee 1 meeting on December 11, 2006 – with Sheri Mecklenburg

Subcommittee 1 met on December 11, 2006, with Sheri Mecklenburg, General Counsel to the Superintendent of the Chicago Police Department. She addressed a number of issues.

First, Ms. Mecklenburg discussed the DNA rape kit testing backlog. Three years ago, 10,000 kits were untested, while the current backlog is approximately 300.

Second, recording custodial interviews in Chicago investigations. Ms. Mecklenburg said the police have adapted well to this practice, and in general find it useful, although they have concerns about future storage costs. There is also concern on the part of some prosecutors and police about showing tactics used during interrogations to juries, but she believes training is the key to overcoming this hurdle.

Third, the pilot program relating to sequential lineup and photo spreads. Ms. Mecklenburg said she was comfortable with the experts chosen to administer the study, notwithstanding criticisms from various sources. The Chicago Police Department has set up a committee to study its lineup and photo spread procedures. The CPD may participate in an upcoming Department of Justice study, provided that the researchers are acceptable to the CPD.

Mr. Coldren submitted the following documents to the subcommittee. These documents were not discussed with Ms. Mecklenburg:

Appendix 2: Memo of Gary Wells, April 24, 2006.

Appendix 3: Memo of Nancy Steblay, May 3, 2006.

Appendix 4: Letter of James G. Sotos to Mr. Wells and Ms. Steblay, July 20, 2006.

Appendix 5: Letter of Thomas P. Sullivan to Ms. Mecklenburg, July 7, 2006.

Appendix 6: Letter of Ms. Mecklenburg to Mr. Sullivan, July 24, 2006.

The subcommittee plans to meet in January with members of suburban Chicago major crime task forces.

(2) *Report of Subcommittee 2 – Eligibility for capital punishment, DNA and proportionality.*

Ms. Bienen reported that the subcommittee held a meeting on December 11, 2006. The minutes of the subcommittee meeting of October 17 (attached as Appendix 2 to the full Committee's minutes of October 23, 2006) were approved.

As to the DNA backlog relating to convicted felons and open cases, Mr. Baroni reported that the Governor's Office refused to release that information to the subcommittee.

Ms. Bienen reported that only four major counties have not complied with the subcommittee's request for indictment/charging information on first degree murder cases – Champaign, McLean, Sangamon, and Will. Mr. Waller said he will contact the State's Attorneys in those counties to seek compliance.

The subcommittee's next meeting will be held on January 16, 2007 at Ms. Bienen's office. The meeting will focus on the first degree murder database, and Mr. Olson's input on the effective use of the database.

Mr. Baroni called attention to the letter he received from Illinois Supreme Court Chief Justice Thomas, dated September 15, 2006, attached as Appendix 7, responding to Mr. Baroni's letter of July 21, 2006 concerning the Committee's desire to circulate a survey concerning capital punishment litigation.

(3) Report of Subcommittee 3 – Trial court proceedings.

Mr. Howard reported that the subcommittee minutes of its October 16, 2006 (attached as Appendix 3 to the Committee's minutes of October 23, 2006) were approved.

The subcommittee was scheduled to meet on December 11 with Judge Harold Peters of DeWitt County, but the meeting was canceled owing to a change in the Judge's schedule. The meeting will be held on January 30, 2007 at the DeWitt County Courthouse, Clinton, Illinois.

Mr. Howard said he will contact Judges Gambler and Cini, two downstate judges who have recently presided over capital cases.

A written questionnaire has been completed by Judge Scott Shore of Peoria, 10th Judicial Circuit; his responses to the questionnaire will be included in the next subcommittee meeting minutes. Judge Shore calls attention to the lack of qualified

defense lawyers for capital cases in some smaller counties, and the lack of capital litigation trust funds when the fund is depleted. Mr. Schwind responded he believes that problem was cured by legislation enacted last spring, providing for fund availability when a need arises.

(4) Report of Subcommittee 4 – Post-conviction proceedings and general topics.

Mr. Gottfried reported that the subcommittee met earlier in the day on December 13, 2006. The minutes of the meeting of October 23, 2006 (attached as Appendix 4 to the Committee's minutes of October 23, 2006) were approved.

Mr. Baroni reported that he contacted the Law Enforcement Training and Standards Board to determine if any police perjury complaints had been filed. According to the Executive Director, no complaint has yet been filed.

Mr. Baroni stated that he spoke to the Administrative Office of Illinois Courts (AOIC) to obtain the curriculum required for training judges and capital litigation trial bar members. The AOIC requires formal authorization from the Supreme Court for compliance with the request, so Mr. Baroni will follow up with Chief Justice Thomas.

Mr. Schwind and Mr. Gottfried will provide the subcommittee with materials they have used for training capital litigation trial bar lawyers.

Mr. Gottfried said the subcommittee's next meeting will be held at noon on Tuesday, January 23, 2007 in the CJIA office, 120 S. Riverside Plaza, Chicago, Illinois.

6. Other Business.

(1) Third annual report.

Mr. Sullivan reported that he will draft the third annual report of the Committee, and circulate the draft to all members for review and comment.

(2) Special Counsel.

The members expressed their appreciation to Peter Baroni for the excellent services he has provided as the Committee's Special Counsel.

7. Next meeting – January 23, 2007, 1 P.M.

It was agreed that the next meeting of the Committee will be held on Tuesday, January 23, 2007 at 1 P.M., at the Illinois Criminal Justice Information Authority, 120 S. Riverside Plaza, Chicago, Illinois.

Thomas P. Sullivan
Chair
January 11, 2007

Attachments: Appendices 1 through 7

EXCERPT FROM CONTRACT BETWEEN CAPITAL PUNISHMENT REFORM STUDY COMMITTEE AND LOYOLA UNIVERSITY DAVID OLSON

3.3 Services Required

The VENDOR will work with the BUYER in the development, distribution and analyses of surveys of criminal justice agencies/representatives (i.e., police, prosecutors, public defenders and judges) and develop other data collection mechanisms to gauge the implementation and impact of the capital punishment reform legislation. VENDOR will address the research questions submitted per the VENDOR's submitted proposal dated October 30, 2006. A number of methodological options are described in VENDOR's proposal that have the ability to examine the implementation and impact of the reforms on how murder cases are handled in Illinois, including potential sampling frames and techniques, appropriate unit(s) of analysis and the relative strengths and weaknesses of the different options presented. VENDOR will work with BUYER in the refinement and selection of these methodological options, data collection and analyses.

Description of Expected Services

VENDOR shall have the following responsibilities:

- Participate in meetings/conversations with BUYER members and special counsel within the first month of the project to discuss the study design and logistics. VENDOR may be expected to participate in additional meetings, including meetings to discuss the progress of the project and to garner feedback. Researchers should be prepared to present information and answer questions at meetings, and include presentations of findings and analysis, if appropriate. Additional meetings may involve presentations of preliminary findings and may include meetings prior to the final development of the report to discuss the results.

- Deliver a written plan that includes the survey design, research questions, types of measures that will be used to answer the research questions, data, types of data collection instruments that will be utilized (if applicable), potential data collection methods and procedures (if applicable), and data analysis plan (if applicable).

- Deliver a written progress report every three months and an interim report half way through the project. The progress reports should describe the progress made in the previous three months by the VENDOR toward completion of the survey. Relevant materials reflecting progress should be attached to the progress report, including exact measures and instruments used in the analysis (if applicable).

- Engage in all necessary activities to ensure that the survey design is in compliance with generally accepted principles and standards regarding the use of human subjects in social science research. Such activities may include completing an application for human subjects research developed by an established Institutional Review Board (IRB) and modifying the study based on IRB review. Should IRB review be necessary, then the VENDOR must deliver to the BUYER a copy of the accepted application, including signed approval from the IRB (if applicable), prior to conducting the survey and analysis.

- Survey and collect all data in a manner that enables the VENDOR to answer research questions.

- Deliver a final report that (1) described the methodology, research questions and data (2) uses existing criminological and social science research to place the results in a broader research context, (3) describes the data survey and collection plan, and (4) describe analysis and results (if applicable). The final project report should be written so that it can be easily understood by the general public, yet not sacrifice sufficient detail. The final report is intended to be useful to the general public, criminal justice practitioners, staff and policy makers.

4/24/06

4/24/2006
Comments on the Illinois Report:

The Report of the Illinois Pilot Program on Sequential Double-Blind Identification Procedures was released to the public on March 28, 2006. That report can be accessed via the following link:
http://www.psychology.iastate.edu/faculty/gwells/Illinois_Report.pdf

The Report states that the double-blind sequential procedure resulted in more errors (picking fillers) than the simultaneous procedure. I have two main concerns about the Report.

Concern 1: The Failure to Include a Simultaneous Double-Blind Condition?

My main reaction to this report is disappointment and concern that the design of the study does not permit any clear conclusions. The reason that it does not permit clear conclusions is because the simultaneous lineups never used the double-blind procedure whereas the sequential lineups always used the double-blind procedure. This is extremely problematic, as explained in the following paragraphs.

The reason that scientific researchers have called for double-blind lineup procedures is because of a concern that the lineup administrators (usually the case detective) could influence the eyewitnesses by steering them away from the fillers and steering them toward the suspected person (who might or might not be the culprit). [See http://www.psychology.iastate.edu/faculty/gwells/Wells_articles_pdf/whitepaperpdf.pdf] There is no presumption here that the influence of the lineup administrator is intentional or that the lineup administrator is even aware of the influence that s/he is having.

Because the simultaneous lineups were not conducted using the double-blind procedure, their "low" rate of filler identifications could have been a product of this influence. The sequential lineups, on the other hand, were always conducted in a manner that did not permit the lineup administrator to influence the results (i.e., they were always double-blind). The somewhat higher rate of filler identifications for the sequential, therefore, could have been due to the absence of any lineup administrator influence on the eyewitness that could have directed them away from fillers and toward the suspected person.

Another way to say this is to note that the lineup administrator could not influence the eyewitnesses to avoid the fillers in the sequential because the administrator did not know which were fillers and which was the suspected person. But this guarantee is not there for the simultaneous lineups because the simultaneous lineups were always conducted by the case detective, who knew very well which were fillers and which was the suspected person.

In any subsequent write-ups of this study, I urge the authors to call the simultaneous lineups non-blind simultaneous rather than just simultaneous so that this problem is more transparent to the reader. Furthermore, I call on the authors of the report to recast the sentence on page 34 that could be read to suggest that I approved of this flawed design.

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APPENDIX 2

Concern 2: Why are the Filler Identification Rates so Low for the Simultaneous?
The rate of filler identifications in the simultaneous lineups are quite low (around 3%) in this Illinois Pilot Project compared to what has been reported in other jurisdictions using actual lineups with real eyewitnesses. For instance, a study organized by the Metropolitan Police in London examined 584 attempts by eyewitnesses to identify suspects from lineups using the simultaneous procedure and found a filler identification rate of 21%[1]. These results are similar to the 22% filler identification rates in a police-supervised study reported by Slater[2] involving 843 eyewitnesses to serious crimes. Bothe of these results are similar to the 20% filler identification rate reported by Wright and McDaid in their analysis of 1,561 eyewitnesses' attempts to identify suspects from simultaneous lineups based on serious crimes[3]. And, these three studies are similar to the filler identification rates of 24% with live simultaneous lineups in a sample from Sacramento County California and several other counties in Northern California[4].

Why are the filler identification rates so low with simultaneous lineups for the Illinois Pilot Project (e.g., in the area of 3%) whereas other studies show filler identification rates in the area of 20%? I certainly do not know the answer. From the published research using controlled studies, we know that low rates of filler identification can be obtained by using fillers who do not fit the description of the perpetrator (a classic biased lineup). In the absence of any analyses of the Illinois Pilot Project lineups for the presence of such biases, we cannot yet rule out that possibility. But, for now, we can only say that we do not have an answer to that question.

Gary L. Wells

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[1] See peer reviewed article describing this work in detail by Valentine, T., Pickering, A., & Darling, S. (2003) Characteristics of eyewitness identification that predict the outcome of real lineups. *Applied Cognitive Psychology, 17*, 969-993.

[2] See report by Slater, A. (1994). *Identification parades: A scientific Evaluation.* Police Research Award Scheme. London: Police Research Group, Home Office.

[3] See peer reviewed article describing this work by Wright, D.B., & McDaid, A.T. (1996). Comparing system and estimator variables using data from real lineups. *Applied Cognitive Psychology, 10*, 75-84.

[4] See peer reviewed article describing this work by Behrman, B.W., & Davey, S.L. (2001). Eyewitness identification in actual criminal cases: An archival analysis. *Law and Human Behavior, 25*, 475-491.

5/3/06

Observations on the Illinois Lineup Data

Nancy Steblay, Ph.D.
Augsburg College
May 3, 2006

First, Hennepin County –

Over the last two years, I have worked with the Hennepin County (HC) Attorney's Office to analyze data from their year-long pilot project. Today the HC double-blind sequential procedure is regarded as cost-effective and successful. As Illinois decision-makers and others across the country weigh the results of the Illinois project, it is useful to consider the Minnesota experience.

Prior to the start of the pilot program, the HC Attorney's Office was convinced by the scientific laboratory evidence that double-blind sequential procedure was essential to reduce the risk of eyewitness error and to gain greater confidence in eyewitness evidence. Therefore, all lineups in the HC pilot were double-blind sequential. The central question for HC was somewhat different from Illinois: How do blind sequential techniques work in real police investigations? A summary of the Hennepin County project is in press in the Cardozo Public Law, Policy and Ethics Journal[1], and full data will be available later on the website of the National Institute of Justice, which funded my work on the project. The report clarifies misconceptions about the HC protocol that were present in the Illinois summary report.

The aggregate data for 280 HC double-blind sequential lineups:

❑ Suspect IDs	54 %	(of 280 lineups)
❑ Filler selections	8 %	
❑ No Choice	38 %	

Interpretation of these data illustrates two important considerations regarding lineup field data. First, it is essential to be clear about what is being measured; this is particularly true with simple aggregate figures such as the above. Second, the numbers must be viewed in the context of broader considerations of what is known about memory, eyewitness error, and field practice.

Field data may be parsed many ways for analysis, with subsequent effects on the overall aggregate figures that become the simple summary of the more complex data. For example, HC chose to include every lineup conducted for felony crimes in four cities, including crimes in which the perpetrator was a stranger to the witness and those in which the witness was familiar with the offender. Most HC lineups followed crimes of very short duration for which the witness did not know the perpetrator; not surprisingly, this subset resulted in lower suspect ID rates and somewhat higher filler selection rates compared to situations in which the witness had longer or even multiple exposures to the perpetrator. Of course, the aggregate statistics change if the mix of stranger vs. familiar perpetrator percentages that make up the data set is adjusted.

Adherence to lineup protocol is also important. The double-blind sequential procedure is really a package of components that together form best practice. It is useful to keep track of how these components are implemented in the field – and how revisions to the recommended protocol are employed. An example is the use of "laps" in the sequential procedure. In HC, a witness's additional viewings of the sequential lineup generated more known errors (fillers). Would filler rates decline if witnesses were held to a single viewing of the lineup? Now we know: yes. The point is that it is useful to know the particulars of both the witnesses' exposure to the offender and of the identification experience and how these affect the overall statistics.

APPENDIX 3

Now, the Illinois data --

The Illinois cities of Chicago, Evanston, and Joliet collected field data for police lineups under two conditions: 1) double-blind sequential; and 2) traditional non-blind simultaneous ("status quo"). The two conditions provide a picture of how each procedure is operating in the field and may allow a starting point for productive discussion about the effectiveness of field procedures in securing accurate eyewitness memory.

How does the double-blind sequential technique perform in Illinois police investigations?

The prescribed blind sequential protocol for both HC and IL *required* that the lineup include only one suspect. A single-suspect model is the recommended blind sequential procedure, therefore the IL data below are those blind sequential lineups that adhere to that requirement. This also allows for a closer apples-to-apples comparison to HC. Both the Malpass and Ebbeson analyses are presented for IL: Dr. Malpass' data exclude perpetrators known to the witness; Dr. Ebbeson's data include known perpetrators, as do the HC data.

The similarity in performance between IL and MN for these blind sequential lineups is noteworthy. One reasonably may conclude that blind-sequential lineups are producing very good results in both Illinois and Minnesota test sites.

Double-blind sequential lineups; 1 suspect in lineup

Suspect ID	51%	57%	54%
Filler selection	7%	7%	8%
No choice	43%	37%	38%
	(Malpass)	(Ebbesen)	(HC)

How does the traditional lineup perform in Illinois police investigations?

Here also, the witness decision rates suggest reasonable levels of suspect identifications and low filler selections.

Non-blind simultaneous lineups: 1 suspect in lineup

Suspect ID	64%	67%
Filler selection	3%	2%
No choice	34%	31%
	(Malpass)	(Ebbesen)

How do the two Illinois conditions compare?

Before moving to a comparison of the non-blind simultaneous and the double-blind sequential conditions, the nature of the data must be considered.

Eyewitness performance measures.

Witness performance in the field is measured through percentage rates of suspect identifications, filler selections, and "no choice" responses. *Suspect IDs* cannot be directly equated to *Accurate IDs*, because any false identification of an innocent suspect (dangerous error) is buried within the *Suspect ID* category. *Filler selections* are known errors -- not directly dangerous to the selected lineup member, but a signal to investigators that the witness has a poor memory of the offender, or is uncooperative, or perhaps that the filler is a better match to the perpetrator than is the suspect. *No choice responses* include those witnesses unable or unwilling

to select from the lineup; a response of "he's not there" suggests that the suspect is not the offender.

Because these field measures are imperfect, there are no established absolute levels of "goodness," and the evaluation of a procedure must be made within the context of what we know about the data that contributed to the statistical outcome and about estimated gains or loses in accuracy that are likely from the procedures employed.

Lineup Procedure and Construction Issues in the Illinois data

Witness decisions may be affected by both the lineup *procedure* and by the *quality of the lineup construction*. Some of these topics are discussed below.

1. Non-blind lineups

Dr. Gary Wells, in his website comments on the IL report[2], explains the implications of the absence of administrator blind in the simultaneous "status quo" condition of the Illinois pilot, and I refer readers to that document for a more complete discussion. The lack of administrator masking *is* a substantial difficulty in these data and truly does prevent clear understanding of the status quo condition.

Lack of a blind administrator is inherent to the IL "status quo" lineup. That fact, however, should not excuse evaluators from rigorous examination of the role that non-blind administration may have played in the outcome of that field condition. A non-blind administrator may affect the witness's decision and confidence as well as the administrator's attention to and recording of the witness's comments and decision.

Concern regarding non-blind is more than simply a preference for basic scientific rigor. The vulnerability of the traditional lineup to administrator influence and to witness inferences about administrator behavior is a very serious concern and an ever-present challenge to validity of eyewitness evidence. A problem with the data from Chicago and Evanston in particular is that the pattern easily suggests dramatic non-memory influences on eyewitness decisions.

2. Zero filler identifications in Chicago and Evanston non-blind simultaneous lineups

The most surprising element of the IL data is that both Chicago and Evanston report no filler identifications in their non-blind simultaneous lineups (see table on page 5). This suggests a qualitatively different experience from that of simply low filler rates. It is puzzling to see 152 lineups in which no eyewitness chose a filler and to imagine that all witnesses with weak memories and/or limited exposure to the offender were captured in the *no choice* category.

Nearly 3000 data points from simultaneous field lineups have been collected by others[3], showing a typical filler selection rate around 20%. The IL data are substantially at odds with these figures.

3. Muddy areas in the field data

The blind sequential protocol was clearly scripted in the IL study; the requirement for the non-blind simultaneous protocol less so. The practice of the status quo presumably encompassed a flexible range of lineup size and construction, instruction, and presentation modes. Thus, while constraints of the new procedure helped to clarify its parameters, the non-blind simultaneous

condition remained amorphous. We know very little about the status quo condition, beyond Exhibit 13 of the Illinois report.

The IL data analysis tables indicate variation in such factors as lineup size (4 to 46) and number of suspects in the lineup (0-3), as well as differences such as photo vs. live presentation and some instances of multiple lineup tasks for the same witness. These variations extended to both lineup formats.

Some variability in protocol is not a problem, particularly as it may represent natural field practice. The challenge is to evaluate lineup outcomes when procedural changes violate prescribed protocol or when they confound interpretation of the data. For example, placement of more than one suspect in the lineup runs counter to recommended protocol (one reason for my reliance on the *1-suspect* data). Blind sequential protocol is very clear about a-priori definition of one suspect and at least five fillers.

Similarly, understanding of live lineup performance is confused in cases where the witness's selection of the suspect from a photo lineup was followed with a (second) live lineup identification task. This practice introduces the possibility that the witness's recognition of the suspect in the live lineup stems from the previous procedure (rather than the crime) or that the witness can infer the suspect's identity due to his presence as a common denominator across two lineup tasks.

An aside: The IL report compares IL outcomes to Queens (New York) data (pg 43). Those data, from live simultaneous non-blind lineups, show an annual filler selection rate of < 5%. Caution is advised, however, in that these lineups typically are the second identification task for each witness. Eyewitness identification practice in New York, if I understand correctly, usually includes an initial photo lineup task; a successful suspect ID is then followed by the live lineup identification test. It should be noted that Behrman and Davey's 2001 documentation[4] of traditional simultaneous field lineups in California showed that the practice of a using second identification task increased suspect ID rates 17% for the later identification.

Problems of variability are compounded to the extent that they occur disproportionately in one condition versus the other. However, even if a deviation from practice is distributed evenly across both lineup conditions, there may be uneven effects. For example, it may be reasonably argued, following the results of Lindsay, et al., 1991[5], that the sequential format may help to tamp down effects from some aspects of biased lineup construction.

4. Functional lineup size

Functional size of the lineup – the number of lineup members who effectively match the description of the perpetrator -- is an important consideration for both sequential and simultaneous lineups.

When HC results were released, critics reasonably argued that the low filler selection rate (8%) could be due to poor lineup construction. That is, if fillers are implausible, the witness is left with only the suspect. If this were the case, suspect and/or no-choice rates would be elevated and filler rates reduced. HC took this concern very seriously and conducted an extensive mock witness test with a sample of lineups from the original 280. The fillers were found to be functioning well, drawing mock witness responses in appropriate proportions. The alternative interpretation for low filler rate – poor fillers -- can be ruled out in HC. Illinois may wish to conduct a similar test.

5. Inconsistent performance across photo and live lineups.

A comparison of photo to live lineups is provided in Ebbesen's Table 8. Note that for both simultaneous and sequential lineups in Chicago, the suspect ID rate is higher for physical lineups. However, In Evanston, suspect ID rate is lower for physical lineups. (No live lineups were used in Joliet.) The reasons for asynchrony in Chicago vs. Evanston and live vs. photo are not evident. However, one can speculate that the quality of fillers in live vs. photo lineups differs or that the procedure in live vs. photo arrays somehow varies, even across jurisdiction.

	Chicago Nonblind Sim	Blind Seq	Evanston Nonblind Sim	Blind Seq
Photo Suspect ID	63%	49%	76%	47%
Live Suspect ID	76%	61%	60%	33%

6. Inconsistent performance across jurisdictions

Joliet produced positive performance for blind-sequential Suspect IDs. (This outcome was mis-stated in the Illinois report (p. iv) where it was claimed that all three cities showed inferior performance by the new procedure.) Joliet represents a full 33% of the lineups. It seems important to determine why Joliet results were so different from the other two cities. Joliet ran only photo lineups – might this be one reason for the difference?

	Chicago Nonblind Sim	Blind Seq	Evanston Nonblind Sim	Blind Seq	Joliet Nonblind Sim	Blind Seq
Suspect	64%	50%	72%	44%	62%	69%
Filler	0%	6%	0%	14%	4%	7%
No choice	36%	44%	28%	42%	34%	24%

(Data from Ebbeson report, pg 7)

The Malpass data in Table 3b in fact provide a strong case that Joliet should continue to use double-blind sequential lineups.

Joliet	Nonblind Sim	Blind Seq
Suspect ID	61%	69%
Filler	6%	3%
No choice	34%	29%

7. Laps

The HC data showed that additional viewings (laps) of the sequential lineup reduced eyewitness accuracy, and this lesson was repeated in the IL data. The simultaneous lineup format does not allow us to know the level of comparison shopping (relative judgment) employed by the witness prior to his or her decision. In the sequential lineup, the number of laps is an objective indicator of the witness's scanning of the lineup. The Malpass analysis shows a 5% higher suspect ID rate for the "one lap" witnesses, bringing suspect IDs in that group to 50%. Aggregate data that include witness decisions following multiple laps will present a less positive picture of the double-blind procedure.

The broader context for data evaluation – A reminder about eyewitness memory

The objective of a lineup is to accurately access the eyewitness's memory of the perpetrator, circumventing non-memory factors that may otherwise influence the witness's decision. Examples of non-memory factors include expectations and beliefs of the witness, inferences that the witness may draw from the lineup construction or presentation, the relative judgment process, and influences (imagined by the witness or real) from the lineup administrator.

The new double-blind sequential lineup procedure was designed to limit the impact of some non-memory factors that may occur in traditional lineups. Much recent laboratory research has occurred in direct response to wrongful conviction data that indicate eyewitness error as a central factor in miscarriages of justice.

Challenges to eyewitness identification evidence typically claim that the witness's decision can be attributed to non-memory factors. Sound eyewitness evidence must be able to demonstrate that the identification is of the highest quality – that extraneous influences have been avoided. Thus, evaluation of field data must include recognition of the extent to which the outcomes represent procedural safeguards against memory error.

So, which technique is better for Illinois?

It is likely apparent at this point that I do not believe a firm answer can come from these data. Any meaningful attempt to compare conditions is made very difficult by the complexities noted above.

My primary concern with the Illinois report is that its conclusion appears to be based primarily on the simple aggregate results in Table 3a, with minimal appreciation of the underlying reasons for these outcomes or the broader context of what is known about eyewitness fallibility.

Illinois decision-makers must determine their next steps from imperfect and somewhat confusing field data. My inclination is to assume that the blind sequential has much to offer and to reject the notion that the status quo should be the "standard to beat," particularly given the demonstrated vulnerability to witness error of standard lineup procedures.

Again, perhaps the HC experience can be useful.

The broader context for data evaluation: What has been gained in Hennepin County?

HC's conclusion is that the blind-sequential procedure is working well in Minnesota. Acceptable suspect ID rates and low filler rates suggest a protocol that will help to convict the guilty and protect the innocent. Beyond the numbers, the following considerations are important in this evaluation:

- HC now has implemented a standardized scientifically-based procedure that works in the field.
- The eyewitness is pushed to depend on memory.
- The lineup administrator conducts and reports an objective appraisal of the lineup interaction and results.
- HC data regarding eyewitness response patterns in the field make sense in the context of what is known about eyewitness experience and memory.
- These results are achieved with the safeguards of the Double-Blind Sequential technique in place.
- HC is now seeing the benefits in court of stronger eyewitness evidence: the new procedure rules out the likelihood of administrator influence, selective or imprecise reporting of filler selections, relative judgment effects, and (with the filler quality test data) ineffective lineup construction.

Footnotes

1. Klobuchar, A., Steblay, N., & Caligiuri, H. (in press). Improving eyewitness Identifications: Hennepin County's Blind Sequential Lineup Project. Cardozo Public Law, Policy, and Ethics Journal.

2. Wells, G. March 29, 2006. Comments on the Illinois Report. http://www.psychology.iastate.edu/faculty/gwells/Illinois_Report.pdf

3. See the following:

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Slater, A. (1994). Identification parades: A scientific Evaluation. Police Research Award Scheme. London: Police Research Group, Home Office.

Wright, D.B., & McDaid, A.T. (1996). Comparing system and estimator variables using data from real lineups. Applied Cognitive Psychology, 10, 75-84.

Behrman, B.W., & Davey, S.L. (2001). Eyewitness identification in actual criminal cases: An archival analysis. Law and Human Behavior, 25, 475-491.

4. Behrman, B.W., & Davey, S.L. (2001). Eyewitness identification in actual criminal cases: An archival analysis. Law and Human Behavior, 25, 475-491.

5. Lindsay, R.C.L., Lea, J.A., Nosworthy, G.J., Fulford, J.A., Hector, J., LeVan, V., & Seabrook, C. Biased lineups: Sequential presentation reduces the problem. Journal of Applied Psychology, 76, 796-802.

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July 20, 2006

VIA U.S. MAIL

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Dear Professors Wells & Steblay:

Sheri Mecklenburg received your letter on Iowa State University letterhead by e-mail on July 11, 2006. Although you said that a hard copy was to follow, it never did. Due to the threatening nature of the letter, Ms. Mecklenburg has referred the letter to me.

You use the term "defamatory," and refer to a "final warning" and to damages to your professional reputations, as if you are threatening a cause of action against Ms. Mecklenburg and her "Department." You are mistaken if you believe that you have any claim of defamation. Any claim for defamation premised on the accusations contained in your letter would be both baseless and sanctionable. If anyone has such a claim, it is Ms. Mecklenburg and the others associated with the Illinois Pilot Project, who repeatedly have declined to engage you at this level and instead have chosen to address the real issues at stake here.

Initially, the disputed statement in the Report cannot constitute defamation because of the reasonable belief that the statement is, in fact, true. Professor Wells, you initially indicated to Ms. Mecklenburg that you were surprised that you were not involved in the Illinois study. Based upon what appeared to be your desire to be involved, Ms. Mecklenburg went out of her way to

involve you despite the fact that she already had engaged two prominent experts on this topic, Professors Roy Malpass and Ebbe Ebbesen. The e-mails between you and Ms. Mecklenburg clearly demonstrate that she sought your input on the design and protocols and that you did not raise with her the issue of comparing blind sequential to blind simultaneous procedures. In fact, you referred Ms. Mecklenburg to protocols which indicated that among the information to be collected was "whether or not the conductor [of the lineup] was blind as to which person was the suspect and which were fillers..." This is contrary to any post-results suggestion you are now making that *all* lineups in the study must be blind. You clearly led Ms. Mecklenburg to believe that her comparison of the new, recommended sequential, double-blind procedure to the traditional, non-blind simultaneous procedures was an acceptable comparison. The e-mails show that the first person to raise the issue of including *simultaneous, double-blind procedures* in the pilot was Ms. Mecklenburg, who told you at the time that it was not in her protocols but that it would be interesting to include if possible down the line. You did not object or respond further to that point, although she invited your further response. Just two months later (December 2004), you posted on your own website a document entitled "Notes on Protocol for Collecting Data on Actual Lineups for Pilot Projects," which offers advice to law enforcement conducting pilot programs on eyewitness identification procedures. You specifically state the following:

> "Police jurisdictions might be interested in collecting data on their current lineup procedures or on new procedures that they implement. Perhaps, for example, they want to *compare new procedures to old procedures* (emphasis added)...
> Also needed are: who constructed the lineup, who conducted the lineup, (emphasis in original), *whether or not the conductor was blind* as to which person was the suspect and which were fillers...(emphasis added)..."

Your posted article continues, discussing "what could be expected from implementation of the lineup reforms, such as the double-blind lineup procedure or the sequential lineup." This discussion then focuses on the expected difference in witness confidence between the "double-blind condition and the non blind condition." This article alone belies your complaint about the statement in the Illinois Report.

It is interesting to note, Professor Wells, that in your sworn deposition testimony in Michael Evans v. City of Chicago, Case Number 04 C 3570, on January 5, 2006, *before you knew the results of the data collected in the Illinois Pilot Program,* you testified on pp. 182-83 as follows :

Q. You mentioned in your report that you've worked with prosecutors from Illinois. Who?
A. Did I?
Q. Or prosecutors and law enforcement.

A. Yeah.
Q. Who's that?
A. Well, Sherrie (sic) Mecklenburg with the Chicago Police Department, I've had quite a bit of work with over the last year or two. She's the one who's coordinating the pilot project on eyewitness identification procedures here in Chicago.

Despite your pride then in being involved in the Illinois Pilot Program, you have tried to disavow it only after you learned of the results. You particularly tried to minimize your involvement in subsequent sworn testimony at the trial in the Evans case, where you were paid to testify to many of the same theories that were called into question in the Illinois study. It is not surprising that, as a paid expert against law enforcement, you are concerned now with your admitted involvement in the Illinois study, given that the study destabilizes the theories on which you testify.

Professor Steblay, your claims of defamation are equally disingenuous. Like Professor Wells, you indicated a desire to be involved in and conduct a review of the study. Ms. Mecklenburg initially had no intention of involving you but did so at the wishes of you and Tom Sullivan. You specifically told Ms. Mecklenburg that you were conducting a similar comparison of double-blind sequential lineups to traditional, i.e., non-blind simultaneous lineups, but that "the Illinois comparisons are better." You certainly led Ms. Mecklenburg to believe that this protocol of comparison was not just acceptable but was to be commended. Moreover, any claims that you have regarding your professional reputation certainly would raise the fact that you repeatedly have represented the protocols in the Hennepin County study as different than the actual protocols used in that study, either because you were unaware of the actual protocols in the very study that you were analyzing or because the protocols did not fit in with your theory on relative judgement. You initially criticized the Illinois Report for inaccurately portraying the Hennepin County protocols, but since the Hennepin County prosecutors verified the accuracy of the Illinois Report on this point, both at the Loyola Conference and at the PERF Conference in Washington D.C., you seem to have dropped this criticism.

In addition to the truth of the challenged statement, the lack of any malicious intent on the part of Ms. Mecklenburg easily defeats any claim of defamation. Ms. Mecklenburg, of course, stands by the protocols used in the Illinois Pilot Program. When Ms. Mecklenburg included the statement in the Report about which you now take issue, her intent was to give you *credit* for your desired involvement in the study. She did not intend to say anything ill about either of you, because she believed and still believes that the protocols are appropriate. In fact, she believed that she was strengthening your professional reputations by including you in this ground-breaking study, the first field study to collect data on real crimes, real witnesses and real victims and actually conduct a comparison of procedures. Keep in mind, both of you had indicated your desire to be a

part of this study despite the fact that Ms. Mecklenburg had engaged other experts. You both have turned yourselves into public figures on this issue and any defamation claim would require malice on the part of Ms. Mecklenburg. Because she believes that the protocols are proper, she could not have had any malice in making her statement. This logic is unassailable when it is remembered that both Dr. Ebbesen and Dr. Malpass embraced the utility of the study's chosen protocols.

We are confident that your claims of defamation ring hollow in light of the above facts. In addition, we believe that your motives for making these claims and otherwise viciously attacking the Illinois study have nothing to do with your concerns over your "professional reputation" but instead, are motivated by concern over how the results call into question the theories that you have advanced. We believe that your true concern is over how this report affects your agenda, including training on the issues you advance, testimony in front of legislatures and, of course, paid expert fees. It is noteworthy, Professor Wells, that in your courtroom testimony against the Chicago Police Department in the Michael Evans case for which you were being paid, you reportedly implied that the only experts who supported the Illinois study were those who were paid for it, Professors Ebbesen and Malpass, when you knew that neither were ever paid a dime for their involvement.

Despite the fact that your claims are factually unsupported and appear to be motivated by other concerns, Ms. Mecklenburg fairly addressed your claims in an Addendum posted June 19, 2006, in which she acknowledged your disclaimer, put forth the reasons for the original statement and generously called it a "misunderstanding." In her lecture at the Loyola Conference, she also merely put forth the facts, showing the e-mails and Professor Wells' posted "Notes on Protocols" and explained to the audience that those communications were the basis of her belief that her protocols were fine with both of you.

If there has been any adverse effect on your professional reputations, that effect is due to your own conduct since the release of the Illinois study. Ms. Mecklenburg invited you to the conference at the Loyola School of Law where the substance of your presentation, Professor Wells, was to attack her and the study. She had no choice but to respond, albeit in a factual, measured manner. Nevertheless, many in the audience felt that you were only hurting your own professional reputation and that, too, will be relevant to any claim that the Report's single statement has damaged your professional reputation.

Since the day after the Illinois Report has issued, you have attacked it with highly charged rhetoric. Initially, Professor Wells, you called the statement about which you complain "grossly misleading" but then even you agreed that you had gone too far and you deleted those words from your posting. Nevertheless, you both have attacked the study and Ms. Mecklenburg,

making derogatory comments about her abilities to members of both the profession and the media. Although this is not constructive debate, Ms. Mecklenburg has ignored these comments and continued to address the issues. It appears that you now have stepped up your attacks in order to intimidate Ms. Mecklenburg and others from talking freely about the Illinois study. In light of your recent threatening letter, it is becoming more difficult for Ms. Mecklenburg, as well as others associated with the study, to ignore these comments.

Professor Wells, it is also noteworthy that you posted on your website the Tribune's editorial criticizing the Illinois study (inaccurately calling it the Tribune's "article") and also rearranged the website to reflect an entire section criticizing the Chicago Police Department. It is noteworthy that you did not include any reference to the prominent, front-page New York Times article favorable to the study (in which you appear), or to the actual Tribune article reporting favorably on the study and conference, or to the fact that your reference is to an editorial, not an article, and that there was both a correction to that editorial and a published response. It appears that you are trying to bias readers against the Illinois study by discrediting the Chicago Police Department, as well as Ms. Mecklenburg and the others associated with the study. When Ms. Mecklenburg politely pointed this out to you, you removed the inappropriate references.

Your letter reflects that you have sent a copy of these accusations to others, but that you have declined to reflect the actual names of those to whom you copied your baseless accusations. This, of course, prevents Ms. Mecklenburg from providing her response to these accusations to the same people. We therefore demand identification of those whom you have copied on these baseless accusations so that we can provide a copy of this response to each of those people. We also demand that you cease your baseless accusations against Ms. Mecklenburg.

Professors, it would better serve everyone, particularly the justice system, to engage in constructive debate on the interesting issues raised by the Illinois study. If you continue to choose instead to engage in personal attacks, outrageous rhetoric and unwarranted attempts to discredit the study, its analysts and its director, we will take that very seriously against both you and your respective Departments.

Very truly yours,

JAMES G. SOTOS & ASSOCIATES, LTD.

James G. Sotos

JGS/tz
cc: Sheri H. Mecklenburg
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July 7, 2006

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Dear Sheri:

This letter is intended to button up a few loose ends, and is sent in the same spirit of friendship and good will that has characterized all our past contacts.

You sent me an email dated April 30, in which you question the accuracy of statements in the Tribune editorial of that day, and you wrote a letter to the Editor which was published last Friday, May 12. I agree with you that was inaccurate to say that the Chicago Police Department "wouldn't allow [me]...to observe the study while it was in progress or examine the protocols created to test and compare the two methods." The words "wouldn't allow" are mistaken, as is stated in the correction also printed in the May 12 Tribune. Here is what I recollect:

The protocols

The documents you sent me on September 17, 2004, entitled "Protocol Guidelines for Jurisdictions Participating in Illinois Sequential Pilot" and the attached General Order 88-18, do not deal in any detail with the way in which the simultaneous procedures would be conducted, and did not state that non-blind administrators were to be used. These documents do not state, as does the Protocol attached as Exhibit 16 to the Report, that "The policy is to use blind administrators only for sequential lineups" (page 6). Having re-read your letter in light of the questions that have arisen, I realize that I might have inferred from the following sentence that non-blind administrators were going to be used in the simultaneous procedures: "Obviously, the blind administrator's form is filled out for a

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sequential photo or live lineup; the investigator's form will be filled out for every photo or live lineup, whether sequential or traditional, in order to give a basis for comparison..." At the time I did not parse the language that closely, drew no negative inference from what you wrote, and remained unaware that non-blind administrators were to be used in "traditional" procedures.

During the progress of the pilot program, I was not shown that Protocol (Exhibit 16), or any other protocol for the simultaneous procedures to be used in the pilot program. I was not aware of that document until I read the published Report and looked at the exhibit volume. However, as noted above, I did not specifically ask you for permission to see all of the protocols.

To the very best of my recollection, throughout the course of the program I remained unaware that non-blind administrators were used in the simultaneous procedures. Rather, I assumed – as correctly stated in the editorial – that all lineups and photo spreads in the entire pilot program would be conducted with blind administrators. This assumption was based on my belief that to have a valid comparison between the two methods, it would be necessary to have the administrators of both sequential and simultaneous procedures who were not aware of the identity of the suspects. That seemed logical to me because, in my view, a valid comparison of the two systems required that in both there must be no risk that a non-blind administrator could, by word or action, deliberately or inadvertently, steer the eyewitnesses to the police suspects and/or away from fillers. Accordingly, I believed the pilot program would use parallel methods in both sequential and simultaneous procedures.

It is my understanding that both Gary Wells and Nancy Steblay take issue with and flatly deny the statement on page 32 of the Report that implies they were shown a protocol that said non-blind administrators would be used in the simultaneous procedures, whether before the program began or at any other time during its progress. In their written comments on the Report, they have both explained why they believe the use of blind in one system and non-blind in another impairs the validity of a comparison between the two methods, and fails to comply with the statutory requirement that the pilot program be "consistent with objective scientific research methodology" (725 ILCS 5/107A-10(e)).

Potential for leading by non-blind administrators

On page iv of the Report it is stated (see also page 45):

> "There has also been some speculation that the police 'lead' witnesses to suspect identifications. . . . There is no evidence to support this theory."

Sheri, this is not a "theory," it is a reality. Whether on purpose or through inadvertence, non-blind administrators can and have suggested the identity of suspects to witnesses during lineups and photo spread procedures. The point is proven by judicial rulings, some here in Illinois, setting aside convictions based in whole or in part on police suggestions to eyewitnesses during identification processes, as well as the large civil judgments paid in some of those cases, for example, the recent case involving James Newsome and Chicago Police Department detectives. (319 F.3d 301.) The erroneous assumption that no leading ever occurs may well have been the justification for your experts recommending the use of non-blind administrators in the simultaneous procedures. It seems to me – and to Gary and Nancy and other knowledgeable persons to whom I've spoken – that when that justification falls, the program's use of non-blind administrators for the simultaneous procedures also falls, taints indelibly the methodology used in the program, and calls into legitimate question many of the key conclusions drawn from the data.

To put it in terms of the statutory command, using blind administrators for sequential and non-blind for simultaneous was *not* consistent with objective scientific research methodology.

This is the subject that was brought early on and forcefully to your attention. Gary Wells has shown me his email to you dated September 15, 2004, before or at the outset of the pilot program, in which he stated that "The double-blind procedure is essential for all lineups." He explained:

> "The point is not that double-blind is more important for sequential than for simultaneous or vice versa. The point of the research is that administrator-knowledge effects are dynamic and unpredictable as to

> when they will occur, such effects can occur through a variety of mechanisms, and such effects occur in the total absence of any malicious attempt by the lineup administrator.
>
> * * *
>
> "I'd be interested in knowing how you got the impression that double-blind (or a comparable technique such as the lap-top administered procedure) may not be necessary. It ought to be the least controversial of all the eyewitness reform ideas because of the way it instills incontrovertible integrity in both the identification session itself and in the written record of the eyewitness's behaviors that occurred in that session."

It is of interest here to note that in 1998, Roy Malpass, Steven Penrod, Gary Wells and others published an authoritative study of eyewitness errors and suggestions for improving accuracy. The first recommendation was: "The person who conducts the lineup or photospread should not be aware of which member of the lineup or photospread is the suspect." The explanation for this recommendation states in part ("*Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads*," 22 Law and Human Behavior 1, 21 (1998), internal references deleted):

> "Common practice at this time is for the detective involved closely in the case, who knows which lineup member is the suspect, to administer the lineup. This person contacts the eyewitness, tells the eyewitness about the impending lineup or photospread, instructs the eyewitness, maintains a physical presence with the eyewitness during the interview, answers questions that the eyewitness might have, asks the eyewitness to indicate a choice, records answers, and so on. This interaction between the lineup administrator and the eyewitness is a highly interpersonal process. Research on experimenter-expectancy effects shows how powerful

> such interpersonal processes can be, especially when close physical distance between the interactants allows for eye contact, visible facial expressions, and verbal exchanges. The absence of video recordings in these interactions makes it difficult or impossible to know what role might have been played by the lineup administrator in leading the eyewitness to select a particular lineup member.
>
> "We need not assume that a lineup administrator's influence is conscious or deliberate in order to see the value of a double-blind recommendation. It is well established that people have natural propensities to test a hypothesis in ways that tend to bias the evidence toward confirming the hypothesis. The confirmation bias in human reasoning and behavior is the seed that gives birth to the self-fulfilling prophecy phenomenon in which a person's assumption that a phenomenon will happen leads to behaviors that tend to make the phenomenon happen. *The simple use of procedures in which the person collecting the evidence is unaware of the 'correct' answer is an effective prevention for this powerful phenomenon.*" (Emphasis added.)

See also, Haw & Fisher, "*Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*," 89 Journal of Applied Psychology 1106, 1110 (2004).

In response to Gary's email, you wrote on September 15, 2004, in part:

> "As for the double-blind issue, I think that you have the wrong impression. I am not hostile to the double-blind issue, there are just still questions as to the benefits and the costs, which is why we are doing a pilot and I am anxious to see what happens here in Illinois, especially since we do live lineups; in that way, as well as many others, we clearly are different from New Jersey and cannot simply adopt their experience as our own. In

> any case, it is because of my open mind on the subject that I was interested in the fact that several of the jurisdictions presented as models at the [Cardozo Law School] conference had adopted sequential but do not require double blind. I then spoke to Professor Cutler, who explained that double-blind is not necessary. He stated that removal of potential bias is the issue and that there are other ways to remove potential bias, such as allowing self-administered laptop ids where the detective is on the other side of the laptop and does not know who the witness is viewing. Prof. Cutler specifically mentioned that you had developed an envelope procedure which would in fact allow self-administered photo arrays which would eliminate the bias without double-blind. I was interested in this because if double-blind is a practical issue, but there are other ways to eliminate any potential bias, then I want to explore those procedures, as well. But it appears from your e-mail that you still maintain that double-blind is necessary for sequential and *now, it appears, you take the position that it also is necessary for traditional, simultaneous procedures. So now I am thinking that we should somehow build into our pilot the issue of double-blind with simultaneous, although it may be too much right now. Maybe we can add it down the road a few months."* (Emphasis added.)

We now know that neither a double-blind requirement for simultaneous procedures was put into place at any time during the pilot program, nor were any of the other prophylactics methods described in your email ("allowing self-administered laptop ids where the detective is on the other side of the laptop and does not know who the witness is viewing," or "an envelope procedure which would in fact allow self-administered photo arrays which would eliminate the bias without double-blind").

I did not become aware of this exchange of emails until after the Report was published.

The importance of blind administrators in whichever method is used, simultaneous or sequential, is conceded in your own Report (pages 56-57):

> "Even if the issue of feedback [by law enforcement personnel to the witness] can be addressed in a manner other than the use of a blind administrator, there are still perceived advantages to the use of a blind administrator. The use of a blind administrator should increase public confidence that the eyewitness identification is not the product of suggestion by law enforcement. The use of a blind administrator also should reduce claims of officer misconduct, a fact not lost on the survey respondents who cited protection from lawsuits as a welcome advantage of the blind administrator."

The benefits enumerated – public confidence and reduced claims of administration misconduct – should result from use of double-blind procedures in all lineups and photospreads, but to my way of thinking they are not the most important, which is to remove the risk of suggestion by the administrator to the witness.

Our meetings in January and June 2005

You graciously agreed to meet in person to discuss the pilot program. We met twice, on January 28, 2005 – you, Daniel J. Roach, Commander, Zone 1, Illinois State Police, Illinois Rep. Julie Hamos and me – and on June 15, 2005 – you, Illinois Sen. John Cullerton, Ms. Hamos, Thomas P. Needham and me. To the best of my recollection, at neither of those sessions were we told that non-blind administrators were being used in the simultaneous procedures, or shown the Protocol attached to the Report as Exhibit 16; at neither of these meetings, or at any other time, were we given permission to observe the training given, or the way in which the lineups were being conducted, or given any substantive information about the pilot program; we agreed with you that it would not be proper for non-law enforcement personnel to monitor your pre-program training sessions, or to view actual lineup and photo spread procedures. Accordingly, it is incorrect to say that the Chicago Police Department refused to allow me to do so. It remains true,

however, that I did not observe any of the actual training for the program, or the way in which lineups and photo spreads were conducted during the program.

At the end of the June 15 meeting, we agreed to meet again in the fall. My memorandum of that meeting states:

> "After discussion, during which I expressed serious concern about the objectivity of the professors, especially Mr. Ebbesen, Sheri agreed that, before her report is finalized and submitted to the General Assembly (but not before she begins to draft the report), we will hold a meeting among herself, the two professors, Senator Cullerton, Representative Hamos, Nancy Steblay and me. We will be permitted to look at the forms, or a summary of the information contained in the forms, and discuss the analysis thereof, with the understanding that we will not be able to dictate what should be in the final report. Sheri emphasized that she did not want to be subjected to a 'collaborative' report writing requirement. No date was set for the meeting."

In September 2005 you wrote to say that the proposed meeting was canceled and would not occur, and was not to be re-scheduled. You explained your reasons in your email to me of September 16, 2005:

> "I do, however, have a concern because a number of groups have expressed a desire to see the results ahead of time and to have input into the report ahead of time. After talking to ISP and the scientists, we have agreed that in order to maintain both the actual and apparent integrity of the project, we are going to decline these meetings and decline discussing the results and the report ahead of time with anyone outside the project. I had my analysts sign confidentiality agreements just to avoid any criticism of outside influence. In addition to the genuine concerns that the analysis will be compromised due to political considerations, it opens up the entire project to

criticism from different groups who are concerned about the input of other groups. You should know that I already have been reproached by one group who has expressed concern that you, as a Board member of the Center for Wrongful Convictions, have had undue input into the study.

"Nevertheless, I definitely would welcome Nancy Steblay's scientific input where appropriate if she is willing to sign a confidentiality agreement. I have met Nancy, read her work and would welcome the opportunity to gain her input. As I told you, I am planning a conference on this subject at Loyola Law School in April and have invited Nancy (along w/ Gary Wells, and my two experts, Ebbe Ebbesen and Roy Malpass, and you, of course), to present. After my experts have had an opportunity to review and analyze the results and report back to me, before I write the final report I will contact Nancy and see if she is interested in signing a confidentiality agreement and discussing with me her views on the results, so that I may take her input into account in writing the final report. It may be that she only confirms my analysts, it may be that she offers additional perspective. In any case, I would welcome the opportunity to get her input into the final report. I do not anticipate being in a position to talk to her until January but will contact her then. I still have a lot of work ahead of me on this project – finishing the study, getting the survey results, analysis and review of the results, formulating recommendations, and writing the report. Obviously, I have to leave time for ISP to review the report before submitting it, and I will have to keep them apprised along the way so that it is a report that they are comfortable submitting.

"I know that you understand the importance of maintaining the integrity of the report and I am sure that

> you understand why ISP and I have decided to decline any meetings with anyone outside the project. . . ."

Nancy Steblay's involvement

As you know, I acquiesced in your decision not to hold further meetings. Later, you allowed Nancy Steblay to look at some of the data. I do not know precisely what Nancy saw or did, because she signed and we have both respected her confidentiality obligations. But I do know that her involvement began after the entire pilot program had ended, when it was too late to repair any damage which may have been done by comparing blind with non-blind procedures.

Summary

To summarize, I did not observe the training of the administrators, or how the pilot programs were conducted at the police stations. The editorial is accurate in this statement. However, as noted above, we both agreed that it would be inappropriate for an outsider such as myself to be present during training or during actual eyewitness viewing procedures. As a result, I had minimal understanding or knowledge as to how the program was being conducted, nor was I permitted to view the administrators' reports as they came to you and from you to your experts, and I still have not seen them.

Recordings of pilot program procedures

Your Report emphasizes the importance of capturing as accurately as possible the response of witnesses at the very moment that they observe the persons or photos, so that the witnesses' responses, statements, reactions and degree of certainty may later be replicated unaffected by post-identification events: "The issue of feedback may actually be less related to accuracy or reliability, and more related to credibility in testifying, which could be adequately addressed by recording the confidence of the witness at the time of the identification." (Report, p. 56, n. 57.)

The first sentence of Section 5/107A-5(a) of the Illinois Criminal Code provides: "All lineups shall be photographed or otherwise recorded." I am

interested in learning whether the pilot program lineups and photo spreads were photographed or otherwise recorded, and if so, in what form.

The selection of experts/analysts

On another very significant subject, which the Tribune editorial did not allude to, I repeatedly warned you about the potential biases of the analysts/experts you chose, and asked you to add Steven Penrod to your team. My memorandum containing my recollections of our meeting of January 28, 2005 states in part:

> "I said there was a belief among those I have spoken with that the selection of Messrs. Ebbesen and Malpass appears to have 'stacked the deck' against the sequential method. Ebbesen has written and spoken about his views that there is insufficient data to warrant the conclusion that the sequential method is superior to simultaneous; he is not regarded as neutral or near neutral by the peers that I have spoken with; no matter what the results of the pilot programs, he will continue to insist that the data is insufficient to reach conclusions one way or the other. I read them the concluding paragraph from his 'Simultaneous v. Sequential' paper. As to Malpass, I said that, although he co-authored the article with Gary Wells, et al, that said sequential was a better method, he has recently altered his position, and last March stated at the American Psychology-Law Society that rather than changing to sequential, the administrators should emphasize that witnesses should not attempt an id unless they are positive.
>
> "I suggested that Sheri appoint a third expert, and I recommended Steven Penrod of the John Jay School of Criminal Justice.
>
> "Sheri said that she attempted to appoint two experts who had not taken a firm position that sequential was either a superior or inferior method, but who were

> open minded on the subject. She understood both Ebbesen and Malpass to be open minded; they both believe the 'jury is still out' on whether sequential has been shown to be an improvement, and that more data is needed before reliable conclusions may appropriately be drawn. I responded that from what I've read and heard, no matter what the results of the pilot programs are, Ebbesen and probably Malpass will insist that there is still insufficient evidence to conclude that sequential is superior, or else will assert that the evidence shows that sequential is not superior to simultaneous.
>
> * * *
>
> "Sheri said she is not inclined to appoint a third expert, but she will present the idea to 'her people,' including Ebbesen and Malpass. She does not expect the addition of a third expert to be accepted."

In August 2005, I sent you an email in which I once again expressed the concerns of many of the persons I had spoken with about your selection of experts:

> "[Name omitted] was in Chicago ... and we met and talked for a long time on July 27.... Incidentally, when I told him who your consultants are, to my surprise he was more concerned about Roy than Ebbe, but he shares the view of everyone else I've spoken with who know about the simultaneous vs. sequential research and literature, that you've got on your staff the two most negative, biased consultants available, and as a result there is great concern and anxiety about the consequences. I say this so you'll know what's being bruited about, and not to diminish your efforts, because I am completely satisfied that you (and I assume the State Police reps) want to render an objective, fair report."

You later reported to me that no other expert/analyst would be appointed.

Lineups following photo spread identifications

My memorandum of our meeting on January 28, 2005 states:

> "We learned that in Cook County, the State's Attorney has directed that, if a witness identifies a police suspect from a photo spread, there must be a live lineup which includes the person selected and fillers. Sheri and Dan agreed that this is inherently suggestive, because in most cases the person selected in the photo spread will be the only person in the subsequent live lineup who was also in the photo spread."

It is my understanding that both the first photo spread and the subsequent live lineups are included and tabulated in the pilot program statistics. The potential for suggestion is obvious: the witness, having selected the police suspect from a photo spread, is then required to view a live lineup which contains the person whose picture the witness has already selected as the perpetrator. If the witness selects the same person from the live lineup, reporting that as two correct selections of a suspect would unfairly skew the reported results from Chicago, by increasing the numbers of correct selections in live lineups.

I do not know how many of the prior photo spreads were done using the simultaneous or the sequential method, so I am unable to tell in which direction the resulting numbers were skewed. Based upon the figures contained in the Report (see discussion below, "*The low rate of filler identifications,*" page 16), my guess is that the number of correct selections of suspects using the simultaneous system were improperly inflated owing to the use of this suggestive two-step practice in Cook County.

Findings regarding cross racial identifications

Sheri, you are now aware that serious questions have also been raised concerning several conclusions from the data collected, which seem to flout common sense, and conflicts with findings of many past studies. One is the following (Report p. vii):

> "Analysis also showed that the rates of suspect and filler identifications did not vary according to age or cross race. This appears to conflict with the classroom studies that cross-racial identifications are problematic."

Based upon the data reported in the Appendix to the Report, this statement appears wrong. It also is in conflict with many studies showing – as the Report states – "that cross-racial identifications are problematic." (Report p. vii; see also pp. 39- 40.)

First, with respect to the reported data: Exhibit 17, Table 5, shows cross-race suspect IDs of 51.7% in simultaneous and 32.2% in sequential procedures, or a combined rate of *43% cross-race suspect IDs.* This is compared to same- race suspect IDs at 64.8% in simultaneous and 53.3% in sequential procedures, or a combined rate of *59% same-race suspect IDs.* This is a statistically significant in the predicted direction.

Ebbe Ebbesen came to a similar conclusion in his analysis (see Exhibit 18, pp. 29-30, Table 39). He states (Exhibit 18, p. 30), "Thus, when witness/victims attempted to identify suspects who were in a different racial group than their own, they were less likely to identify the suspect as the culprit ..."

With respect to the prior research: many prior same-race studies have shown consistently that cross-race is an impediment to witnesses' abilities to identify the real perpetrator. Thus, Roy Malpass' current website (http://eyewitness.utep.edu/projects.html) states:

> "Research has reliably demonstrated a deficit in the recognition of other-race faces, known as the 'cross-race effect.'"

Similarly, the case of *State v. Cromedy*, 158 N.J. 112, 727 A.2d 457 (N.J. 1999), discussed at page 11 of the Report, in which the New Jersey Supreme Court, having discussed the literature on cross-race identifications, including an article co-authorized by Roy Malpass (727 A.2d at 462), stated that "... there is an

impressive consistency in results showing that problems exist with cross-racial eyewitness identification."

The recently issued Report and Recommendations of the California Commission on the Fair Administration of Justice (April 13, 2006), comments on the alarming rate of known wrong IDs of innocent persons in cross-race IDs (p. 2):

> "Among the 80 cases in which rape defendants were subsequently exonerated and the race of both parties was known, 39 of the cases involved black men who were wrongfully convicted of raping white women, and nearly all of the cases involved mistaken eyewitness identifications. Since less that 10% of the rapes in the United States involve white victims and black perpetrators, the fact that a disproportionate number of the rape exonerations involve white victims identifying black suspects suggests that the risk of error is greater in cross racial identifications. Research has consistently confirmed that cross-racial identifications are not as reliable as within-race identifications."

The footnote to the last sentence cites "*Symposium, The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*," 7 Psychol., Pub. Pol'y & Law, 3-262 (2001). See also, Meissner & Brigham, "*Thirty Years of Investigating Own-Race Bias in Memory for Faces: a Meta-Analysis,*" 7 Psychology, Public Policy and Law 3 (2001); Gross, et al, "*Exonerations in the United States 1989 Through 2003*," Gideon Project of the Open Society Institute (2004), pp. 23-31.

The charts of both Messrs. Malpass and Ebbesen show no statistically significant difference in the rate of *filler* IDs between same-race and cross-race IDs.

Accordingly, you may wish to revise the statements quoted above from page vii of the Report.

Findings regarding the involvement of weapons, violence and injuries

The Report also states that the data collected "showed no difference between identification rates when injury or violence occurred, nor any difference when a weapon was present or absent, contrary to the studies showing 'weapon focus.'" (p. vii; see also pp. 41-42; Exhibit 17, Tables 14-16; Exhibit 18, Tables 14-16). Here too, prior research and common experience indicate a substantial diminution in witnesses' ability to focus, recall and identify perpetrators accurately when the crime involves heightened stress levels resulting from violence, injury or presence of a weapon, although different rates of diminution of recall accuracy have been found depending upon the psychological makeup and emotional stability of the witness. See, e.g., Deffenbacher, et al, "*A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*," 28 Law and Hum. Beh. 687 (2004); Wells & Olson, "*Eyewitness Testimony*," 54 Annual Review of Psychology 277, 282 (2003); Steblay, "*A Meta-Analytic Review of the Weapon Focus Effect*," 16 Law and Hum. Beh. 414 (1992). The contrary results reported from the pilot program provide a further suggestion of an underlying flaw in methodology.

The low rate of filler selections

There is also a curious lack of filler selections in the simultaneous procedures, as noted in Ms. Steblay's written analysis (p. 5, referring to Report, Exhibit 18, p. 7, Table 7): not a single filler selected in the non-blind simultaneous procedures conducted in Chicago and Evanston out of 152 lineups and photo spreads. See also Exhibit 17, p. 10, Table 3b, and Exhibit 18, pp. 7-13, Tables 7 to 13.

These results are so far out of kilter with prior studies, as well as common sense and experience, that to knowledgeable readers they must raise serious questions about the way in which the simultaneous procedures were conducted. I do not impugn the integrity of the simultaneous administrators. All or some of them may have made no suggestions to witnesses, or made suggestions innocently or inadvertently, and there is of course the risk that some may have done so deliberately. But it is the *potential* for leading by non-blind administrators that has raised fundamental questions about the pilot program, which are fueled by the reported results about the lack of filler selections, and no adverse impact owing to the presence of a weapon, violence or cross-racial identifications.

My conclusions

Gary Wells and Nancy Steblay have written critiques of the Illinois pilot programs setting forth their views about the pilot program and the results reported. I trust and rely on them both. A comparison of double-blind sequential procedures with traditional simultaneous, non-blind procedures, which simply lays the two side-by-side, cannot be informative in any scientific way. To properly assess the sequential against simultaneous procedures, either both simultaneous and sequential would have to be non-blind, or both would have to be double-blind. The experts on whom I rely all are firm in the stance that it is not scientifically appropriate or meaningful to compare blind with non-blind procedures, and that no valid conclusions may be drawn from this study as to whether the simultaneous or sequential method is superior. They insist that a proper pilot program must use procedures that are blind for all lineups, sequential and simultaneous. They also underline the importance of independent, fair minded outside control over the protocols and actual lineup and photo spread process.

I concur. Some valuable information undoubtedly was obtained from this program. But I am convinced that no scientifically valid conclusions will be forthcoming until a parallel comparison is studied between simultaneous and sequential procedures, using blind administrators for both, conducted under the auspices of unbiased analysts/experts. Therefore, I am in full support of efforts that I believe will now proceed in other venues to test parallel blind pilot programs.

In my judgment, it is unfortunate that so much effort, time and money was expended on a program that has caused knowledgeable experts to raise fundamental questions about its value as a precedent. However, this does not change my view about the dedicated effort you and personnel of the Chicago Police Department and Illinois State Police put into the pilot program. Although I believe the analysts on whom you relied caused or allowed the program to be fundamentally flawed and misdirected, I am also satisfied that you acted in good faith, unaware of the flaws in your analysts' methodology.

Sheri, this letter is written solely in my personal, private capacity. I do not write, or have authority to write, on behalf of my law firm, or the Capital

Punishment Reform Study Committee, or the Center on Wrongful Convictions, or any other person or group. These are solely my own views.

I have taken the liberty of sending copies of this letter to Ebbe Ebbesen, Roy Malpass, Nancy Steblay, and Gary Wells, as well as to those who attended our two meetings, Senator John Cullerton, Representative Julie Hamos, Daniel J. Roach, then Commander of Zone 1 Illinois State Police, and Thomas P. Needham, and also to Larry Trent, Director, Illinois State Police, and Cornelia Grumman of the Chicago Tribune.

It was truly a pleasure being with you on June 9, and I look forward to seeing you again soon. Warm personal regards.

Yours truly,

Thomas P. Sullivan

TPS:js
Enclosures

cc: John Cullerton
Dr. Ebbe B. Ebbesen
Cornelia B. Grumman
Julie Hamos
Roy S. Malpass
Thomas P. Needham
Daniel J. Roach
Nancy Steblay
Larry G. Trent
Gary L. Wells

ichard M. Daley
layor

Department of Police • City of Chicago
3510 S. Michigan Avenue • Chicago, Illinois 60653

Philip J. Cline
Superintendent of Police

July 24, 2006

Mr. Thomas Sullivan
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

Dear Tom:

I received your letter dated July 7, 2006. I appreciate your statement, even at this late date, that the Tribune Editorial was incorrect.

The issues that you raise already have been addressed in my letter to the Editor of the Tribune, published May 12, 2006, in the Addendum to the Report, posted June 19, 2006 and in our discussions during the course of the study. I do not believe that further elaboration would be helpful. Nevertheless, on the very same day that I received your letter, I received a threatening letter jointly from Professors Wells and Steblay. Given the timing of the two letters, that your letter mirrors their arguments and that your letter is copied to both of them, I have included with this letter a copy of the response to Professors Wells and Steblay, which I hope will put to rest the issues that they, and you, raise.

I am proud to be associated with the study, with the law enforcement agencies and officers who participated and with the two nationally-recognized analysts who generously gave of their time, wisdom and experience and who exhibited intellectual objectivity every step of the way. As you heard at the conference, there was praise for the study from prominent people from around the nation. Professors Ebbesen and Malpass and I since have heard from many who have lauded the study as the first field study to collect substantial field data and offer a thorough and comparative analysis. It is unfortunate that you do not share their enthusiasm but, of course, you are entitled to your opinion.

Despite our professional disagreement on this area, we share many common concerns and I hope that we can continue to collaborate on many of these matters in the future. I, of course, remain both your friend and, as part of the Chicago Police Department, at your service.

Sincerely,

Sheri H. Mecklenburg
w/ enc.

APPENDIX 6

cc: Senator John Cullerton
Dr. Ebbe Ebbesen
Cornelia Grumman, Tribune
Rep. Julie Hamos
Dr. Roy Malpass
Tom Needham, Esq.
Daniel Roach, Commander, Illinois State Police
Larry Trent, Director, Illinois State Police

SUPREME COURT OF ILLINOIS

CHAMBERS OF
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September 15, 2006

Mr. Peter G. Baroni
Special Counsel
Capital Punishment Reform Study Committee
321 S. Plymouth Court
Chicago, IL 60604

Dear Mr. Baroni:

I am in receipt of your letter dated July 21, 2006, concerning the Capital Punishment Reform Study Committee's desire to disseminate a survey to attorneys and judges experienced in capital litigation.

While the Court agrees that such a survey will undoubtedly prove helpful to the Committee, the Court would like to review the survey before conferring its formal endorsement. Accordingly, I invite you to forward to me at your earliest convenience both the survey itself as well as any cover letter or instructions that would go out with it.

I look forward to hearing from you and to working with the Committee on this important issue.

Sincerely,

Robert R. Thomas
Chief Justice

APPENDIX 7