

- (1) Whether the police constructed the lineup in a manner that made the accused stand out. When police compose a lineup in a way that makes their suspect stand out, they increase the likelihood that a witness will select that person because of the differences in appearance as compared to other lineup members, rather than recalling the features of the actual perpetrator from the witness's independent memory.
- (2) Whether the police selected the lineup fillers to match the original description given by the witness. When police do not carefully select lineup fillers to match the characteristics provided by the witness, the resulting lineup can have the effect of suggesting that the suspect is the culprit, whether or not that is the case, because the result may be that the suspect is the only person in the lineup matching the original description. When particular distinguishing features were included in the description, such as a scar, tattoo, or unique hair or facial characteristics, it becomes particularly important for police to ensure that all members of the lineup match with respect to the description of that feature. When police administrators fail to take that precaution, the resulting lineup tends to have the effect of pointing toward the police suspect, regardless of that person's guilt.
- (3) Whether the police included at least five "fillers" in the lineup, in addition to the accused. When police construct a lineup with fewer than five fillers, the chance that the witness will identify the suspect, regardless of the identity of the perpetrator, is increased. In such cases, the effectiveness of a lineup procedure as a test of the witness's independent memory of the perpetrator is diminished, while the likelihood that a mere guess will result in the identification of the police suspect is increased.
- (4) Whether the police placed more than one suspect in the lineup. When the lineup administrator includes more than one suspect in a single lineup, the reliability of the procedure is diminished because,

again, guessing is more likely to result in an identification, regardless of whether or not the perpetrator is in the lineup. In other words, when the police are prepared to file charges against multiple people included in a lineup, it reduces the effectiveness of the lineup procedure as a mechanism for testing the ability of the witness to remember the perpetrator's identity. Such a procedure is more an exercise in chance than it is a test of witness memory.

- (5) Whether police failed to inform the witness that the suspect might or might not be present in the lineup, and that the witness need not select anyone. Psychological studies have shown that when police caution a witness that the suspect might or might not be present in a lineup, she is less likely to make an incorrect identification. According to the Department of Justice, this type of instruction can "lessen the pressure on the witness to make an identification solely to please the investigator or because the witness feels it is his/her duty to do so."¹ Conversely, when a witness is informed or otherwise left to assume that the police suspect is present in the lineup, she is more likely to identify someone, regardless of whether or not the actual perpetrator is present in the lineup, which is known as a "forced choice."
- (6) Whether the police selected a police officer who did not know the identity of the suspect to conduct the lineup procedure. When the police allow an investigator who knows the identity of the suspect to conduct the procedure, they create the risk that that police officer will give intentional or unintentional cues to the witness to select a particular person. A simple nod of the head, for example, can undermine the reliability of eyewitness evidence collected from a procedure of this kind, which is why the DOJ proposed the use of a police lineup administrator who is not connected to the case and does not know the identity of the suspect.

¹Eyewitness Evidence: A Trainer's Manual for Law Enforcement, United States Department of Justice, 31 (Sept. 2003).

- (7) Whether police investigators made any comments or gestures to the witness before, during, or after her identification of the accused, suggesting a particular person or suggesting that she made the correct choice. Recent studies have shown that when police give feedback that might be taken to confirm the correctness of a witness's choice, this practice can significantly increase the confidence of an otherwise uncertain witness, and thereby diminishes the reliability of the procedure as a test of the witness's actual recollection.
- (8) Whether the police documented the procedures used in detail. Under DOJ guidelines, in order to protect against suggestive and unreliable procedures, the administrator of a police lineup should document in detail every step of the process, including any conversation between the administrator and the witness.
- (9) Whether the police recorded a statement of the witness' confidence in her choice immediately following the identification procedure. Psychological studies have shown that external factors not relating to a witness's memory can distort the level of confidence attributed to an identification after the procedure is completed, so it is essential that police make an immediate, detailed record of the witness's confidence level, in the witness's own words, to ensure the reliability of the procedure and the accuracy of the resulting identification. While the confidence of a witness is not necessarily a reliable indicator of accuracy at any time, it can become significantly less reliable as time passes following the initial identification and as the witness is exposed to intervening influences.

Request #4: Additionally, you may want to consider whether the police showed the witness a photo-array or lineup containing the accused more than once before the witness positively identified the accused. Psychological studies have shown that when police show a witness multiple photos or lineups including a suspect, they create the risk that she will unconsciously confuse those viewings with her actual memory of the perpetrator.

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FACTUAL BACKGROUND

[add facts here: focus on ID procedures]

LEGAL ARGUMENT

It is well-known both among social scientists and the courts that the procedures used by police to collect eyewitness evidence can have a dramatic effect on the reliability of that evidence and the testimony that flows from it at trial (see, e.g. **Manson v. Braithwaite**, 432 U.S. 98, 114 [1977] [holding unreliable identification evidence resulting from suggestive procedures inadmissible as violative of due process]; Gary L. Wells et al., **Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads**, 22 L. & Hum. Behav. 603 [1998]). This is hardly surprising: As a general matter, "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly force will diminish it" (**Kyles v. Whitley**, 514 U.S. 419, 446 n.15 [1995]).

Eyewitness evidence is not unique in this respect. When police collect any forensic evidence, the probative force of that evidence is a function of the reliability of the methods employed to gather and preserve it. Under his basic right to present a defense, [ACCUSED] is entitled to introduce any evidence serving to undermine the reliability of prosecution 's evidence. The manner in which any evidence was acquired and handled goes directly to its weight, and as such is a critical factor for consideration by the jury in performing its core duty (see, **United States v. Morrow**, 374 F.Supp.2d 42, 46 [D.D.C. 2005] ["the great weight of legal precedent indicates that possible contamination issues go towards the weight ... of DNA evidence"]; **United States v. Lowe**, 954 F.Supp. 401, 420 [D.Mass. 1996] [finding evidence of contamination and inadequate quality procedures go to weight

of evidence collected by those procedures]).

When one court considered the integrity of a field procedure employed by a police officer to collect evidence suggesting intoxication, it observed that adherence to established best practices "leads to greater accuracy and consistency" with respect to that evidence (State v. Klawitter, 518 N.W.2d 577, 586 [Minn. 1994]). In the same analysis, that court found that when there is a question about the reliability of a particular procedure, if the resulting evidence is deemed admissible, the reliability of that evidence is a question of weight which must be tempered by a cautionary instruction when one is requested (Id. at 585-86). Eyewitness evidence is no less susceptible to contamination and error than other types of forensic evidence. When established best practices for the collection of eyewitness evidence are violated, cautionary instructions are an effective method of offsetting the danger that the jury will assign that evidence undue weight.

In this case, the prosecution is offering eyewitness identification evidence that was collected through a procedure infected by a series of errors known to undermine the reliability of this type of evidence. In some cases, the exclusion of eyewitness evidence is the only appropriate remedy for the use of unnecessarily suggestive procedures; however, in other cases, an increasing number of courts have begun using jury instructions as a mechanism to offset the dangers accompanying practices like those used to collect the eyewitness evidence in this case (see, e.g. State v. Ledbetter, 881 A.2d 290 [Conn. 2005] [finding tailored jury instructions "necessary to mitigate the risks" of suggestive police procedures on the reliability of eyewitness evidence]; State v. King, 915 A.2d 587 [N.J. Super. Ct. A.D. 2007] [overturning conviction for trial court's failure to give instruction on the effects of suggestive police practices]).

The published best practices on the collection of eyewitness evidence are informed by those

areas of social science research on which there is broad consensus, and provide clear protocols for conducting police lineups in a manner that will minimize suggestivity (see, Eyewitness Evidence, A Guide For Law Enforcement, United States Department of Justice; American Bar Association, Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures). Virtually none of those practices was followed here. Carefully tailored instructions are necessary at this final stage to mitigate the risks accompanying the suggestive practices that were used in their stead.

It is the duty of this Court to provide such instructions. Courts must provide instructions that allow jurors to reach informed conclusions on the pertinent issues, and, when an instruction is requested on a defense theory for which sufficient evidence exists, due process requires the Court to give that instruction (Bonilla v. United States, 894 A.2d 412, 417 [D.C. 2006] ["As a general proposition, an accused is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."] [quoting Mathews v. United States, 485 U.S. 58 [1988]]). Failure to give an instruction on a defense theory supported by "any evidence, however weak," is reversible error (Graves v. United States, 554 A.2d 1145 [D.C. 1989]). In making the determination of error, the evidence will be viewed in the light most favorable to the accused (Fearwell v. United States, 886 A.2d 95, 100 [D.C. 2005] [citing Adams v. United States, 558 A.2d 348, 349 [D.C. 1989]]). Further, when the pattern instructions on an issue are insufficient to address the particular circumstances of a case, then special instructions are warranted. (Id. ["A special instruction is warranted when there is evidence of special facts sustaining a rational defensive theory."] [quoting Martin v. United States, 452 A.2d 360, 262 [D.C. 1982]]).

Detailed jury instructions are also consistent with the controlling due process standard

governing eyewitness evidence set forth in Manson v. Brathwaite, 432 U.S. 98 (1977). Manson restricted the situations in which suppression of witness testimony would be a proper remedy for unnecessarily suggestive procedures, emphasizing that "identification testimony that has some questionable feature" "is customary grist for the jury mill" (Id. at 116). That is to say, defects in identification procedures go to the question of weight to be accorded that evidence by the jury (Id. at 117). In accordance with the controlling standard set forth in Manson, this Court should instruct the jury on those specific factors that uncontrovertibly affect the reliability of eyewitness evidence, such that their assignment of weight is adequately and accurately informed.

A. The Need For Instructions On Eyewitness Reliability Is Particularly Acute

The need for accurate instructions on the factors affecting the reliability of eyewitness evidence is particularly acute, given its well-known force among juries and demonstrated fallibility. Mistaken eyewitness testimony remains the leading cause of wrongful conviction, as evidenced by the mounting number of DNA exonerations (see www.innocenceproject.org [click on "Understand the Causes" and then "Eyewitness Misidentification"]) (as of March 7, 2014). But "jurors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence" (Elizabeth F. Loftus, *Eyewitness Testimony* 9 [1979]). Indeed, there is "nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the accused, and says 'That's the one!'" (Watkins v. Souders, 449 U.S. 341, 352 [1982] [Brennan, J. dissenting]).

Courts across the country recognize the unique danger of eyewitness evidence when introduced in criminal trials without "a lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict," in the form of scientifically informed jury instructions (see,

Brodes v. State, 614 S.E.2d 766, 769 [Ga. 2005] [reversing conviction due to jury instruction incorrectly citing witness confidence as indicator of reliability]). The Supreme Court of Connecticut invoked its supervisory power to require jury instructions "to mitigate the risks of [suggestive identification] procedures" (**State v. Ledbetter**, 881 A.2d 290, 316 [Conn. 2005]). The Utah Supreme Court confronted the issue in 1986, endorsing a jury instruction particularly in cases where the eyewitness identification is the 'lynchpin' of the prosecution's case," because of "the great weight jurors are likely to give eyewitness testimony, and the deep and generally unperceived flaws in" such evidence (**State v. Long**, 721 P.2d 483, 492 [Utah 1986]). Given the disproportionate weight afforded by juries to eyewitness evidence and a host of known problems with the same, this Court should follow the emerging trend and require detailed instructions on the factors affecting the reliability of eyewitness evidence to "guide the jury's feet" toward an informed conclusion on the facts.

II. SPECIAL INSTRUCTIONS ARE NECESSARY IN THIS CASE

A. The District of Columbia Has Acknowledged the Need for a Special Instruction on Eyewitness Evidence

The District of Columbia Court of Appeals has long recognized the importance of a special instruction on eyewitness evidence. In **Smith v. United States**, the Court found such instructions particularly important "because in a complicated case cross-examination, final arguments, and general instructions on credibility and burden of proof may not adequately apprise the jury of its role in this crucial area" (**Smith**, 343 A.2d 40 [D.C. 1975] ["commending" the *sua sponte* use of such instructions by trial judges in one-witness cases]; see also, **Wilkerson v. United States**, 427 A.2d 923, 927 [D.C. 1981] [affirming the importance noted by the Court in **Smith** of a special jury charge

on eyewitness evidence]). Indeed, studies have confirmed that other traditional safeguards, including cross-examination and expert testimony, are often ineffective when applied in the context of expert testimony (see Jennifer L. Devenport et al., How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures, 87 (6) J. Applied Psychol. 1042 [2002]). The pattern instructions for the District of Columbia already include a specialized charge addressing a limited set of the factors affecting the reliability of eyewitness evidence, but a more informed set of instructions is required on this delicate topic, as it is rife with pitfalls and potentially grave in its consequences.

B. The Proposed Instructions Give the Jury Comprehensive and Necessary Guidance That the Outdated Pattern Instructions Lack

The "identification" pattern instruction available to criminal accuseds in the District of Columbia has remained almost entirely unchanged for over 30 years, and as a result it fails to incorporate the substantial findings of three decades of social science research on the factors affecting the reliability of eyewitness memory (Standardized Criminal Jury Instructions for the District of Columbia, No. 5.06 [4 ed. rev. 2005]; Smith v. United States, 343 A.2d at 43 n.5 [quoting from the pattern instruction available in 1975, which reads almost verbatim to the current version]). It is the duty of this Court to provide more than that generic and outdated instruction here, where eyewitness evidence plays a critical role and the defense theory turns on a collection of factors relating to the reliability of the evidence at issue in this case. Indeed, in a binding decision the D.C. Circuit observed that "[i]t has long been the rule, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made" (Montgomery v. Virginia Stage Lines, 191 F.2d

770 [D.C. Cir. 1951]). As the New Jersey Supreme Court has observed, "when identification is a critical issue in the case, the trial court is obligated to give the jury a discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification" (**State v. Cromedy**, 727 A.2d 457, 465 [N.J. 1999] [reversing conviction for trial court's failure to give a fact-specific instruction on eyewitness identification]).

i. An instruction is necessary to counteract the faulty procedures used to collect the eyewitness evidence

1. Lineups should be constructed in a manner that does not make the suspect stand out

The danger posed by lineups in which a suspect stands out is acute, because they draw unnecessary attention to the suspect, thereby diminishing the weight that a witness attributes to her own memory and increasing the likelihood that the police suspect will be chosen, regardless of the identity of the culprit (see, **Eyewitness Evidence, A Guide For Law Enforcement** at 29). Indeed, "[t]he presence of features that make the suspect stand out from the distractors confounds our ability to conclude that the selection of the suspect was due to true recognition versus some form of suggestion, demand, or inference" (Gary Wells et al., **Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads**, 22 L. & Hum. Behav. at 626). That danger is present here, as [FACTS]. The stark contrast between the features of [ACCUSED] and the other members of the lineup renders the procedure extremely suggestive, and a cautionary instruction on the adverse effects of this practice is a crucial safeguard to mitigate the attendant risk of misidentification.

2. Fillers should be selected to match the original description given by the witness

It is a fundamental rule of lineup construction that the fillers should generally match the original description given by the witness in order to avoid suggestiveness (**Eyewitness Evidence, A Guide For Law Enforcement** at 29; **Statement of Best Practices For Promoting the Accuracy of Eyewitness Identification Procedures** at 3). When the fillers are not selected to match the original description, this increases the danger that the suspect - who presumably became a suspect at least in part because she matched the witness's description - will be the person in the lineup who obviously matches that description most closely. Studies have shown that "the rate of selecting an innocent person who fit the description of the culprit increased dramatically when others in the lineup did not fit the description" (Gary Wells et al., **Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads**, 22 L. & Hum. Behav. at 614 [citing R.C.L. Lindsay & Gary Wells, **What Price Justice? Exploring the Relationship Between Lineup Fairness and Identification Accuracy**, 4 L. & Hum. Behav. 303 [1980]). It has also been demonstrated that witness confidence is artificially inflated, even when selecting an innocent suspect, when fillers do not adequately match the characteristics provided in the original description (**Id.**).

The same guideline is aimed at discouraging the use of lineup fillers who are chosen to match the characteristics of the suspect, rather than the witness' description of the culprit. While this guideline may not be immediately intuitive, it serves to protect against lineups in which the suspect stands out as the only person linked to the witness's description by a core trait (or traits), but by which the suspect might not be linked to fillers - despite the fact that the suspect might not otherwise appear to stand out as compared to those fillers, absent consideration of the traits included in the

description, which is presumably the witness' benchmark.

For that reason, the guideline requires that the original description of the culprit, rather than suspect characteristics, be used as the lineup norm (see, Gary L. Wells & Elizabeth A. Olson, **Eyewitness Testimony**, 54 Ann. Rev. Psychol. 277, 287 ["[R]esearch has shown that using the suspect as the reference point to select fillers can create a "backfire effect" in which an innocent suspect, being the origin or central tendency of the lineup, actually has an increased chance of being identified as the culprit"]; see also Gary Wells et al., **Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads**, 22 L. & Hum. Behav. at 627 ["[I]f the suspect is the only person who fits the eyewitness's verbal description of the culprit, then this sets a high prior probability that the suspect is relatively more similar to the culprit than are the other lineup members"]). The danger is particularly evident in cases where the suspect is not the culprit: in those cases, fillers chosen to match the suspect's characteristics might be easily ruled out because they fail to match even the most generic original description, and the only person left in the lineup will be the police suspect, even though a third party viewing the lineup might not conclude that any one person objectively stands out when the lineup is viewed on its face (**Id.** ["[In those cases,] any propensities for the eyewitnesses to make relative judgments will be disproportionately focused on the innocent suspect"]).

When fillers are chosen to match the suspect and not the description, the procedure is reduced to a test of matching documented descriptors to the only person in the lineup who could be described as a match, rather than a test of the witness's ability to remember the identity of the actual perpetrator. Because [OFFICER] selected lineup fillers in this case to match the suspect rather than the description given by [WITNESS], a cautionary instruction is also warranted on this point to guide

the jury in weighing the reliability of a procedure proven to be suggestive.

3. At least five "fillers" and only one suspect should be included in any lineup

To comport with established best practices, the lineup administrator should include at least five fillers, and only one suspect, both aimed to ensure that the lineup procedure is a test of the witness's legitimate recollection and not an empty guessing game (**Eyewitness Evidence, A Guide For Law Enforcement** at 29). The guidelines require at least five fillers in a given lineup, because the probability of a mistaken identification increases as the ratio between suspects and non-suspects in a lineup decreases. For the same reason, there should only be one suspect per lineup; the more non-suspect choices are presented, the more likely the procedure is to serve as a reliable test of the memory of the witness - namely her ability to distinguish the culprit from innocent people and vice versa - and the less likely it is to result in the wrongful conviction of an innocent person placed in the lineup as a result of a bad police procedure (See Gary L. Wells, **Eyewitness Identification: Systemic Reforms**, 2006 Wis. L. Rev. 615, 623 ["A lineup that contains only suspects (no fillers) is like a multiple-choice test with no 'wrong' answer. In an all-suspect lineup, charges may be brought against anyone whom the witness identifies. If there are fillers, however, an eyewitness who is prone to simply pick someone is likely to pick a filler.... The one-suspect recommendation applies under all circumstances"]).

In this case, [FACTS DEVIATING FROM BEST PRACTICES]. This renders the lineup wholly unreliable, because in the best cast scenario it can do no more than confirm police suspicion that someone in the lineup is guilty; in the worst case scenario, it validates a suspicion that is incorrect, and leads to a wrongful conviction. Because this practice was not followed here, an

instruction is also warranted on this point to offset the corresponding risk.

4. Witnesses should be warned that the perpetrator might or might not be present in the lineup

At risk of leading a witness to make a "forced choice," the administrator of a lineup procedure should always give detailed instructions to the witness regarding the purpose and nature of the lineup procedure (**Eyewitness Evidence, A Guide For Law Enforcement** at 31-32). In every case, the investigator should "provide instructions to the witness to ensure the witness understands that the purpose of the identification procedure is to exculpate the innocent as well as to identify the actual perpetrator" (**Id.** at 31). Further, the lineup administrator should expressly instruct the witness that the culprit might or might not be present in the lineup, and that the investigation will continue regardless of whether an identification is made (**Id.** at 32). Extensive studies have been conducted which confirm the importance of this set of instructions in reducing false identifications, as well as the danger of failing to include it. Courts are beginning to require jury instructions to offset the risk when police investigators fail to use it (See, e.g. **State v. Ledbetter**, 881 A.2d 290, 314-319 [Conn. 2005]; **State v. King**, 915 A.2d 587 [N.J. Super. A.D. 2007]). Psychologist Dr. Nancy Steblay conducted a meta-analysis of the literature to examine the effect of the "might or might not be present" instruction, and found that across all the studies she examined, this instruction alone reduced the rate of false identifications by 41.6% in lineups where the actual culprit was not present in the lineup. It was based largely on the research of Dr. Steblay that the Department of Justice included this recommendation in its **Guide for Law Enforcement** (See Gary L. Wells & Elizabeth A. Olson, **Eyewitness Testimony**, 54 Ann. Rev. Psychol. 277, 286-287 [2002]).

At least one state court has acknowledged the importance of lineup instructions, and held

recently that in cases where such identification testimony is otherwise admissible, it must be accompanied by an instruction warning the jury of the associated risk of misidentification when no such instruction was provided at the lineup (**State v. Ledbetter**, 881 A.2d at 318-319 [concluding that "some action is necessary to mitigate the risks of such procedures"]). In this case, no instructions whatsoever were given to any witness, and the resulting risk that [ACCUSED] was falsely identified is unacceptably high. Once again, well-known non suggestive procedures were readily available, but instead [OFFICER] took the great risk of conducting a lineup procedure with no cautionary instructions, thereby leading the witness to believe that it was [HIS/HER] duty to select someone from the photo array. A cautionary instruction is necessary to mitigate this highly suggestive practice.

5. The administrator of a lineup procedure should not be aware of the suspect's identity

In order to avoid suggestiveness in conducting a lineup, police best practices dictate that an investigator should not know the identity of the suspect. According to the Department of Justice publication entitled **Eyewitness Evidence: A Trainer's Manual for Law Enforcement**, using "blind" procedures helps to ensure "that the case investigator does not unintentionally influence the witness ("**Eyewitness Evidence: A Trainer's Manual for Law Enforcement**, United States Department of Justice, 42 [Sept. 2003]). Research has conclusively demonstrated that when individuals conduct experiments in a context in which they know the preferred or "correct" outcome, they are likely to give inadvertent cues that not only support that result, but increase the likelihood that it will occur - often with no knowledge that the suggestion is taking place, and even when earnest attempts are made to avoid doing so. This danger is particularly grave immediately following

the lineup, when non-blind investigators almost always give confirmatory feedback - whether intentionally or unintentionally - which has been shown to eliminate doubt in the mind of the witness that may have existed previously (Gary Wells et al., **Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads**, 22 L. & Hum. Behav. at 14). In this case, [OFFICER] knew that [ACCUSED] was the suspect, and conducted the lineup with the intention of confirming [HIS/HER] involvement. There are simple methods available at zero cost to avoid the highly suggestive practice of a non-blind lineup administration, even when a "blind" administrator is not available to conduct the procedure. One such low-budget option is known as the "folder method," which is the recommended procedure in several jurisdictions for cases in which cost prohibits bringing in an investigator who is not aware of the identity of the suspect (See **Model Policy and Procedure for Eyewitness Identification**, State of Wisconsin, Office of the Attorney General, 7 [2005]; Amy Klobuchar et al., **Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project**, 4 Cardozo Pub. L., Pol., & Ethics J. 381 [2006]). Despite the ready availability of less suggestive alternatives, [OFFICER] used the most suggestive method for conducting the lineup procedure in this case and an instruction is necessary to offset the resulting bias.

6. The administrator of a lineup should not make comments to influence the witness, before or after a selection is made

Another fundamental rule of lineup construction dictates that the lineup administrator refrain from making comments to a witness to influence the witness's selection, or confidence in a selection after it is made. Eyewitness Evidence, A Guide For Law Enforcement at 33. Studies have shown that

feedback relating to a witness's choice, lack of choice, or decision making process in general can dramatically influence a witness's confidence, as well as his or her overall recollection of not only the identity of the perpetrator, but other material details surrounding the event being recalled (See generally Amy L. Bradfield et al., **The Damaging Effect of Confirming Feedback on Eyewitness Certainty and Identification Accuracy**, 87 J. Applied Psychol. 112 [2002]; Gary L. Wells & Amy L. Bradfield, **"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience**, 83 [3] J. Applied Psychol. 360 [1998]).

In one case cited in the Wells & Bradfield study, a witness spent a full thirty minutes attempting to identify her attacker from a photo lineup of four people, and her behavior during that process exhibited a tremendous amount of uncertainty about his identity (**Id.** at 360). At the beginning of the procedure, she was equally torn between two individuals depicted in the lineup. By the end, she hesitantly settled on one person, stating "I don't know . . . number two?" At trial, however, she confidently proclaimed: "There was no maybe about it . . . I was absolutely positive." **Id.** "There is good empirical evidence to indicate that the confidence with which eyewitnesses give identification testimony is the most important single quality of testimony in terms of whether jurors will believe that the eyewitness correctly identified the perpetrator. In fact, a confident eyewitness tends to make jurors ignore the witnessing conditions themselves and believe the eyewitness at a rate that exceeds the actual rate of accuracy" (**Id.** at 361 [internal citations omitted]).

Confidence has also been shown, however, to be highly susceptible to suggestion, whether intentional or otherwise, and even tends to increase when a lineup administrator simply asks the same question more than once. **Id.** A simple comment such as "Good, you identified the actual suspect in the case" - when that person was not the actual culprit - has been shown to dramatically

affect not only the confidence of witnesses, but other material components of a witness's memory of events. In response to that comment alone, witnesses' reported recollection of the distance between them and the perpetrator was shown to be inflated, along with ability to view his face and the amount of attention paid. *Id.* at 366. Given the clear danger of even apparently innocuous comments made by a lineup administrator to a witness, a cautionary instruction on the effect of such comments on eyewitness reliability is critical to guide juror deliberation.

7. A statement of the witness's confidence should be taken immediately following the identification

Given the demonstrated malleability of eyewitness confidence, it is also important that a statement of the witness's confidence be documented, in the witness's own words, immediately following any identification (**Eyewitness Evidence, A Guide For Law Enforcement** at 38). Research has demonstrated that witness confidence statements correlate with accuracy only when they are made immediately after the original identification, and are uncontaminated by confirming feedback (Gary L. Wells et al., **Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads**, 22 *L. & Hum. Behav.* at 15-16 & 18; see, e.g. Evan J. Mandery, **Due Process Considerations of In-Court Identifications**, 60 *Alb. L. Rev.* 389, 418 [1996]; Benjamin E. Rosenberg, **Rethinking Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal**, 79 *Ky. L.J.* 259, 276 [1990/1991] [citing Cutler et al., **The Reliability of Eyewitness Identification**, 11 *L. & Hum. Behav.* 233, 234 [1987]; Kenneth A. Deffenbacher, **Eyewitness Accuracy and Confidence**, 4 *L. & Hum. Behav.* 243, 258 [1980]). Where (as here) the police officer administering the lineup failed to take a confidence statement immediately following

the identification, and prior to the eyewitness being subjected to corrupting factors between the identification and trial, a cautionary instruction is warranted.

8. Multiple viewings of a photo of a suspect create the risk of a witness confusing the photo with memory

Apart from the composition of the lineup, another serious problem with the lineup is that [ACCUSED] was the only person in the lineup of whom the witness had already seen a prior photograph. That is, [ACCUSED] was the only "repeater" - the only person in the lineup that the witness had seen before. This greatly adds to the suggestivity of the lineup in that it creates a high probability of a scenario where the witness could be identifying [ACCUSED] not because she recognizes him as the perpetrator but because she recognizes him from a photograph she had seen of her previously (Jennifer E. Dysart et al., **Mug Shot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects**, 86 [6] J. Applied Psychol. 1280 [2001]. "Th[e] danger [that a witness will make an incorrect identification] will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw" (**Simmons v. United States**, 390 U.S. 377, 383 [1968]). Here, the witnesses viewed [ACCUSED]'s photograph [FACTS]. "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in [her] memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification" (**Id.** at 383-384). To counteract this suggestive practice, a targeted instruction is critical to assist the jury in weighing the reliability of the resulting eyewitness testimony.

9. The lack of documentation on the lineup procedure is an absence of evidence that the prosecution had a duty to preserve

Best practices dictate that every step of the identification process be recorded, from the pre-lineup instructions, to any conversation between the investigator and a witness, to any selections made by a witness and corresponding confidence statements in the witness's own words, to any feedback given by the investigator following the lineup (**Eyewitness Evidence, A Guide For Law Enforcement** at 34). Wherever practicable, the entirety of the procedure should be videotaped (**Statement of Best Practices For Promoting the Accuracy of Eyewitness Identification Procedures** at 1). The District of Columbia Court of Appeals has held that "in assessing whether the prosecution has met its burden of proving guilt beyond a reasonable doubt, the jury may properly consider not only the evidence presented but also the lack of any evidence that the prosecution, in the particular circumstances of the case, might reasonably be expected to present" (**Greer v. United States**, 697 A.2d 1207, 1210 [D.C. 1997]). At least one state's highest court has expressly held that the failure of police to record an identification procedure "should be weighed in deciding upon the probative value of the identification, out-of-court and in-court" (**State v. Delgado**, 188 N.J. 48, 902 A.2d 888 [N.J. 2006]). It is a "firmly grounded" principle in the District of Columbia that where "the prosecution's failure to collect [certain] evidence violated standard police procedures," it is proper for the jury to consider "the lack of corroborative evidence in deciding whether the prosecution has met its burden of proof" (**Brown v. United States**, 881 A.2d 586, 594 [D.C. 2005] [citing **Smith v. United States**, 709 A.2d 78 [D.C. 1998]). Not only is it reasonable to expect that police keep detailed records of identification procedures, but it is a fundamental rule under DOJ best

practices, and essential to the fair administration of justice. In this case, the prosecution has provided no records whatsoever of the procedure that it seeks to introduce as evidence against [ACCUSED], which deflates the procedure and resulting identification of its ability to give any insight into the accuracy of the witness' memory, which is the material matter the jury will seek to resolve. An instruction on this point is critical to counterbalance the probative weakness of a lineup procedure about which no records were kept, in direct violation of standard police procedures.

III. CONCLUSION

Eyewitness identifications are the most devastating and persuasive evidence in criminal trials. In this case, the prosecution has introduced eyewitness evidence that resulted from procedures that were demonstrably flawed, and known to diminish reliability while increasing the likelihood of an erroneous identification. To mitigate that risk, this court should instruct the jury on those areas of police procedure that are governed by well-settled best practices, both among law enforcement agencies and the social scientists who have studied these practices and their effects on eyewitness accuracy. Where best practices have been violated and a direct link is known to exist between the violation of those practices and inaccurate identifications, the fair administration of justice demands that the jury be equipped with that information to guide its deliberations and proper assignment of weight to the evidence before it.

For these reasons and for any other that may appear to the Court, [ACCUSED] respectfully submits that this Motion should be granted, and that the instructions set forth above be submitted to the jury prior to deliberations.

Respectfully submitted,

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