

## The Reactions of Mock Jurors to the Department of Justice Guidelines for the Collection and Preservation of Eyewitness Evidence

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Failure to follow the recommended guidelines for conducting lineups set forth by the Department of Justice (DOJ) could result in fewer convictions. To test this supposition, mock jurors read 1 of 3 versions of a court transcript. In 1 version, no issues were raised about how the investigating officer conducted the photo array. In the second version, 2 procedural errors made by the investigator were highlighted. In the third version, the defense attorney highlighted 2 procedural errors and mentioned that these errors violated the DOJ guidelines. Mock jurors informed of the procedural errors their violation of the DOJ guidelines found the prosecution's case against the defendant to be weaker than mock jurors in the other 2 conditions. Also, mock jurors informed of the procedural errors were less likely to find the defendant guilty than mock jurors in the other 2 conditions. Thus, the failure of law enforcement to implement the DOJ guidelines could be used to discredit the prosecution's case in the jurors' eyes.

Eyewitness testimony research is one of the great success stories in applied social and cognitive psychology. A quarter-century of quality scientific research and more than 1,000 peer-reviewed scientific articles have produced considerable understanding of the factors that influence eyewitness accuracy (Cutler & Penrod, 1995; Wells, 1993; Wells & Olson, 2003; Wells & Seelau, 1995; Wells et al., 1998). Moreover, this research is being moved from the laboratory into the police station, where it can do the most good (Wells, Malpass,

Lindsay, Fisher, Turtle, & Fulero, 2000). The U.S. Department of Justice (DOJ), through its research arm, the National Institute of Justice, has recently produced a set of guidelines entitled *Eyewitness Evidence: A Guide for Law Enforcement* (Technical Working Group on Eyewitness Evidence, 1999; hereinafter the *Guide*). The *Guide* has led at least one state to adopt its own set of guidelines for the collection and preservation of eyewitness evidence (New Jersey Department of Law and Public Safety, 2001). In this research, we examine the issue of how jurors will react to the *Guide* and, in particular, the extent to which violations of its recommendations will reduce convictions in trials in which eyewitness identification plays a key role.

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Some time ago, Wells (1978) argued that the variables that influence eyewitness accuracy can be divided into two categories: estimator and system variables. Estimator variables are factors that influence eyewitness accuracy but are not under the control of the legal system. For instance, witnesses are more accurate when identifying members of their own race than members of a different race (Anthony, Cooper, & Mullen, 1992; Bothwell, Brigham, & Malpass, 1989; Chance & Goldstein, 1996; Malpass, 1974; Platz & Hosch, 1988). Eyewitness accuracy is also influenced by the amount of stress the witness experienced at the time of the event (Deffenbacher, 1983; Kramer, Buckout, Fox, Widman, & Tusche, 1991; Loftus & Burns, 1982) and the amount of time the witness had to view the event (Laugherty, Alexander, & Lane, 1971; Read, Vokey, & Hammersley, 1990). System variables, by contrast, are under the direct control of the police investigator. For instance, simply informing witnesses that the perpetrator may or may not be present in the lineup reduces false identifications considerably without reducing correct identifications (Malpass & Devine, 1981). Constructing lineups such that the suspect does not unduly stand out also greatly reduces false identifications (Lindsay & Wells, 1980). Sequential, as opposed to simultaneous, lineups have also been proposed. (Lindsay & Wells, 1985). Recently, research suggests that the lineup administrator should be blind to the identity of the suspect so as not to inadvertently influence the witness's choice or level of confidence (Garrioch & Brimacombe, 2001; Phillips, McAuliff, Kovera, & Cutler, 1999; Wells et al., 1998).

The system variable approach culminated in the development of a set of recommendations for conducting lineups and photo spreads. The initial step in this process was the 1996 formation of an American Psychology-Law Society (AP-LS) committee to develop research-based recommendations, which produced what has come to be known as the Eyewitness Whitepaper (Wells et al., 1998; hereafter, the Whitepaper). The Whitepaper made the following recommendations: (a) The person conducting the lineup or photo array should be blind as to who the suspect is; (b) the lineup administrator should explicitly tell the witness that the perpetrator may, or may not, be in the lineup; (c) the suspect should not stand out as being different from the other members of the lineup; and (d) the lineup administrator should obtain a statement of confidence from the witness before providing any feedback.

The Whitepaper impressed then-Attorney General Janet Reno (Wells et al., 2000), who had become concerned about the large number of DNA exoneration cases and the finding that many of these cases involved faulty eyewitness identifications (Connors, Lundregan, Miller, & McEwen, 1996). She established a Technical Working Group for Eyewitness Evidence made up of psychologists, police investigators, prosecutors, and defense attorneys, which produced the *Guide*. The result of a consensus process, the *Guide* includes many, but not all, of the recommendations outlined in the

Whitepaper. For example, the *Guide* does not specify that investigators should use double-blind lineups but instead states that further study is needed to determine whether such procedures should be recommended in any future guidelines.

Although the *Guide* asserts that failure to comply with its recommendations "will not necessarily invalidate or detract from the evidence in a particular case" (p. 4), we wondered whether jurors would see it that way. In particular, we were interested in how jurors would react to an investigating officer's failure to adhere to the *Guide*'s recommendations when conducting a lineup. Considerable research in social psychology has demonstrated that the impact of a persuasive message is influenced by characteristics of the source. Sources are most likely to be influential when they are deemed to be knowledgeable and trustworthy (Hovland, Janis, & Kelley, 1953; McGuire, 1985). Consistent with such findings, other research indicates that expert testimony on eyewitness issues can influence jury decision making. For instance, in a study by Loftus (1980), mock jurors who read a trial transcript that included the testimony of an eyewitness expert were about 20% less likely to vote guilty than mock jurors who read the same transcript without the expert testimony. Still other research has shown the effect of expert testimony to depend on jurors' prior knowledge of eyewitness behavior. Expert testimony in areas about which jurors are already knowledgeable has a small impact, whereas expert testimony in areas in which jurors are less knowledgeable has a more pronounced impact (Cutler, Dexter, & Penrod, 1989).

It seems likely to us that jurors will regard the *Guide* as coming from an authoritative source and, therefore, that mention of violation of its recommendations by an investigating officer will influence jurors' perceptions of the case. To examine these issues, we developed a trial transcript in which the primary evidence against the defendant was an eyewitness identification made by a single witness. Although other witnesses testified, only one witness got a good look at the culprit. Three versions of the transcript were developed. In one version, no mention is made of how the investigating officer conducted the photo lineup. In the second version, the defense attorney highlights two procedural errors made by the investigating officer. In the third version, the defense attorney highlights two procedural errors made by the investigating officer and also points out that the errors violate the *Guide*'s recommendations.

## METHODS

### Participants and Design

A total of 174 participants completed this experiment as partial fulfillment of a research requirement for an introductory psychology class. Participants were tested in small groups of up to 6 participants. Participants were randomly assigned to one of three transcript conditions (no error, procedural error,

DOJ). Data from 2 participants were discarded because they failed to provide answers for all of the requested ratings.

## Materials and Procedures

**Jury instructions.** Before reading the trial transcripts, participants were given the standard cautionary instructions used in Arkansas addressing issues such as the duties of the judge and jury, burden of proof, proof beyond a reasonable doubt, what constitutes evidence, statements of lawyers not being evidence, and the use of personal experience and common knowledge. After reading the trial transcript, participants were given substantive instructions, which provided the legal definitions for aggravated robbery and theft of property.

**Trial transcripts.** Participants read one of three trial transcripts adapted from an actual criminal case in which a defendant was charged with aggravated robbery and theft of property. The transcripts, between 12 and 14 pages long depending on the condition, were identical except for the manipulations described next.

In all three transcripts, witnesses testified that a robber entered a Food Mart convenience store around closing time wearing a makeshift mask with his hands covered with socks and duct tape. He told the customers and workers that he had a gun and was not afraid to use it. After taking approximately \$1,500 in cash, he made his escape. Outside the store, an eye-witness (Ms. Wilcox) observed the robber removing his mask. Ms. Wilcox testified that she was approximately 40 ft away from the robber in a well-lit parking lot when she saw the robber remove his mask. She testified that she got a good look at the robber's face at this time.

Following an anonymous tip, the lead investigator, Officer Jacobs, constructed a photo array to show Ms. Wilcox. Ms. Wilcox positively identified the defendant, Mr. Reggie Martinez, in the photo array and also during the trial. Other prosecution witnesses included Officer Jacobs, a witness from inside the store during the robbery, and a friend of the defendant who testified that the defendant had a large gambling debt, thus establishing motive. The defense called a single witness who had been inside the store during the robbery. This witness testified that, although she could not see the robber's face or hands, she thought the robber had been African American. All other witnesses testified that the robber had been Hispanic and, on cross-examination, the defense witness admitted that she could be mistaken about the perpetrator having been African American and not Hispanic. Pilot testing on this basic scenario produced a conviction rate of approximately 60%. Three versions of the transcript were developed: One involved no mention of police errors in the identification procedures; one transcript included two errors, which were subsequently brought up by the defense; and one transcript included the same two errors plus the fact that they violated the *Guide*.

In the no error condition, the testimony indicated that the lead witness had identified the defendant in a photo array shortly after the crime. In the procedural error condition, the same testimony was offered about the identification, but on cross-examination the defense attorney attempted to establish that Officer Jacobs had committed two prejudicial errors in conducting the lineup:

- Q. Officer Jacobs, I want to now ask you about the lineup which you showed to Ms. Wilcox.
- A. Okay.
- Q. Officer Jacobs, did you ever inform Ms. Wilcox that the culprit may or may not be in the lineup?
- A. I don't believe so.
- Q. Don't you believe it would have been a good idea to let the witness know that she didn't have to pick somebody?
- A. In my experience, things like that don't make any difference.
- Q. Officer Jacobs, Mr. Martinez has a mole on his left cheek, did any of the other photographs you showed Ms. Wilcox have a mole?
- A. No.
- Q. Aren't you afraid that would make Mr. Martinez stand out?
- A. No sir I wasn't. In my experience, witnesses either recognize someone or they don't.

In the DOJ condition, defense counsel not only mentioned these errors, but also brought up the *Guide*:

- Q. Officer Jacobs, I want to now ask you about the lineup which you showed to Ms. Wilcox.
- A. Okay.
- Q. Officer Jacobs, did you ever inform Ms. Wilcox that the culprit may or may not be in the lineup?
- A. I don't believe so.
- Q. Don't you believe it would have been a good idea to let the witness know that she didn't have to pick somebody?
- A. In my experience, things like that don't make any difference.
- Q. Officer Jacobs, are you familiar with the Department of Justice guidelines that were recently published entitled "Eyewitness Evidence: A Guide for Law Enforcement"?
- A. I've heard of them.
- Q. And are you aware that they state that the investigating officer should make clear to the witness that the culprit may or may not be in the lineup?
- A. No I wasn't.
- Q. Alright Officer Jacobs, Mr. Martinez has a mole on his left cheek, did any of the other photographs you showed Ms. Wilcox have a mole?
- A. No.

- Q. Aren't you afraid that would make Mr. Martinez stand out?
- A. No sir I wasn't. In my experience, witnesses either recognize someone or they don't.
- Q. I see, well were you aware, Officer Jacobs, that the Department of Justice guidelines state that the suspect should not stand out as being different from the other members of the lineup?
- A. No I wasn't.

The only other differences in the three transcripts concerned the closing arguments. The relevant portion of the defense closing argument in the no error condition read:

The prosecution only has one witness who claims to have fleetingly seen the defendant's face. Is that enough to put somebody in jail? You've heard the expression, "Garbage in, garbage out." She was 60 feet away. It was dark outside. You can't rely on her identification. Like I said, "Garbage in, garbage out."

In the procedural error condition, this argument was expanded to include the procedural errors made by the investigator:

The prosecution only has one witness who claims to have fleetingly seen the defendant's face. Is that enough to put somebody in jail? You've heard the expression, "Garbage in, garbage out." She was 60 feet away. It was dark outside. You can't rely on her identification. And ask yourself whether Officer Jacobs, when he conducted the lineup, followed a fair and just procedure or one which would taint the witness's recollection. Officer Jacobs didn't even inform the witness that she could pick no one, if the culprit was not in the lineup. He didn't even inform the witness that the culprit may, or may not, be present in the lineup. Not only that, you heard Officer Jacobs admit that Mr. Martinez was the only one in the lineup with a mole. He was sure to stand out. Officer Jacobs wasn't following the right procedures, plain and simple. Like I said, "Garbage in, garbage out."

Finally, in the DOJ condition, the relevant portion of the defense closing read as follows:

The prosecution only has one witness who claims to have fleetingly seen the defendant's face. Is that enough to put somebody in jail? You've heard the expression, "Garbage in, garbage out." She was 60 feet away. It was dark outside. You can't rely on her identification. And ask yourself whether Officer Jacobs, when he conducted the lineup, followed a fair and just procedure or one which would taint the witness's recollection. He testified that he was aware of the guidelines published by the United States Department of Justice. Did he follow those guidelines? He did not. Officer Jacobs didn't even inform the witness that she could pick no one, if the culprit was not in the lineup. He didn't even inform the witness that the culprit may, or may not, be present in the lineup. Not

only that, you heard Officer Jacobs admit that Mr. Martinez was the only one in the lineup with a mole. He was sure to stand out. Officer Jacobs wasn't following the right procedures, plain and simple. Like I said, "Garbage in, garbage out."

*Questionnaire.* Immediately after reading the trial transcript, participants were presented with a questionnaire. First, participants were asked to provide a verdict of guilty or not guilty for the crime of aggravated robbery and to provide a confidence rating for their judgment on a 7-point Likert-type scale. Participants next provided a verdict and confidence rating for the theft of property charge. Participants were also asked to explain the reasons for their verdicts.

Participants were then asked to indicate their level of agreement with three statements concerning the prosecution's witnesses using a 7-point Likert-type scale ranging from 1 (*disagree strongly*) to 7 (*agree strongly*). With regard to the eyewitness who made the identification, participants were asked to rate their agreement with the statement, "I think Cynthia Wilcox is a credible witness, and I believe her testimony." With regard to the investigating officer, they were asked to rate their agreement with the statements, "I believe that Officer Jacobs conducted himself with the utmost professionalism during the course of this investigation," and "I believe during the course of this investigation Officer Jacobs did jeopardize the integrity of the investigation."

In addition to these questions, participants completed 10 items taken from Liu and Shure's (1993) due process orientation scale. Our measure included 10 of the 16 items used by Liu and Shure (5 procedural due process, 5 due process vs. crime control). We omitted the items that loaded the poorest on the two constructs, two of which were noted as being politically charged by Liu and Shure, and another that referred to Charles Manson. Additionally, to help with the coherence of the measure, we dropped two items that were scaled using a feeling thermometer. The 10 items were rated on a 7-point Likert-type scale ranging from 1 (*disagree strongly*) to 7 (*agree strongly*). After all participants were finished, they were thanked for their participation and any questions they had about the research were answered.

## RESULTS

This experiment sought to identify how mock jurors would respond to learning of procedural errors made in the administration of a photo array. We did not presuppose that the potential hazards of such errors would be self-evident to mock jurors. Instead, we predicted that informing mock jurors that the procedural errors violated the *Guide's* recommendations would result in more negative beliefs about the prosecution's case and more not guilty verdicts than merely pointing out that the errors occurred. The data of interest in testing this

TABLE 1  
Average Rating Provided by Mock Jurors in Each of the Transcript Conditions and the Proportion of Mock Jurors in Each of the Transcript Conditions Who Found the Defendant Guilty of Aggravated Robbery and Theft of Property

	<i>No Error</i>		<i>Procedural Error</i>		<i>Department of Justice</i>	
	<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
Investigator's professionalism	4.39	1.46	4.16	1.65	3.10	1.77
Did investigator jeopardize case?	4.10	1.39	4.24	1.47	5.14	1.38
Eyewitness credibility	5.12	1.55	4.90	1.62	3.69	1.54
Aggravated robbery	.63		.48		.29	
Theft of property	.59		.47		.28	

prediction are provided in Table 1. Within Table 1 are the average ratings provided by participants in the three transcript conditions for Officer Jacobs's professionalism, the extent to which he jeopardized the prosecution's case, and the credibility of the principle eyewitness. The proportion of participants who found the defendant guilty of aggravated robbery and theft of property is also presented in Table 1.

In the following section, we first present the results from analyses conducted using mock jurors' ratings of Officer Jacobs's professionalism, the extent to which the errors jeopardized the prosecution's case, and the credibility of the principle eyewitness. We then present analyses that were conducted on the verdicts given by participants for the two charges brought against the defendant. All statistics were significant at a  $p$  value of less than .05, unless otherwise specified.

For the first set of analyses, we conducted a series of one-way analyses of variance (ANOVAs) with type of transcript read by participants used as an independent variable.<sup>1</sup> Participants' ratings of Officer Jacobs' professionalism, the extent to which he jeopardized the case, and the credibility of Ms. Wilcox's eyewitness identification of the defendant varied depending on which transcript participants read:  $F(2, 171) = 10.30$ ,  $MSE = 2.68$ ,  $\omega^2 = .10$ ;  $F(2, 171) = 9.70$ ,  $MSE = 1.99$ ,  $\omega^2 = .09$ ;  $F(2, 171) = 14.45$ ,  $MSE = 2.45$ ,  $\omega^2 = .14$ . The omega-squared values indicate that, on average, manipulating the type of transcript read by participants had a large effect (Cohen, 1988).

To determine exactly which transcript condition had the largest impact on mock jurors' ratings, we conducted a series of  $t$  tests. Ratings of Officer Jacobs's professionalism, the extent to which he jeopardized the case, and the credibility of Ms. Wilcox's eyewitness testimony did not differ between mock jurors who were informed of the two procedural errors and mock jurors who were not informed of the procedural errors, all  $t(112) < .90$ . By contrast, participants who were in-

formed that the two procedural errors violated the *Guide's* recommendations rated Officer Jacobs as being less professional and having placed the case in greater jeopardy, and devalued the testimony of Ms. Wilcox more so than did participants who were informed of the errors but not made aware that the errors violated the *Guide's* recommendations, all  $t(112) \geq 3.30$ . The same pattern of results was true when comparing participants informed of the *Guide* to those not informed of any procedural errors, all  $t(112) \geq 4.19$ .

An analogous pattern appeared in the verdicts reached by these mock jurors. Participants informed that the investigating officer had violated the *Guide's* recommendations were more likely to acquit the defendant of aggravated robbery and theft of property than participants who were merely informed that procedural violations had been made,  $\chi^2(1, N = 116) = 4.39$ ;  $\chi^2(1, N = 116) = 4.47$ ; as well as those who had not been informed that procedural errors had been committed at all,  $\chi^2(1, N = 114) = 12.65$ ;  $\chi^2(1, N = 114) = 11.42$ . Mock jurors informed only that procedural errors were made were no more likely to acquit the defendant than mock jurors who were not informed of any procedural errors,  $\chi^2(1, N = 114) = 2.33$ ;  $\chi^2(1, N = 114) = 1.75$ . In short, simply informing participants that procedural errors were made had no impact, but pointing out that the errors violated the *Guide's* recommendations significantly reduced guilty verdicts. A similar pattern of results was observed using a joint confidence verdict index. This index was calculated by multiplying the confidence rating provided for a verdict by 1 for guilty verdicts and  $-1$  for innocent verdicts for both aggravated robbery and theft of property. There were no significant differences between the confidence verdict indexes of mock jurors in the no error and procedural errors conditions, both  $t(112) < 1.56$ . However, mock jurors in the DOJ condition had significantly lower confidence verdict indexes than did mock jurors in the no error and procedural error conditions, both  $t(112) > 2.187$ .

<sup>1</sup>A series of analyses of covariance with due process orientation and due process versus crime control orientation used as covariates produced the same overall effects as did the series of one-way ANOVAs. These additional analyses demonstrate the effect of manipulating the contents of the trial transcript to be more than just participants' inherent orientation to be procedurally just.

## GENERAL DISCUSSION

Informing mock jurors during cross-examination, and reminding them during closing argument, that the investigating

officer failed to comply with recommendations in the *Guide* for conducting photo array identification procedures (compared to when no errors were mentioned or when the errors themselves were described without mention of the guidelines) had a pronounced effect. Mock jurors in the DOJ condition (a) voted to convict at a lower rate, (b) rated the eyewitness as less credible, (c) rated the investigating officer as less professional, and (d) were more likely to opine that the investigating officer had thereby jeopardized the prosecution's case. Informing mock jurors through cross-examination of the investigating officer that the officer had failed to follow the guidelines apparently affected mock jurors' disposition and perceptions of the case on each of our measures.

The implications of these results are potentially substantial. The best reason for members of the law enforcement community to follow research-based recommendations for handling eyewitness evidence is to reduce the risk of erroneous identifications in the first place and ultimately to prevent false convictions. With respect to the recommendations that we chose for this study (i.e., use of unbiased instructions and unbiased composition of the lineup), it is clear that the risk of false identification is reduced without increasing the risk of false rejections or the difficulty and expense of conducting the identification procedure. Law enforcement (including prosecutors), however, can sometimes be resistant to new ideas and skeptical of social science, traits that may interfere with adoption of the *Guide's* recommendations (Doyle, Larson, & DiTraglia, 2001). Our results point toward another reason why law enforcement should not ignore those recommendations: To do so risks compromising the strength of the prosecution's case at trial if the omission comes to the jury's attention.

The end result of noncompliance with the *Guide* thus could be the worst of both worlds. Law enforcement's innate conservatism and skepticism might delay or preclude implementation of the *Guide's* recommendations, thus perpetuating use of more error-prone procedures, the risk of false identifications, and sometimes the conviction of the actually innocent. Yet our results suggest that such interference, if brought to the jury's attention, might also disadvantage the prosecution's case at trial, increasing the chances of acquittal, perhaps even creating the risk of acquittal of the actually guilty. As one member of the technical working group put it, one reason for law enforcement (particularly prosecutorial) resistance was the fear that in the interim between announcement and implementation of recommended procedures, defense lawyers would use the *Guide* to challenge identifications based on current police practices (Doyle, 1999). Taken together, the combined risks of false convictions on the one hand and false acquittals on the other hand would, in an ideal world, provide a powerful incentive for law enforcement to move with alacrity to implement the DOJ recommendations.

There is good reason to believe that the operative factor behind our results is the credibility of the source of the infor-

mation; what is less clear is the cognitive mechanism through which that factor comes into play. The presence of an effect in the DOJ condition and its absence in the procedural error condition indicates that the key factor is indeed the identity of the *Guide's* institutional authorship, rather than the content of the particular recommendations in issue, and despite the identity of the particular person bringing the matter to the jurors' attention. In other words, the jurors seemed to have cared much more that the recommendations violated by the investigator had been promulgated by the U.S. Department of Justice than that the investigator in fact had administered biased instructions for a biased lineup; this reaction to defiance of the DOJ obtained even though it was prompted by defense counsel.

As a source variable, DOJ would seem to carry some credibility. Sources that are generally regarded as knowledgeable, trustworthy, and powerful tend to be more persuasive than sources rated lower on those dimensions (McGuire, 1985). With respect to the issue at hand (the proper method for handling evidence in a criminal case), jurors probably would regard the DOJ as having expertise, as being honest, and as being a source of power. It is less clear whether this source variable's persuasive appeal produced its effect by prompting jurors to more carefully assess the central merits of the information (i.e., to engage in more cognitively effortful processing of the facts of biased instructions and lineups) or whether its effect operates more peripherally as a cognitive shortcut (i.e., a relatively low-effort process relying primarily on the DOJ's credibility; Chaiken, 1980, 1987; Petty & Cacioppo, 1986). Our study did not specifically test that question. Given, however, that only a minimal amount of information was conveyed to the jurors concerning the actual merits of the recommended procedures, that the DOJ condition provided no additional means for evaluation of the merits, and that it is difficult to see any greater motivation or opportunity in the DOJ condition for more effortful consideration, we lean toward the interpretation that the effect seen in the DOJ condition results mostly from peripheral-route processing.

It is also possible to interpret the current results from a retributive justice framework (Schroeder, Steel, Woodell, & Bembek, 2003). As one reviewer suggested, it is possible that what is crucial for these findings is that Officer Jacobs knowingly violated the *Guide's* recommendations and that the participants in our study believed that doing so required that the prosecution should not benefit by his normative violation. Future work in our lab is being designed to address this possibility.

Whatever the cognitive mechanism of the jurors' reaction, the practical significance of the results of this study depend on defense counsel's success in getting the fact of the investigator's noncompliance with the *Guide's* recommendations before the jury. It remains to be seen whether courts will regard the *Guide* as qualifying under any of the numerous exceptions to the hearsay rule. One possibility is the learned treatise exception under the Federal Rules of Evidence

## REFERENCES

- (2004, Rule 803(18)). The investigator in our study, Officer Jacobs, was implicitly representing to the jury that, in his expert opinion, the eyewitness identification procedures that he followed were fair. The DOJ condition simply confronted him with an example of informed opinion to the contrary, which was prepared by a technical working group that was dominated by representatives from law enforcement and endorsed by the U.S. Attorney General. Defense counsel would have to establish the authoritativeness of the *Guide*, which can be done by admission of the witness, other expert testimony, or judicial notice. Because federal law enforcement agents work for the DOJ, federal courts might regard the *Guide* as an admission by a party opponent's agent or by a person authorized by the party opponent to make such a statement and thus not hearsay under the Federal Rules of Evidence (1993, Rule 801(d)(2)(C) or (D)).
- Another way to get the fact of noncompliance with the *Guide* before the jury would be through the testimony of an expert witness for the defense. Our study, because we sought to isolate the fact of noncompliance, did not test the impact of such testimony. In actual court cases an expert might be used simply to substantiate the *Guide's* authoritativeness or, as is more likely to be the case, to explain directly to the jury the factors that impact human memory and the accuracy of eyewitness identification. Such testimony would be subject to the jurisdiction's test for expert opinion evidence (Grosup, Penrod, Studebaker, Huss, & O'Neil, 2002).
- The publication of the *Guide* reflects an unprecedented level of practical cooperation between law enforcement and psychological science. Although some have criticized it for not going far enough (Judges, 2000; Levi & Lindsay, 2001), and others have reexamined (Stebly, Dysart, Fulero, & Lindsay, 2001) or challenged (Ebbesen & Flowe, 2005) some of the conclusions of the underlying research, its recommendations offer federal, state, and local jurisdictions guidance toward increasing the accuracy of their practices for handling eyewitness evidence. The *Guide* is a pragmatic compromise that allows for considerable local variation. The recommendations we used in this study (unbiased instructions and unbiased composition of lineups) are modest measures easily implemented by any jurisdiction, which clearly would be an improvement. Their adoption strikes us as the closest thing to a "no-brainer" that one is likely to encounter in forensic psychology.
- In our discussions with law enforcement and prosecutors about adoption of the *Guide*, we have suggested that compliance is a win-win proposition from their perspective: Compliance not only reduces the risk of erroneous identifications and hence erroneous convictions, but might also reduce the risk of erroneous acquittals as defense lawyers increasingly become aware of the *Guide's* existence and use it to impeach noncomplying identification procedures on cross-examination. We occasionally have been met with the response that jurors' judgment would not be influenced by noncompliance. The results of our study suggest otherwise.
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