SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : T7

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IN THE MATTER OF THE INVESTIGATION

INTO THE DEATH OF

SYLVIA TAYLOR

Grand Jury No:44206

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ROBERT L. COHEN, J.:

BACKGROUND

On July 18, 2002, the Assistant District Attorney assigned to the case at bar applied for a lineup order based upon an affirmation submitted to another Supreme Court Justice. The Assistant District Attorney requested that the subject of the order, who is a sentenced prisoner on another case and is currently incarcerated on Riker's Island, be produced for a lineup at the Bronx Homicide Task Force.

According to the affirmation submitted in support of the order, on November 17, 1981, Sylvia Taylor was shot during the course of a robbery in The Bronx. There were two alleged perpetrators of the crime. On November 18, 1981, Ms. Taylor was pronounced dead. On or about July 2001, two eyewitnesses to the robbery identified the subject of the instant motion from a photograph as one of the perpetrators of the robbery. In addition, according to the Assistant District Attorney, the

suspect has also admitted to the police that he was involved in the robbery.

The Justice that was originally presented with the lineup order signed it, however the lineup proceeding has been stayed, on consent, pending this Court's decision as to the nature of the lineup to be conducted at the Bronx Task Force precinct.

After the lineup order was signed, the prosecutor appropriately applied to this Court to appoint counsel for the suspect, since the lineup order triggered the suspect's right to counsel.[1] See, People v. Jackson, 74 NY2d 738; People v. Coleman, 43 NY2d 222.

Subsequent to his appointment, the attorney assigned to represent the suspect then filed the instant motion seeking an order to compel the police to conduct a double-blind sequential lineup, i.e. a lineup in which the suspect and the fillers are displayed to the eyewitness singly and the officials conducting the lineup do not know which of the fillers is the suspect.

For the reasons stated herein, the motion is denied.

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[1]. The prosecutor applied to this Court since I am one of the supervising judges of the Grand Jury and the empaneling judge of the panel that is currently investigating the death of Sylvia Taylor. I have spoken to the Justice who signed the original order and she has deferred to me the decision regarding the instant motion.

## Discussion

In his motion Petitioner[2] claims that there is a large body of social science research indicating that sequential lineups lower the rate of mistaken identifications by 50%, and are therefore more reliable than simultaneous lineups. Furthermore, Petitioner argues that this Court has the authority to grant this motion pursuant to its inherent authority to control the content of its orders. Counsel further argues that the Court ordered simultaneous lineup could cause irreparable damage to the defense.

The People have opposed defendant's motion arguing that the studies cited by the Petitioner are flawed and therefore unreliable. They further argue that since the suspect does not contend that simultaneous lineups are unconstitutional, it would violate the doctrine of separation of powers if the Court were to compel the police to employ one type of constitutional identification procedure over another.

At the outset it should be noted that the deepest concern of this Court is to provide the accused with a reliable identification procedure. Our statutory and

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[2]. Since the individual who is the subject of the instant motion has not been arrested nor indicted, he is hereinafter referred to as the suspect or petitioner.

decisional law provides a procedure whereby a trial court, as well as our appellate courts, would scrutinize an identification procedure to insure that the procedure did not violate the due process rights of that defendant, and the People bear the burden of establishing non-suggestivity in the identification process. See, e.g. People v. Owens, 74 NY2d 677 [defendant "conspicuously displayed" in lineup]; People v. Puckett, 270 AD2d 364 [dissimilarities between defendant and fillers unduly suggestive]; People v. Breitenbach, 260 AD2d 389 [significant contrast between defendant and fillers unduly suggestive]; People v. Bady, 202 AD2d 440, appeal denied 83 NY2d 908 [defendant only person wearing a red shirt matching description of perpetrator].

Although several of my colleagues have written learned decisions denying this type of application based upon their belief that a court should not encroach upon the investigative responsibility of the executive branch of the government or, to put it another way, not to micro-manage law enforcement's responsibilities to acquire evidence in a particular way (see, People v. Martinez and Ogera, NYLJ, Jan. 18, 2002, at 18, col 3 [Sup Ct, New York County, Soloff,J.]; People v. Franco, NYLJ, July, 5, 2002, at 20 col 5[ Sup Ct, Bronx County, Barrett, J.]; People v. Alcime, NYLJ, February 19, 2002 at 21 col 1 [ Sup Ct, Kings County, Douglas, J.]; Illinois v. Lafayette, 462 US 640; United States v. Crouch, 478 F. Supp. 867 [E.D. Cal. 1979]. I have not reached a conclusion in that regard, because, in my opinion that

issue is not dispositive for this decision.[3] This Court has carefully reviewed all of the submissions of the parties and has spent considerable time reviewing the scientific studies submitted and applicable decisional law. However, my study of all of the scientific evidence submitted by Petitioner does not lead me to conclude that a double-blind sequential lineup is, at this time, necessary and appropriate in order to insure that a suspect is subjected to a fair and reliable identification procedure consistent with due process.

Furthermore, I have doubts as to the applicability of the scientific studies and research findings submitted by Petitioner to real life identification proceedings (see,

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[3] In People v. Wilson, NYLJ, March 26, 2002, at 20 col 1 [Sup Ct, Kings County, Knipel, J.], the Court held that the Supreme Court (State of New York) has "the inherent power to do all things necessary for the administrationof justice within the scope of its jurisdiction (citations omitted);see also People v. Thomas, NYLJ, November 15, 2001 at 22 col.3. In US v. Wade, 388 US 226,228 the Court stated that "identification evidence is peculiarly riddled with factors which might seriously, even crucially, derogate from a fair trial". The Wade Court further stated: "The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification" (footnote omitted)Id., at 228. Importantly, the Court noted that once an identification is made the witness "'is not likely to go back on his word'" see footnote 8 [quoting from Williams & Hammelmann, Identification Parades, Part I,[1963], Crim.L.Rev. 479, 482]. Wade, 388 US at 229.

People v. Legrand, NYLJ, September 17, 2002 at 19 col 3 [Sup Ct, New York County Fried, J.] for a particularly erudite and incisive discussion of forensic expert eyewitness testimony at trial).

As the People point out, all of the studies submitted and /or discussed in the literature were carried out with photographic or videotaped lineups using mock crimes in controlled settings. The witnesses in those laboratory settings experienced no real criminal transaction and consequently, no stress or trauma.

There is a controversy within the scientific community concerning the applicability of identification studies to forensic situations. See, People v. Legrand, at p. 20 col 6, supra. As pointed out in Legrand, scientists do not yet understand the impact of trauma that is evident in a real life criminal transaction, on memory, nor do they understand how other factors, such as unconscious transference, confidence, retention interval, exposure duration, lineup fairness, racial similarity and weapon focus interact to affect eyewitness identification. See, People v. Legrand, at p. 20 col 6, supra.

Nowhere in the scientific evidence submitted by Petitioner have I found any indication that there is a generalized consensus within the scientific community that one type of identification procedure is superior to another. In none of the studies submitted by Petitioner has anyone stated that, to a reasonable degree of scientific certainty, a sequential lineup is superior to a simultaneous lineup in a real life

situation.

Moreover, although Petitioner states that the United States Department of Justice favors the sequential lineup as the preferable method of conducting lineups, the report cited by the Petitioner actually states “although sequential procedures are included in the Guide, it does not indicate a preference for sequential procedures”. United States Department of Justice Office of Research Programs, Eyewitness Evidence: A Guide for Law Enforcement (1999), p.9; see also People v. Martinez and Ogera, NYLJ, Jan. 18, 2002, at 18, col 3 , supra ).

As a Judge I am concerned with insuring that this suspect receive a fair and reliable identification procedure that is not unnecessarily suggestive nor violative of due process. As the Wade Court poignantly stated “the trial which might determine the accused’s fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness - ‘that’s the man’.” Id. at 235-236.

However, unlike the basis for the Wade court’s concern, at bar we have defense counsel who is an exceptionally skilled and resourceful advocate. In addition, the prosecutor in this case is also highly professional, skilled, responsible, and balanced.

I believe that the presence of counsel for the suspect at the lineup will serve to insure that the identification procedure is reliable, balanced and not suggestive. The United States Supreme Court has stated that the "presence of counsel [at a lineup] itself can often avert prejudice and assure a meaningful confrontation at trial". (footnote omitted). United States v. Wade, 388 US 226, 236. Defense counsel at bar will insure the reliability of the proceeding by his ability to view the fillers involved, observe the identification proceeding itself and participate meaningfully in a Wade hearing should an identification be made. Additionally, I have no doubt that the prosecutor in this case will also insure that the lineup is conducted in as fair a manner as possible.

Regarding Petitioner's request for a Frye hearing, that application is also denied. While it may be appropriate to grant that motion at a Wade hearing or a trial, at this stage of the judicial proceedings that application is premature.

For all of the reasons stated herein, Petitioner's motion for a double-blind sequential lineup is denied.

This opinion constitutes the decision and order of the Court.

Dated: September 24, 2002
Bronx, New York

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J.S.C.