SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX, PART 49

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NOTICE OF MOTION

LEO FRANCO

Ind. No. 903/01

Defendant

PLEASE TAKE NOTICE, that upon the annexed affirmation of David L. Feige the annexed exhibits and the prior proceedings in this case, the undersigned will move this Court at 851 Grand Concourse, Bronx, N.Y., Part 49 on the 3rd day of May 2001, at 9:30 a.m., or as soon thereafter as Counsel may be heard for an Order providing that a double-blind sequential line-up procedure be used if Mr. Franco is to be placed in any line-up, or in the alternative, a hearing to determine the matter.

DATED: New York, New York
March 12 20001

David L. Feige Esq.
Karen Smolar Esq.
Jake Sussman Legal Intern
THE BRONX DEFENDERS
890 Grant Avenue
Bronx NY 10451
(718) 838-7878

TO: ROBERT JOHNSON
District Attorney
Bronx County

Clerk of the Supreme Court
Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX, PART 49

PEOPLE OF THE STATE OF NEW YORK

vs **Affirmation**

LEO FRANCO

David L. Feige, an attorney duly admitted to practice law in New York Courts, under penalty of perjury, affirms the following to be true:

I am associated with The Bronx Defenders, and, with Ms. Karen Smolar, am attorney of record for Leo Franco. I am familiar with the facts of this case and the prior proceedings held in it.

This affirmation is made in support of Mr. Franco's application for a Judicial Order directing the use of a double-blind sequential line-up procedure.

Unless otherwise indicated, all allegations of fact are made on information and belief based upon inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incident, personal observations, and extensive review of scientific research in the area of Eyewitness Identifications and line-up procedures.

The law is desperately behind the times. In the last 15 years, a large body of social science research has begun to unravel some of the mysteries of eyewitness identification. The findings are frightening. In a recent study of DNA exonerations, 53 of the 63 innocent people wrongly convicted were convicted based on faulty eyewitness identifications. Other studies, some involving hundreds of erroneous convictions consistently rank eyewitness identification as

the leading cause of innocent people going to prison and even death row.

These miscarriages of justice can be prevented. It should be of paramount concern to this court that innocent people are wrongly convicted. It must be the business of this and every court to insure that the chances of such a miscarriage of justice is minimized. It can be done. Indeed, it has been done. This application affords the court an opportunity to employ a procedure, formulated by the federal government, endorsed by social scientists around the world, and uniformly shown to decrease the chances of an innocent person being wrongly identified by 50 percent, while being just as effective in correctly identifying criminal suspects.

A review of the science is astonishing. When compared to the traditional simultaneous lineup procedure, sequential lineups produce a significantly lower rate of mistaken identifications. In fact, critical tests have shown that sequential lineup procedures routinely decrease the potential for false identifications by 50 percent. In one of the first empirical studies on the sequential lineups, 243 undergraduate students witnessed staged thefts. Five minutes after the staged thefts, half of the witnesses were presented with a simultaneous photo array containing six persons. The other half were shown the six photographs sequentially. Half of the witnesses in each presentation condition viewed culprit-present photo arrays while the other half viewed culprit-absent photo arrays. The presentation style – simultaneous versus sequential – had a significant influence on witnesses' identification performances. In the culprit-absent presentation, only 17% of those witnesses viewing sequential arrays made a false identification, as compared with 43% of those witnesses viewing simultaneous arrays.

These initial findings have been replicated repeatedly by other empirical studies. Indeed, another study in a different lab showed that 39% of eyewitnesses viewing simultaneous six-

person lineup identified an innocent person as the criminal, as opposed to 19% mistaken identification rate by those witnesses who viewed suspects sequentially. Yet another study found that among subjects shown culprit-absent photo arrays, false identifications were made by 20% of subjects who experienced simultaneous presentation and 5% of subjects who experienced sequential presentation. In a survey of studies, sequentially presented photo arrays successfully reduced false identifications in five different experiments, each aimed at demonstrating the ability of sequential presentation to reduce the singular and/or combined impact of typical lineup biases.

In yet another study in which the actual perpetrator was not present, the findings are also frightening: when suspects were displayed in a simultaneous lineup, the false identification rate was 72.2%, whereas, when witnesses viewed photographs of suspects sequentially the rate of false identification decreased to 38.9%.

The Memorandum of Law and exhibits attached hereto detail in greater depth the science and law applicable to this case. What is clear is that the legal community has been slow to react to the sea change in the science of eyewitness identification. What is striking is that with no additional effort, no added costs, and no additional inconvenience, the police, prosecutors, and judiciary could each put a stop to a practice that results in innocent citizens going to prison or death row for crimes they did not commit. This application does not seek to single-handedly reform police practices. It merely suggests a simple single small step in the right direction. A direction which has been well illuminated by the social scientists who have gone before us. A direction which leads to only one thing: the continued identification of the guilty, and a better way to avoid the conviction of the innocent. This application does not threaten anything that

has come before it. Granting this relief will jeopardize no convictions, nor provide free passes to those already sentenced. What it will do, is set a new standard--one well supported by science, and long overdue. The method we suggest is not cumbersome. There is no reason it cannot be utilized. The benefits are manifest, and the drawbacks nonexistent. Justice cries out for its application.

WHEREFORE, the affiant requests that the motion be granted or in the alternative, that the court grant a **Frye** hearing to adduce such further facts and testimony as the court finds necessary to determine this application. And such other and further relief as this Court may deem just and proper.

DATED: Bronx, New York
March 15th 2001

_____

David L. Feige Esq
Karen Smolar Esq.
Jake Sussman Legal Intern
The Bronx Defenders
220 East 161st Street
Bronx, NY 10451
(718) 838-7878

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX, PART 49

THE PEOPLE OF THE STATE OF NEW YORK

-against-

LEO FRANCO

Defendant

Memorandum of

Law in Support of Defendant's Motion For A Double-Blind Sequential Lineup

I. Introduction

The administration of criminal justice seeks two basic results: convict the guilty and free the innocent. This application seeks simple relief: employ a method of suspect identification which is no more costly or unwieldy, which has been scientifically proven to significantly reduce the number of FALSE identifications while leaving INTACT the number of TRUE identifications. Social science research has proven that the proper use of a double-blind sequential line-up can cut by half the number of misidentifications, without altering the number of accurate identifications. This memorandum, and the appendix attached hereto detail the scientific research which leads inexorably to the conclusion that to fail to employ the simple procedure we seek, is to turn a blind eye to the significant likelihood that a misidentification could take place and that an innocent person could be convicted.

In recent studies of people who were wrongly convicted and later exonerated, eyewitness misidentification was the single most common cause of wrongful conviction. Indeed, in one recent study of DNA exoneration (discussed in more detail later) 53 of 63 wrongful convictions stemmed from faulty identifications. What these studies show, is that incarcerating the innocent is a very real possibility--particularly when a case relies on identification.

Because eyewitness evidence quite often plays an essential role in identifying, charging, and ultimately convicting suspected criminals, it is absolutely critical that eyewitness evidence and the processes through which it is adduced be accurate and reliable. Law enforcement personnel must follow sound and reliable protocols so as to reduce the devastating possibility of

misidentification. Because eyewitness identification may occur at any number of points prior to the actual prosecution – e.g., during an initial emergency call to police – the court is often limited in its ability to take an active role in affirmatively enhancing the reliability of eyewitness identifications. However, the present case provides for such an opportunity. Social science research has repeatedly shown that the use of simultaneous lineup procedures – where a witness views photos or live persons at the same time – exacerbates the problems of eyewitness identifications. Alternatively, blind, sequential lineup procedures have been shown to significantly heighten the validity and accuracy of eyewitness evidence. As detailed below, the court has the inherent authority to order the use of the procedure we request, and, in light of the issues detailed below, the court should exercise its discretion and order a double-blind sequential lineup.

II. Problems with Eyewitness Identifications

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 228 (1967). Both archival studies and psychological research support this acknowledged truth – that eyewitness identifications, which are among the most common forms of evidence presented in criminal trials, are frequently wrong. See, e.g., Atul Gawande, "Under Suspicion: The Fugitive Science of Criminal Justice," The New Yorker, Jan. 8, 2001, at 50 (noting study of 63 DNA exonerations of wrongfully convicted people wherein 53 involved mistaken identifications, and where almost invariably the witnesses had viewed a lineup in which the actual perpetrator was not present) (**Attached hereto as Exhibit A**); Gary L. Wells et al., "Eyewitness Identification

Procedures: Recommendations for Lineups and Photospreads," 22 Law & Hum. Behav. 603, 605-08 (1998) (noting study of 40 cases involving innocent people who were convicted of serious crimes and served time in prison, five on death row, in which 36 involved eyewitness identification in which one or more eyewitnesses falsely identified the person) (**Attached hereto as Exhibit B**); U.S. Department of Justice Office of Research Programs, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996) (reporting study of 28 cases of mistaken convictions in which defendants were later cleared with DNA evidence, in which the majority of those 28 convictions were predicated on mistaken eyewitness identifications); Daniel Goleman, "Studies Point to Flaws in Lineup of Suspects," N.Y. Times, Jan. 17, 1995, at C1 (discussing 1993 study of 1000 cases in which the convicted defendant was later proven innocent and where eyewitness error accounted for approximately half the convictions and was the single greatest cause of error) (**Attached hereto as Exhibit C**); C. R. Huff, "Wrongful Conviction: Societal Tolerance of Injustice," 4 Res. Soc. Probs. & Pub. Pol'y 99 (1987) (implicating mistaken eyewitness identifications in 60% of the more than 500 erroneous convictions studied); see also Jennifer L. Devenport, Steven D. Penrod, & Brian L. Cutler, "Eyewitness Identification Evidence: Evaluating Commonsense Evaluations," 3 Psychol., Pub. Pol'y & L. 338, 338 (1997) (supporting the proposition that "eyewitness performance is a matter of serious concern in criminal cases" by examining "results of eyewitness studies conducted under fairly realistic conditions" which yield similar rates of error).

A number of explanations for erroneous eyewitness identifications have been postulated. For example, studies have shown that the experience of being a crime victim, especially when that crime involves violence, produces stress far beyond optimum levels for cognitive functioning,

thereby reducing the potential accuracy of an eyewitness's identification. See Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal § 2.08 (2d ed. 1992); Vaughn Tooley et al., "Facial Recognition: Weapon Effect and Attentional Focus," 17 J. App. Soc. Psychol. 845 (1987); Kenneth A. Deffenbacher, "The Influence of Arousal," in Evaluating Witness Evidence (S.M.A. Lloyd-Bostock & B.R. Clifford eds., 1983).

Studies have also shown that certain pretrial identification procedures – e.g., leading questions, positive feedback from police after making the "correct" selection from a lineup or photo array, or repetitive viewing of the same suspect – can have a distortive effect on the act of retrieving memory. See Loftus & Doyle, Eyewitness Testimony: Civil and Criminal, supra, §§ 3.04, 3.06, 3.10-11.1; John C. Brigham & Robert K. Bothwell, "The Ability of Prospective Jurors to Estimate the Accuracy of eyewitness Identifications," 7 Law & Hum. Behav. 19 (1983); Elizabeth F. Loftus & Katherine E. Ketcham, "The Malleability of Eyewitness Accounts," Evaluating Witness Evidence, supra, at 159; Elizabeth F. Loftus & Edith Greene, "Warning: Even Memory for Faces May Be Contagious," 4 Law & Hum. Behav. 323 (1980); Elizabeth F. Loftus, Eyewitness Testimony 150-52 (1979).

The Supreme Court has acknowledged the powerful impact that law enforcement procedures can have on the accuracy of eyewitness identification. In Neil v. Biggers, the Supreme Court disapproved the use of suggestive procedures "because they increase the likelihood of misidentification," and it is the admission of testimony carrying such a "likelihood of misidentification which violates a defendant's right to due process." 409 U.S. 188, 198 (1972). The admissibility of identification testimony, therefore, is to be determined by whether the identification is reliable, with particular attention being paid to the procedure itself. See, e.g.,

Watkins v. Sowders, 449 U.S. 341, 347 (1981) ("it is the reliability of identification evidence that primarily determines its admissibility"); Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("reliability is the linchpin in determining the admissibility of identification testimony . . . ").

III. A Sequential Lineup Procedure is More Reliable Than a Simultaneous Lineup Procedure

Law enforcement officials have traditionally used simultaneous lineup procedures when presenting a lineup – live or photo – to an eyewitness. While simultaneous lineups are somewhat entrenched as the default procedure for many law enforcement personnel, research on the reliability of identification evidence has conclusively shown that simultaneous lineups greatly *exacerbate* the problem of mistaken identifications. By comparison, the use of sequential lineups produces a significantly lower rate of mistaken identifications. **In fact, critical tests have shown that sequential lineup procedures decrease the potential for false identifications by as much as 50 percent.**

A. The Research

Even the **United States Department of Justice** Office of Research Programs in Eyewitness Evidence: A Guide for Law Enforcement (1999), sets forth the proper procedures for the use of the sequential line-up. That report is mirrored almost identically in the ORDER attached to this motion. In other words, this motion only seeks to have the court adopt a protocol developed by the United States Department of Justice itself.

The Justice Department study acknowledges the advantages of the sequential line-up procedure. The witness viewing a sequential lineup has an opportunity to view each person apart from the rest of the group, but ultimately sees both the suspect and a number of people

who are not suspects. Although the witness has an opportunity to view one person at a time, the procedure does not operate to suggest than any one person in the lineup is in fact the person who the witness should identify. Thus, a sequential lineup does not run the risk of violating a defendant's right to due process by creating an overly suggestive identification procedure. See Stovall v. Denno, 388 U.S. 293, 302 (condemning "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup."); Matter of James H., 34 NY2d 814 (condemning practice of displaying single photograph to witness because of danger that such procedure suggests to witness that police believe the person shown is the perpetrator).

When compared to the traditional simultaneous lineup procedure, sequential lineups produce a significantly lower rate of mistaken identifications. In fact, critical tests have shown that sequential lineup procedures decrease the potential for false identifications by as much as 50 percent. In one of the first empirical studies on the sequential lineups, 243 undergraduate students witnessed staged thefts. Five minutes after the staged thefts, half of the witnesses were presented with a simultaneous photo array containing six persons. The other half were shown the six photographs sequentially. Half of the witnesses in each presentation condition viewed culprit-present photo arrays while the other half viewed culprit-absent photo arrays. The presentation style – simultaneous versus sequential – had a significant influence on witnesses' identification performances. In the culprit-absent presentation, only 17% of those witnesses viewing sequential arrays made a false identification, as compared with 43% of those witnesses viewing simultaneous arrays. See R. C. L. Lindsay & Gary L. Wells, "Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation," 70 J. App. Psychol. 556 (1985) **(attached hereto as Exhibit D).**

These initial findings have been replicated repeatedly by other empirical studies. See, e.g., Brian L. Cutler & Steven D. Penrod, "Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation," 73 J. App. Psychol. 281 (1988) (study showing that 39% of eyewitnesses viewing simultaneous six-person lineup identified an innocent person as the criminal, as opposed to 19% mistaken identification rate by those witnesses who viewed suspects sequentially) **(attached hereto as Exhibit E)**; "Identifying Crime Suspects," N.Y. Times, May 10, 1988, at C9 (referring to same); Edwin Chen, "Jogging the Memory: Making the Eye a Better Witness," L.A. Times, March 3, 1989, at 1 (referring to same); R. C. L. Lindsay et al., "Sequential Lineup Presentation: Technique Matters," 76 J. App. Psychol. 741 (1991) (finding that among subjects shown culprit-absent photo arrays, false identifications were made by 20% of subjects who experienced simultaneous presentation and 5% of subjects who experienced sequential presentation); R. C. L. Lindsay et al., "Biased Lineups: Sequential Presentation Reduces the Problem," 76 J. App. Psychol. 796 (1991) (**attached hereto as Exhibit F)**; (showing that sequentially presented photo arrays successfully reduced false identifications in five different experiments, each aimed at demonstrating the ability of sequential presentation to reduce the singular and/or combined impact of typical lineup biases, such as instruction, clothing, and foil); Siegfried Sporer, "Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups," 78 J. App. Psychol. 22 (1993) (showing that when suspects were displayed in a simultaneous lineup, where none of the suspects were the real culprit, the false identification rate was 72.2%, whereas when witnesses viewed photographs of suspects sequentially, also where none of the suspects were the real culprit, the rate of false identification decreased to 38.9%); Brian L. Cutler & Steven D.

Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 127-35 (1995) (reviewing one dozen experimental studies "involving more than 1,800 participants [comparing] the impact of sequential versus simultaneous presentations on identification performance," in which each "stud[y] clearly demonstrates that the traditional method of simultaneous presentation carries no benefit in terms of correct identifications when perpetrators are present in an array") **(attached hereto as Exhibit G).**

B. The Rationale

Psychologists note that the superiority of sequential lineups is consistent with psychological studies that explain why simultaneous lineups are often unreliable, namely that they encourage eyewitnesses to make relative judgments. See R. C. L. Lindsay et al., "Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children," 4 Law & Hum. Behav. 391, 392 (1997) (citing studies indicating that "[p]resenting witnesses with all lineup members in view at the same (simultaneous lineup) allows, and possibly encourages, the use of relative judgments."); Lindsey & Wells, "Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation," supra, at 558 (1985) (finding in simultaneous lineups that "eyewitnesses tend to choose the lineup member who most looks like the perpetrator relative to the other lineup members."). Sequential lineups encourage witnesses to make absolute judgments (i.e., compare a single face in a lineup to their memory of the culprit's face) instead of comparative or relative judgments (i.e., decide which of several faces most resembles the memory trace). See, e.g., Gary L. Wells, "What Do We Know About Eyewitness Identification?," 48 Am. Psychol. 553, 561 (1993) (explaining

that "although an eyewitness could reason that a given lineup member . . . was a relatively better match to the culprit than was a previously presented member . . . the witness could not be certain that a subsequent lineup member (yet to be viewed) would not prove to be an even better match to the culprit than the one being currently viewed.").

In fact, research reveals that many witnesses who correctly identify the culprit in a culprit-present lineup would simply identify another suspect when the culprit's photo is removed. See Asher Koriat, Morris Goldsmith, & Ainat Pansky, "Toward a Psychology of Memory Accuracy," Ann. Rev. Psychol. 481 (2000) (noting that witnesses' use of relativistic judgment process results in increased rates of false identifications in culprit absent simultaneous lineups); Wells, "What Do We Know About Eyewitness Identification?," supra, at 560 (showing that "relative-judgment process will still produce an affirmative answer even in the absence of the actual culprit").

A sequential lineup procedure enhances the reliability of eyewitness identification without being unduly burdensome or costly. Most importantly, sequential lineups significantly decrease the potential for misidentifications, without resulting in fewer accurate identifications. See, e.g., Cutler & Penrod, "Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation," supra, at 281 (noting results of experiment in which 80% of subjects who experienced sequential lineup presentation correctly identified the culprit, as compared to 76% accuracy rate of subjects who viewed simultaneous presentation); Lindsay et al., "Sequential Lineup Presentation: Technique Matters," supra (noting lineup presentation style did not significantly influence identification performance when culprit was present in photo array); Lindsay et al., "Biased Lineups: Sequential Presentation Reduces the Problem," supra

(study showing that when culprit was present, type of photo array did not significantly influence identification performance); Cutler & Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law, supra, 127-36 (reviewing one dozen experimental studies "involving more than 1,800 participants [comparing] the impact of sequential versus simultaneous presentations on identification performance," in which it is decisively shown that "the traditional simultaneous method of presentation clearly fosters substantially more mistaken identifications when the perpetrator is not present in the array"). Thus, the administration of justice is in no way hampered by the implementation of a less error-prone procedure.

C. The Double-Blind Procedure

Furthermore, sequential lineup procedures do not unduly burden law enforcement personnel. The only additional element to the above-mentioned protocols is that sequential procedures must be implemented in conjunction with "blind" identification procedures. It is well documented that investigators' unintentional cues (e.g. body language, tone of voice) may negatively impact the reliability of eyewitness evidence. Studies have shown that the margin of error for *both* sequential and simultaneous lineups are further reduced when the test is done by an officer who is not involved in the investigation and does not know the identity of the suspect. See Donald P. Judges, "Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement," 53 Ark. L. Rev. 231, 253 (2000) (noting that "double-blind" lineup procedures have been shown to conclusively reduce rates of error in eyewitness identifications generally and assist lineup procedures in becoming "more than an investigator's self-fulfilling prophecy").

Researchers have speculated that an investigator who knows which lineup member is the

suspect can inadvertently (or advertently) bias the eyewitness through nonverbal behavior such as smiling, nodding, and so on. See, e.g., Wells, "What Do We Know About Eyewitness Identification?," supra; Judges, "Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement," supra, at 253 (arguing that "[t]he best way to avoid the serious problem of contamination . . . is to have the lineup administered by someone who lacks potentially contaminating knowledge himself or herself - i.e. through a double-blind procedure. One cannot disclose, even inadvertently, what one does not know."). Just as a good social psychological experiment requires that the experimenter with whom the subject interacts is blind to the experimental condition to which the subject has been randomly assigned, a good lineup test requires that the investigator conducting the test is blind to the identity of the suspect. See Cutler & Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law, supra, at 135; Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," supra, at 627 (noting that recommendation for double-blind administration is listed first in official Scientific Review Paper of American Psychology-Law Society, Division 41 of the American Psychological Association on recommendations for lineups and photospreads).

"Blind" identification procedures can be accomplished through two methods. The first method has an investigator conducting the identification procedure who is unaware of which lineup member is the suspect. This requires that an officer otherwise uninvolved with the case conduct the identification procedure. The alternative method permits the investigating officer to conduct the lineup procedure but in such a way that s/he cannot know which member of the lineup the witness is examining at any given time. This can be accomplished in several ways, the

easiest through the use of photographs. Given a live sequential lineup, the investigating officer must remain with the witness while others send the lineup members into the room one at a time. The investigating officer is placed in a position preventing him or her from seeing the lineup members, and declines to comply with any requests to look at or comment on the lineup members. As the foregoing contends, a sequential lineup procedure does not impose "more restrictions . . . than are imperative to assure the proceedings' fundamental fairness." See In re Gault, 387 U.S. 1, 72 (Harlan, J., concurring in part and dissenting in part).

Although current statistics regarding the use of sequential lineups in police departments are unavailable, law enforcement officials – both in the United States and abroad – increasingly advocate the use of sequential lineup procedures. See, e.g., U.S. Department of Justice Office of Research Programs, Eyewitness Evidence: A Guide for Law Enforcement, supra, at 9 (noting that "[s]cientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially – one at a time – rather than simultaneously"); Leslie Ferenc, "Police bias said to influence suspect identification; Psychologist says investigators' zeal can result in mistaken identity," Toronto Star, July 13, 1997, at A12 (noting that since 1995 many Ontario forces have been using sequential lineups, and that "[t]he procedure has gained acceptance and credibility because it's been promoted by the Ontario Police College")

The grave potential for error in eyewitness identifications in well known. When a misidentification resulting from flawed lineup procedure can lead to penal sanctions and incarceration, the Court should, opt for a procedure that, though not infallible, both significantly increases the likelihood of accuracy AND decreases the likelihood of inaccuracy .

Eyewitness identification is an extraordinarily powerful prosecution tool, and sequential lineup procedures have been proven to be the most effective means of minimizing the inherent potential for misidentifying an accused defendant. The failure to utilize a more reliable lineup procedure runs the significant risk of inaccurate, false, and untrustworthy identifications being accepted as fact. By requiring the use of a sequential lineup procedure, the Court ensures a more just and accurate process. The advantages to be gained from ordering a sequential lineup are clear and there are no substantial countervailing disadvantages. The State seeks only an accurate and reliable eyewitness identification – or lack thereof – and to grant Defendant's motion for an enhanced procedure to this end cannot conceivably impair the achievement of this purpose.

The Court, as the supervisor of the criminal proceedings, must take every step to insure fundamental fairness to the accused. See, e.g., People v. Wright, 125 Misc. 2d 550, 480 N.Y.S.2d 259 (Sup. Ct. N.Y. 1984) (dismissing indictment with leave to re-present since unfair presentation to the Grand Jury cannot be reviewed in the event of a conviction after trial, thus placing a special burden on, *inter alia*, the court, as the supervisor, to insure fundamental fairness). In light of the extraordinary power of eyewitness identifications, fundamental fairness would be materially assisted by the Court ordering the use of the lineup procedure proven to be more reliable

IV. The Court Clearly Has The Power to Grant This Application

A. Another Court has Already Granted the Type of Relief Sought Here

There is little question that a court can grant the relief requested. Other courts have already done so. On November 7th of 2001, In The Matter of an Investigation of Rahim

Thomas Index Number 42374/01, Justice Robert Kreindler, of the Supreme Court of Kings County ordered precisely the relief requested herein. In a lengthy and well-reasoned opinion, Justice Kreindler found that "This court, therefore, finds that it has the authority or discretion to order a double blind sequential lineup". Id at 8. But beyond the persuasive authority of the Thomas case, there is precedent.

B. The Inherent Power of the Court Includes the Power to Ensure that Investigations Be Conducted in a Fair and Reliable Manner.

A court has the inherent authority to control the content of its orders (see Ladd v. Stevenson 112 NY 325). When a party seeks the judicial intervention of a court, the court is not bound to comply with every detail of the proposed order, or request for relief. Obviously, a court can grant, modify or reject such a request. Courts routinely exercise their discretion to ensure that an investigation is generally fair. Thus, a trial court has the power to grant a defendant's motion for a lineup. United States v. Brown, 699 F.2d 585, 593-94 (2d Cir. 1983) (explaining that a trial court has the discretion to order a lineup). Similarly, a court can modify a request for a lineup. In People v. Lopez, the trial court granted the *defendants'* motion for a pretrial lineup, noting that "[d]emand for a lineup by a defendant, while certainly novel and unique, is neither forbidden by statute or any case law." 86 Misc.2d 111, 112-14 (Sup. Ct. Bronx Cty. 1976). See United States v. Caldwell, 465 F.2d 669 (D.C. Cir. 1972) (remanding in the interest of justice after trial court denied defendant's motion to compel holding lineup attended by identification witnesses); United States v. MacDonald, 441 F.2d 259, 259 (9th Cir. 1971) (holding that decision concerning defendant's motion to require government to conduct pretrial lineup "is a matter committed to the sound discretion of the trial judge"); United States v.

Ravich, 421 F.2d 1196, 1203 (2d Cir. 1970) (unanimously upholding defendant's right to demand pretrial lineup, noting, "A pretrial request by a defendant for a line-up is . . . addressed by the sound discretion of the [trial court] and should be carefully considered); See also State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) ("in the exercise of our supervisory power to insure the fair administration of justice, we hold that all custodial interrogation . . . shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.").

C. Here, The Prosecution has Asked the Court to Take Affirmative Action in an Investigation.

Although it is regrettable that the police and District Attorney have not generally adopted investigatory methods that are proven to be more reliable, the defendant does not ask the Court to interfere with the internal workings of the police or District Attorney's Office. Rather, because the prosecution has come to the court seeking an order directing a lineup, the request falls squarely under the jurisdiction of this Court. In contrast to a suspect who is the subject of an independent police investigation, Mr. Franco is under the direct protection of the Court. See e.g., People v. Hawkins, 55 N.Y.2d 474 (1982) (holding that a defendant who has been formally charged with a crime has a right to counsel at a lineup, while a suspect who is merely being placed in an investigatory lineup has no such right).

It is the prosecution that has asked the Court to get involved by requesting that the Court order a lineup, and it is the prosecution's intention to conduct this court-ordered lineup in an unreliable manner. The Court should not lend its weight to such a process. See Cannon of Judicial Ethics, Cannon 1 ("A judge should uphold the integrity . . . of the judiciary.").

D. C.P.L. § 240.40(2) Allows the Court to Order a Lineup That Will Be Reliable and Fair.

Criminal Procedure Law § 240.40(2) gives the Court authority to grant the prosecution's request to order the defendant to participate in a lineup. But Court intervention can and should be designed to increase the justice of a proceeding. Therefore, the Court is entitled to use its power under C.P.L. § 240.40(2) to ensure that the lineup that the Court has ordered is conducted in a manner designed to increase reliability and accuracy. See Judiciary Law § 2-b ("A court of record has power . . . to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."). The Court may, for instance, order that a suspect shave his facial hair so that he appears in a lineup in the same condition as the perpetrator at the time of the crime. In re: Ford, 206 A.D.2d 425 (2d Dept. 1994) (finding no error in the order of Justice Robert S. Kreindler, pursuant to C.P.L. 240.40(2)(b)(i), that the defendant "stand in a lineup and to shave any facial hair so that he could 'appear in a lineup in reasonably the same condition as was the perpetrator * * * at the time of the murder.'") (quoting trial court). See also People v. La Placa, 127 A.D.2d 610 (2d Dept. 1987) (finding that court order directing defendant to remove his beard before taking part in a lineup did not violate C.P.L. § 240.40(2)). The same authority permits the Court to alter other aspects of the standard lineup procedure to increase its accuracy. The Second Department has specifically approved court orders that require lineups be conducted in a manner requested by the defendant and designed to increase reliability. In People v. Moses, the trial judge ordered law enforcement to conduct a "blank" lineup, in which the defendant was not present, prior to conducting a lineup in which the defendant participated. The Second Department found that the police's failure to abide by the judge's order was error, although harmless in that case. 126 A.D.2d 755, 755 (2d Dept. 1987) ("[t]he police failure to have a blank lineup prior to the regular one in contravention of a prior

court order was harmless."). See also Miriam Hibel, New York Identification Law, 169 (2001) (citing Moses for the proposition that the court has discretion to order that a "blank" lineup be held before the lineup in which the defendant is a participant). The relief that the defendant seeks here, a lineup conducted in a manner that will require only slightly more time than a simultaneous lineup, is far less burdensome, and will increase the lineup's reliability even more significantly, than the order for a blank lineup condoned by the Appellate Division.

In circumstances very similar to these, courts in other jurisdictions have ordered that lineups be conducted in a manner that increased their reliability. In United States v. Tyler, in the Western District of Pennsylvania, the government moved for an order that the defendant participate in a line-up. The defendant moved for a "blank lineup." The district court granted the defendant the right to conduct the blank as well as the regular lineup, and additionally authorized the subpoenaing of "persons who look like Tyler" to appear in the blank lineup. In an effort to stop the blank lineup, the government sought a stay from the Third Circuit, which was denied. See 878 F.2d 75, 755-56 (3d Cir. 1989).

E. A Court-ordered Simultaneous Lineup Could Result in Irreparable Damage to the Defense.

Imagine for a moment, the core of the People's argument in another context. A crime has been committed, and a tiny sample of biological material has been culled from the crime scene. It is just enough to provide blood-typing evidence, but by doing that analysis the sample will be destroyed. The defendant vehemently asserts his innocence and urges that DNA typing be done rather than the classic serology the prosecution prefers. Blood typing may show that only one third of the population could have committed the crime. There is only one chance. The people would have this court believe that it would be powerless to order the sample preserved, and

DNA testing performed. They would urge the court to allow the sample to be destroyed, and then hold a hearing to determine whether classic serology has any value. This fundamentally misapprehends the nature and calling of the judiciary.

If the Court orders that a lineup take place, without ensuring that the lineup be reliable, the damage will be irreparable. "[I]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on . . ." United States v. Wade, 388 U.S. 218, 229 (1967). If a witness participates in an unduly suggestive simultaneous lineup, that witness will be permanently tainted. Assuming that such a witness falsely identifies the defendant as the perpetrator, the witnesses's participation in a simultaneous lineup will decrease the possibility that the witness would correctly identify someone else as the perpetrator in the future. Thus, a simultaneous lineup may destroy exculpatory evidence. Surely, the Court should not order a procedure that will have that effect.

F. This Court Should Exercise It's Discretion To Order The Double-Blind Sequential Lineup

The Cannon of Judicial Ethics concerns itself largely with issues of conflict of interest. Political affiliations and fiduciary obligations are exhaustively covered. Precious little time is spent on the methods or aims of judging. But what is said is said first -- sealing its place as both mandate and aspiration is this: "A judge should uphold the integrity and independence of the judiciary" (Cannon 1-The Model Code of Judicial Conduct). Nothing in the code suggests excessive or unusual deference to prosecutors or police officers. The functionaries of the executive branch -- litigants like all others--are not to be shielded from the requirements of justice, nor do they exist outside its ambit. The gold shield does not shield its possessor from the long

arm of the judiciary, much as the people might like to think it does. See generally Moxham v. Hannigan, 89 A.D.2d 300, 302, 455 N.Y.S.2d 424, 426 (N.Y.A.D. 4 Dept., Oct 29, 1982) (NO. 601/1982); Matter of Peck v. Stone, 32 A.D.2d 506, 508, 304 N.Y.S.2d

Contrary to what the people believe, Courts have a clearly defined and critically important role as facilitators in the criminal justice system. See, e.g., Bartel v. Riedinger, 338 F.2d 61, 61 (6th Cir. 1964) (holding that trial judge was not a mere referee and that his function was "to see that justice was done"); Goss v. State of Ill., 312 F.2d 257, 259 (7th Cir. 1963); Amercian Universal Ins. Co. v. Sterling, 203 F.2d 159, 165 (3d Cir. 1953) (holding that trials in the courts of the United States have gone beyond the point where trial judges are merely referees; rather, trial judges sit to facilitate the ends of justice); People v. White, 210 A.D.2d 446, 620 N.Y.S.2d 436, 437 (2d Dept. 1994). In short, this role is critically compromised by the people's suggestion that injustice must occur first followed later by the judicial surgery needed to correct it.. It is astonishing that in light of the clear precedent, and obviousness of the judicial function, the People might still seek to prevent this court from modifying it's own order. Under their theory, they can bring an order seeking to compel a defendant to stand in a line-up, but the court is powerless to do anything but sign. The court is asked here to do a simple thing in a single case--modify a line-up order to comport with the standards that are obviously the best ones.

In suggesting that the court might not have the power to order the relief sought here, the prosecution appeals to judicial apathy--albeit falsely cloaked in the rhetoric of restraint. They suggest, fundamentally, that courts are powerless to right wrongs until they are actually perpetrated. They ignore the hallowed history of the judiciary itself -- erasing in one grandiose swipe such broad prospective interventions as the integration of school systems or the sheltering

of the homeless. Entire fields of law from the great writ to the temporary restraining order stand arrayed against the perversity the People seek to pass as argument. Joseph Heller could do no better in creating a scenario in which injustice is forever perpetuated.

In case after case, courts have granted requests by the defense to alter the standard line-up protocol. If a court can order a 'blank' lineup--one which is 'perpetrator absent' in the argot of the literature, surely, the court can order a 'sequential lineup' in which the alleged perpetrator is present. In terms of inconvenience and cost, the 'blank lineup' is far worse than the 'sequential lineup'. Thus, this request is as valid as those already ordered, and less inconvenient. Indeed, it is different only in the broad social scientific shoulders on which it stands.

New York trial courts have ordered law enforcement to conduct particular types of lineups at the request of a defendant. In People v. Brown, the trial court ordered the police, at the request of the defendant, to conduct a "blank" lineup prior to their conducting a regular lineup. See 136 A.D.2d 556, 523 N.Y.S.2d 551 (2 Dept. 1988). Similarly, in People v. Moses, the trial judge ordered law enforcement to conduct a "blank" lineup at the defendant's request. See 126 A.D.2d 755, 511 N.Y.S.2d 338 (2 Dept. 1987). In People v. Lopez, the trial court granted the defendants' motion for a pretrial lineup, noting that "[d]emand for a lineup by a defendant, while certainly novel and unique, is neither forbidden by statute or any case law." 86 Misc.2d 111, 112-14, 382 N.Y.S.2d 609, 610-11 (Sup. Ct. Bronx Cty. 1976)

Courts in other jurisdictions have ordered law enforcement to conduct particular types of lineups, as well. See, e.g., United States v. Tyler, 878 F.2d 753 (3d Cir. 1989) (noting with approval panel's own previous denials of prosecution's attempts to stay and overturn trial court's order granting defendant right to conduct 'blank' lineup, as well as "authoriz[ing] the

subpoenaing of 'persons who look like [defendant]'"); United States v. Crouch, 478 F. Supp. 867, 871 (E.D. Cal. 1979) (suggesting that "such a power [to order a "blank" lineup] derives from the Court's general powers to provide the defendant with a lineup when he requests one) (citations omitted).

A trial court's discretion to grant a defendant's motion for a lineup is well-grounded. See United States v. Caldwell, 465 F.2d 669 (D.C. Cir. 1972) (remanding in the interest of justice after trial court denied defendant's motion to compel holding lineup attended by identification witnesses); United States v. MacDonald, 441 F.2d 259, 259 (9th Cir. 1971) (holding that decision concerning defendant's motion to require government to conduct pretrial lineup "is a matter committed to the sound discretion of the trial judge"); United States v. Ravich, 421 F.2d 1196, 1203 (2d Cir. 1970), cert. denied, 400 U.S. 834 (1970) (unanimously upholding defendant's right to demand pretrial lineup, noting, "A pretrial request by a defendant for a line-up is . . . addressed by the sound discretion of the [trial court] and should be carefully considered). As D.C. Circuit Court of Appeal Judge Leventhal eloquently stated for the majority in United States v. Ash:

> This court has an abiding concern for and interest in ensuring a combination of fairness and intelligent and effective techniques in law enforcement. That is the hallmark of a decent society concerned with both order and justice. It has led us in the past to countenance personal confrontations that were both suggestive and in the absence of counsel when the circumstances, close in time and place to the offense, enhanced reliability for law enforcement and thus enhanced fairness. This results not only in a "balance of pertinent interests," but in mutually reinforcing goals, as the same procedures result in both release of the innocent and enhanced opportunity to renew the search for and to apprehend the guilty, serving in both respects to further the proper interest of all citizens. These concerns stand at zenith for this court . . . .

461 F.2d 92, 104 (D.C. Cir. 1972) (en banc) (internal citations omitted), rev'd by United

States v. Ash, 413 U.S. 300 (1973). Though Judge Leventhal's majority opinion in Ash was later overturned when the Supreme Court held that the Sixth Amendment does not guarantee the right to counsel at photographic displays conducted by the government for the purpose of allowing witnesses to attempt an identification of the offender, see United States v. Ash, 413 U.S. 300 (1973), the concerns expressed for the "enhanced reliability" of the administration of the criminal justice system remain incontestable.

In Ravich, the court explained that when considering a defendant's motion for a lineup, trial judges should "carefully consider," *inter alia*, "the propriety of other identification procedures used by the prosecution, and the degree of doubt concerning the identification." Ravich, 421 F.2d at 1203. Considering the overwhelming evidence that simultaneous lineups are, indeed, far less reliable than double-blind sequential lineups, it would be a proper and just use of the Court's discretion to order a sequential lineup for Mr. Franco.

V. Conclusion

The petitioner seeks simple, cost effective relief designed to reliably exonerate the innocent and convict the guilty. Erroneous eyewitness identifications have been shown to be responsible for more innocent people going to prison than any other single factor in the criminal justice system. The petitioner here is not seeking to beat the system, only change it for the better. Adopting the procedure suggested strengthens the People's case in any instance in which a reliable identification is made, and aids in quickly exonerating those innocent citizens our system is sworn to protect. Social Science has proven, time and time again that we can protect our citizens from wrongful arrest and prosecution without spending an extra dime, or setting a single extra criminal free. Denial of the relief sought here can only rest on fear or entropy--for

what is sought is simply justice.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX, PART 49

THE PEOPLE OF THE STATE OF NEW YORK

-against-

PROPOSED JUDICIAL ORDER

LEO FRANCO

Ind. No. 903/01

Defendant

Whereas a simultaneous lineup procedure is inherently unreliable in that it encourages a witness to make a comparative or relative judgment;

Whereas a sequential lineup procedure encourages a witness to make an absolute, and therefore more accurate, judgment;

Whereas a sequential lineup procedure has been shown to significantly decrease the rate of error for false identifications;

Whereas a sequential lineup procedure places no unduly costs or burdens on law enforcement, especially in light of its proven capability to reduce the potential for a miscarriage of justice;

IT IS HEREBY ORDERED THAT:

1. A 'sequential line-up procedure shall be employed in the above captioned case.
2. This 'sequential line-up procedure' shall be conducted in accordance with this Nine (9) page order dated _____.

3. A person, known hereinafter as "**the lineup administrator**," shall remain with the complaining witness during the duration of the lineup.
4. The complaining witness shall be allowed to view each individual presented before him or her for as long as s/he feels is necessary.
5. The lineup **administrator** shall be responsible for instructing the complaining witness prior to the witness viewing the lineup. The lineup **administrator** shall also be responsible for recording both identification and nonidentification results in writing.
6. A person, known hereinafter as "**the lineup Conductor**," shall remain with the individuals to be presented in the lineup during the duration of the entire process.
7. The lineup **Conductor** shall be responsible for composing the lineup and instructing its members.
8. The lineup **administrator** shall be unaware of the name, description and identify of the suspect.
9. The lineup **administrator** and lineup **Conductor** shall have no contact or communication of any kind, be it direct or indirect, once the lineup process is commenced and until it is completed.

10. Nor shall the lineup **administrator** and lineup **Conductor** discuss the identity of the suspect or any other information relevant to the identify of the suspect at any time prior to the viewing of the lineup

11. The lineup process commences at whichever of the following moments occurs first:

    a. Once the lineup **Conductor** is informed that s/he must compose a lineup to match Mr. Leo Franco, known hereinafter as the "suspect."

    b. Once the lineup **Conductor** begins the process of randomly selecting the presentation order of the lineup.

    c. Once the lineup **administrator** has the opportunity to have, or does have, initial contact with the complaining witness.

12. The lineup process is completed once all members of the lineup have been viewed by the complaining witness and the lineup **administrator** has recorded the witness' identification and nonidentification results in writing.

13. Prior to the presentation of the lineup, while all lineup participants are out of the view of the complaining witness, the lineup **administrator** shall;

    a. instruct the witness as follows:

> **You will soon be asked to view a group of individuals. As you know, it is just as important to clear innocent persons from suspicion as to identify guilty parties. The individuals you are about to see will be viewed *one at a time*. They will be presented in random order. The person who committed the crime may or may not be present in this group of individuals. Take as much time as needed in making a decision about each individual before moving to the next one. You should understand that all the individuals will be presented, even if an identification is made.**
>
> **If you can, you should identify the person who committed the crime if he or she is present. Regardless of whether you identify one of the individuals, the police will continue to investigate this incident.**

This procedure requires that you state, in your own words, how certain you are of any identification. Once you have either made a positive identification or decided that the individual you are observing is not the person who committed the crime, you should tap the one-way glass separating the you from the individual being observed three times with your hand. This "signal" shall indicate to the lineup Conductor that the next individual is to be presented.

Do you understand the nature of the lineup procedure and the process?

a. Should the complainant be confused or have questions, the lineup **administrator** shall re-read the above paragraph as is necessary. The lineup **administrator** shall not answer any other questions, but shall tell the complainant that any other questions will be answered by after the line-up procedure is completed.

b. The lineup **administrator** shall instruct all those present at the lineup that they may not say or communicate, directly or indirectly, anything to the witness that may influence, advertently or inadvertently, the witness' selection.

14. Once the witness has confirmed that s/he understands the nature of the lineup procedure, the lineup **administrator** shall instruct the complaining witness to signal the lineup **Conductor** to begin presenting lineup participants. This signal shall be tapping on the glass three times.

15. Prior to instructing the complaining witness, the lineup **administrator** shall not have any opportunity to see any representation of, or have any contact with, or observe in any way, or discuss with anyone, any information about the suspect or about other members of the lineup.

16. The lineup **administrator** shall be placed in a physical location preventing him or her from seeing the lineup members as they are presented, and shall decline to comply with

any requests to look at or comment on the lineup members. If the lineup procedure necessitates that lineup members speak, the investigating officer shall decline to comment on this action, as well.

17. The lineup **administrator** shall not suggest in any way the identity of the suspect in the lineup.
18. The lineup **administrator** shall not say or communicate, directly or indirectly, anything to the witness that may influence, advertently or inadvertently, the witness' selection to the witness that may influence the witness' selection.
19. The lineup **Conductor** shall not have any contact or communication, direct or indirect, with the complaining witness once the lineup procedure has commenced.
20. The lineup **Conductor** shall remain out of the view of the complaining witness, as well as out of the view of any other persons present behind the one-way glass with the complaining witness.
21. The lineup **Conductor** shall establish the following procedures when composing and presenting a live lineup:
    a. Include only one suspect in each identification procedure.
    b. Include a *minimum* of **five fillers** (non-suspects) per identification procedure.
    c. Select fillers who generally fit the witness' description of the perpetrator. **When there is a limited and/or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.**

d. Allow the suspect to choose a position among the randomly ordered fillers. If no preference is expressed, the suspect shall be placed randomly within the order of individuals to be presented. If multiple lineup presentations are to be made to multiple complaining witnesses, position the suspect randomly with respect to each presentation.

e. The lineup **conductor** shall create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature (e.g., scars, tattoos) used to describe the perpetrator by artificially adding or concealing that feature.

f. At no time may the lineup participants be seen by the complaining witness and/or lineup **administrator** all at one time.

g. Prior to being presented, all lineup participants shall be kept in one place, out of the view of the complaining witness and/or lineup **Conductor**.

h. Upon the "ready" signal from the complaining witness, the lineup **Conductor** shall command the first, randomly chosen participant to enter the **viewing room**, which is on the other side of the one-way glass from the complaining witness and lineup instructor.

i. The lineup **Conductor** shall direct each participant that:

    i. Upon the lineup **Conductor**'s command, s/he shall enter the viewing room and walk to a marked spot which shall be in the middle of the back wall opposite the one-way glass.

    ii. S/he shall then turn and face the one-way glass from the said marked spot and remain standing for a count of five.

iii. S/he shall then turn to his or her left and present a profile view and remain in said position for a count of five.

iv. S/he shall then turn and face the other side and present the opposite profile view and remain in said position for a count of five.

v. S/he shall then turn and again face the one-way glass and remain standing.

vi. At no time, unless otherwise directed by the lineup **Conductor**, may the s/he move his or her arms or make any unusual gestures or movements.

vii. At no time, unless otherwise directed by the lineup **Conductor**, may the s/he speak or make any aural sound.

viii. S/he shall remain standing, facing the one-way glass, until hearing the signal from the complaining witness, as described above.

ix. Upon hearing the signal from the complaining witness, s/he shall exit the viewing room through the means of entry.

22. During the presenting of a live lineup, the lineup **Conductor** shall ensure that any identification actions (e.g., speaking, moving) are performed identically by all members of the lineup.

23. If the complaining witness, based on his or her previous identification, requests to have the lineup participants say or do anything other than those actions described above, the complaining witness must inform the lineup administrator. The lineup **administrator** must then detail any instructions on a piece of paper and send the paper through an

intermediary. This requirement may also be satisfied by leaving the paper where the lineup conductor can retrieve it.

24. When the suspect and all the fillers have entered and exited the line-up room, the line-up shall be deemed to be concluded. The fillers may be dismissed and shall exit in such a way as to avoid any contact with the complainant and/or line-up **administrator**.
25. The suspect shall, be detained or released as is legally appropriate. In either case, the complainant shall have no contact with nor any opportunity to observe the suspect. The information as to whether an identification has been made shall fist be recorded as set forth below. Once duly recorded, it shall be conveyed from the line-up **administrator** to the line-up **conductor**.
26. If an identification is made, the lineup **administrator** shall avoid reporting to the witness any information regarding the individual s/he has selected.
27. If an identification is made, the lineup **administrator** shall:
    a. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure s/he is.
    b. Ensure results are signed and dated by the witness.
    c. Ensure that no materials indicating previous identification results are visible to the witness.
    d. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.
    e. Document the lineup procedures and content in writing, including:
        i. Names of all persons present at the lineup.

ii. Date and time the identification procedure was conducted.

f. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case.

28. If an identification is made, the lineup **Conductor** shall:

a. Document the lineup procedures and content in writing, including

i. Identification information of lineup participants.

ii. Date and time the identification procedure was conducted.

b. Document the lineup by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly. Photo documentation shall be of both the group and each individual..

SO ORDERED: _____ _____

Justice Barrett J.S.C Dated

Exhibits

A. Atul Gawande, The New Yorker, (January 8th 2001)

B. Gary L. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 Law & Hum. Behav. 603 (1998)

C. Daniel Goleman, "Studies Point to Flaws in Lineup of Suspects," N.Y. Times, Jan. 17, 1995, at C1

D. R. C. L. Lindsay & Gary L. Wells, "Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation," 70 J. App. Psychol. 556 (1985)

E. Brian L. Cutler & Steven D. Penrod, "Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation," 73 J. App. Psychol. 281 (1988)

F. R. C. L. Lindsay et al., "Biased Lineups: Sequential Presentation Reduces the Problem," 76 J. App. Psychol. 796 (1991)

G. Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law (1995)