

Virginia State Crime Commission

Law Enforcement Lineups

2014

Law Enforcement Lineups

Executive Summary

Over the last decade, the Crime Commission has reviewed the issue of eyewitness misidentification and law enforcement lineups, including lineup policies and procedures. As a result of these studies and recommendations, a number of changes have been made in Virginia, including a statutory requirement for law enforcement agencies to have a written lineup policy, the development of training for persons conducting lineups, the creation and revision of the DCJS model lineup policy, and the inclusion of specific lineup procedures as part of lineup policy accreditation standards. DNA exonerations have indicated that mistaken eyewitness identification has been a factor in almost 75% of wrongful convictions.

Based on this year's recent survey and analysis of collected policies conducted by Crime Commission staff, it appears almost every single law enforcement agency with primary law enforcement duties has a written policy as required by Virginia law. Furthermore, over half of the responding law enforcement agencies have adopted a lineup policy that is nearly identical or substantially similar to the DCJS model policy. An additional number of remaining responding agencies have adopted many of the features and procedures of the revised DCJS model policy, which includes blind administration, showups, folder shuffle method, witness instructions, and confidence statements.

As a result of this study, detailed findings and survey results were presented to the Crime Commission at the October meeting. At the December Crime Commission meeting, members considered the following policy options:

Policy Option 1: Should Virginia law enforcement agencies be required by statute to adopt:

- “Evidence-based practices” in their written lineup policy?
- A policy that references certain procedures, such as blind administration?
- A policy that has detailed prescriptions on how procedures are to be carried out, such as Connecticut enacted?
- The DCJS model policy?

Policy Option 2: Should Virginia law enforcement agencies be mandated by Code to follow specific procedures for conducting lineups?

There was no motion made on either of these policy options at the December Crime Commission meeting.

Background

The Crime Commission has studied the issue of eyewitness misidentification and law enforcement lineups on two separate occasions, in 2004 and 2010. The reason for concern regarding lineup

procedures is that out of the 330 DNA exonerations nationwide, over 70% involved an eyewitness misidentification.¹ At least 16 of these DNA exonerations occurred in Virginia, with 81% (13 of 16) of the cases involving an eyewitness misidentification as a contributing factor.²

2004 Crime Commission Mistaken Identity Study

In 2004, the Crime Commission studied mistaken identification as a result of House Joint Resolution 79 (HJR 79).³ The study resolution specifically requested the Crime Commission to review DNA exoneration cases, examine traditional lineup procedures, and review the sequential method for conducting lineups.⁴ As a result of the 2004 study recommendations, the following was accomplished:

1. Va. Code § 19.2-390.02 was enacted, which requires a written lineup policy for the Department of State Police and each local police department and sheriff's office;
2. The Department of Criminal Justice Services (DCJS) created a model policy (Order 2-39) for lineups; and,
3. The Virginia State Police was required to maintain, in the CCRE, a photo of each individual arrested, per Va. Code § 19.2-390, to be used for photographic lineups.

2010 Crime Commission Lineup Study

In 2010, Crime Commission staff conducted a survey and reviewed the status of lineup policies based upon House Bill 207.⁵ As part of the lineup survey policy analysis, staff reviewed specific criteria, such as the use of blind administration, sequential method, and other best practices. Blind administration is a procedure where the person administering the lineup is not working on the investigation or is otherwise unaware of the suspect's identity.⁶ This procedure reduces the chance of accidental or inadvertent influence on the eyewitness.⁷ Crime Commission staff also reviewed the sequential method, which is the process of showing suspects to eyewitnesses one at a time, rather than simultaneously.⁸ The sequential method, when used in conducting a lineup procedure, helps eyewitnesses avoid using relative judgment, as it relies more on the witnesses' own memory of the perpetrator.⁹

Staff received survey responses from 95% (127 of 134) of primary law enforcement agencies, with 25% (32 of 127) of those agencies responding that they did not have a written lineup policy as required by Va. Code § 19.2-390.02. Staff also reviewed and analyzed 82 lineup policies that were submitted as a result of the survey. As Table 1 illustrates, only 21% (17 of 82) of responding law enforcement agencies had lineup policies that were identical or substantially similar to the DCJS model policy in 2010.

Table 1: 2010 Lineup Policy Analysis Findings

Type of Requirement or Preference	Total Number of Agencies (n=82)
Require that fillers similar to the suspect be used	77
Use the sequential method	54
Require the use of a current picture of the suspect	51
Require administrators to refrain from influencing the witness	48
Provide formal instructions for witnesses	47
Mandate only one suspect per lineup	45
Require documented results of the lineup	45
Separate the witnesses if there are more than one	38
Preference for a video or audio recording of the lineup	17
Have policies that are substantially similar to DCJS model policy (Order 2-39)	17
Require independent administrators	5

Source: Virginia State Crime Commission Lineup Survey, 2010.

As a result of the 2010 study, the Crime Commission endorsed three recommendations:

1. Require DCJS to develop training for law enforcement officers who regularly perform lineups.

Status: DCJS conducted five training sessions in 2012 and made the course available online for training academies to use as part of their training programs.¹⁰ Additionally, DCJS developed an updated model policy in November 2011.¹¹ This policy revision incorporated a number of best practices that were not in the previous version of the policy. The new policy revision recommended use of blind administration and/or a “blinded” administrator, or use of the folder shuffle method.¹² The revision also added requirements for documenting witness confidence statements at the time of identification and included instructions on show-up procedures.¹³ Since 2011, the policy has been updated three times - July 2012, September 2013, and March 2014.¹⁴

2. Request DCJS to conduct a policy compliance audit and report findings to the Crime Commission.

Status: DCJS made a presentation to the Crime Commission at the November 2011 meeting and published its findings in spring 2012.¹⁵

3. Request the Virginia Law Enforcement Professional Standards Commission (VLEPSC) to consider revising the accreditation standard for lineups.

Status: Crime Commission staff made a presentation to the VLEPSC board in 2011, informing members about the results of the study and about the Commission’s request for VLEPSC to consider adopting an updated standard concerning lineups. In January 2013, VLEPSC adopted a revised accreditation standard, which incorporated elements of the revised DCJS model policy.¹⁶

Crime Commission staff also made a presentation to both the Virginia Sheriffs' Association and the Virginia Association of Chiefs of Police on results of the 2010 study.

Update on Other States

A review of other states indicates that at least 14 states specify lineup procedures in their statutes. At the time of the 2010 study, there were only nine states that had addressed lineups by statute or statewide regulation.¹⁷ Since that time, at least five more states have added statutory requirements for lineup procedures, as discussed in detail below.

Connecticut: In 2012, Connecticut passed a requirement for all law enforcement agencies to adopt a model policy that was to be developed by the state police. These policies would need to include blind administration, sequential presentation, instructions, proper filler selection, and certainty statements.¹⁸

Nevada: In 2011, the legislature passed a bill that requires all law enforcement agencies to adopt written polices for “live lineups, photo lineups, and show-ups.”¹⁹

Rhode Island: A legislative task force recommended that a statewide lineup policy be adopted with best practices, including blind administration, in 2011.²⁰

Texas: The legislature enacted a statutory mandate, in 2011, which requires specific and detailed procedures that must be contained in agency lineup policies, including blind administration, sequential method, and witness instructions.²¹

Vermont: In 2014, the legislature passed a bill, which requires all state law enforcement agencies to adopt a policy that includes blind administration, sequential method, and recording the witness confidence statement.²²

Recent Studies

In 2013, Professor Brandon Garrett of the University of Virginia School of Law conducted a study on law enforcement lineups in Virginia.²³ Professor Garrett sent out a survey and requested lineup policies from over 350 Virginia law enforcement agencies.²⁴ Professor Garrett's study included all law enforcement agencies, including those that are not responsible for primary law enforcement duties. He received 201 responses, with an approximate 57% response rate.²⁵ Of the 201 agencies that responded, 144 provided a copy of their lineup policy.²⁶ Some of the findings from his report included:

- The revised DCJS model policy is excellent;²⁷

- 40% (58 of 144) of law enforcement agencies included blind administration procedures available as an option;²⁸
- Very few agencies required the use of blind administration;²⁹
- Only nine agencies included the folder shuffle method;³⁰
- 63% (91 of 144) of respondents offered sequential lineups;³¹
- 43 agencies did not address avoiding suggestiveness in their lineup procedure;³²
- 61% (88 of 144) had standard instructions to witnesses;³³ and,
- 71 of 144 agencies required taking a witness confidence statement.³⁴

Professor Garrett's conclusion was that the "majority of Virginia law enforcement agencies still followed earlier and outdated model policies" and more should be done to disseminate best practices to law enforcement agencies.³⁵ Due to the confidentiality of responses in Professor Garrett's study and the fact that results were not specific for law enforcement agencies with primary responsibilities, it is impossible to make any comparisons to the past and current Crime Commission surveys and policy analyses.

2014 Lineup Policy Status

In 2014, Crime Commission staff requested copies of lineup policies from law enforcement agencies with primary law enforcement duties. By October 2014, when the presentation was made to Crime Commission members, there was a 90% (122 of 135) response rate.³⁶ Staff completed an analysis of the lineup policies to see how congruent they were with the current DCJS model policy. A number of elements from the DCJS model policy were evaluated in the analysis to include:

- Similarity to the DCJS model policy;
- Training;
- Show-up procedures;
- Blind administration;
- Folder shuffle method;
- Requirement for current photograph of suspect;
- Similar fillers;
- Sequential method;
- Administrators refraining from influencing witnesses;
- One suspect per lineup;
- Witnesses separated -if more than one;
- Witness instructions;
- Document procedure;
- Record confidence/certainty statements; and
- Video recording of identification process.

Overall, staff found that 46% (56 of 122) of agencies submitted a policy nearly identical to the DCJS model policy. An additional 9% (11 of 122) of the submitted policies are substantially similar to the DCJS model policy. In terms of the use of a blind lineup administrator, staff found that 10% (12 of 122) of agencies require this method, 69% (83 of 122) use a blind administrator whenever practicable/optional, and 22% (27 of 122) do not include this method in their policies. Table 2 provides a detailed breakdown of findings from the 2014 policy analysis:

Table 2: 2014 Lineup Policy Analysis Findings

Type of Requirement or Preference	Total Number of Agencies (n=122)
Require that fillers similar to the suspect be used	122
Use the sequential method	117
Require the use of a current picture of the suspect	109
Require administrators to refrain from influencing the witness	106
Provide formal instructions for witnesses	115
Mandate only one suspect per lineup	114
Require documented results of the lineup	116
Separate the witnesses if there are more than one	102
Require training for persons conducting lineups	89
Include the folder shuffle method as an option	77
Include a section on show-ups	103
Record confidence/certainty statements	106

Source: Virginia State Crime Commission Lineup Survey, 2014.

Crime Commission members requested that staff continue to follow-up with the non-responding agencies in an effort to determine statutory compliance for a written lineup policy. By December 2014, staff confirmed that 99% (133 of 135) of law enforcement agencies with primary law enforcement duties have a written lineup policy. The remaining two offices did not respond to multiple requests; therefore staff is unable to determine if they have a written policy or not.

Sheriff Brian Roberts, Brunswick County, recently requested an informal opinion from the Attorney General’s Office regarding whether a MOU between a jurisdiction’s sheriff’s office and its primary law enforcement agency satisfies the requirements of Va. Code § 19.2-390.02. The informal opinion stated that a MOU with a primary agency is an acceptable way to comply with the statute, as the statute does not specify what the terms of the policy must be, only that the policy must be written. Therefore, a sheriff’s office’s policy can consist of an agreement that “whenever a lineup needs to be carried out, the local police agency will do this for us.”

Summary

The Crime Commission has studied the issue of eyewitness misidentification and law enforcement lineups three times in the past ten years. As a result of the past decade of work, the Crime Commission has recommended: a statutory requirement for agencies to have a written lineup policy; the development of training; creation of the DCJS model policy; and, the inclusion of lineup

policy specifics as part of accreditation standards. All of these recommendations have been implemented.

Based on this year's recent survey and analysis of lineup policies conducted by Crime Commission staff, it appears that almost every single law enforcement agency with primary law enforcement duties has a written policy as required by Virginia law. Furthermore, over half of the responding law enforcement agencies have adopted a lineup policy that is nearly identical or substantially similar to the DCJS model policy. It also appears that a significant number of responding agencies have adopted several facets of the revised DCJS model policy, including blind administration, show ups, folder shuffle method, witness instructions, and confidence statements.

As a result of this study, detailed study findings and survey results were presented to the Crime Commission at the October meeting. At the December Crime Commission meeting, members considered the following policy options:

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There was no motion made on either of these policy options at the December Commission meeting.

¹ See, <http://www.innocenceproject.org/> (last visited June 30, 2015).

² Id.

³ H.J.Res. 79, Gen. Assemb., Reg. Sess. (Va. 2004).

⁴ Id.

⁵ H.B. 207 Va. General Assemb. (2010).

⁶ See, generally, Gary L. Wells, *The Double-Blind Lineup. General Comments and Observations*, GARY WELLS, retrieved from http://www.psychology.iastate.edu/~glwells/Meet_the_Double-Blind_Lineup.doc (last visited December 8, 2014).

⁷ Id.

⁸ H.D. 40, REPORT ON MISTAKEN EYEWITNESS IDENTIFICATION, Virginia State Crime Commission, 9-10 (2005), retrieved from

<http://leg2.state.va.us/DLS/H&SDocs.NSF/4d54200d7e28716385256ec1004f3130/cece4e476d79218985256ec500553c3b?OpenDocument>.

⁹ Id.

¹⁰ Information provided by DCJS.

¹¹ General Order 2-39, <http://www.dcjs.virginia.gov/cple/sampleDirectives>.

¹² Id. The folder shuffle method is a procedure that allows a photographic lineup to be performed by an administrator who is aware of the suspect. This is accomplished by inserting pictures into marked folders, and allowing the witness to self-administer the procedure.

¹³ Id.

¹⁴ Id.

¹⁵ See <http://www.dcjs.virginia.gov/research/documents/12LawEnforceLineup.pdf>.

¹⁶ Virginia Law Enforcement Program Manual, OPR.03.07, 03.08, retrieved from <http://www.dcjs.virginia.gov/accrad/documents/6th-EditionProgramManual-V7.pdf>

¹⁷ VA. STATE CRIME COMM'N, LAW ENFORCEMENT LINEUPS (2010), retrieved from <http://vscc.virginia.gov/documents/Law%20Enforcement%20Lineups.pdf>.

¹⁸ CONN. GEN. STAT. § 54-1p (2014).

¹⁹ NEV. REV. STAT. ANN. § 171.1237 (Lexis-Nexis 2014).

²⁰ R.I. GEN. LAWS § 12-1-16 (2014).

²¹ TEX. CODE CRIM. PROC. art. 38.20 (West 2014).

²² VT. STAT. ANN. tit. 13 § 5581 (2014).

²³ Brandon Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L., 1 (2014), retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313908.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id. at 10.

²⁸ Id. at 13

²⁹ Id.

³⁰ Id. at 14.

³¹ Id. There is an ongoing debate over whether sequential photo lineups or simultaneous photo lineups are more valid or reliable. A study by the National Academy of Sciences (Oct. 2014) has recommended that lineup procedures should include: blind administration, contemporaneous confidence statements, witness instructions, and videotaping of the procedure. However, the study did not take a position on sequential versus simultaneous presentation of photos, indicating the need for further research on the issue. *See Identifying the culprit: Assessing eyewitness identification*. Washington, D.C.: The National Academies Press. Retrieved from http://www.nap.edu/download.php?record_id=18891#.

³² Id. at 15.

³³ Id. at 16.

³⁴ Id. at 17.

³⁵ Id. at 17-20.

³⁶ The total number of policies received at this time of report was 133, with only two agencies failing to comply with the survey request. Only 122 policies were analyzed for the October 21, 2014, presentation, as the other 11 were received after this meeting.