

## Response to Letter of Dissent

April 17, 2006

Commissioners  
California Commission on the Fair Administration of Justice

Dear Commissioners:

The Report and Recommendations of the Commission regarding eye witness identification procedures which was released April 13, 2006 contains a dissent received shortly before its release, and the dissent refers to a more lengthy letter lodged with the Commission. The letter of dissent will be posted on the Commission website, but I did not want to do so without including this response. The Commission Report and Recommendations did not offer a lengthy justification for each of our recommendations, and I am concerned that the criticism contained in the dissent letter might create the false impression that the recommendations were presented in haste or without full consideration of all of the research on both sides of all of the issues we considered.

It is certainly true that the debate over simultaneous vs. sequential identification procedures is not over. The Commissioners all received the Illinois study referred to, and fully considered it. Our recommendation that sequential presentation is preferred when double-blind procedures are utilized was based upon the general agreement among research studies, the recommendations adopted by the North Carolina, Virginia and Wisconsin Innocence Commissions, the favorable experience with sequential procedures in Boston, in New Jersey, and in Santa Clara County in California, and the study conducted in Hennepin County, Minnesota which concluded that the sequential, double-blind method of lineups is superior to the simultaneous method.<sup>1</sup> The Commission was reluctant to rely upon the single Illinois pilot program to reject the accumulated weight of prior research and experience in the absence of peer review, and the suggestion of potential flaws in the design of the pilot study.<sup>2</sup>

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<sup>1</sup> Klobuchar, A. and Caliguri, H., *Protecting the Innocent / Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 Wm.Mitchell L. Rev. 1 (2005).

<sup>2</sup> Professor Gary Wells, who testified before the Commission, advised the Commission that the Illinois Pilot Program compared double blind sequential identifications with simultaneous identifications which were *not* double blind, thus confounding the variables. Professor Wells did not participate in the design of the Illinois study.

The Commission’s recommendation does not foreclose more detailed guidelines to govern the appropriate choice between sequential and simultaneous procedures, as research progresses and the debate continues. Our recommendation is simply that at the present time, based upon our analysis of the available research, sequential identification procedures are preferred.

With respect to the argument that this Commission should not “interject” itself into the work of the Advisory Committee on Criminal Jury Instructions, it should be noted that the Advisory Committee *invites* suggestions, and the California Judicial Council regularly seeks comment from organizations interested in improvements to courts rules and forms. Our Commission closely scrutinized the standard jury instruction recommended in California with respect to eyewitness identification.<sup>3</sup> The instruction includes the following two questions to be considered in evaluating identification testimony: “How certain was the witness when he or she made an identification?” and “Are the witness and the defendant of different races?” The instruction currently offers no guidance as to the potential significance, if any, of either of these factors. The Supreme Courts of five other states have questioned the adequacy of jury instructions similar to this.<sup>4</sup> The Commission has not endorsed or drafted any particular form of instruction, but simply recommends that the current instruction be evaluated in light of current scientific research that may not have been previously considered.

John Van de Kamp,  
Chair,  
California Commission on the Fair Administration of Justice

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<sup>3</sup> Judicial Council of California, Criminal Jury Instructions, 1-300 CALCRIM 315 (2005).

<sup>4</sup> *See, e.g., State v. Long*, 721 P.2d 483 (Utah Supreme Court, 1986) (Approving instruction that “identification by a person of a different race may be less reliable than identification by a person of the same race.”); *State v. Ramirez*, 817 P.2d 774 (Utah Supreme Court, 1991) (Rejecting level of certainty as an indicator of an identification’s reliability); *Brodex v. State*, 614 S.E.2d 766 (Georgia Supreme Court, 2005) (Reversible error to instruct jury to consider level of certainty as a factor in evaluating reliability of identification); *State v. Ledbetter*, 881 A.2d 290, 311 (Connecticut Supreme Court, 2005) (“uncontradicted scientific literature . . . suggests the [certainty] factor is particularly flawed because of a weak correlation, at most, exists between the level of certainty expressed by a witness . . . and the accuracy of that identification.”). *Cf. Commonwealth v. Johnson*, 650 N.E.2d 1257 (Massachusetts Supreme Judicial Court, 1995); *State v. Dubose*, 699 N.W.2d 582 (Wisconsin Supreme Court, 2005).