

CAPITAL PUNISHMENT REFORM STUDY COMMITTEE

Agenda for meeting on November 23, 2009

The meeting will be held at 1 PM on Monday, November 23 at the new offices of Jenner & Block, 353 North Clark Street, 45th Floor, Chicago, IL. The conference call in number is 888-363-4734, access code 4209525, host code 3365.

1. Approval of minutes of October 26, 2009.
2. Report by David Olson re surveys.
3. Subcommittee reports.

Subcommittee 1: Police and investigations.

James R. Coldren, Jr.
Richard D. Schwind

Geoffrey R. Stone
Eric C. Weis

Discussion of recommendations attached as Appendices 1, 2 and 3 to Agenda for meeting on October 26.

Discussion of other recommendations of subcommittee 1, summarized in Mr. Sullivan's email of November 5, 2009, attached as Appendix 1.

Subcommittee 2: Eligibility for capital punishment and proportionality.

Leigh B. Bienen
Kirk W. Dillard

Thomas P. Sullivan
Michael J. Waller

Subcommittee 3: Trial court proceedings.

Jeffrey M. Howard
Boyd J. Ingemunson

Edwin R. Parkinson
Randolph N. Stone

Discussion of recommendations attached as
Appendix 4 to Agenda for meeting of October 26,
2009.

*Subcommittee 4: Post-conviction proceedings, DNA and
general topics.*

Jennifer A. Bishop-Jenkins
Walter Hehner

Charles M. Schiedel
Arthur L. Turner

4. Other business.



TPS
11/16/09

Attachment - Appendix 1.

TPS

From: Sullivan, Thomas P
Sent: Thursday, November 05, 2009 12:18 PM
To: 'Leigh Bienen'; 'Jenniferbjenkins@aol.com'; 'Coldren, James R., Jr. "Chip";
'senator@killard.com'; 'bdrew@hds.ilga.gov'; 'Howard, Jeffrey M.';
'boydingemunson@gmail.com'; 'eparkinson@ilsaap.org';
'Charles.Schiedel@OSAD.state.il.us'; 'Schwind, Richard D.'; 'Stone, Geoffrey R.'; 'Stone,
Randolph N.'; 'repartturner9@aol.com'; 'mwaller@lakecountyil.gov'; 'eweis@co.kendall.il.us'
Subject: EYEWITNESS IDENTIFICATION PROCEDURES
Attachments: Appendix 1.pdf; Appendix 2.pdf

The purpose of this message is to alert each Committee member to proposals for Committee recommendations in three areas dealing with eyewitness identification procedures that take place in places of detention during homicide investigations.

At the Committee meeting last Monday, we had an extensive discussion of recommendations made by subcommittee 1 concerning eyewitness identification procedures. They were attached to the Agenda for the meeting as Appendix 3, Attachment B, and are attached to this email as Appendix 1.

We were joined in the meeting by Kevin O'Connell, Chief of Investigations, IL Attorney General, and Michael Cook,

Captain, IL State Police, both of whom had attended our meeting of March 9, 2009, together with other members of a working group of law enforcement officers. They presented the paper attached as Appendix 2 on behalf of the working group.

The current IL statute requires that each witness must be told before viewing a lineup or photo spread that the suspect might not be in the lineup or photo spread, the witness is not obliged to make an identification, and the witness should not presume that the administrator knows which person is the suspect. Suspects in the array should not appear substantially different from the fillers. (725 ILCS 5/107A-5(b).)

The existing statute also requires that "All lineups shall be photographed or otherwise recorded." (725 ILCS 5/107A-5(a).) The officers stated that compliance with this provision is usually accomplished by "recording" the procedure in a written report, rather than by use of an electronic audio or video recording.

The three areas we discussed, and to which this message is directed, are as follows:

First. The subcommittee recommended that in homicide investigations, blind administration should be required of all eyewitness identification procedures. Blind administration may be achieved either by use of:

(a) *A blind administrator.*

The administrator is not aware which of the persons or pictures in the array is the police suspect. The administrator records the witness' response to each person in a live lineup, or each photo in a photo spread, using previously assigned numbers; or

(b) *A blind method.*

Live lineups may not be used without a blind administrator, because it is necessary to have an administrator present during a live lineup.

Using photos, a blind method may be achieved by use of either one of two procedures: (1) hard copies in a folder or folders, or a computer screen, with the photos of the fillers and the police suspect. The administrator shuffles the photos or folders randomly, or on the screen. A number is assigned to

each picture, without the administrator knowing the number assigned to any of the photos, or the position of the suspect's photo. The administrator does not see the photos as the witness views them in the folders or on the screen. The administrator records the witness' response to each photo as the witness views the photos, referring to the assigned numbers, without knowing the photo to which the witness is referring.

The subcommittee recommended that the use of a blind administrator was the preferred method; and that if blind administration was not feasible (that is, neither a blind administrator or a blind procedure was used), the officer in charge must prepare a contemporaneous written report explaining the reasons why blind administration was not feasible.

The paper presented by the officers states opposition to requiring a blind administrator, for the reasons stated in the second to last paragraph of Appendix 2. The last sentence states, "We are in favor, however, of a blind method of

administering line-ups, and these methods will be extensively covered in the training block of instruction."

The discussion at the meeting centered chiefly around recommending the use of blind administration (rather than only or primarily a blind administrator), which could be achieved either by a blind administrator or a blind method, as described above.

The majority of those in attendance appeared to favor the requirement of blind administration, but to be against stating a preference for a blind administrator, because in many instances, especially in smaller departments, the requirement of a blind administrator may be impractical.

To my recollection, we did not discuss the recommendation that a report be filed in the event blind administration was not used.

Question #1: Should the Committee recommend that in homicide investigations, blind administration as described above should be required of eyewitness identification procedures conducted in detention facilities?

Question #2: If your answer to Q. #1 is yes, should there be a requirement that if blind administration is not used, a contemporaneous written report must be prepared explaining why blind administration was not feasible?

Second. The subcommittee recommended that, in homicide investigations, if blind administration is used, it should be required that in homicide investigations the persons in live lineups and the photos in the photo spreads be shown sequentially (that is, one by one, with the witness responding to each person or photo before viewing the next) rather than (as is now the common practice in Illinois) simultaneously, that is, all at the same time.

This difference in presenting arrays was the subject of the pilot program conducted several years ago in Chicago, Joliet and Evanston. The results of the program are contained in the so-called Mecklenburg Report, the deficiencies of which we discussed in our Third Annual Report, pages 14 to 16.

The proponents of use of sequential procedures recommend its use only if a blind method is used.

To my recollection, there was very little discussion of this recommendation at our meeting.

Question #3. If blind administration is used in homicide investigations, should there be a requirement that sequential procedures be used, that is, the persons or pictures be displayed to the witness one at a time, and the witness' response be recorded after each person or picture is displayed, before the witness views the next person or picture?

Third. The subcommittee recommended that eyewitness identification procedures in homicide investigations that take place in detention facilities be electronically recorded on audio and video tape.

This recommendation contained three subsidiary recommendations:

(1) That if audio and video taping is not feasible, there must be a contemporaneous written report prepared explaining why that was not feasible;

(2) That the recommendation of electronic recording is to take effect only after the Illinois Police Training and

Standards Board and the Illinois Attorney General's Office develop a model procedure for audio and video recording of eyewitness identifications in homicide investigations that take place in detention facilities; and

(3) That the Illinois Eavesdropping statute be amended to permit recording of live lineups without the knowledge or consent of the suspects or fillers in the array (this recommendation appears to require that the *witness'* consent to recording must be obtained as required by the Illinois Eavesdropping statute).

In the Committee's discussion, this series of recommendations met with mixed reactions. The officers raised the problem of the cost of equipment, particularly in smaller departments, and in counties which are suffering financially at the present time. Rick Schwind raised logistical concerns about the requirement of videotaping in situations where there are multiple suspects, or when time is of the essence, or when witnesses may be hesitant to be recorded while they attempt to make identifications. A concern was also

raised about recording on film and tape of the likenesses and voices of fillers, who are not suspected of having had a part in the crime under investigation.

Chuck Schiedel suggested that the eyewitness should be given the option as to whether or not a recording is made of the identification procedure.

Question #4: Should the Committee recommend that all eyewitness identification procedures in homicide investigations, conducted in places of detention, be audio and video recorded (assuming the Illinois Eavesdropping Act is not violated)?

Question #5: If your answer to Q. #4 is yes, should the Committee recommend that if a recording is not made, there must be a contemporaneous written report as to why recording was not feasible?

Question #6: If your answer to Q. #4 is yes, should the requirement of recording take effect only after the Illinois Police Training and Standards Board and the Illinois Attorney General's Office develop a model procedure for audio and

video recording of eyewitness identifications in homicide investigations that take place in detention facilities?

Question # 7: If your answer to Q. #4 is yes, should the Committee recommend that the Illinois Eavesdropping statute be amended to permit recording of live lineups without the knowledge or consent of the eyewitnesses and the suspects and fillers in the array?

These questions will be placed on the agenda for the Committee's forthcoming meeting on Monday, November 23 at 1 PM. I urge you to give them your consideration, and if you wish, to send other Committee members your thoughts. If you will be unable to attend the November 23 meeting, please circulate your thoughts or votes, or give your proxy to another Committee member, so that all of us will be heard on these important topics.

I also invite those who attended the meeting on October 26 to edit or correct what I have written concerning the discussion at the meeting, and all members to weigh in as to

whether the questions have been properly and completely phrased.

I have asked Rick to send a copy of this email to the members of the law enforcement working group, and to invite them to respond in writing and/or to attend the forthcoming meeting.

TPS

November 5, 2009.

Attachment B

Capital Punishment Reform Study Committee – Police and Investigations Subcommittee
Modified Recommendations Regarding Police Lineups in Homicide Cases

The Illinois Legislature should enact legislation that requires the following regarding administration of suspect lineups in homicide cases:

1. Use of a blind method in all lineup administrations, so that the administrator of the lineup is not aware which individual viewed by a witness in a lineup array is the police suspect,
2. Blind administration (blind administrators or, in the absence of blind administrators, blind procedures) of lineup methods in homicide cases, that permit several different administration options, such as: live lineups, photo-spread lineups using the 'folder' method, or computer-generated lineups; if a blind administrator or a blind procedure is not feasible, then there must be a contemporaneously prepared written report explaining why blind administration was not used,
3. When an independent (blind) administrator is not available, a photo array must be used (the folder method, or a computer-generated method), and the lineup procedure must insure that the lineup administrator does not know the point in the sequence of photos that the suspect's photo appears, and does not know which photo a witness is viewing at any time during the procedure,
4. Sequential presentation of suspects, photographs or images, if a blind administration method is used,
5. Video and audio taping of all eyewitness identification procedures that occur within a police facility; if video or audio taping is not feasible, then there must be a contemporaneously prepared written report explaining why the video or audio taping was not feasible (this recommendation shall take effect only after the Illinois Police Training and Standards Board and the Illinois Attorney General's Office develop a model procedure for video and audio recording of line-ups in police facilities in homicide cases), and
6. Training for all Illinois law enforcement agencies that covers, at a minimum:
 - a. Research evidence regarding lineup administration,
 - b. The three primary blind administration methods (live, folder, computer photo array),
 - c. Details of lineup administration and recordkeeping, and
 - d. Recording of lineups.

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The Illinois legislature should also amend the existing eavesdropping law to allow for recording of lineups in homicide cases without notifying the suspect or fillers in the lineups.

REC'D. ePRsc
10/26/09

Good Afternoon,

We would like to start by thanking you for giving us, Law Enforcement, the opportunity to address this issue.

Eyewitness Identification is a key element in criminal cases, and as such we in law enforcement need to be better at what we do to assure that correct and fair identification is made of suspects in criminal cases.

The worst thing that could happen in criminal cases is that an innocent person is accused or arrested for a crime he or she didn't commit

Several months ago we were challenged by your Committee to look at ourselves in law enforcement to see if we can do better

We needed to take into consideration the cross section of law enforcement within the state and the challenges they face as each region have their own distinct issues dealing with manpower, availability, physical layout of police facilities, and budgetary concerns

We have had numerous meetings dealing with all aspects of this issue and have identified several key elements that we believe must be addressed.

The following outlines our findings:

Our first main finding involves **Training**. Currently there is limited training on the topic of the administration of line-ups by law enforcement personnel. A block of instruction for the training of new recruits, reference the proper way to conduct line-ups in criminal investigations, will be brought to the Illinois Law Enforcement Training and Standards Board and all Illinois Law Enforcement Academies in the state in order to implement this needed training. We have also researched ways to implement the statewide training of existing law enforcement officers through web based and/or roll call training. This training should be mandatory for all Investigators, as they are normally tasked with conducting the majority of the physical and photo line ups.

This training will include past concerns and issues, suggested best practices and Constitutional and State law that has already been enacted. Our current Illinois law, under 725 ILCS 5/107A, addresses the mandatory warnings that need to be issued prior to the administering of all line ups.

These warnings mandate that all line ups need to be photographed or otherwise recorded and that those photographs or recordings be provided to the accused or his or her defense counsel following discovery. The law also addresses that mandatory warnings are to be issued to witnesses prior to viewing the line up and those warnings make it clear to the witness that the suspect may or may not be in the lineup and that the person administering the lineup does not necessarily know who the suspect is or where he is placed in the line-up. Finally, the law speaks

to the fairness needed in the assembling of a line up, in that the suspect should not be substantially different from the fillers, and no other factors should draw undue attention to the suspect

Our second main finding involves **Technology**: In the metro Chicago land area, similar line up fillers are easy to come by. However, in other parts of the state, either because of population, resources, or lack of technology, fillers are a bit more challenging. Knowing this problem, we are working with the Chicago Police Department and the Illinois State Police in developing a computer based system for the retrieval of photographic fillers which can be accessed by every police department in Illinois. To this end, we will be pursuing grant money through the Illinois Criminal Justice Authority in order to enhance the interoperability of photos throughout the state.

Our third main finding involves **Methods**. We are not in favor of mandating the exclusive use of either sequential or simultaneous viewing of suspect photos, as it has not been proven that one is superior to the other. However, the pros and cons of each system will be one of the issues touched on in the training phase.

As to a blind method of showing line-up photos, we are not in favor of a mandated double blind administrator, as it places an undue burden on law enforcement and its resources, is not deemed practical, and is directly contrary to the future of law enforcement ,in regards to the sharing of information in order to serve the public and solve crimes. We are in favor, however, of a blind method of administering line-ups, and these methods will be extensively covered in the training block of instruction.

In conclusion, on behalf of police officers throughout the state, I would like to stress that we in Illinois law enforcement continually strive to become better in order to serve the citizens of this state. We also understand that with the powers that come with this job there is also great responsibility and we do not take that responsibility lightly. I would again like to thank the committee for giving us the opportunity to address this issue and provide our input, and we look forward to working with you on this and other issues in the future. Thank You.