COMBATTING SUGGESTIVENESS IN LINEUPS: CAN LEGISLATION BE THE ANSWER?

*Samantha Kay Krasker**

INTRODUCTION

The risk of suggestiveness in a lineup starts far before Number One steps in front of the double mirror. All words and interactions between state actors and witnesses can carry a suggestive effect—from the state agent's initial call to the witness to organize the lineup, to the instructions the state agent provides to the witness during the lineup, to the state agent's response to the witness's questions following the lineup.[1]

The state agent's specific terms, language, emphasis, and phrases can influence which suspect the witness identifies and even whether the witness identifies a suspect at all.[2] These communications between state agents and witnesses, verbal and nonverbal, demonstrative and subliminal, are at the heart of the issue of suggestiveness in a lineup.[3]

So how should state agents ensure their actions are not suggestive, preserving

* J.D. Candidate, Notre Dame Law School, 2023; B.A., University of Virginia, 2020. Many thanks to Professor Gerard Bradley for his continued guidance. His Constitutional Criminal Procedure: Investigations course was the inspiration for this project. Thank you to Alexis Flores, whose feedback and mentorship greatly improved the discussion. This Note is dedicated to my twin sister, Lucy Krasker—someone who would definitely be confused for me in a lineup.

1. *Infra* Part II.
2. *Infra* Part II.
3. *See generally* REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES (Brian L. Cutler ed., 2012).

the admissibility of the lineup at trial? Model legislation has largely been the government response to suggestiveness,[4] but it is not a feasible fix for suggestiveness for two reasons—federalism concerns and the lack of evidentiary success thus far.

The right to counsel can serve as a solution. The right to counsel already applies to the post-indictment lineup itself, due to the confrontational nature of the procedure compelled by the state between the witness and the accused.[5] Extending the right to counsel before and after the lineup is an available answer far superior to model legislation due to the ease of its extension and the pre-defined role of defense counsel at lineups.

Section I describes why suggestiveness is a threat to lineups. Section II discusses the current constitutional criminal procedure with respect to suggestiveness in lineups. Section III discusses the relevant model legislation concerned with lineups, including its historical trajectory in light of current constitutional requirements. Section IV discusses the effectiveness of the current model legislation—or lack thereof. Section V introduces the right to counsel as a possible solution to the suggestiveness by reviewing the Supreme Court precedent related to the right to counsel. Section VI reviews how the right to counsel can be extended to state agent and witness interaction regarding the lineup and why such extension resolves the threat of suggestiveness. Section VII addresses counterarguments, including originalist concerns related to extending the right to counsel.

What is the proper fix? Should governments, either at the state or national level, legislate to reduce suggestiveness by creating clear language for state actors to use when interacting with eyewitnesses before, during, and after the lineup? Should courts step in, extending existing rights and constitutional protections?

I. THE PROBLEM OF SUGGESTIVENESS

Identity is an element of every criminal prosecution—meaning the prosecution must prove both the elements of a crime *and* confirm the identity of the perpetrator before the court.[6] There are ways beyond eyewitness testimony to prove identity, including DNA evidence, fingerprints, surveillance photos or video, or through confessions. However, eyewitness testimony continues to be used within prosecutions to prove identity.[7]

Eyewitness testimony is either uncontested or contested.[8] Eyewitness testimony

4. *Infra* Part III.

5. United States v. Wade, 388 U.S. 218, 228 (1967); *infra* Part V.

6. *Identity*, LEGAL-DICTIONARY.THEFREEDICTIONARY.COM, https://legal-dictionary.thefreedictionary.com/identity+element (last visited Mar. 19, 2022) [https://perma.cc/F3WR-LL7Y].

7. *See* Gary L. Wells, *Eyewitness Testimony*, *in* THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT 663, 664 (David Levinson ed., 2002).

8. *See* Wells, *supra* note 7, at 663.

is uncontested in situations where the victim and perpetrator know one another.[9] Although the victim in an uncontested eyewitness testimony case may lie, he or she is sure to know the identity of the perpetrator.[10] An example of such uncontested eyewitness testimony is a domestic dispute.[11] There, the couple is sure to be able to identify one another, as they have a relationship that predates the crime and established knowledge of one another's identities.[12]

Eyewitness testimony is contested when the witness does not know the perpetrator and is unsure of his or her identity.[13] The witness may know some of the perpetrator's physical characteristics from the time of the crime, but the witness may not know the perpetrator's name. In contested eyewitness testimony cases, identity is harder for the prosecution to prove, especially if the witness's credibility is suspect.[14] Therefore, the prosecution needs some operative way to increase reliability of the identification.

Lineups are one such method, and they are often used in cases where eyewitness testimony is contested.[15] Typically, the witness is unsure of who the perpetrator is or what he or she looks like.[16] If the witness can pick the perpetrator from a line of individuals who look like him, dress like him, or speak like him, then the jury is more likely to find that witness's testimony reliable and trustworthy.[17] Lineups are corporeal identification procedures.[18] Corporeal identification procedures are those that involve the accused—the accused must be present for the procedure to proceed.[19] In contrast, incorporeal identifications do not involve confrontation and can be

---

9. *Id.*

10. *Id.* at 664.

11. *See generally The Role of Testimony in Domestic Violence Cases*, WHITE & ASSOCS. (Jan. 6, 2022), https://www.whiteandassociateslaw.com/2017/01/06/role-testimony-domestic-violence-cases/ [https://perma.cc/8576-DJL5].

12. See generally id.

13. Wells, *supra* note 7, at 664.

14. *See generally* Lisa Steele, *Trying Identification Cases*, L. OFF. OF TIMOTHY HESSINGER, (Nov. 2004), https://www.hessingerlaw.com/criminal-defense/resources/trying-identification-cases/ [https://perma.cc/YD4S-LDY2] (explaining how eyewitness identification alone is a weak argument, especially when the witness and the defendant are strangers).

15. *Lineups and Understanding the Nature of Eyewitness Testimony*, H. MICHAEL STEINBERG, https://www.hmichaelsteinberg.com/lineups-and-understanding-the-nature-of-eyewitness-testimony.html [https://perma.cc/N8GB-YU8J] (last accessed Jan. 1, 2022) ("[A] lineup is essentially an experiment designed to test…whether the suspect matches the witness's memory of the perpetrator.").

16. *Id.* at 664–67.

17. John Bohannon, *How Reliable is Eyewitness Testimony? Scientists Weigh In*, SCIENCEINSIDER (Oct. 3, 2014), https://www.science.org/content/article/how-reliable-eyewitness-testimony-scientists-weigh [https://perma.cc/DD5P-SUXT] ("Jurors can't help but find an eyewitness's confidence compelling….").

18. *See* Andrew J. Costello et al., *Comparing Corporal Lineups to Photo Arrays*, 4 J. CRIM. JUST. & L. 40 (2020).

19. *See generally* Wells, *supra* note 7 (describing the process of a lineup, which implies the presence of the accused-or at least, suspects that may potentially become the accused).

conducted in his or her absence.[20]

Because eyewitness testimony is used to urge the jury that the individual identified is guilty of the crime, it is imperative to reduce suggestiveness in a lineup. Suggestiveness occurs when state agents *encourage* a witness to select a particular perpetrator.[21] Suggestiveness can be implicit or explicit. Implicit suggestiveness involves the state agent's gestures or tones.[22] Explicit suggestiveness involves the language used by the state agent that can encourage the witness to select one particular individual from the lineup.[23] Suggestiveness in either form is problematic because it takes away from the witness's ability to identify the suspect independently. The whole purpose of the lineup is to provide testimony that is reliable for the jury to be able to conclude that the state properly identified the one accused as the one who actually committed the crime. Suggestiveness also greatly diminishes reliability in the wake of generalized criticisms of eyewitness testimony with the rise of DNA evidence.[24] For example, DNA evidence has consistently been used to overturn false convictions based on eyewitness testimony.[25] In such cases, "mistaken eyewitness identification testimony was a factor in nearly seventy-five percent of post-conviction DNA exoneration cases."[26] Suggestiveness is one factor that allows for witnesses' "memories [to] be altered by external influences and [to] fade over time."[27]

Suggestive lineups have serious implications for accused individuals and can be decisive in juries' decisions on factual matters.[28] Suggestive lineups have the potential to be inadmissible in trial, if they are found to lead to irreparable mistaken

---

20. United States v. Ash, 413 U.S. 300, 320 (1973) (holding that photo arrays are not critical enough to require Sixth Amendment protections because they lack confrontation); *cf.* United States v. Wade, 388 U.S. 218 (1967) (explaining that the confrontation is what makes a lineup critical enough to require Sixth Amendment right to counsel).

21. Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 959 (1997) ("The Constitution requires the exclusion of unreliable eyewitness testimony only when improper governmental conduct—for example, an impermissibly suggestive police line-up—has produced it.").

22. *See* ALAMEDA CNTY. DIST. ATTY'S OFF., LINEUPS AND SHOWUPS, POINT OF VIEW 1, 4–6 (2011), https://le.alcoda.org/publications/point_of_view/files/F11_LINEUPS.pdf [https://perma.cc/2Z5M-6L2Q] (for information about suggestiveness generally).

23. *Id.*

24. *See* U.S. DEP'T OF JUST., NCJ178240, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, at iii (1999), https://www.ojp.gov/pdffiles1/nij/178240.pdf [https://perma.cc/EP3M-G43C] ("Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible.").

25. Wells, *supra* note 7, at 664.

26. POLICE EXEC. RSCH. F., NCJ242617, A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES 3 (2013), https://www.ojp.gov/pdffiles1/nij/grants/242617.pdf [https://perma.cc/ZX5P-66NF]

27. *Id.* at 2.

28. *See generally* Robert Holland, *How Courts Evaluate Eyewitness Testimony*, JARRETT MAILLET CRIMINAL DEFENSE (Oct. 24, 2018), https://www.mailletcriminallaw.com/how-courts-evaluate-eyewitness-testimony [https://perma.cc/8ZAG-E5GP] ("[E]yewitness testimony plays an important role in the determination of guilt.").

identity.[29] Suggestiveness poses a risk before, during, and after the lineup, and this hindrance creates doubt in the legal system. In all interactions, the implicit and explicit communications between state agents and witnesses can impact who a witness identifies and with which degree of certainty.[30] Therefore, it is in the public interest to reduce suggestiveness during eyewitness identifications in lineups.

II. LAW ADDRESSING SUGGESTIVENESS IN LINEUPS

Prior to resolution, it is first necessary to grasp the law behind suggestiveness. Much of the current legal framework in the suggestiveness analysis is based on Supreme Court rulings rather than statutes or legislative action.[31]

Suggestive lineups can lead to the lineup's suppression. Suppression of an identification is necessary under the due process clauses of both the Fifth and Fourteenth Amendments when the procedure is unnecessarily suggestive *and* when the procedure is conducive to irreparable mistaken identification.[32] Law enforcement act in a manner which is unnecessarily suggestive when they manipulate the identification procedure to influence the witness to identify the defendant as the perpetrator, *and* such manipulation to the procedure is not justified under all the surrounding circumstances.[33]

The Supreme Court has identified some procedures that are sure to be suggestive in a lineup —including when all the individuals in the lineup were known to the witness, the suspect doesn't look like any of the other individuals in the lineup, the suspect is required to wear the clothing the suspect allegedly wore, law enforcement tell the witness they caught the suspect and then the witness views the suspect alone, the suspect is viewed in jail, the suspect is identified to the witness before or after the identification procedure, or when lineup stand-ins are forced to try something on that only fits the suspect.[34] It is *not* suggestive for a state agent to request a suspect to speak during the lineup, or for the state agent to employ a procedure to promote or encourage such request.[35] In fact, the Supreme Court has barred the accused from making a valid claim of violation of his Fifth Amendment right against self-incrimination if asked to speak.[36] Speech is an identifying physical characteristic that is not

29. Neil v. Biggers, 409 U.S. 188, 198 (1972); *see also e.g.*, Fellers v. United States, 540 U.S. 519 (2004) (affirming that violations of Sixth Amendment rights automatically result in inadmissibility); Wong Sun v. United States, 371 U.S. 471 (1963) (illustrating the exclusionary rule on inadmissible evidence).

30. *Infra* Part III.

31. *Infra* Part IV.

32. *Biggers*, 409 U.S. at 197; Simmons v. United States, 390 U.S. 377, 384 (1968); Foster v. California, 394 U.S. 440, 442 (1969).

33. Stovall v. Denno, 388 U.S. 293, 302 (1967), *abrogated by* United States v. Johnson, 457 U.S. 537 (1982).

34. United States v. Wade, 388 U.S. 218, 231–235 (1967).

35. *Id.* at 223.

36. *Id.*

protected by the Fifth Amendment right against self-incrimination, like general physical appearance, DNA, fingerprints, and handwriting.[37]

Some suggestive identification procedures can be justified under the surrounding circumstances, thus making the second element of the suppression analysis essential. For example, in *Stovall v. Denno*, the Supreme Court held that law enforcement's actions were *not* suggestive when officers brought the suspect to the witness's hospital bed for identification purposes.[38] There, the witness was unlikely to survive.[39] According to the Court, bringing the suspect to the witness's hospital bed was justified due to the urgency of the situation when considering imminent death.[40]

Last, the suggestive identification procedure *must* be conducive to irreparable mistaken identification for the identification to be suppressed in court.[41] An unreliable identification gives rise to irreparable mistaken identification.[42] Some factors that impact the reliability of the identification procedure include: the witness's opportunity to view the suspect at the time of the crime, their attention, the accuracy of any prior descriptions they made, their level of certainty at the identification procedure, and the duration between the crime and identification procedure.[43] In determining whether the suggestive procedure led to irreparable mistaken identification, courts weigh these factors against the corrupting effect of the suggestive identification.[44]

III. Applicable Model Legislation

Because preventing suggestiveness serves the public interest, model legislation has largely been the answer to reducing suggestiveness in lineups.[45] Preventing suggestiveness is a central goal of the model legislation because it can cut the head off of the suppression analysis, if the Sixth Amendment right to counsel is not in question. All suppressed lineups are suggestive, but not all suggestive lineups are suppressed.[46] By removing suggestiveness, the lineup is likely to be admissible at trial, so long as there are no other constitutional issues. By curtailing suggestiveness, state agents can therefore reduce questions of whether the identification procedure is conducive to irreparable mistaken identification. The first model lineup procedure is

37. *Id.*; *see also* Schmerber v. California, 384 U.S. 757, 762 (1966).

38. *Wade*, 388 U.S. at 302.

39. *Id.* at 295.

40. *Id.* at 302.

41. Perry v. New Hampshire, 565 U.S. 228, 248 (2012).

42. Neil v. Biggers, 409 U.S. 188, 198 (1972).

43. *Id.* (known as "The Biggers Factors").

44. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

45. *See infra* Part III.

46. *See e.g.*, Gilbert v. California 388 U.S. 263 (1967) (If it can be shown that the in court ID is independent from the original, tainted ID, then the in court ID is admissible); *Brathwaite*, 409 U.S. at 113 (concluding that reliability precludes suggestiveness).

from 1966:

> 1. All accused persons should be brought before a magistrate for a judicial determination of probable cause prior to being placed in a lineup.
>
> 2. Once in a lineup, the accused should be requested to recite only inane words. (For example, the police may ask the accused to read from the sports page of a local newspaper.) No request should be made to speak the words allegedly said by the culprit at the time of the crime. No questioning should be done unless counsel is present or a valid waiver has been made.
>
> 3. The utmost effort should be made to have persons of similar characteristics in the lineup. Prior to the lineup the accused should not be identified as the person arrested for the crime. Both of these measures are designed to result in a reliable identification that would be as effective as possible at trial.
>
> 4. If possible, counsel should be present. A photograph of the lineup should be taken for submission to the jury as evidence of the reliability of the witnesses' identification.
>
> 5. If the accused is held after bail is set because of his indigency, no lineup should be held for other crimes unless sufficient evidence exists in the hands of police to constitute probable cause for arrest for the lineup-connected offense.[47]

There are two major issues with this model lineup procedure. First, it was developed prior to the Supreme Court's analysis in seminal cases regarding lineups and suggestiveness.[48] For instance, Rules Two and Four suggest, rather than constitutionally require, that counsel be present at lineup procedures. Second, the authors of the model procedure implicitly assume that the suspect in the lineup has been arrested for the crime, which is not always the case in lineups. Lineups can occur before or after arrest, and before or after indictment.

Thirty–three years later, the Technical Working Group for Eyewitness Evidence ("Working Group") developed a guide for law enforcement regarding eyewitness evidence in a 1999 guidebook ("NIJ Guidelines").[49] This group was comprised of

47. Thomas E. Byrne et al., *Constitutional Ramifications of the Police Lineup*, 12 VILL. L. REV. 135, 158–59 (1966).

48. *United States v. Wade*, 388 U.S. 218 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967), were decided in 1967, just one year after the model legislation was written.

49. U.S. DEP'T OF JUST., *supra* note 24, at v.

diverse attorneys, police officers, district attorneys, professors, and prosecutors "from both urban and rural jurisdictions."[50] Such diverse backgrounds within Working Group allowed for the incorporation of additional "research and practical perspectives on eyewitness identification and provides recommendations to promote the accuracy and reliability of eyewitness evidence."[51]

Broadly speaking, Working Group established procedures and policies to ensure "the outcome of the identification procedure accurately and completely reflects the identification results obtained from the witness."[52] Thus, in conducting any identification procedure, the state agent should:

> 1. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he/she is.
>
> 2. Ensure results are signed and dated by the witness.
>
> 3. Ensure that no materials indicating previous identification results as visible to the witness.
>
> 4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.[53]

Working Group identified different procedures for state agents for composing a lineup, acting prior to a live lineup, presenting a lineup generally, presenting a simultaneous lineup, and presenting sequential lineups.[54] Working Group established such individualized procedures because of system variables, which are elements of the identification procedure which "affect the accuracy of eyewitness identifications and can be controlled by criminal justice agencies."[55] Accordingly, these different procedures correspond to four broad categories: (1) instructions, (2) lineup content, (3) lineup presentation method, and (4) behavioral influence of the lineup administrator.[56]

According to Working Group, the principle for composing a lineup is that "fair composition of a lineup enables the witness to provide a more accurate identification or nonidentification."[57] The policy behind lineup composition is that "the

50. *Id.* at v–vi.
51. POLICE EXEC. RSCH. F., *supra* note 26, at 21.
52. U.S. DEP'T OF JUST., *supra* note 24, at 38.
53. *Id.*
54. *Id.*
55. POLICE EXEC. RSCH. F., *supra* note 26, at 4.
56. *Id.* at 4–5.
57. U.S. DEP'T OF JUST., *supra* note 24, at 29.

investigator shall compose the lineup in such a manner that the suspect does not unduly stand out."[58] Such principle and policy rationales in composing a lineup shows that there is clear need for some regulation and procedural rules with respect to the interaction between the state agents and the witness before the lineup actually occurs. Below is Working Group's procedure for composing a live lineup:

> 1. Include only one suspect in each identification procedure.
>
> 2. Select fillers who generally fit the witness' description of the perpetrator. When there is a limited/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.
>
> 3. Consider placing suspects in different positions in each lineup, both across cases and with multiple witnesses in the same case. Position the suspect randomly unless, where local practice allows, the suspect of the suspect's attorney requests a particular position.
>
> 4. Include a *minimum* of four fillers (non–suspects) per identification procedure.
>
> 5. When showing a new suspect, avoid reusing fillers in lineups shown to the same witness.
>
> 6. Consider that complete uniformity of features is not required. Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
>
> 7. Create a consistent appearance between the suspect and 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.[59]

The Working Group broadly described the composition procedure as follows: "The above procedure will result in a photo or live lineup in which the suspect does not unduly stand out. An identification obtained through a lineup composed in this manner may have stronger evidentiary value than one obtained without these

58. *Id.*

59. *Id.* at 29; *see also* POLICE EXEC. RSCH. F., *supra* note 26, at 57 (discussing information that appears to be similar to the information written above).

procedures."[60] Yet this regulation is significantly limited. Nowhere does The Working Group consider the interaction between the state agent and witness specifically in composing the lineup—except for the obvious prohibition of multiple witnesses identifying a perpetrator at the same time.[61] The regulation is limited to the state agent's interactions with potential suspects and in ordering neutral lineup stand-ins.[62] The only pre-lineup regulation thus falls short of regulating all suggestive content.

After composition, Working Group "recommends a number of procedures to help ensure reliability [during a lineup], such as instructing the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties."[63] Working Group also recommends "instructing the lineup administrator to avoid reporting to the witness any information regarding the individual he or she may select prior to obtaining a statement from the witness about his or her level of certainty about the identification."[64] Such statements combat explicit suggestiveness, but any mention of implicit suggestiveness is noticeably absent in the principle[65] and policy[66] guidelines for instructing witnesses prior to lineups. Both the principle and policy statements as well as the procedures focus on what the state agent tells the witness rather than how the state agent acts.[67] See below for the formal procedure:

> 1. Instruct the witness that he/she will be asked to view a group of individuals.
>
> 2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
>
> 3. Instruct the witness that individuals present in the lineup may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
>
> 4. Instruct the witness that the person who committed the crime may or may not be present in the group of individuals.

---

60. U.S. DEP'T OF JUST., *supra* note 24, at 31.

61. *Id.*

62. *Id.*

63. POLICE EXEC. RSCH. F., *supra* note 26, at 9.

64. *Id.*

65. U.S. DEP'T OF JUST., *supra* note 24, at 31 ("Principle: Instructions given to the witness prior to viewing a lineup can facilitate an identification or nonidentification based on his/her own memory.").

66. *Id.* ("Policy: Prior to presenting a lineup, the investigator shall provide instructions to the witness to ensure the witness understands that the purpose of the identification procedure is to exculpate the innocent as well as to identify the actual perpetrator.").

67. *Id.*

> 5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
>
> 6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.[68]

Without discussing risks of implicit suggestiveness from state agents, Working Group notes in its summary of live lineup procedures that the "instructions provided to the witness prior to presentation of a lineup will likely improve the accuracy and reliability of any identification obtained from the witness and can facilitate the elimination of innocent parties from the investigation."[69]

Lineups can be either simultaneous or sequential.[70] A simultaneous lineup occurs when the accused and stand-ins are all present, and the witness thus identifies the accused with all stand-ins present.[71] A sequential lineup occurs when the state agent presents the witness with the suspect and stand-ins one-by-one.[72]

For a simultaneous lineup, Working Group states that "[t]he identification procedure should be conducted in a manner that promotes the reliability, fairness, and objectivity of the witness' identification."[73] This is the first time within the entirety of Working Group's procedures that the authors mention objectivity, rather than subjectivity, which is the essence of suggestiveness.[74] See below for Working Group's procedure for a simultaneous lineup:

> 1. Provide viewing instructions to the witness . . . .
>
> 2. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in lineup.
>
> 3. Ensure that any identification actions (e.g., speaking, moving) are performed by all members of the lineup.
>
> 4. Avoid saying anything to the witness that may influence the witness' selection.

---

68. U.S. DEP'T OF JUST., *supra* note 24, at 32.

69. *Id.* at 33.

70. Gary L. Wells et al., *A Test of the Simultaneous vs. Sequential Lineup Method*, AM. JUDICATURE SOC'Y (2011), https://mn.gov/law-library-stat/archive/urlarchive/a100499.pdf [https://perma.cc/4GQL-8VTL].

71. *Id.*

72. *Id.*

73. U.S. DEP'T OF JUST., *supra* note 24, at 3–4.

74. *Id.*

5. If an identification is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty.

6. Record any identification results and witness' statement of certainty . . . .

7. Document the lineup in writing, including

a. Identification information of lineup participants.

b. Names of all persons present at the lineup.

c. Date and time the identification procedure was conducted.

11. Document the lineup by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly.

12. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.[75]

In a sequential lineup, the procedure differs slightly:

1. Provide viewing instructions to the witness . . . .

2. Provide the following additional viewing instructions to the witness:

a. Individuals will be viewed one at a time.

b. The individuals will be presented in random order.

c. Take as much time as needed in making a decision about each individual before moving to the next one.

d. If the person who committed the crime is present, identify him/her.

e. All individuals will be presented, even if an identification is made; or the procedure will be stopped at the point of an identification

75. *Id.* at 35–36.

(consistent with jurisdictional/departmental procedures).

3. Begin with all lineup participants out of the view of the witness.

4. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.

5. Present each individual to the witness separately, in a previously determined order, removing those previously shown.

6. Ensure that any identification actions (e.g. speaking, moving) are performed by all members of the lineup.

7. Avoid saying anything to the witness that may influence the witness' selection.

8. If an identification is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty.

9. Record any identification results and witness' statement of certainty . . . .

10. Document the lineup procedures and content in writing, including;

a. Identification information of lineup participants.

b. Names of all persons present at the lineup.

c. Date and time the identification procedure was conducted.

11. Document the lineup by photo or video. The documentation should be of a quality that represents the lineup clearly and fairly. Photo documentation can be of either the group or each individual.

12. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.[76]

For both simultaneous and sequential lineups, Working Group explicitly

76. U.S. DEP'T OF JUST., *supra* note 24, at 36–37 (emphasis in original).

recommends that state agents avoid "saying anything to the witness that may influence the witness's selection."[77] Clearly this recommendation aims as combatting the suggestive effect of the state agent's language during the lineup—explicit suggestiveness. But language is not the only way a state agent may act suggestively. Behavior, tone, physical movements, etc. can all carry an implicit suggestive effect.[78] Further, absent are any recommendations for state agents interactions with witnesses before or after the lineup beyond "instructing the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media."[79] Such recommendations is therefore aimed at preserving the admissibility of the lineup, rather than directly combatting suggestive effect—even though combatting suggestiveness is the ultimate way to preserve admissibility.

In order to ensure that lineup procedures were implemented, recognized, and followed, the Commission on Accreditation for Law Enforcement Agencies ("CALEA") "adopted accreditation standards that require agencies to have in place formal procedures for lineups and show-ups in order to establish reliable identification testimony by witnesses."[80] However, such requirement for accreditation was not implemented until 2009.[81] Included in the required procedures for accreditation are written policies "to address issues such as the composition of lineups, instructions on the viewing of the lineup, and the prohibition of feedback by the administer of the lineup."[82]

Following such requirement, the International Association of Chiefs released its own "model policy for eyewitness identifications to establish guidelines for . . . lineups" in 2010.[83] Similar to "the 1999 NIJ Guidelines and 2009 CALEA Standards, this model policy addresses issues such as providing instructions to witnesses, conducting the lineup, composition of the lineup, and recording witness responses."[84]

IV. THE EFFECTIVENESS OF MODEL LEGISLATION

The Working Group deserves credit for its efforts.[85] Bringing diverse parties together to evaluate and recommend procedures—and achieving some

77. *Id.*

78. David Matsumoto et al., *Reading People: Behavioral Anomalies and Investigative Interviewing*, FBI L. ENF'T BULL. (Mar. 5, 2014), https://leb.fbi.gov/articles/featured-articles/reading-people-behavioral-anomalies-and-investigative-interviewing [https://perma.cc/97BN-JYC9].

79. U.S. DEP'T OF JUST., *supra* note 24, at 36-37.

80. POLICE EXEC. RSCH. F., *supra* note 26, at 22.

81. *Id.*

82. *Id.*

83. *Id.* at 23.

84. *Id.*

85. *See infra* Part III.

compromise—is a feat in and of itself. Although Working Group theoretically achieved high ideals, the effectiveness of their model legislation is questionable beyond the concerns discussed above. These concerns lead to the conclusion that there are insurmountable flaws to Working Group's model legislation, and to model legislation in general, in resolving the issue of suggestiveness in lineups.

First, the effectiveness of Working Group's model legislation faces federalism concerns which were ultimately detrimental to its success. Reviewing such model legislation for possible constitutional challenges in relation to suggestiveness is "necessary to protect the rights of the individual and at the same time preserve the lineup as an effective tool for law enforcement."[86] State and local governments, rather than the federal government, have largely created, passed, and implemented regulation of state actors' procedures during lineups.[87] This is because the federal government does not have the constitutional authority to pass and implement an overarching procedure regulating the witness and state actor communications in the lineup context.

Instead, states hold the authority to regulate police procedures broadly through their police powers. State police powers are understood as "the fundamental ability of a government to enact laws to coerce its citizenry for the public good, although the term eludes an exact definition."[88] Police powers are broader than one may think, as "the term does not directly relate to the common connotation of police as officers charged with maintaining public order, but rather to broad governmental regulatory power."[89] In recognizing the broad construction of police power, the Supreme Court has noted that "[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."[90]

The states' power to regulate police lineup procedures stems from the Tenth Amendment.[91] Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[92] Accordingly, general regulatory power is left to the states unless the federal government has constitutional authority to regulate on the matter.[93] Because the Constitution does not grant such authority to the federal government, the authority should rest with the states.

---

86. Byrne, *supra* note 47, at 135.

87. *See supra* Part II.

88. *Police Powers*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/police_powers [https://perma.cc/C7GT-6WPB] (last accessed Jan. 1, 2022); *see also Police power*, BLACK'S LAW DICTIONARY (11th ed. 2019).

89. LEGAL INFO. INST., *supra* note 88.

90. Berman v. Parker, 348 U.S. 26, 32 (1954).

91. *See* U.S. CONST. amend. X.

92. *Id.*

93. *See* LEGAL INFO. INST., *supra* note 88.

However, states do not have unfettered authority to regulate policing procedures, whether directly related to a lineup or beyond. There are thus three layers of complexity that diminish the possibility of uniform police procedure. First, because the federal government has no authority for regulation, there are no national rules. The federal government recognizes state and local authority in establishing their own police procedures by leaving the passage of policies to such state and local governments. There is a lack of a federal floor with respect to lineup procedures through federal legislation. As of 2013, there were "no national standards for eyewitness identification procedures in the United States."[94] Only "[a] handful of states have made eyewitness reforms through statewide requirements imposed by the State Attorney General or through state legislation."[95] Thus, what resulted is a fragmented application of the model procedures.[96] Fragmentation was practically inevitable—as without a national standard the "18,000 autonomous law enforcement agencies in the United States"[97] are permitted to devise their own standards.

Second, a state's regulatory authority is limited by the state's own constitution.[98] The federal Constitution and Bill of Rights serve as a floor for the basic rights for all United States citizens. However, state constitutions can confer additional rights upon their citizens. Thus, when determining whether a policy or procedure impacts the rights of its citizens, law enforcement may have to answer to additional rights beyond those in the federal Constitution or Bill of Rights. For instance, "Judge Jeffrey S. Sutton argues that American constitutional law is richest and most protective of individual rights when state supreme courts reject lockstepping and assert independence in interpreting their constitutions."[99] In addition, "state constitutions provide a greater chance to vindicate rights because state supreme courts, the decisions of which affect only one state, often feel less constrained than does the U.S. Supreme Court and have greater flexibility to tailor their interpretations to 'local conditions and traditions.'"[100] Thus, "individual rights may flourish most when the U.S. Supreme Court shows restraint and the state supreme courts take a more active role."[101] When drafting, passing, and implementing procedures, the differences between the states' conferral of different rights upon their citizens introduces complexity and leads to laws that are not uniform.

---

94. POLICE EXEC. RSCH. F., *supra* note 26, at 20.

95. *Id.* at 23.

96. *See id.* at 12.

97. *Id.*

98. LEGAL INFO. INST., *supra* note 88.

99. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018), *reprinted in* 132 HARV. L. REV. ONLINE 811 (Dec. 10, 2018), https://harvardlawreview.org/2018/12/51-imperfect-solutions-states-and-the-making-of-american-constitutional-law/ [https://perma.cc/M2WU-JHGK].

100. *Id.*

101. *Id.*

Third, different states' geographic and economic circumstances also impact the states' choices in using their police powers. For instance, rural versus urban communities within different states have different needs and different economic resources that preclude the passage and implementation of certain procedures. The differences between the current legislation varies as "[t]he specificity of these state-wide mandates ranges from requiring agencies to have a written policy in place (but leaving the content of the policy to the individual agencies to decide) to providing detailed guidelines and requirements for the procedures outlined in law enforcement agency policies."[102]

For example, in North Carolina, non-mandatory recommendations "include . . . blind administration, and specific recommendations regarding witness instructions and recording witness responses."[103] In 2007, the North Carolina state legislature passed the Eyewitness Identification Reform Act, which "plac[ed] very specific requirements on the administration of lineups," including "an 'independent administrator' or an alternative method that ensures neutrality" and presentation of the recommended instructions from the 1999 NIJ guide to the witness.[104] Wisconsin's model policy includes the recommendation to "[i]nform eyewitnesses that the real culprit may or may not be present and that the administrator does not know which person is the suspect."[105] A Floridan "state innocence commission established standards and recommendations for the use of live" lineups within the State of Florida.[106] The commission outlines standards which include creating and filing a written policy with the state that addresses the following procedures: "(1) Creation, composition, and utilization of the lineup; (2) Standardized instructions; (3) Steps to ensure that lineup administrators avoid influencing witnesses; (4) Documentation of the procedure and outcome of the lineup; (5) The methods of presenting the lineup; and (6) Training."[107]

Further, statistical evidence shows that states have implemented Working Group's model legislation in a rather haphazard pattern—picking and choosing instructions and procedures. Without a full and complete implementation of Working Group's model legislation, the goals, aims, and principles have not been fully realized. The National Institute of Justice supported the creation of the Police Executive Research Forum ("PERF") to determine the impact of Working Group's model policy and subsequent accreditation requirements in 2013.[108] PERF "was designed to obtain the first nationwide assessment of the state of the field regarding eyewitness

102. POLICE EXEC. RSCH. F., *supra* note 26, at 23.
103. *Id.* at 25.
104. *Id.*
105. *Id.*
106. *Id.* at 26.
107. *Id.* at 26.
108. *See id.* at vii.

identification procedures used by law enforcement agencies."[109] The purpose of their research was "to describe the state of the field with respect to eyewitness identification procedures and to assess agency progress and change since publication of the NIJ Guide."[110]

Regardless of The Working Group's recommendations, "more than 40 percent of agencies report having made no changes to their lineup policies and procedures."[111] Directly in response to The Working Group's model legislation, "[a]pproximately 56 percent of all responding agencies reported one or more changes in policy or procedure since 1999."[112] Of the 139 agencies that responded to PERF research, 39.3 percent of agencies reported a change to their live lineup instructions.[113] However, knowing exactly what procedures were changed is impossible because "[m]ost surveyed agencies do not have written policies for eyewitness identification procedures."[114] In fact, "84 percent report no written policy for live lineups" whatsoever.[115] The issue of lack of written policy and policy change especially threatens suggestiveness in smaller communities. PERF noted that "[g]enerally, as the agency size decreased, the likelihood of the agency having a written policy decreased."[116] In larger communities, with correspondingly larger agencies of 500 or more officers, "are consistently more likely to report having a written policy for each of the procedures."[117]

Less than half of agencies provide training on live lineup procedures.[118] Again, larger agencies are more likely than smaller agencies, which have twenty-five or less officers, to provide such training.[119] Who teaches the training for lineups varies – "half provide their own training, and over a quarter receive training from prosecutors."[120] Of the agencies that even offer training, "[f]ewer than 10 percent of all responding agencies reported having training for how to compose live lineups."[121] This

---

109. *Id.*

110. *Id.* at 12.

111. *Id.*

112. *Id.* at xi.

113. *Id.* at xii.

114. *Id.* at vii.

115. *Id.* at viii.

116. *Id.* at 46.

117. *Id.* at viii.

118. *Id.* at viii (only "44 percent of agencies that conduct live lineups provide training on live lineup administration procedures.").

119. *Id.*

120. *Id.* at 55–56. More specifically:

> Agencies also reported that their personnel receive training from a state law enforcement agency (39.6%), a prosecutor's office (25.9%), and country law enforcement agency (23.1%), or a federal law enforcement agency (6.5%) … [while] 19.5 percent of respondents reported receiving training from another entity, with the most common responses being private companies or on-line courses.

Id.

121. *Id.* at 57.

means that in most agencies across the country, officers receive *no* training for how to compose lineups whatsoever.[122]

With respect to the substance of the training, "69 percent of agencies train lineup administrators to instruct witnesses that the perpetrator may or may not be present in the lineup…."[123] Further, "[o]f those 58 agencies that train personnel on live lineups, 42.8 percent of the agencies said the training includes guidance that 'fillers should generally fit the witness' description of the perpetrator,' and 40.2 percent said training includes guidance that 'the suspect should not stand out.'"[124] When responding to whether training addressed instructions that state agents must provide to witnesses, most "include the statement, 'the perpetrator may or may not be in the lineup' (47.1%)."[125] Forty-six percent of agencies report using standardized written instructions for lineups, while forty-three percent of agencies report using standardized verbal instructions for lineups.[126]

Of the agencies that do provide instructions, "over half of the agencies' training instructs administrators to 'avoid saying anything that may influence the witness's selection' (56.1%), and to 'advise the witness not to discuss the identification procedure or results with other witnesses'" (50.5%)."[127] However, no specifics are given.

PERF also found that implementing the following two procedures and policies did reduce suggestiveness and misidentifications. The first procedure is the instruction that the perpetrator may or may not be present. Such instruction has "reduced mistaken identifications in culprit-absent lineups, without compromising the ability of witnesses to select the culprit when he or she was present."[128] When compared to an explicitly suggestive instruction, the "unbiased instruction that the culprit 'might or might not be present' … reduced mistaken identification rates in culprit-absent lineups by 41.6%."[129] Already "87.6 percent of agencies that use live lineups provide instructions that 'the perpetrator may or may not be present' to the witnesses or victims prior to viewing the lineup."[130]

Evidence also supports the use of blind administration. Blind administration occurs when the state agent conducting the lineup is unaware of the suspect's

122. *See id.*

123. *Id.* at viii–ix.

124. *Id.* at 57.

125. *Id.*

126. *Id.* at ix.

127. *Id.* at 57.

128. *Id.* at 5–6.

129. *Id.* at 19–20. Such statistics have recently been reaffirmed, as "[t]he 'might or might not instruction' significantly reduced identification errors when the culprit was missing from the lineup, from 70% to 43%, and a designated innocent suspect was picked by half as many witnesses (19% vs. 40%) after hearing a 'might or might not' instruction." *Id.*

130. *Id.* at ix.

identity.[131] Blind policies are one such practice that can be extended to all communications between the state agent and witness to reduce suggestiveness. By mandating that the state agent contacting the witness and running the lineup is unfamiliar with the case, suggestiveness is limited because a state agent unfamiliar with the case is less likely to make a personal comment or be personally invested in the outcome of the lineup. However, PERF found that among the "21.4 percent of the responding agencies use live lineups,"[132] "the most commonly reported procedure for administration of a live lineup is the simultaneous presentation by a non-blind administrator. This was consistently the most common, regardless of agency size."[133] Thus, like all of the recommended practices and procedures, blind administration procedures have not been implemented in any sort of regular fashion. In fact, "the most commonly reported procedure currently in use for administration of … live lineups (92.1%) is a non-blind administrator – that is, the administrator knows which of the photographs or individuals is the suspect. This is consistently the most common method used by more than half of agencies regardless of agency size."[134]

Further, blind administration is noticeably absent from Working Group's recommendations. Working Group specifically excluded a blind administration recommendation due to the inability of some jurisdictions to actually enact it, while in the same vein acknowledging that "investigators' unintentional cues (e.g., body language, tone of voice) may negatively impact the reliability of eyewitness evidence."[135] The push for states to implement blind administration comes from psychologists, who suggest that "influences could be avoided if 'blind' identification procedures were employed."[136] Regardless of such urging, Working Group noted that "an enhanced awareness on the part of investigators of the subtle impact they may have on witnesses will result in more professional identification procedures."[137] Research on blind administrations and its effectiveness has continued.[138]

V. THE RIGHT TO COUNSEL: ITS USE IN MITIGATING SUGGESTIVENESS DURING LINEUPS

Because of the haphazard implementation of Working Group's

131. *Id.* at iv.

132. *Id.* at 63.

133. *Id.*

134. *Id.* at x.

135. U.S. DEP'T OF JUST., *supra* note 24, at 8.

136. *Id.*

137. *Id.* at 9.

138. POLICE EXEC. RSCH. F., *supra* note 26, at iii–iv ("As law enforcement agencies have focused on increasing the reliability of witness identifications resulting from lineups of individuals or photographs, researchers have continued to examine blind and non-blind lineup administration, sequential and simultaneous lineup presentation, and other issues . . . related to lineup composition and presentation.").

recommendations and the federalism concerns to national legislation regulating lineups, the solution to reducing suggestiveness must come from another area of the law. The Sixth Amendment right to counsel is the proper solution due to its national applicability and preciously recognized use. Prior to applying the Sixth Amendment to interactions between state agents and witnesses before, during, and after the lineup, it is necessary to explain the law surrounding the Sixth Amendment right to counsel.

Any individual has the right to *retained* counsel at any point of the criminal proceeding.[139] This right comes directly from the text of the Sixth Amendment, specifically from the text that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[140] The text of the Sixth Amendment implies that an individual has a right to counsel of his choice, not necessarily a right to government-appointed counsel, at any point of the proceeding.[141]

The Sixth Amendment right to counsel attaches—meaning the accused has the Sixth Amendment right to counsel—when a criminal prosecution begins.[142] Criminal prosecutions begin when an adversarial proceeding has been initiated against the accused.[143] Courts have generally recognized the following as clear signs that the adversarial proceeding has begun (and thus the Sixth Amendment right to counsel has attached): formal charge, preliminary hearing, indictment, information, and arraignment.[144] In order to step away from categorical definitions of an adversarial proceeding, the Supreme Court has since held that an adversarial proceeding occurs in interactions between the accused and government officers where such officers attempt to elicit incriminating information, either surreptitiously or directly, from the accused.[145]

Adversary proceedings do *not* include bail hearings nor the issuance of an arrest warrant.[146] Specifically, bail hearings are not adversary proceedings because they are limited in scope to whether the charged individual will remain detained or free prior to and during trial.[147] Further, the determinations at a bail hearing are not related to

139. U.S. CONST. amend VI.

140. *Id.*

141. *Id. But see infra*, Part V; FED. R. CRIM. P. 44(a) (guaranteeing counsel to an indigent defendant "at every stage of the proceeding from initial appearance through appeal"); Powell v. Alabama, 287 U.S. 45, 72–73 (1932) (holding that all states have the duty to appoint counsel for indigent citizens in order to maintain constitutional rights.); *see also* Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal . . . ."); Gideon v. Wainwright 372 U.S. 335 (1963).

142. United States v. Gouveia, 467 U.S. 180 (1984); Maine v. Moulton 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387 (1980).

143. *Powell*, 287 U.S. at 53; Rothgery v. Gillespie County, 554 U.S. 191 (2008).

144. *Gouveia*, 467 U.S. at 185.

145. Brewer v. Williams, 430 U.S. 387, 405 (1977).

146. Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (holding that bail hearings can be adversarial and remanded the case to make sure it was not harmless error).

147. *See id.* at 9–10.

the charged defendant's ability to defend himself or herself.[148] Thus, there is no need for "assistance of counsel."[149] Likewise, the issuance of an arrest warrant is not related to the defendant's ability to defend himself or herself because the defendant is not present.[150]

Once attached, the Sixth Amendment right to counsel is offense specific.[151] However, the attached Sixth Amendment right to counsel may apply to offenses that, even if not formally charged, are considered to be the same offense.[152] The Supreme Court outlined a test for determining offenses that are considered to be the same, which focuses on the elements of the offense.[153]

After attachment, the accused has the right to counsel both at trial and at *every* critical stage of the pre-trial process.[154] Critical stages involve pre-trial procedures, the outcomes of which impact the accused's substantive rights.[155] If the accused is required to participate in critical stages without counsel present, reviewing courts presume that the lack of present counsel will impact the defense on the merits of the case.[156] Thus, the Supreme Court requires counsel to be present at all critical stages.[157] If counsel is not present at critical stages, any resulting evidence will be excluded from trial.[158]

Critical stages of the pre-trial interactions between the accused and state agents include: some arraignments and preliminary hearings,[159] post-indictment lineups and other corporeal identification procedures,[160] interrogations, post-attachment police questioning,[161] post-attachment plea negotiations,[162] pre-trial psych examinations[163],

148. *Rothgery*, 554 U.S. at 203 (explaining "[N]ot only the Federal Government . . . but 43 states take the first step appointing counsel before, at, or just after the initial appearance" to show that counsel is typically statutorily required at bail hearings).

149. *Id.* at 213 (holding that defendant's bail hearing was a critical stage and his lack of counsel was therefore a violation of his Sixth Amendment right to counsel).

150. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

151. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991); Texas v. Cobb, 532 U.S. 162, 164 (2001).

152. *See* Blockburger v. United States, 284 U.S. 299, 303-05 (1932).

153. *See id.* at 304.

154. *See* Coleman v. Alabama, 399 U.S. 1, 10 (1970).

155. *See id.*

156. *See id.* at 11.

157. *See* Gerstein v. Pugh, 420 U.S. 103, 122 (1975).

158. *See Coleman*, 399 U.S. at 11.

159. *See id.*

160. *See* United States v. Wade, 388 U.S. 218, 242 (1967).

161. *See* Brewer v. Williams, 430 U.S. 387, 405 (1977); *see also* Massiah v. United States, 377 U.S. 201, 206 (1964).

162. *See* Lafler v. Cooper, 566 U.S. 156, 166 (2012).

163. *See* Estelle v. Smith, 451 U.S. 454 (1981).

and trial. Probable cause hearings[164] and pretrial photos identification procedures[165] are not considered critical stages. In addition, all evidence derived from such deliberately elicited incriminating statements made without counsel present run the risk of being excluded from evidence.[166]

A post-indictment lineup is a critical stage of the pre-trial proceedings, and thus all defendants have a right to counsel during the post-indictment lineup.[167] Pre-indictment lineups and showups occur before adversarial criminal proceedings have begun against the accused.[168] Therefore, an accused individual has no Sixth Amendment right to counsel at pre-indictment lineups or showups.[169] There are two reasons why post-indictment lineups are critical stages — first, due to the risk of error, and second, due to their nature as corporeal proceedings.[170] Scholars have noted that "[c]ounsel's presence at a lineup is constitutionally necessary because the lineup stage is filled with numerous possibilities for errors, both inadvertent and intentional, which cannot adequately be discovered and remedied at trial."[171]

Suspects thus have a right to counsel in some lineups due to their status as corporeal proceedings. Corporeal proceedings occur when the accused is present.[172] Lineups are not incorporeal proceedings.[173] Incorporeal proceedings for identifications include photo and surveillance video identification.[174] For incorporeal proceedings, the accused does not have a right to counsel.[175] The accused does not have a right to counsel at a photographic identification because the accused is not present at the proceeding, thus there is no need for legal advice.[176] Second, the defense is provided with the photos of the proceeding, which defense counsel can re-create at trial if there are issues with the identification procedure.[177]

---

164. Gerstein v. Pugh, 420 U.S. 103, 122–23 (1975).

165. United States v. Ash, 413 U.S. 300, 314 (1973).

166. *See Brewer*, 430 U.S. at 405.

167. *See Lineups and Other Identification Situations*, JUSTIA, https://law.justia.com/constitution/us/amendment-06/19-lineups-and-other-identification-situations.html [https://perma.cc/4ZX9-6DNX].

168. *Id.*

169. *Ash*, 413 U.S. at 325; Kirby v. Illinois, 406 U.S. 682 (1972).

170. United States v. Wade, 388 U.S. 218, 236–37 (1967).

171. JUSTIA, *supra* note 168.

172. Andrew J. Costello et al., *Comparing Corporeal Lineups to Photo Arrays*, 4 J. CRIM. JUST. & L. 40, 41 (2020).

173. *Id.*

174. *Id.* at 44.

175. United States v. Ash, 413 U.S. 300 (1973).

176. *Id.* at 316.

177. *Id.* at 320.

VI. Extending the Right to Counsel to State Agent and Witness Interactions Before and After Lineups

In order to minimize suggestiveness in the communications before, during, and after the lineup, defense counsel should be included in interactions between state agents and witnesses. The Sixth Amendment right to counsel is one easily understood rule – supported by clear constitutional precedent – rather than a slew of policies and procedures. Unlike The Working Group's model legislation, the right to counsel is generally and vastly applicable. The series of caselaw as described above is established by the Supreme Court, rather than a state or appellate court. Supreme Court caselaw is binding across the states and functions as a national standard. In addition, the Supreme Court has previously extended the right to counsel to the duration of lineups. The Supreme Court first recognized the right to counsel in state prosecutions in 1963 with its ruling in Powell v. Alabama.[178] There, the Court held that "the [S]ixth [A]mendment applied to the states through the due process clause of the [F]ourteenth [A]mendment. As a consequence of Gideon, the federal decisions relevant to the time at which a right to counsel accrues were also made applicable to the states."[179] Thus, the federal right to counsel as discussed applies to all states.[180]

The right to counsel is simple to implement because the role of the defense attorney is rather well-accepted as non-adversarial and non-participatory.[181] Rather, the presence of a defense attorney is to ensure that the state agent follows protocol.[182] When defense counsel is present at a lineup, his or her role is limited to observation to ensure fairness, even though there is no formal constitutional rule that defense counsel must act in such manner.[183] A lineup is not the type of proceeding to have a fruitful adversarial engagement because there is no arbiter presiding over the lineup.[184]

Defense counsels's presence at all lineups would not change the state's control over the proceeding because their presence is merely that of a passive observer. Such role as passive observer serves two distinct purposes. First, the defense counsel can observe the witness and prepare for cross examination. Second, the presence of defense counsel also has a protolithic effect – law enforcement behavior will likely improve when they know defense counsel is watching. Defense counsel can prevent

178. Powell v. Alabama, 287 U.S. 45, 72–73 (1963).

179. Byrne, *supra* note 47, at 144–45.

180. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

181. Larry. E. Rissler, *Role of Defense Counsel at Lineups*, 49 FBI L. Enf't Bull. 23 (1980).

182. *Id.* at 26–27.

183. *Id.*

184. United States v. Wade, 388 U.S. 218, 238 (1967) ("[C]ounsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.").

unnecessarily suggestive procedures simply through his or her presence – "[i]f the accused has counsel present at the lineup, counsel can take steps to make certain the lineup is conducted in a manner that is fundamentally fair to the accused."[185] Therefore, "[n]o concrete reason can be advanced for denying counsel permission to be present, and his presence will serve to attest to the fairness and integrity of the lineup as practiced in a particular jurisdiction."[186] The defense attorney is simply supervising.

Extending the right to counsel is also simple to implement because the means to do so are readily available. With the rise of Zoom and conference call technology, it is simple to include defense counsel in all communications or interactions before and after the lineup. Such inclusion would likely involve minimal edits to current state agent procedures because defense counsel would listen to the phone conversation between the state agents and witnesses through a simple conference call or enter and exit the location of the lineup at the same time as the witness while being guided by a state agent.

In addition, the Sixth Amendment right to counsel as applied to lineups already faces serious limits that preserve the central function of the right, regardless of its extension. The right to counsel during a lineup is limited in three ways: first by the critical stage analysis, second by its offense-specific nature, and third by the right to appointed counsel analysis.[187] Such limits prevent the Sixth Amendment right to counsel from becoming overbroad or unworkable.

First, and as stated previously, the right to counsel only applies post-attachment and during critical stages. Critical stages involve pre-trial procedures the outcomes of which impact the accused's substantive rights.[188] If the accused is required to participate in critical stages without counsel present, it is sure that the lack of counsel present will impact the defense on the merits of the case.[189] Critical stages include post-indictment lineups and other corporeal identification procedures.[190] Thus not every lineup is implicated by the right to counsel, which reduces overhead work by state agents and allows state agents to continue other investigative methods.

Second, the Sixth Amendment right to counsel is offense-specific.[191] The offense-specific limitation is effective for similar reasons as the post-indictment limitation. The offense-specific nature of the right to counsel ensures that police officers can continue their investigative work without having counsel present for every possible interaction—so long as those interactions are related to different crimes. In

185. Byrne, *supra* note 47, at 146.

186. *Id.*

187. *See supra* notes 111–138 and accompanying text.

188. Powell v. Alabama, 287 U.S. 45, 72–73 (1932).

189. Gerstein v. Pugh, 420 U.S. 103, 122 (1975).

190. United States v. Wade, 388 U.S. 218 (1967).

191. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).

addition, when state agents and witnesses interact with defense counsel present before and after the lineup, the conversation is likely to be more focused by its limit to one specific offense.[192] This further reduces suggestiveness—preventing the implication that the accused is the perpetrator of several crimes.

Third, until the right attaches, a suspect is not guaranteed appointed counsel for lineup procedures. The Supreme Court has outlined specific circumstances in which the Sixth Amendment right to appointed counsel applies. The right to appointed counsel does not come directly from the text of the Sixth Amendment.[193] Instead, the right to appointed counsel is a "logical corollary" stemming from the Sixth Amendment right to be heard and represented by counsel.[194] Courts were concerned about a defendant's ability to mount an adequate defense, especially considering the cost of not being able to do so is the defendant's liberty.[195] The inability to mount an adequate defense would ultimately lead to an unfair trial.[196] Thus, the Sixth Amendment right to counsel was recognized and incorporated to the states through the Fourteenth Amendment due process clause.[197] Only indigent criminal defendants have the right to appointed counsel under the Sixth Amendment.[198] An indigent criminal defendant is one who cannot hire his own attorney due to his financial situation.[199] Thus, criminal defendants who can afford to hire their own attorneys, do not have the Sixth Amendment right to appointed counsel. States establish who qualifies as an indigent criminal defendant, and federal courts typically follow the rules of the states within their jurisdiction.[200] In Gideon v. Wainwright, the Supreme Court first recognized the right to appointed counsel for indigent defendants in both state and federal jurisdictions.[201] The Supreme Court later qualified such right, holding that indigent defendants have the right to appointed counsel in all felony cases.[202] In misdemeanor and petty-offense cases, imprisonment must actually be imposed for an indigent defendant to have the right to appointed counsel.[203] Thus, even if the statute authorizes imprisonment as a penalty for a misdemeanor, an indigent defendant may not have

192. *Id.*

193. *Powell*, 287 U.S. at 87; CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 1399–1400 (Michael J. Garcia et al. eds., Centennial ed. 2017).

194. *Powell*, 287 U.S. at 71–72.

195. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

196. *Id.* at 341–42.

197. *Id.*

198. *Id.* at 340.

199. *Id.*

200. *See* INDIGENT DEFENSE FACT SHEET, OFF. OF JUST. PROGRAMS (2011), https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/factsheets/ojpfs_indigentdefense.html [https://perma.cc/VW7C-DHT7].

201. *Gideon*, 372 U.S. at 341–42.

202. *See* Nichols v. United States, 511 U.S. 738, 749 (1994).

203. Argersinger v. Hamlin, 407 U.S. 25, 39 (1972); Scott v. Illinois, 440 U.S. 367, 373 (1979)

the right to appointed counsel. Instead, the right to appointed counsel in misdemeanor and petty-offense cases hinges on whether the judge actually imposes imprisonment as a sentence.[204] This limitation prevents state agents from having to provide defense counsel for all accused individuals. Further, the right to appointed counsel is subject to the critical stage analysis. In conjunction with the other limits like the critical stage analysis, the appointed counsel requirement ensures that the requirement to appoint counsel is tailored to economic need.

In the past, the right to counsel was defined, interpreted, and expanded upon by the Supreme Court. Thus, to extend the right to counsel to state agent and witness interactions before and after a lineup, the Supreme Court holds the necessary authority to extend such right. If the right to counsel were extended by the Supreme Court to before and after a lineup, then the right to counsel would have to be recognized by all states. The only other authority would be through the Legislature in passing an amendment to the Constitution. Perhaps Congress could pass an amendment to extend the right to counsel to achieve the same outcome. However, there are clear hurdles to passage of such amendment in the wake of American politics and pressing concerns involving budgeting, promoting equity, and addressing the needs of the American workforce post-COVID-19. Thus, the Supreme Court is the most feasible entity to extend the Sixth Amendment right to counsel.

VII. COUNTERARGUMENTS: RESPONDING TO ORIGINALIST CONCERNS

The right to counsel has previously been extended significantly by the Supreme Court— beyond what the actual text of the Sixth Amendment has ever conferred. Some may argue that any further extension would be too broad. However, extending the Sixth Amendment in this manner only serves to recognize the realities of suggestiveness in lineups. Based on the evidence, circumscribing the Sixth Amendment right to counsel to just during lineups has not resolved the issue of suggestiveness—both explicit and implicit suggestiveness still occur.

The author's arguments expressed here are concededly from a legal realist approach. It is possible to argue that the Supreme Court should exhibit restraint—rather than extending the right to counsel to conversations before, during, and after the lineup. However, it is necessary to recognize that it is not likely that the framers of the Constitution could have predicted the structure of police taskforces in the United States today because

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. . . . [T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at

204. *Nichols*, 511 U.S. at 741; *Scott*, 440 U.S. at 373.

> pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality.[205]

Due to the challenges of the diverse police forces across the country, a national standard is necessary to actually reduce suggestiveness, especially in the wake of failed model legislation. Encouraging every state and local police entity to enact the same cohesive set of procedures would be far too costly – both with respect to time and lobbying expenses.[206] Thus, an achievable manner to establish a national standard requires federal constitutional law, specifically through extension of the Sixth Amendment right to counsel.

In addition, the right to counsel also faces significant limitations that would continue to be preserved if extended to state agent and witness interactions. These limitations are important to ensure that the right to counsel before, during, and after lineups for interactions between state agents and witnesses are properly tailored and not overly broad. Such limitations include defense counsel's observation-based role in lineups. Defense counsel, in interactions between state agents and witnesses before and after the lineup, would also act in the same observatory role. The same rationale that encourages an observatory role for the defense counsel during the lineup is present both before and after. There is no adjudicatory entity, so it is not a proper place to bring up issues. The simple presence of defense counsel would also encourage proper police conduct.

Clearly, the right to counsel cannot be extended by the Supreme Court to state agent and witness interactions before and after the lineup by a vast decree.[207] In order for the right to be extended, a test case would have to be tried, appealed, and brought before the Supreme Court. Next the Supreme Court would need to grant certiorari. Then, a majority of the Supreme Court would have to agree to extend the right to counsel. Such process involves significant time and expense – and a high degree of legal analysis.

Regardless of the counterarguments, it is important to note that the accused still has choice in this situation and a voice. Extending the right to counsel does not remove any sort of authority from the accused. The accused may choose to waive his right to counsel at a lineup.[208] The effective waiver of the Sixth Amendment right to counsel is the knowing relinquishment of a known right or privilege.[209] Although waiver of the right to counsel is not considered a wise choice, it is within the rights

---

205. United States v. Wade, 388 U.S. 218, 224 (1967).

206. *What Policing Costs*, VERA, https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities [https://perma.cc/HKX4-ZUJH] (last visited Jan. 1, 2022).

207. *The Court and Constitutional Interpretation*, THE SUPREME COURT, www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/R7HX-8LM6https].

208. *Wade*, 388 U.S. at 237.

209. *See generally* Johnson v. Zerbst, 304 U.S. 458 (1938).

of the defendant. Every citizen has the right to make such choice, and the Sixth Amendment right to counsel is certainly not compulsory.

The argument here is limited to interactions between witness and state agents during the lineup and does not interfere with state agents' preparation of their witnesses. The current right to counsel doctrine, with the critical stage analysis, supports such assertion. The Supreme Court has not recognized witness preparation to be a critical stage likely because it would be unnecessary to question, given that counsel preps their witnesses, and so it would follow that they would already be present. Some may argue that Congress may pass legislation impacting constitutional rights under the ever-elusive Fourteenth Amendment. However, if challenged, it is unclear what level of scrutiny that law would have to survive to comply with the Constitution. In light of pervasive political decisiveness, it is highly unlikely that any such law could be passed.

CONCLUSION

Extending the right to counsel is the proper solution to the issue of suggestiveness in lineups. Model legislation has failed to reduce suggestiveness.[210] Model legislation needed threats of loss of accreditation to actually be passed and enacted. Such passage was done in a haphazard manner leading to a lack of uniformity and pervasive explicit and implicit suggestiveness in lineups.

The right to counsel is already a national standard that the Supreme Court and every state recognizes. The right to counsel already applies to post-indictment lineups. Instead of creating new doctrine and new challenges for the legislature, especially with the concerns the modern legislatures face, the right to counsel provides an opportunity to look inward at existing doctrines. State agents already know the protocol for including defense counsel during lineups. Thus, including defense counsel in communications between state agents and witnesses before and after a lineup would thus be a low-cost shift.

210. *Eyewitness Identification Reform*, THE INNOCENCE PROJECT, https://innocenceproject.org/eyewitness-identification-reform/ [https://perma.cc/8NVM-5JCE] (noting that the problem is primarily suggestive procedures and there is already statutory reform for that in half of the country).