

LINEUPS AND SHOWUPS

*That man there is the one. He's the one that shot me.*¹

When a victim or witness positively identifies a suspect at a lineup or showup, that suspect is in deep trouble. In fact, the U.S. Supreme Court has noted that a positive ID often seals the suspect's fate.² Why is that?

For one thing, it is likely that a witness who identifies a suspect at a lineup or showup will also identify him at trial.³ For another, the prosecution is usually permitted to buttress the reliability of the in-court ID by presenting evidence that the witness, months or years earlier, also identified the defendant at a lineup or showup.

Simply put, the combination of the pretrial and in-court identifications generates such convincing force that, from the defendant's perspective, it's devastating.⁴

But what if the lineup or showup was flawed? What if it was somehow structured—intentionally or inadvertently—so as to prompt the witness to identify the suspect? If so, the result could be the conviction of an innocent person. As the Court of Appeal observed, “Heinous wrongs have been associated with incorrect identification based upon improper procedures.”⁵

To help prevent this from happening, due process requires that lineups and showups be conducted in a manner that provides ample assurance that the witness's ID was reliable.⁶ If the procedure passes the test, the pre-trial ID will be admissible in court. Otherwise, it will be suppressed.

There is another reason that officers must be conscientious in conducting lineups and showups. Assuming the ID was not so untrustworthy as to result in suppression, its impact on jurors will be greatly diminished if they think it was unfair. In the words of the United States Supreme Court:

The interest in obtaining convictions of the guilty also urges the police to adopt procedures that show the resulting identification to be accurate. Suggestive

¹ *Colman v. Alabama* (1970) 399 US 1, 5.

² *United States v. Wade* (1967) 388 US 218, 235 [“The trial which might determine the accused's fate may well not be that in the courtroom but that at the [lineup].”]. ALSO SEE *Evans v. Superior Court* (1974) 11 Cal.3d 617, 623 [“Evidence of identification in criminal proceedings is not only material but is also frequently determinative of an accused's guilt.”].

³ See *United States v. Wade* (1967) 388 US 218, 229 [“(I)t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on . . .”].

⁴ See *Gilbert v. California* (1967) 388 US 263, 273 [“(T)he witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury.”]; *People v. Cuevas* (1995) 12 Cal.4th 252, 261; *People v. Gould* (1960) 54 Cal.2d 621, 626 [“Evidence of an extrajudicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence of identity.”]; *People v. Leung* (1992) 5 Cal.App.4th 482, 500 [“Evidence of the witnesses' prearrest photographic identification of defendants could therefore be introduced at trial in addition to courtroom identifications of defendants.”].

⁵ *People v. Odom* (1980) 108 Cal.App.3d 100, 110.

⁶ See *Manson v. Brathwaite* (1977) 432 US 98, 113 [“The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment.”]; *Neil v. Biggers* (1972) 409 US 188, 198 [“It is the likelihood of misidentification which violates a defendant's right to due process”]. NOTE: A due process violation can occur only if the lineup or showup ID is used against the defendant in court. See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386, fn.8 [“The lineup process is not in and of itself a violation of constitutional rights; it is the use of evidence produced by an unfair lineup which constitutes the violation.”].

procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence.⁷

The question, then, is what can officers do to make sure their lineups and showups are reliable? There are several things, as we will discuss in this article. In addition, we will explain when a suspect has a right to have an attorney present at a lineup, the attorney's role, the procedure when a suspect won't cooperate, appearance orders, court-ordered lineups, "double blind" and sequential lineups. But first, the basics.

TYPES OF LINEUPS AND SHOWUPS

There are different kinds of lineups and showups. Although they all serve the purpose of identifying the perpetrator of a crime, they are used in different situations.

STANDARD PHYSICAL LINEUPS: The standard physical or "corporeal" lineup is the most structured of all the ID procedures. In most cases, it occurs at a police station, often in specially-designed lineup room with a stage on which the suspect and the fillers are displayed.⁸ Bright lights directed at the participants and near-darkness elsewhere in the room prevent the participants from seeing the witnesses (which gives the witnesses a much-needed sense of security).

Because standard physical lineups cannot be conducted without the presence of the suspect, they are usually used only when a suspect is in custody for the crime under investigation or some other crime. If the suspect has not been arrested, the usual procedure is to conduct a photo lineup.

Of all the pre-trial ID procedures, standard physical lineups are probably the most trustworthy because they test the witness's ability to identify the suspect in person from among other people who resemble him; i.e., the "fillers" or "foils." For this reason, a positive ID usually carries a lot of weight with both judges and jurors.

VIDEOTAPED PHYSICAL LINEUPS: A videotaped physical lineup is the same as a standard physical lineup except the witness is not present. Instead, the lineup is videotaped *as if* the witness was there, then the witness views the videotape later.

The main advantage of a videotaped lineup is that the suspect does not have a right to have counsel present when the lineup is taped or when the witness views the tape. So if an attorney is unavailable, this is an option. It is also useful when there are two or more witnesses to the crime who cannot attend the lineup at the same time. When this happens officers may videotape the lineup and permit the witnesses to view it when they can.

VOICE-ONLY LINEUPS: If the witness heard the perpetrator speak but did not see him, officers may conduct a voice-only lineup in which the witness listens to the voices of the suspect and the fillers. The results of a voice-only lineup are relevant in establishing the identity of the perpetrator because, as the California Supreme Court observed, "The speech patterns of individuals are distinctive physical characteristics that serve to

⁷ *Manson v. Brathwaite* (1977) 432 US 98, 112, fn.12. ALSO SEE *People v. Carter* (1975) 46 Cal.App.3d 260, 266 ["(T)he probative value of an identification depends on the circumstances under which it was made."]; *People v. Adams* (1982) 137 Cal.App.3d 346, 353 ["That Mrs. Taylor was able to pick out this defendant from the number of young men similarly dressed and with such similar facial appearances points to the accuracy and soundness of her memory."].

⁸ See *People v. Dampier* (1984) 159 Cal.App.3d 709, 712-3 [a lineup is "a relatively formalized procedure wherein a suspect, who is generally already in custody, is placed among a group of other persons whose general appearance resembles the suspect. The result is essentially a test of the reliability of the victim's identification."]; *People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049.

identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints.”⁹

Voice-only lineups can be live or taped. Like taped physical lineups, they are usually used to resolve scheduling problems of attorneys or witnesses.

PHOTO LINEUPS: In a photo lineup, the witness views several photographs—typically six or so—to determine if he can identify the perpetrator. In most cases, officers use photo lineups when it is impractical to conduct a physical lineup, usually because the suspect is not in custody.¹⁰ There is, however, no rule prohibiting photo lineups when the suspect is in custody.¹¹

There are two types of photo lineups.

“LOADED” PHOTO LINEUPS: If officers have a suspect in the case, the lineup will consist of a photo of the suspect (often a booking or DMV photo) and photos of fillers.¹²

“UNLOADED” PHOTO LINEUPS: If officers do not have a suspect, they may ask the witness to look at photos of people who are considered potential suspects. For example, if the crime was gang-related, they may ask the witness to view “gang books” in which officers keep photographs of known gang members. Or the witness might be shown “mug” books containing photos of people who have been arrested for committing the same or similar crime.¹³ Or, if the perpetrator was of school age, officers may ask the witnesses to look at yearbooks from schools in the area.¹⁴

SHOWUPS: Showups may be conducted live or by photograph. A live showup is a one-person “lineup” in which the witness is essentially asked, “Is *this* the perpetrator?”¹⁵ Live showups are used when officers have detained a suspect for a crime that recently occurred, and they need to quickly confirm or dispel their suspicion that the detainee was the perpetrator.¹⁶ A photo showup, on the other hand, is one in which officers show the witness a single photograph of the suspect.

⁹ *People v. Ellis* (1966) 65 Cal.2d 529, 534.

¹⁰ See *People v. Blair* (1979) 25 Cal.3d 640, 660.

¹¹ See *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052, fn.15; *People v. Rist* (1976) 16 Cal.3d 211, 217, fn.5; *People v. Whittaker* (1974) 41 Cal.App.3d 303, 309 [no requirement that “once [the defendant] was in custody, officers were limited to use of a corporeal lineup, and that the showing of photographs to witnesses was no longer permitted.”]; *People v. Adair* (1969) 2 Cal.App.3d 92, 95, fn.1; *People v. Suttle* (1979) 90 Cal.App.3d 573, 581 [“There is no requirement, constitutional or otherwise, that the *most* reliable technique be used. Here, since the photo identification was not suggestive, we will not go farther by holding that a corporeal lineup should have been used since appellant was in custody”]; *People v. Hawkins* (1970) 7 Cal.App.3d 117, 122; *U.S. v. Fowler* (1971) 439 F.2d 133, 134.

¹² See *Simmons v. United States* (1968) 390 US 377, 383-4; *People v. Hawkins* (1970) 7 Cal.App.3d 117, 122.

¹³ See *People v. Posten* (1980) 108 Cal.App.3d 633, 647 [officers used a “mug” book, thus “minimizing the possibility of suggestiveness.”].

¹⁴ See *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402. ALSO SEE *People v. Pervoe* (1984) 161 Cal.App.3d 342, 357 [looking through a scrapbook].

¹⁵ See *People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049 [“An in-the-field showup is generally an informal confrontation involving only the police, the victim and the suspect. One of its principal functions is a prompt determination of whether the correct person has been apprehended.”].

¹⁶ See *Stovall v. Denno* (1967) 388 US 293, 302; *People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049; *People v. Nash* (1982) 129 Cal.App.3d 513, 517; *People v. Dampier* (1984) 159 Cal.App.3d 709, 712-3; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072; *People v. Irvin* (1968) 264 Cal.App.2d 747, 759-60; *People v. Johnson* (1989) 210 Cal.App.3d 316, 323; *People v. Floyd* (1970) 1 Cal.3d 694, 714; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219.

Although showups are inherently suggestive, they are not *unduly* suggestive if there was an overriding need.¹⁷ As the Court of Appeal noted:

A single person showup is not necessarily unfair. Such a procedure should not be used, however, without a compelling reason because of the great danger of suggestion from a one-to-one viewing which requires only the assent of the witness.¹⁸

With live showups, there are usually two compelling needs: (1) to quickly determine whether the detainee was the perpetrator, and (2) to obtain an ID while the witness's memory is fresh.¹⁹ Thus, if either of these circumstances existed, a reliable showup identification will be admissible even if it would have been possible for officers to conduct a photo or physical lineup.²⁰

With photo showups, however, there is seldom an overriding need. This is because it is usually possible to conduct a photo lineup.¹⁸ Consequently, photo showups are used mainly to confirm an identification when ID will not be a contested issue.

MISIDENTIFICATION

The "Primary Evil"

Whenever the identity of the perpetrator is an issue in a case, the "primary evil to be avoided" is the identification of an innocent person.²¹ But how can the courts determine whether a lineup or showup resulted in misidentification?

¹⁷ See *People v. Sandoval* (1977) 70 Cal.App.3d 73, 85 ["A single person showup is not necessarily unfair. Such a procedure should not be used, however, without a compelling reason because of the great danger of suggestion from a one-to-one viewing which requires only the assent of the witness."]; *People v. Bauer* (1969) 1 Cal.3d 368, 374; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1461, fn.5 ["Even one-person showups are not inherently unfair."]; *People v. Johnson* (1989) 210 Cal.App.3d 316, 323 ["not necessarily unfair and must be assessed in the light of the totality of the circumstances."]; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071; *People v. Jardine* (1981) 116 Cal.App.3d 907, 915 ["This was a conventional field identification which courts recognize as not unduly suggestive or otherwise unfair."]; *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 412; *People v. Gomez* (1976) 63 Cal.App.3d 328, 336 ["A single person showup is not inherently unfair."]; *People v. Floyd* (1970) 1 Cal.3d 694, 714.

¹⁸ *People v. Sandoval* (1977) 70 Cal.App.3d 73, 85.

¹⁹ See *People v. Dampier* (1984) 159 Cal.App.3d 709, 712-3; *In re Richard W.* (1979) 91 Cal.App.3d 960, 970 ["(T)he law favors field identification measures when in close proximity in time and place to the scene of the crime"]; *People v. Bisogni* (1971) 4 Cal.3d 582, 587 ["It is settled that a single person showup is not necessarily unfair and must be assessed in the light of the totality of the circumstances."]; *People v. York* (1980) 108 Cal.App.3d 779, 787 ["(T)his element [suggestiveness] must be balanced against other factors supporting the need for and justification of the prompt confrontation."]; *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 412 ["On-the-scene showups for identification purposes aid in quickly exonerating the innocent and reliably discovering the guilty."]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 ["the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended."]; *People v. Anthony* (1970) 7 Cal.App.3d 751, 765; *People v. Odom* (1980) 108 Cal.App.3d 100, 110.

²⁰ See *People v. Nash* (1982) 129 Cal.App.3d 513, 518 ["(N)o cases has held that a single-person showup in the absence of compelling circumstances is per se unconstitutional."]; *People v. Knight* (1976) 57 Cal.App.3d 515, 517-8; *People v. Brown* (1969) 273 Cal.App.3d 109; *People v. Craig* (1978) 86 Cal.App.3d 905, 914.

²¹ *Neil v. Biggers* (1972) 409 US 188, 198. ALSO SEE *People v. Faulkner* (1972) 28 Cal.App.3d 384, 391 ["(T)he crucial issue is whether appellant has been singled out and his identification made a foregone conclusion under the circumstances."]. NOTE: If ID is not an issue, the

In most cases they do it by examining the procedure that the officers followed. If it appears the procedure was reliable, the witness's identification of the defendant will be admissible.²² Any suggestiveness or other flaws in the process go to the weight of the identification, not its admissibility.²³ If, however, the procedure was unreliable, the identification will be suppressed on grounds that the admission of unreliable evidence on such an important issue would violate the defendant's right to due process.

To determine whether a lineup or showup was fair, the courts employ a two-prong test.²⁴ First, they determine whether the procedure was unduly and unnecessarily suggestive.²⁵ If not, the test is over—the identification is considered sufficiently reliable

suggestiveness of the lineup is irrelevant. See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386, fn.8 [“We are unaware of any case permitting a defendant who admits involvement to claim prejudicial error based on a faulty lineup.”].

²² See *Colman v. Alabama* (1970) 399 US 1, 4; *Stovall v. Denno* (1967) 388 US 293, 302 [“(A) claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it”]; *Neil v. Biggers* (1972) 409 US 188, 199; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051; *People v. Blum* (1973) 35 Cal.App.3d 515, 520; *People v. Contreras* (1993) 17 Cal.App.4th 813, 819.

²³ See *Manson v. Brathwaite* (1977) 432 US 98, 116 [“We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.”]; *Foster v. California* (1969) 394 US 440, 442, fn.2 [“The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury . . . [although] in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.”]; *People v. Yeoman* (2003) 31 Cal.4th 93, 125; *People v. Arias* (1996) 13 Cal.4th 92, 170; *People v. Gordon* (1990) 50 Cal.3d 1223, 1243; *Simmons v. United States* (1968) 390 US 377, 384 [“The danger that use of the [photo lineup] technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error.”]; *People v. Perkins* (1986) 184 Cal.App.3d 583, 591 [“Here, Perkins's counsel was able to effectively develop and cross-examine witnesses about the facts of Maria's identification. No more was required.”]; *People v. DeVaney* (1973) 33 Cal.App.3d 630, 636 [“(I)t was for the jury to determine whether Pendleton's in-court identification was believable.”]; *People v. Lawrence* (1971) 4 Cal.3d 273, 278; *People v. Contreras* (1993) 17 Cal.App.4th 813, 823; *People v. Carpenter* (1997) 15 Cal.4th 312, 369; *People v. Flint* (1986) 180 Cal.App.3d 13, 18; *People v. Rodriguez* (1970) 10 Cal.App.3d 18, 31-2.

²⁴ See *Manson v. Brathwaite* (1977) 432 US 98, 109-14; *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *People v. Wash* (1993) 6 Cal.4th 215, 244; *People v. Johnson* (1992) 3 Cal.4th 1183, 1216; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222; *People v. Clark* (1992) 3 Cal.4th 41, 135; *People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. Gordon* (1990) 50 Cal.3d 1223, 1242 [“The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary; and if so, (2) whether the identification itself was nevertheless reliable under the totality of circumstances . . .”]; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 37-8 [“First the court must determine whether the pretrial identification procedure was unduly suggestive and unnecessary. [If it was], the court must next decide whether the in-court identification was nevertheless reliable under the totality of circumstances.”].

²⁵ NOTE: Burden of proof: The defense has the burden of proving the lineup or showup was unduly and unnecessarily suggestive. See *People v. Cunningham* (2001) 25 Cal.4th 926, 989 [“The defendant bears the burden of demonstrating the existence of an unreliable identification procedure.”]; *People v. Johnson* (1989) 210 Cal.App.3d 316, 322 [“Where the challenge is to the fairness of the pretrial identification the burden is upon the defendant to show that it was suggestive or unfair.”]; *People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. Hunt* (1977) 19 Cal.3d 888, 893; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051; *People v. Cooks* (1983) 141 Cal.App.3d 224, 305. Furthermore, it must prove such suggestiveness “as a demonstrable reality, not speculation.” See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222; *People v. Contreras* (1993) 17

to go to the jury.²⁶ In addition, the witness will be given an opportunity to identify the defendant at trial.²⁷

If, however, the procedure was unduly and unnecessarily suggestive, the courts go to the second prong. Specifically, they ask whether, despite such suggestiveness, it appears the ID was reliable based on the totality of the surrounding circumstances?²⁸ Or, is there a substantial likelihood of misidentification?²⁹ If it's the former, the ID will be admissible.³⁰ Otherwise it will be suppressed.

It is, therefore, necessary that officers and prosecutors know the following:

- (1) What makes a lineup or showup unduly and unnecessarily suggestive?
- (2) If the procedure was suggestive, how can it be proven that the ID was nevertheless reliable?

Unduly and unnecessarily suggestive?

Some degree of suggestiveness is inherent in the lineup and showup procedure. For example, showups are suggestive because the witness views only one person. And photo lineups are suggestive because they usually consist of a fairly small number of photos, six or so. Even physical lineups are suggestive because they are composed of a relatively small number of people, plus officers may be unable to find fillers who resemble the suspect.³¹ Although officers should strive for suggestion-free lineups and showups, as the

Cal.App.4th 813, 819; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1461; *People v. Perkins* (1986) 184 Cal.App.3d 583, 589. If it sustains its burden, the prosecution must prove—by clear and convincing evidence—that the witness's identification was reliable, despite the suggestiveness. See *People v. Cooks* (1983) 141 Cal.App.3d 224, 306; *People v. Rodriguez* (1977) 68 Cal.App.3d 874, 881; *People v. Ingle* (1986) 178 Cal.App.3d 505, 512, fn.4; *People v. Ratliff* (1986) 41 Cal.3d 675, 689; *People v. Floyd* (1970) 1 Cal.3d 694, 712.

²⁶ See *People v. Ochoa* (1998) 19 Cal.4th 353, 412 [(I)f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends." Quoting *U.S. v. Bagley* (9th Cir. 1985) 772 F.2d 482, 492].

²⁷ See *People v. Faulkner* (1972) 28 Cal.App.3d 384, 391 ["If the trial court decides that the pretrial identification procedure was fair, the witness may identify defendant in the courtroom without requiring the prosecution to show that the in-court identification has an independent origin."].

²⁸ See *Manson v. Brathwaite* (1977) 432 US 98, 114 [(R)eliability is the linchpin in determining the admissibility of identification testimony . . ."]; *Neil v. Biggers* (1972) 409 US 188, 199 [the "central question" is "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive."]; *People v. Yeoman* (2003) 31 Cal.4th 93, 125 ["Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification."]; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 37 ["An identification may be so unreliable that it violates a defendant's right to due process under the Fourteenth Amendment."]; *People v. Bisogni* (1971) 4 Cal.3d 582, 586 ["The reason for excluding identification evidence based on an unfairly conducted showup is that such evidence is unreliable as a matter of law and may result in the conviction of innocent persons."]; *People v. Ochoa* (1998) 19 Cal.4th 353, 412-3.

²⁹ See *Manson v. Brathwaite* (1977) 432 US 98, 106; *Neil v. Biggers* (1972) 409 US 188, 198 ["It is the likelihood of misidentification which violates a defendant's right to due process"]; *People v. Arias* (1996) 13 Cal.4th 92, 168.

³⁰ See *People v. Ochoa* (1998) 19 Cal.4th 353, 412 ["If, and only if, the answer to the first question [Was the procedure unduly and unnecessarily suggestive?] is yes and the answer to the second question [Was the ID nevertheless reliable?] is no, is the identification constitutionally unreliable."].

³¹ See *Neil v. Biggers* (1972) 409 US 188, 198 ["While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded."].

Court of Appeal observed, “No identification can be completely insulated from risk from suggestion.”³²

For this reason, the law prohibits only lineups and showups that are both unduly and unnecessarily suggestive.³³ In other words, the courts allow for some suggestiveness, especially when it was unavoidable or was inherent in the procedure that was utilized. They will not, however, tolerate suggestiveness that was intentional, grossly negligent, or gratuitous.³⁴ The question, then, is what should officers do—and avoid doing—to minimize suggestiveness?

KEEP WITNESSES SEPARATED: Whenever two or more witnesses will be viewing a lineup or showup, there is danger that a witness who hears another one identify a certain person may feel some pressure to do the same.³⁵ Also, the witness’s level of certainty may be artificially inflated as the result of “mutual reinforcement.”³⁶

To prevent this from happening, multiple witnesses should be separated before the viewing occurs, and they should be questioned separately afterward.³⁷ Thus, in *People v. Sequeira* the court ruled a lineup was “eminently fair” because, among other things, “The witnesses were separated, told not to talk with each other, and to designate their identifications by writing the suspect’s number on a card provided them.”³⁸

CAUTIONARY INSTRUCTIONS: The courts often note whether officers provided the witness with certain basic instructions to help ensure reliability. Some common instructions:

³² *People v. Perkins* (1986) 184 Cal.App.3d 583, 590; *People v. Contreras* (1993) 17 Cal.App.4th 813, 821.

³³ See *Neil v. Biggers* (1972) 409 US 188, 198-9 [“Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.”]; *People v. Ochoa* (1998) 19 Cal.4th 353, 413. [“(F)or witness identification procedure to violate the due process clauses, the state must, at the threshold improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure.”].

³⁴ See *United States v. Wade* (1967) 388 US 218, 229 [“Suggestion can be created intentionally or unintentionally in many subtle ways.”].

³⁵ See *Manson v. Brathwaite* (1977) 432 US 98, 116 [“And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another.”]; *People v. Ingle* (1986) 178 Cal.App.3d 505, 513 [“Although such witness may not be expressly directed to select the same picture as the other witness, the situation exerts its own pressure that he do so.”]; *People v. Nation* (1980) 26 Cal.3d 169, 180 [“(T)he defendant’s photograph initially selected by one of the girls was then collectively declared to be the one most resembling the assailant.”]; *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 402.

³⁶ See *People v. Nation* (1980) 26 Cal.3d 169, 180; *People v. Ingle* (1986) 178 Cal.App.3d 505, 513 [“It has been recognized that permitting one eyewitness to a crime the opportunity to observe another eyewitness make a photo lineup identification before he himself is asked to make his own identification is unnecessarily suggestive and fraught with the potential for irreparable misidentification.”]; *People v. Keith* (1975) 52 Cal.App.3d 947, 951-2.

³⁷ See *People v. Thomas* (1970) 5 Cal.App.3d 889, 900 [“(W)e do not approve of the practices of . . . having one witness make an identification in the presence of another witness.”]; *People v. Sequeira* (1981) 126 Cal.App.3d 1, 16 [“The witnesses were separated, told not to talk with each other, and to designate their identifications by writing the suspect’s number on a card provided them.”]; *People v. Lineman* (1970) 5 Cal.App.3d 1, 3-4; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 793 [“Each child was called in separately to view the photographs and admonished not to discuss what transpired with the others.”].

³⁸ (1981) 126 Cal.App.3d 1. ALSO SEE *People v. Wash* (1993) 6 Cal.4th 215, 244 [“There is no evidence that [the second witness] participated in the Identikit procedure with [the first witness] on the composite. There is no evidence that [the second witness] participated in the Identikit procedure or pooled his recollections with those of [the first witness].”].

- Keep an open mind; the perpetrator may or may not be in the lineup.
- Do not discuss your case with other witnesses or anyone else in the lineup room.
- Do not sit next to other witnesses.
- Do not call out a person's number or do or say anything that might show you have identified someone.
- If you would like to have a person say something or wear certain clothing, make this request to an officer. To help prevent singling out any person, all members of the lineup will be asked to do the same thing.³⁹

SIMILARITY BETWEEN SUSPECT AND FILLERS: While the suspect and the fillers should be similar in age and general appearance, “there is no requirement that a defendant in a lineup be surrounded by people nearly identical in appearance.”⁴⁰ As the California Supreme Court pointed out, “Because human beings do not look exactly alike, differences are inevitable.”⁴¹

For example, in ruling that lineups were composed of people who were sufficiently similar in appearance, the courts have made the following observations:

- All six participants were bearded and wore identical clothing. Defendant was neither the oldest nor the youngest of the participants, neither the tallest nor the shortest, neither the heaviest nor the lightest. . . . [W]ith one exception, the others resembled defendant very much.⁴²

³⁹ See *People v. Odom* (1980) 108 Cal.App.3d 100, 106 [“Each [witness] was told not to talk to one another and to keep an open mind because this might or might not be the person involved. The officer did not refer to Odom as a suspect; an officer at the scene cautioned them just because the man was in custody did not necessarily mean he was involved in the shooting.”]; *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [“Prior to examining the photographs, [the witness] was instructed that he was not to assume the person who committed the crime was pictured therein, that it was equally important to exonerate the innocent, and that he had no obligation to identify anyone.”]; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 357, fn.12 [“(K)eeep in mind that hair styles, facial hair, and clothing may have changed. That the person or persons you are being asked to identify may or may not be among the photographs. That it is just as important to free innocent persons from suspicion as it is to identify guilty parties.”]; *People v. Arias* (1996) 13 Cal.4th 92, 169 [before a photo lineup, the officer told the witness “the lineup could or could not contain a photo of the suspect, and that he’s under no obligation to select any of the photos shown to him.”]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1223-4 [witness was told the perpetrator “might not be in the lineup”]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1218; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557 [despite minor suggestiveness, witness’s identification was reliable “especially in light of the fact that during the procedure the officer advised [her] that her assailant might not be among the pictures at all.”].

⁴⁰ *People v. Blair* (1979) 25 Cal.3d 640, 660 [Quoting *Wright v. Smith* (W.D.N.Y. 1977) 434 F. Supp. 339, 342]. ALSO SEE *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052 [“Generally, a pretrial procedure will only be deemed unfair if it suggests in advance of a witness’s identification the identity of the person suspected by the police. However, there is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance.”]; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790; *People v. Adair* (1969) 2 Cal.App.3d 92, 97 [trial court noted “there seems to be a reasonably sufficient number of individuals who bear a rough resemblance to the defendant’s age and general appearance.”]; *People v. Holt* (1972) 28 Cal.App.3d 343, 350 [“It is also settled that a photographic identification is sufficiently neutral where the persons in the photographs are similar in age, complexion, physical features and build (small differences in stature do not matter).”]. NOTE: When a physical lineup will be conducted, it is also “eminently fair” to allow the suspect to choose the fillers. See *People v. Sequeira* (1981) 126 Cal.App.3d 1, 16.

⁴¹ *People v. Carpenter* (1997) 15 Cal.4th 312, 367.

⁴² *People v. Carpenter* (1997) 15 Cal.4th 312, 367.

- All of the men depicted in the photographs are White; all have long hair in various shades from blond to brown; and all have beards.⁴³
- [D]efendant does not appear to be significantly taller, heavier, or older than the other participants.⁴⁴
- All [of the five Caucasian women in the photo lineup] are of medium build. The four at the left appear to be of the same general age, that is, between 40 and 50, the tall woman at the extreme right being somewhat younger. None bears a facial resemblance to any of the others. None has extremely distinctive features. The facial idiosyncrasies among the five women are no more marked than those which normally distinguish one person from another.⁴⁵
- The lineup was composed of six men each similarly dressed, of the same general height and of approximately the same age. The facial contour of four of the men was essentially similar and three of them [like the perpetrator] had moustaches.⁴⁶
- [T]he men in the lineup were dressed in street clothes consisting of sport shirts and slacks of varying designs and colors. All were black men of similar height and physical build.⁴⁷
- Each lineup consists of five identically sized photographs of Caucasian males of apparently similar age and with similar facial features. Four of the men . . . appear to have similarly colored light red hair. One man has grey hair. . . . The color photographs show the subjects against identical blue backgrounds.⁴⁸

As for voice-only lineups, the Court of Appeal advised that officers should attempt to use a collection of voices that are “similar in tone, pitch, volume and accent.”⁴⁹

SUSPECT STOOD OUT: There is usually something about every person in a lineup that would arguably cause that person to stand out in some way; e.g., the tallest, heaviest, darkest, lightest, first in the line, in the middle, and so forth. Anyhow, so long as the

⁴³ *People v. Wash* (1993) 6 Cal.4th 215, 245, fn.11.

⁴⁴ *People v. Blair* (1979) 25 Cal.3d 640, 661. NOTE: In discussing *Blair*, the California Supreme Court noted that the identification was upheld even though defendant “was at least seven years older and thirty-seven pounds heavier than anyone else.” *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.

⁴⁵ *People v. Malich* (1971) 15 Cal.App.3d 253, 260.

⁴⁶ *People v. Blum* (1973) 35 Cal.App.3d 515, 520.

⁴⁷ *People v. O’Roy* (1972) 29 Cal.App.3d 656, 662.

⁴⁸ *People v. Yeoman* (2003) 31 Cal.4th 93, 124-5, fn.6. MORE EXAMPLES: *People v.*

Cunningham (2001) 25 Cal.4th 926, 990 [“(A)ll six men are wearing glasses; at least one of the other men is dressed in a three-piece suit, and another is wearing a suit jacket. All of the men have a mustache and some have other facial hair. Several have a hairstyle similar to that of defendant. Defendant was not the tallest, shortest, oldest, or youngest of the participants.”]; *People v. Adams* (1982) 137 Cal.App.3d 346, 353 [“(A)ll the participants had different types of facial hair, some with mustaches, some with beards, goatees, etc. Nothing sets the picture of this defendant off by his facial hair.”]; *People v. Lawrence* (1971) 4 Cal.3d 273, 280 [“(E)ach man wore a shirt or sweater dissimilar from each of the others. The participants all appeared to be of comparable age and of similar build. None had distinctive features.”]; *People v. Holt* (1972) 28 Cal.App.3d 343, 350 [“The suspects depicted in the photographs are all Caucasian, of a reasonably similar build and within the same age group.”]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [“All of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other. . . . Minor differences in facial hair among the participants did not make the lineup suggestive.”]; *People v. Hawkins* (1970) 7 Cal.App.3d 117, 123 [“(T)he police chose from their files photographs of men whose age, complexion, physical features and build were similar to those of defendant and Williams.”].

⁵⁸ See *People v. Vallez* (1978) 80 Cal.App.3d 46, 55.

⁴⁹ See *People v. Vallez* (1978) 80 Cal.App.3d 46, 55.

suspect was not “marked for identification” (discussed later) the fact that there was something distinctive about him will seldom affect the validity of a lineup.⁵⁰ For example, in rejecting arguments that the defendant stood out, the courts made the following comments:

- Although the other men may have been darker in complexion and not as thin, the men in the lineup were sufficiently similar in appearance . . .⁵¹
- All of the participants in defendant’s lineup bore a general resemblance to one another; although defendant was the tallest, all the others were tall as well.⁵²
- The five men were of substantially equivalent race, height, and weight, although the defendant was by two inches the shortest and by five pounds the heaviest.⁵³
- While it has been suggested that a lineup with a tall defendant among short men could be unfair, the California cases have held that the height disparity in a lineup is not per se suggestive.⁵⁴
- [A]ppellant notes that he was wearing a bright white sweatshirt or sweater. However, so long as the defendant is not alone dressed in a striking manner, there is no need for the police to match outfits of everyone in the lineup anymore than the police are required to match the physical proportions of the other men with scientific exactitude.⁵⁵
- While defendant’s profile is facing the opposite direction from the other five pictures, the point of concern to the witness is the person’s features, not the direction he is facing.⁵⁶

As for lineup position, it doesn’t matter—there is no “I’m the guy!” position. As the California Supreme Court noted, “[N]o matter where in the array a defendant’s photograph is placed, he can argue that its position is suggestive.”⁵⁷

⁵⁰ See *People v. Carpenter* (1997) 15 Cal.4th 312, 367 [“The question is whether anything caused the defendant to ‘stand out’ from the others in a way that would suggest the witness should select him.”].

⁵¹ *People v. Floyd* (1970) 1 Cal.3d 694, 712.

⁵² *People v. Gordon* (1990) 50 Cal.3d 1223, 1243.

⁵³ *People v. Mosher* (1969) 1 Cal.3d 379, 396.

⁵⁴ *People v. Faulkner* (1972) 28 Cal.App.3d 384, 391-2.

⁵⁵ *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.

⁵⁶ *People v. West* (1984) 154 Cal.App.3d 100, 105. MORE EXAMPLES: *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557 [“While in the six-picture color photo lineup appellant was darker complected than the other Negroes, this does not by itself render the identification unduly suggestive . . .”]; *U.S. v. Duran-Orozco* (9th Cir. 1999) 192 F.3d 1277, 1282 [although the photos of both defendants showed them holding pieces of paper in front of them, some of the fillers were photographed “against height markers.” “In short, the photo arrays carried mixed suggestions.”]; *People v. Rist* (1976) 16 Cal.3d 211, 218 [“Aside from the fact that defendant may have been the shortest member of the lineup there is no evidence that he differed in appearance from the other members.”]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052 [lineup not invalid because “one suspect’s photograph is much more distinguishable from the others in the lineup.”]; *People v. Hicks* (1971) 4 Cal.3d 757, 764 [court rejects argument that photo lineup unreliable because his photo “had a gray backgrounds while the others had a white background”]; *People v. Bracamonte* (1981) 119 Cal.App.3d 644, 656 [“Each hair style is different and nothing about defendant’s hair style draw’s one’s attention.”]; *People v. Faulkner* (1972) 28 Cal.App.3d 384, 392 [“(T)he jailers, as a general practice, tried to get men of similar height, build, complexion, etc. for the lineups if available, and placed appellant in the lineup with taller men due to the fact that appellant, because of his shortness, was hard to match with similarly short subjects.”]; *People v. Davis* (1969) 2 Cal.App.3d 230, 237 [lineup not suggestive merely because defendant was the tallest].

⁵⁷ *People v. Johnson* (1992) 3 Cal.4th 1183, 1217. ALSO SEE *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 [“(T)he contention of ‘strategically’ placing defendant’s photo toward the center of the display fails of merit. No matter where placed, a like complaint could be made;

In some cases, it is possible to reduce or eliminate any suggestiveness resulting from a single feature by covering it up. For example, in *People v. DeSantis*⁵⁸ where the suspect was much shorter than the fillers in a physical lineup, officers eliminated the problem by having the suspect stand on some books that were concealed from the witnesses. In *People v. Adams*,⁵⁹ where officers were concerned that the photo of the suspect stood out because of a bandage on his forehead, they covered it up with a piece of paper—then covered all the other photos in the same way. And in *People v. De Angelis*,⁶⁰ where all the photos of comparable fillers were in black and white but the only photo of the suspect was in color, the officers reproduced the color photo in black and white.

The point of these cases is that the officers were mindful of the need to present the suspect and the fillers in a similar manner. In contrast is the case of *People v. Slutts*⁶¹ in which a girl who was molested by a man with a beard was shown a photo lineup consisting of five clean-shaven men. The girl selected a photo of Slutts, saying he “closely resembled” the perpetrator. In order to “help” the girl make a more positive identification, the investigator drew a beard on the photo. Although she was still unable to positively identify Slutts, he was convicted. On appeal, the court affirmed his conviction but said, “To be completely fair [the investigator] should have sketched beards on all the photographs.”

SUSPECT DIRECTS ATTENTION TO HIMSELF: A lineup ID will not be suppressed on grounds of suggestiveness if the suggestiveness was caused by the actions of the suspect. For example, in *People v. Wimberly*⁶² the suspect and fillers in a physical lineup were asked to say certain words. Because Wimberly spoke too softly to be heard, an officer asked him to repeat the words. On appeal, he contended the officer’s request rendered the subsequent ID suggestive. The court responded by noting that a suspect may not challenge a lineup “when his own conduct has caused the procedure to be suggestive.”⁶³

MULTIPLE LINEUP APPEARANCES: A suspect in a lineup may “stand out” because a witness had seen his photo in an earlier photo lineup. This might occur when the witness identifies the suspect in a photo lineup then, after he’s arrested, identifies him in a physical lineup. Or, after the witness makes a tentative ID from an old photo, officers show the witness a new photo lineup containing a more recent picture. In any event, so long as there was a need for it, multiple lineup appearances will not render an ID unduly suggestive or otherwise unreliable.⁶⁴

unfortunately for defendant his picture looked like him and this is not recognized as prejudicial.”]; *People v. Davis* (1969) 2 Cal.App.3d 230, 237 [lineup not suggestive merely because defendant was at the end of the line]; *People v. Adair* (1969) 2 Cal.App.3d 92, 97 [in ruling a photo lineup was not suggestive, the court noted the defendant’s photo was placed “toward the center of the stack.”]. NOTE: Although officers will sometimes permit the suspect to pick his own position or determine his position by chance drawing (see *People v. Faulkner* (1972) 28 Cal.App.3d 384, 392), neither is required. See *People v. O’Roy* (1972) 29 Cal.App.3d 656, 662 [“We know of no rule of law and defendant cites none which requires that he be given a choice of position in the lineup.”].

⁵⁸ (1992) 2 Cal.4th 1198, 1223.

⁵⁹ (1982) 137 Cal.App.3d 346.

⁶⁰ (1979) 97 Cal.App.3d 837.

⁶¹ (1968) 259 Cal.App.2d 886.

⁶² (1992) 5 Cal.App.4th 773.

⁶³ Quoting *People v. Boyd* (1990) 222 Cal.App.3d 541, 574. ALSO SEE *U.S. v. Jones* (4th Cir. 1990) 907 F.2d 456, 459-60.

⁶⁴ See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1224 [“The fact that defendant was the only person common to both lineups did not per se violate his due process rights.”]; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 789 [“California and federal courts have rejected the argument that identification procedures are impermissibly suggestive if the defendant is the only person

“MARKED FOR IDENTIFICATION”: A physical or photo lineup will likely be deemed unduly and unnecessarily suggestive if the suspect was “marked for identification.”⁶⁵ Marking occurs if two things happen:

- (1) PERPETRATOR HAD DISTINCTIVE FEATURE: The witness told officers that the perpetrator had a certain prominent or distinctive physical characteristic.
- (2) SUSPECT HAD SAME FEATURE: The suspect was the only person in the lineup with such a characteristic.

For example, in *People v. Caruso*⁶⁶ two robbery victims described the driver of the getaway car as “big, with dark wavy hair and a dark complexion.” Caruso was arrested and placed in a physical lineup. The court described him as being 6’1”, 238 pounds, “of Italian descent, with a very dark complexion,” with “dark wavy hair.” The other four men in the lineup, said the court, “were not his size, not one had his dark complexion, and none had dark wavy hair.” In ruling the lineup was unduly suggestive, the court noted, “During the robbery [the witnesses] noted the driver’s large size and dark complexion, and, if they were to choose anyone in the lineup, defendant was singularly marked for identification.”

Similarly, if the witness described the perpetrator as wearing distinctive clothing or sporting distinctive facial hair or an unusual hairstyle, the suspect in the lineup may be deemed “marked for identification” if he, and no one else, appeared in that manner.⁶⁷ On the other hand, when the clothing or hairstyle were not particularly distinctive, the courts will usually admit the lineup ID and let the jury decide its weight.⁶⁸

SUGGESTIVE INFORMATION: Officers must be careful not say anything to a witness before or during a lineup or showup that undermines the reliability of the procedure by,

appearing in both a display of photographs and a subsequent lineup.”]; *People v. Spencer* (1972) 22 Cal.App.3d 786, 795-6; *Simmons v. United States* (1968) 390 US 377, 386, fn.6; *People v. Yeoman* (2003) 31 Cal.4th 93, 124 [“To use a suspect’s image in successive lineups might be suggestive if the same photograph were reused or if the lineups followed each other quickly enough for the witness to retain a distinct memory of the prior lineup.”]; *People v. Ware* (1978) 78 Cal.App.3d 822, 839; *People v. Holt* (1972) 28 Cal.App.3d 343, 349; *People v. Blair* (1979) 25 Cal.3d 640, 660. BUT ALSO SEE *Foster v. California* (1969) 394 US 440, 443 [when the witness only tentatively ID’d the suspect, the suspect was presented in a showup, then a second lineup in which the witness “finally” ID’d him; said the court, “In effect, the police repeatedly said to the witness, ‘This is the man.’”]; *People v. Nation* (1980) 26 Cal.3d 169, 181.

⁶⁵ See *People v. Caruso* (1968) 68 Cal.2d 183, 187.

⁶⁶ (1968) 68 Cal.2d 183.

⁶⁷ See *Foster v. California* (1969) 394 US 440, 442-3 [“(T)his case presents a compelling example of unfair lineup procedures. . . . [P]etitioner stood out from the other two men . . . by the fact that he was wearing a leather jacket similar to that worn by the robber.”]; *People v. Carter* (1975) 46 Cal.App.3d 260, 263-5; *People v. Ware* (1978) 78 Cal.App.3d 822, 839 [“Appellant was also the only person in the photos wearing a blue denim jacket of the type [the victim] reported her assailant was wearing.”].

⁶⁸ See *Coleman v. Alabama* (1970) 399 US 1, 6; *People v. Harris* (1971) 18 Cal.App.3d 1; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 792 [“While it is true that defendant’s photograph has the mustache with the most pronounced gap in the center [a characteristic of the perpetrator as noted by witnesses to the crime], others of the photographs have mustaches with at least slight gaps.”]; *People v. Hill* (1974) 12 Cal.3d 731, 766, fn.35 [although the victim said the perpetrator “wore a mask or had a beard,” and although the defendant may have been the only person in the photo lineup who had a beard, this was not unduly suggestive because the witness said he based his identification on the defendant’s “eyes, cheeks, nose, and hairline”]; *People v. Hawkins* (1970) 7 Cal.App.3d 117, 123; *People v. DeSantis* (1992) 2 Cal.4th 1198. ALSO SEE *People v. McDaniels* (1972) 25 Cal.App.3d 708 [“(P)rudence suggests that the officer conducting the lineup should have advised the defendant not to wear a blue shirt.”].

for example, causing the witness to focus on the suspect. As the Court of Appeal observed:

Suggestive comments or conduct that single out certain suspects or otherwise focus a witness's attention on a certain person in a lineup can cause such unfairness as to deprive a defendant of due process of law.⁶⁹

The integrity of a lineup or showup can also be undermined if officers provide the witnesses with information about the suspect they would be viewing, especially incriminating information.⁷⁰ As the United States Supreme Court observed, "The chance of misidentification is heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime."⁷¹ An example is found in *Moore v. Illinois*⁷² where, before a one-man showup, a prosecutor told the rape victim that officers had found her guitar in the man's possession.

Nor should officers say anything that would cause the witnesses to believe the perpetrator is in the lineup; e.g., "Which one of these guys did it?"⁷³

It has been argued that officers must not even inform a witness that they have arrested a person or that a "suspect" would appear in the lineup. In most cases, however, these arguments are rejected because witnesses will automatically infer that officers have a suspect or that a suspect has been arrested—otherwise, why have a lineup? As the California Supreme Court observed, "Anyone asked to view a lineup would naturally assume the police had a suspect."⁷⁴ Still, when suggestiveness is an issue, the courts often

⁶⁹ *People v. Perkins* (1986) 184 Cal.App.3d 583, 588. ALSO SEE *Moore v. Illinois* (1977) 434 US 220, 224-5 ["Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they suspect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification."]; *Simmons v. United States* (1968) 390 US 377, 385 ["There is no evidence to indicate . . . that the FBI agents in any other way suggested which persons in the pictures were under suspicion."]; *People v. Ingle* (1986) 178 Cal.App.3d 505, 513 [before viewing a photo lineup, a witness to the robbery was shown a videotape of the robbery; the court rejected the argument that the videotape was essentially a second "witness" and, therefore, the procedure was tantamount to having two witnesses view a lineup at the same time].

⁷⁰ See *People v. Nation* (1980) 26 Cal.3d 169, 180 ["The danger of error [is] heightened when the witness has indications that there is other evidence that the person in the photograph committed the crime."].

⁷¹ *Simmons v. United States* (1968) 390 US 377, 383 ["The chance of misidentification is heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime."].

⁷² (1977) 434 US 220, 230, fn.4.

⁷³ See *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 402, fn.4. COMPARE: *People v. Ballard* (1969) 1 Cal.App.3d 602, 605 [under the circumstances it was not unduly suggestive to tell the witness that "the police had two suspects who 'fit the description' that she had given them of the perpetrators of the offenses."].

⁷⁴ *People v. Carpenter* (1997) 15 Cal.4th 312, 368. ALSO SEE *People v. Meneley* (1972) 29 Cal.App.3d 41, 57 ["The advice that a suspect was in the lineup did not suggest to the identifying witness anything more than he would assume, and in no way suggested that defendant was the suspect rather than one of the [fillers]."]; *Coleman v. Alabama* (1970) 399 US 1, 6 ["(The witness) testified that when the police asked him to go to the city jail he 'took it for granted' that the police had caught his assailants. But the record is utterly devoid of evidence that anything the police said or did prompted [the identification]."]; *People v. Contreras* (1993) 17 Cal.App.4th 813, 820 ["Telling a witness suspects are in custody . . . is not impermissible."]; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 789; *People v. Ballard* (1969) 1 Cal.App.3d 602, 605; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39 [under the circumstances it was not unduly suggestive for an officer to tell the witness, prior to a showup, "that he had been able to catch a few people but that he needed a witness to identify them."].

note, at least in passing, whether the officers did or did not tell the witness that a “suspect” was in custody or that a “suspect” was in the lineup.⁷⁵

“YOU PICKED THE ‘RIGHT’ ONE”: Telling a witness he picked the “right” person in a lineup may have a “corrupting effect” on all of his subsequent identifications and result in their suppression.⁷⁶ For example, in *People v. Gordon*⁷⁷ police arrested Gordon for the robbery-murder of an armored car guard. At a physical lineup, a witness said Gordon “looks familiar, but I’m not certain.” Later that day, an officer phoned her to inquire about her comment. According to the court, in the course of the conversation the officer essentially told the witness, “You’ve picked the right person.” As the result, all subsequent identifications of Gordon by the witness were suppressed.

The same thing might happen if, after the witness identified the suspect, officers told the witness about the evidence linking the suspect to the crime.⁷⁸ For example, in *People v. Slutts*,⁷⁹ after a witness to an indecent exposure tentatively ID’d Slutts, an officer told her that Slutts “had committed a prior similar offense and was in need of psychiatric help.” It was not fatal to the case, but it didn’t help.⁸⁰

To prevent confirmations and any other conduct that might focus attention on the suspect, some departments utilize “double blind” lineups in which the officers at the lineup know nothing about the case, not even the identity of the suspect. Consequently, they cannot possibly confirm an ID or otherwise provide information that can undermine the reliability of the lineup.⁸¹ (By the way, it’s called a “double blind” lineup because neither the witness nor the officer who conducts the lineup are told beforehand which of the participants is the suspect.)

FOLLOW-UP DISCUSSIONS: If a witness fails to make an ID, or makes only a tentative one, it is not unduly suggestive to ask him whether anyone in the lineup “closely resembles” the perpetrator. Such a question is necessary to make sure that officers are “on the right track.”⁸² For example, in *People v. Perkins*, where the main witness to a liquor store robbery failed to identify anyone, the court said it was appropriate for officers to ask such a question because the question “did not indicate in any way that

⁷⁵ See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [“The record is devoid of any indication that police told the victim anything to suggest the people she would be viewing were in fact her attackers.”]; *People v. Johnson* (1989) 210 Cal.App.3d 316, 323 [“(O)fficers did not indicate that they had apprehended the suspect or that they would be showing [the witness] the suspect.”]; *People v. Jardine* (1981) 116 Cal.App.3d 907, 915 [before a showup the officers merely told the witness, “We have a couple of guys down here we want you to look at.”]; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1196 [“(C)ontrary to defendant’s assertion that the police investigators told the victim that one of the suspects was ‘probably’ in the line-up, testimony at the preliminary hearing was that the investigator stated that one or more of the suspects ‘might’ be in the lineup.”]; *People v. Adair* (1969) 2 Cal.App.3d 92, 97 [“There is no evidence the officer told a witness that appellant was under suspicion or had been arrested, nor did he suggest in any way that appellant’s photograph should be selected.”].

⁷⁶ See *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.

⁷⁷ (1990) 50 Cal.3d 1223.

⁷⁸ *Simmons v. United States* (1968) 390 US 377, 383.

⁷⁹ (1968) 259 Cal.App.2d 886.

⁸⁰ NOTE: Although confirmations such as these should be avoided, their corrupting effect may be reduced or eliminated to the extent the witness was certain that the person he identified was the perpetrator. See *People v. Henderson* (1972) 25 Cal.App.3d 371; *People v. Wash* (1993) 6 Cal.4th 215, 245 [“Here, the witness expressed no uncertainty about her initial identification.”].

⁸¹ See Scheck, Neufeld, and Dwyer, “A short List of Reforms to Protect the Innocent,” Doubleday, 2000.

⁸² See *People v. Perkins* (1986) 184 Cal.App.3d 583, 590.

Perkins was a suspect. Furthermore, [the question] was a logical one for an investigator to ask after the chief witness had apparently failed to identify a suspect.”⁸³

If the witness did not make an ID, but said something or reacted in a manner that indicated he recognized someone in the lineup, it is also appropriate to question him about this. As the Court of Appeal said:

It is not impermissible or unduly suggestive for a police officer to question witnesses further if the officer believes the witnesses may actually recognize someone in the lineup.⁸⁴

For example, in *People v. Contreras*⁸⁵ one man was murdered and other critically injured when a drug deal came apart. At the hospital, the injured victim, Lopez, was shown a photo lineup that contained a picture of one of the men officers had arrested, Casare. Although Lopez did not identify Casare, the investigator saw him “react” to Casare’s photo. Later, the investigator told Lopez’s wife that he thought Lopez had lied when he said he did not recognize anyone. Ms. Lopez spoke with her husband who then told the investigator that Casare was one of the killers, that he had decided not to ID him so that he could “get revenge” after he was released from the hospital.

In rejecting the argument that the investigator’s questions were improper, the Court of Appeal said, “[Q]uestioning a witness further if the officer believes the witness actually recognized someone in the lineup is not impermissible.”

If a witness makes no ID or only a tentative one it is also permissible to provide the witness with information *if* he requests it. As the California Supreme Court explained, “Due process does not forbid the state to provide useful further information in response to a witness’s request, for the state is not suggesting anything.”⁸⁶

For example, in *People v. Perkins*⁸⁷ a robbery victim had noticed that one of the robbers had a lightning-bolt tattoo on his neck. During a subsequent lineup, the victim recognized Perkins as the robber but she told the investigating officer that she “could not be sure” until she confirmed that he had such a tattoo. The officer then informed her that Perkins did, in fact, have such a tattoo.

On appeal, the court rejected the argument that the officer’s statement to the witness rendered the lineup unduly suggestive. As the court noted, the victim recognized Perkins as the robber before she learned about the tattoo, and that the purpose of her question about the tattoo was to confirm “a key detail.” Said the court, “[T]his court sees no reason why a more accurate picture than shown to the witness originally should be held impermissibly suggestive merely because it is used as a confirmatory tool.”

SUSPECT RESTRAINED AT SHOWUP: The fact that the suspect was handcuffed or seated in the caged section of a patrol car when the showup was conducted will not result in the suppression of a showup identification.⁸⁸ But such precautions should be limited to those that are reasonably necessary for officer safety.

Suggestive, but reliable

Even if a lineup or showup was unduly and unnecessarily suggestive, the resulting identification will not be suppressed if the court rules that, based on the surrounding

⁸³ (1986) 184 Cal.App.3d 583, 590.

⁸⁴ *People v. Perkins* (1986) 184 Cal.App.3d 583, 590.

⁸⁵ (1993) 17 Cal.App.4th 813.

⁸⁶ *People v. Ochoa* (1998) 19 Cal.4th 353, 413.

⁸⁷ (1986) 184 Cal.App.3d 583. ALSO SEE *People v. Hernandez* (1988) 204 Cal.App.3d 639, 653-4.

⁸⁸ See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386; *People v. Craig* (1978) 86 Cal.App.3d 905, 914; *In re Richard W.* (1979) 91 Cal.App.3d 960, 969-971; *People v. Anthony* (1970) 7 Cal.App.3d 751, 764-5; *People v. Odom* (1980) 108 Cal.App.3d 100, 106-111; *People v. Nash* (1982) 129 Cal.App.3d 513, 516-9.

circumstances, it was nevertheless reliable.⁸⁹ What circumstances will the courts consider? Although they must weigh all relevant circumstances, as a practical matter the determination will almost always be based on the following.⁹⁰

OPPORTUNITY TO SEE PERPETRATOR: One of the most important circumstances is the extent to which the witness had an opportunity to see the perpetrator before, during, and after the crime.⁹¹ Of particular interest is the length of time the witness saw the perpetrator, whether the witness's view of the perpetrator was obstructed, the distance between them, and the lighting conditions.⁹²

⁸⁹ See *Manson v. Brathwaite* (1977) 432 US 98, 114 [(R)eliability is the linchpin in determining the admissibility of identification testimony]; See *Neil v. Biggers* (1972) 409 US 188, 199 [(T)he central question [is] whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.]; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39 [(E)ven if we were to determine that the procedure was suggestive, we would still conclude that the identification was reliable under the totality of the circumstances.].

⁹⁰ See CALJIC 2.92.

⁹¹ See *Manson v. Brathwaite* (1977) 432 US 98, 114; *United States v. Wade* (1967) 388 US 218, 229 [(The dangers of misidentification) are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.].

⁹² See *Manson v. Brathwaite* (1977) 432 US 98, 114 [“two to three minutes . . . within two feet . . . natural light”]; *Simmons v. United States* (1968) 390 US 377, 385 [“The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber for periods ranging up to five minutes.”]; *Neil v. Biggers* (1972) 409 US 188, 200 [“up to half an hour . . . under adequate artificial light in her house and under a full moon outdoors”]; *People v. Blum* (1973) 35 Cal.App.3d 515, 519 [“as close as 1½ feet”]; *People v. York* (1980) 108 Cal.App.3d 779, 786 [“close range for at least three minutes.”]; *People v. Wells* (1971) 14 Cal.App.3d 348, 355 [“approximately 12 minutes . . . her home was well-lighted”]; *People v. Thomas* (1970) 5 Cal.App.3d 889, 900 [about one hour “in broad daylight”]; *People v. Ware* (1978) 78 Cal.App.3d 822, 839, fn.11 [15-20 minutes, “clear and unobstructed view . . . under well-lighted conditions.”]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 731 [three hours]; *People v. Nash* (1982) 129 Cal.App.3d 513, 518 [about two hours “in close proximity”]; *People v. Rist* (1976) 16 Cal.3d 211, 216 [“unobstructed view . . . for at least three minutes”]; *People v. Rodriguez* (1970) 10 Cal.App.3d 18, 32 [“(witness) had seen defendant's face in the store from a distance of about 25 to 30 feet”]; *People v. Posten* (1980) 108 Cal.App.3d 633, 647 [“at close range for the better part of an hour”]; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1462 [“over 30 minutes”]; *People v. McDaniels* (1972) 25 Cal.App.3d 708, 711 [“over 10 minutes”]; *People v. Fortier* (1970) 10 Cal.App.3d 760, 764 [“well-lit bedroom for a couple of minutes”]; *People v. Johnson* (1989) 210 Cal.App.3d 316, 323 [while “directly under a street light,” victim observed the robber's face “from a distance of an arm's length plus eight to ten inches”]; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220 [“20-to-30 second opportunity . . . with lighting provided by the headlights of both cars and a streetlight”]; *People v. Mosher* (1969) 1 Cal.3d 379, 396 [“several minutes . . . well-lighted area”]; *People v. Harris* (1971) 18 Cal.App.3d 1, 6 [“well-lighted store . . . 5 to 10 minutes”]; *People v. Hawkins* (1970) 7 Cal.App.3d 117, 124 [“unobstructed view of his face as he entered the market . . . she was very near him”]; *People v. Harpool* (1984) 155 Cal.App.3d 877, 886 [“about 15 or 30 minutes”]; *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 [“broad daylight from a short distance for about three to five minutes”]; *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [“several minutes”]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052 [kidnapping victim had “ample time” to see the perpetrator's face while he drove her around in a car]; *People v. Blair* (1979) 25 Cal.3d 640, 662 [“three to five minutes in a well-lit room . . . only eighteen inches apart”]; *People v. Clark* (1992) 3 Cal.4th 41, 137 [voice lineup: “The first call was approximately 30 minutes in length. The second call lasted for about two minutes.”]; *People v. Bethea* (1971) 18 Cal.App.3d 930, 934 [“The robbery lasted three to five minutes, [the victim] spent three-quarters of the time observing defendant's face.”]; *People v. Edwards* (1981) 126 Cal.App.3d 447, 454 [“Her view of his face with the nylon covering [which did not distort his features] from a foot away lasted about a minute and a half.”]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [“at close range . . . seventy-five minutes”]; *People v. Guillebeau* (1980) 107

ATTENTION DIRECTED TO PERPETRATOR: A witness's ID is especially likely to be deemed reliable if he consciously directed his attention to the perpetrator's face and other physical features.⁹³ Conversely, reliability may become an issue if the witness was nothing more than a "casual or passing observer" who had little or no interest in taking note of the perpetrator.⁹⁴

For example, in *People v. Gomez*⁹⁵ the court ruled a robbery victim's identification of the defendant was reliable because the victim "kept reminding herself to study the face of the robber because she knew she would be called upon later to identify him." And in *People v. Sanders*⁹⁶ a man who survived an attack that left a friend dead testified he "focused on his attackers' faces in order to identify them if he survived the attack." Finally, in *Neil v. Biggers*⁹⁷ the U.S. Supreme Court ruled a rape victim's identification of her attacker was reliable because, among other things, "She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes."

In some cases, a witness will take note of the perpetrator because there was just "something" about him that caught the witness's attention. For example, in *People v. Cunningham*⁹⁸ witnesses to a robbery-murder testified their attention was initially drawn to the perpetrator because of his unusual physical appearance, which included a "burgundy three-piece pinstripe polyester suit and tie," "thick glasses with dark rims," a

Cal.App.3d 531, 557. COMPARE *Moore v. Illinois* (1977) 434 US 220, 229 ["only 10 to 15 seconds after awakening from a nap"]; *People v. Bisogni* (1971) 4 Cal.3d 582, 587 [only "two short looks" and "a glance"]; *People v. Caruso* (1968) 68 Cal.2d 183, 188 ["fleeting glance"]; *People v. Nation* (1980) 26 Cal.3d 169, 181 ["only seconds to glance at a passerby who made a crude remark to her"].

⁹³ See *Manson v. Brathwaite* (1977) 432 US 98, 114; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1462 ["(The witness) 'looked straight in his face,' and made a conscious effort to 'stare at him.' Her degree of attention could hardly have been higher: appellant Phan was a threat not only to her but to her children."]; *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 ["their degree of attention [during a 'tense conversation'] can hardly be passed off as that of casual observers."]; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220 ["looked him in the face"]; *People v. Clark* (1992) 3 Cal.4th 41, 73 [threatening phone call: "The calls were highly unusual, and Cohen paid close attention."]; *People v. Brown* (1969) 273 Cal.App.2d 109, 112 ["I just know that I would always know him if I ever saw him again."]; *People v. Arias* (1996) 13 Cal.4th 92, 168 ["(H)e was no mere casual observer but a crime victim subjected to a close, extended encounter with the perpetrators."]; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072 ["Her degree of attention was high: she kept fighting off defendant, who was trying to remove her clothes."]; *People v. Harpool* (1984) 155 Cal.App.3d 877, 886 ["(The witness) had been attentive to defendant, a stranger who had presented himself under extraordinary and suspicious circumstances."]; *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 412 ["(T)he victim took time while in the motel room to get a clear view, under daylight, of her assailant."]; *People v. West* (1984) 154 Cal.App.3d 100, 105 ["The victim's degree of attention was undoubtedly high on these occasions as he had invited the defendant into his home."]; *People v. Greene* (1973) 34 Cal.App.3d 622, 647.

⁹⁴ See *Manson v. Brathwaite* (1977) 432 US 98, 115 ["Glover was not a casual or passing observer, as is so often the case with eyewitness identification."]; *People v. Bauer* (1969) 1 Cal.3d 368, 374 ["This was not a case of a hurried look in circumstances where there was no reason to observed with particularity."].

⁹⁵ (1976) 63 Cal.App.3d 328, 336.

⁹⁶ (1990) 51 Cal.3d 471, 508.

⁹⁷ (1972) 409 US 188.

⁹⁸ (2001) 25 Cal.4th 926, 958, 990. ALSO SEE *People v. LeBlanc* (1972) 23 Cal.App.3d 902, 906 [the "oddity" of the perpetrator's hair styling caused the victim to notice him]; *People v. Clark* (1992) 3 Cal.4th 41, 137 [voice lineup: "The calls were highly unusual, and Cohen paid close attention."]; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39 ["(The victim's) degree of attention was high since there were no other customers in the store, and appellant's companion [had] asked for [the victim's] assistance."].

“mustache that connected with a goatee-like beard” and, his “hair in back was shoulder-length in the middle.”

Even in the absence of direct testimony on this issue, the courts are aware that certain people, such as bank tellers and police officers, are trained to pay attention to the physical appearance of people they think they might be required to ID later. As the U.S. Supreme Court noted in *Manson v. Brathwaite*, “[A]s a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his [drug] vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial.”⁹⁹

WITNESS HAD SEEN THE PERPETRATOR BEFORE: An ID is naturally likely to be reliable if the witness was acquainted with the perpetrator or had seen him before.¹⁰⁰ For example, in ruling that a rape victim’s ID of her attacker was reliable, the court in *People v. Nash*¹⁰¹ noted, “The victim had seen appellant around the neighborhood on one or two occasions prior to this event.”

NUMBER OF DETAILS: The courts often look to see whether the witness was able to provide officers with a detailed description of the perpetrator, or whether the description was vague or very general.¹⁰² For example, another reason the rape victim’s ID of the defendant in *Neil v. Biggers* was ruled reliable was that, as the U.S. Supreme Court pointed out, “Her description to the police, which included the assailant’s approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough.”¹⁰³

ACCURACY: A strong indication of reliability is the accuracy of witness’s initial description of the perpetrator; i.e., the number of descriptive details the witness got right.¹⁰⁴ The courts understand, however, that witnesses are often unable to provide

⁹⁹ (1977) 432 US 98, 115. ALSO SEE *U.S. v. Duran-Orozco* (9th Cir. 1999) 192 F.3d 1277, 1282 [“(H)e gave them the attention an alert police officer would give to possible suspects”]; *U.S. v. Sanders* (1980) 626 F.2d 1388, 1389 [“the witness’ degree of attention was enhanced by special training for bank personnel”]; *People v. Bethea* (1971) 18 Cal.App.3d 930, 934 [the witness, the manager of a liquor store, “had been the victim of three robberies”].

¹⁰⁰ See *People v. LeBlanc* (1972) 23 Cal.App.3d 902, 906 [“(D)efendant had been a customer of the store before on several occasions”]; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1462 [“(The witness) had seen him before, four days earlier when he had attempted to open her garage.”]; *People v. Rodriguez* (1977) 68 Cal.App.3d 874, 882 [“(The witness) remembered defendant because she had seen him on *two* separate occasions *before* she saw the photograph of him”].

¹⁰¹ (1982) 129 Cal.App.3d 513, 515.

¹⁰² See *Manson v. Brathwaite* (1977) 432 US 98, 115 [description included the perpetrator’s “race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing [he] wore.”]; *United States v. Wade* (1967) 388 US 218, 241; *People v. Wells* (1971) 14 Cal.App.3d 348, 355 [“(S)he gave officers a detailed description of the assailant”]; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557 [witness was able to help make a composite picture of her assailant “which strongly resembled appellant”]; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220 [description included “clothing, hair, complexion, facial hair, height, weight, and condition of intoxication.”]; *People v. Rodriguez* (1970) 10 Cal.App.3d 18, 32 [“(The witness) described his age, facial appearance and his wearing apparel, as well, in some detail.”].

¹⁰³ (1972) 409 US 188, 200.

¹⁰⁴ See *United States v. Wade* (1967) 388 US 218, 241 [it is relevant whether there was “any discrepancy between any pre-lineup description and the defendant’s actual description”]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [“The accuracy of her description of appellant, while inaccurate as to the type of pants he was wearing, was an otherwise generally accurate description.”]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 731 [“(T)here was substantial congruity between her prelineup description and appellant’s actual description”]; *People v. Edwards* (1981) 126 Cal.App.3d 447, 454; *People v. Ware* (1978) 78 Cal.App.3d 822, 839

detailed descriptions, and that discrepancies are inevitable.¹⁰⁵ As the Court of Appeal observed, “Crime victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock.”¹⁰⁶ Consequently, a somewhat inaccurate description may be offset by other circumstances that tend to show the ID was reliable.¹⁰⁷

BASIS OF ID: What caused the witness to identify the defendant? If the identification was based on a single and unremarkable physical characteristic, the reliability of the ID might be called into question. On the other hand, reliability becomes less of an issue to the extent the ID was based on something unusual or distinctive; e.g., “small wire on her upper right teeth, as though she were wearing a dental plate”¹⁰⁸; “very distinct dental features”¹⁰⁹; “unusual high forehead.”¹¹⁰ Thus, in *People v. Arias* the California Supreme Court rejected the argument that an ID based largely on the defendant’s “bad” acne problem was somehow unreliable, stating, “In our view, [the witness’s] recollection and use of a distinct aspect of the robber’s appearance enhances, rather than undermines, the inference that his photo identification was accurate.”¹¹¹

In most cases, however, reliable ID’s are based on a combination of unremarkable characteristics including such things as height, weight, build, and clothing.¹¹² For example, in *People v. Flint*¹¹³ the witnesses “had difficulty” in identifying a burglar by his facial features. Still, said the court, the ID was sufficiently reliable because their ID was based on “his clothing, posture, build, hairstyle, and race.”

LEVEL OF CERTAINTY: The courts often note whether, and to what extent, the witness expressed certainty that the person he picked was the perpetrator.¹¹⁴ But, as the

[defendant made no claim “that the description given by her at the time inaccurately characterizes the defendant”]; *People v. Johnson* (1989) 210 Cal.App.3d 316, 323 [(H)is description of the perpetrator matched Johnson precisely.”]; *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 412 [“Her descriptions of defendant’s vehicle and personal appearance as well as her clothing . . . were all accurate.”]; *People v. Blum* (1973) 35 Cal.App.3d 515, 519 [“a detailed description”]; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 793; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072; *People v. Sanders* (1990) 51 Cal.3d 471, 508; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220; *U.S. v. Duran-Orozco* (9th Cir. 1999) 192 F.3d 1277, 1281 [“(The witness) was fairly, although not totally, accurate in his description”]. COMPARE *Coleman v. Alabama* (1970) 399 US 1, 4 [(Victim) gave a vague description—that the attackers were ‘young, black males, close to the same age and height.’ Petitioners are both Negro; but Stephens was 18 and 6’2”, and Colman, 28 and 5’4½.”].

¹⁰⁵ See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [“The accuracy of her description of appellant, while inaccurate as to the type of pants he was wearing, was an otherwise generally accurate description.”]; *People v. Arias* (1996) 13 Cal.4th 92, 169 [“These estimates are not so disparate as to cast particular suspicion on Lam’s reliability at trial.”].

¹⁰⁶ See *People v. Smith* (1970) 4 Cal.App.3d 41, 48.

¹⁰⁷ See *People v. Blair* (1979) 25 Cal.3d 640, 662 [“In spite of these discrepancies, there are significant factors pointing in the direction of reliability.”]; *People v. Hill* (1974) 12 Cal.3d 731, 766 [although “brief glance” and no “detailed description,” the subsequent ID was unequivocal].

¹⁰⁸ *People v. Malich* (1971) 15 Cal.App.3d 253, 261-2.

¹⁰⁹ *People v. Harpool* (1984) 155 Cal.App.3d 877, 886.

¹¹⁰ *People v. Faulkner* (1972) 28 Cal.App.3d 384, 392.

¹¹¹ (1996) 13 Cal.4th 92, 169-70.

¹¹² See *People v. Lewis* (1966) 240 Cal.App.2d 546, 548 [ID based on defendant’s “build, walk, and mannerisms”].

¹¹³ (1986) 180 Cal.App.3d 13, 18.

¹¹⁴ See *Manson v. Brathwaite* (1977) 432 US 98, 115 [“There is no question whatsoever.”]; *Neil v. Biggers* (1972) 409 US 188, 200-1 [“no doubt,” “I don’t think I could ever forget”]; *Coleman v. Alabama* (1970) 399 US 1, 5 [“That man, there, is the one”]; *Simmons v. United States* (1968) 390 US 377, 385 [“none of the witnesses displayed any doubt”]; *People v. Clark* (1992) 3 Cal.4th 41, 137

Court of Appeal explained, “Lack of positiveness in identification does not destroy the value of the identification but goes only to its weight.”¹¹⁵

Furthermore, the courts are aware that a witness who positively identifies the defendant at one lineup or showup may become less certain if asked to make a subsequent ID. This can result from many factors, such as the “lapse of time after the crime, coupled with a mental block of details of a horrific experience; change of the suspect’s appearance and attire.”¹¹⁶

Finally, witnesses who view a photo lineup will sometimes make a tentative ID, saying they need to see the person in a physical lineup before making a positive ID. While this may indicate some uncertainty, it may also be a strong indication of conscientiousness.

IMMEDIATE ID: Did the witness immediately identify the defendant when he or his photo was displayed?¹¹⁷ Although this is a relevant circumstance, a failure to make an instant ID does not detract from the reliability of the ID because the courts know that many witnesses will naturally take their time in making an ID. Furthermore, officers often instruct the witnesses to take their time.¹¹⁸

CIRCUMSTANTIAL EVIDENCE OF RELIABILITY: In addition to direct evidence of reliability, the courts will take into account any circumstantial evidence that the witness’s identification of the defendant was accurate. The following circumstances are especially relevant.

EVIDENCE OF GUILT: Apart from the witness’s ID, is there other evidence that the defendant was the perpetrator? If so, it is a strong indication that the identification

[ID was “positive and unshaken”]; *People v. Greene* (1973) 34 Cal.App.3d 622, 641 [“My God, that’s him”]; *People v. Arias* (1996) 13 Cal.4th 92, 169 [the certainty of the witness’s ID was eight “on a scale of one (lowest) to ten (highest).”]; *People v. West* (1984) 154 Cal.App.3d 100, 105 [“without hesitation”]; *People v. Jardine* (1981) 116 Cal.App.3d 907, 915 [“That’s the two guys right there.”]; *People v. Fortier* (1970) 10 Cal.App.3d 760, 764 [“no doubt”]; *People v. Gomez* (1976) 63 Cal.App.3d 328, 336 [“no doubt in her mind”]; *People v. Sanders* (1990) 51 Cal.3d 471, 508 [“certain”]; *People v. Henderson* (1972) 25 Cal.App.3d 371, 379 [witness expressed no doubts]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [“positive”]; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220 [“certain”]; *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 412 [“positive”]; *People v. Bethea* (1971) 18 Cal.App.3d 930, 934 [“This is the one.”]. ALSO SEE *People v. Brown* (1969) 273 Cal.App.2d 109, 112 [“I just know that I would always know him if I ever saw him again.”]; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557 [the witness “emphasized that she would never forget appellant’s face”].

¹¹⁵ *People v. Lewis* (1966) 240 Cal.App.2d 546, 548; *People v. Rist* (1976) 16 Cal.3d 211, 216 [“Confusion, or lack of clarity and positiveness in a witness’ identification testimony goes to the weight, not the admissibility of the testimony.”]; *People v. Prado* (1982) 130 Cal.App.3d 669, 674 [“Hansen’s failure to make a positive identification of appellant based on photographic displays merely goes to the weight of the evidence, not its sufficiency.”].

¹¹⁶ See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387. ALSO SEE *People v. Clark* (1992) 3 Cal.4th 41, 137 [“(I)t is a matter of common experience that the ability to remember a perceptive experience diminishes over time.”].

¹¹⁷ See *People v. Wells* (1971) 14 Cal.App.3d 348, 355 [“her recognition of the defendant was instantaneous upon her first glimpse of him”]; *People v. Harris* (1971) 18 Cal.App.3d 1, 6; *People v. Hawkins* (1970) 7 Cal.App.3d 117, 123 [“unhesitatingly”]; *People v. LeBlanc* (1972) 23 Cal.App.3d 902, 906 [“unhesitatingly”]; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 793 [“immediately”]; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072 [“instantaneously”]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052 [“immediately”].

¹¹⁸ See *People v. Arias* (1996) 13 Cal.4th 92, 169 [veteran officer testified “a witness typically selects a photo, if at all, within five minutes or so,” but that taking 15 to 20 minutes would indicate indecision which he would include in his report].

was accurate.¹¹⁹ For example, it is logical to infer the witness's ID was accurate if the defendant confessed to the crime, or if his fingerprints were found at the crime scene, or if he was ID'd by other witnesses.

TIME LAPSE BETWEEN CRIME AND ID: Because memories fade,¹²⁰ the length of time between the crime and the ID is somewhat relevant, but never decisive.¹²¹

ACCURACY IN OTHER LINEUPS: It may be logical to infer that the witness's ID was accurate if he previously failed to identify anyone in a lineup or showup in which the defendant was *not* present. For example, in the U.S. Supreme Court case of *Neil v. Biggers* the Court, in ruling the victim's ID of the defendant was sufficiently reliable, pointed out that she "made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup."¹²² Conversely, if

¹¹⁹ See *Simmons v. United States* (1968) 390 US 377, 385 ["These initial identifications were confirmed by all five witnesses in subsequent viewings . . ."]; *People v. Anthony* (1970) 7 Cal.App.3d 751, 765 ["The circumstantial evidence that defendant was the robber is overwhelming."]; *People v. Bauer* (1969) 1 Cal.3d 368, 374 ["Finally, there was substantial corroborating evidence."]; *People v. Farham* (2002) 28 Cal.4th 107, 184 ["Significantly, defendant had given a detailed confession to the police"]; *People v. West* (1984) 154 Cal.App.3d 100, 106; *People v. Thomas* (1970) 5 Cal.App.3d 889, 900; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39; *People v. Flint* (1986) 180 Cal.App.3d 13, 19; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072; *People v. Edwards* (1981) 126 Cal.App.3d 447, 454; *People v. Castellano* (1978) 79 Cal.App.3d 844, 852; *People v. McDaniels* (1972) 25 Cal.App.3d 708, 711; *People v. Harpool* (1984) 155 Cal.App.3d 877, 886; *People v. Malich* (1971) 15 Cal.App.3d 253, 261. NOTE: If the lineup or showup was suggestive, circumstantial evidence of guilt is also relevant in determining whether admission of the ID was harmless error. See *People v. Sandoval* (1977) 70 Cal.App.3d 73, 86; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197.

¹²⁰ See *People v. Clark* (1992) 3 Cal.4th 41, 137 ["(I)t is a matter of common experience that the ability to remember a perceptive experience diminishes over time."].

¹²¹ EXAMPLES: All ID's were ruled reliable unless noted otherwise: SHOWUPS: *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220 [one hour]; *People v. Gomez* (1976) 63 Cal.App.3d 328, 336 [1½ to 2 hours]; *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072 [2 hours]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [less than 3 hours]; *People v. Edwards* (1981) 126 Cal.App.3d 447, 455 [4½ hours]; *People v. Nash* (1982) 129 Cal.App.3d 513, 518 [20 hours]; *Neil v. Biggers* (1972) 409 US 188, 201 [7 months]; COMPARE *People v. Bisogni* (1971) 4 Cal.3d 582, 587 [5 months; not reliable]. PHOTO LINEUPS: *Simmons v. United States* (1968) 390 US 377, 385 [one day]; *Manson v. Brathwaite* (1977) 432 US 98, 116 [2 days]; *People v. Sanders* (1990) 51 Cal.3d 471, 508 [2 days]; *People v. Wells* (1971) 14 Cal.App.3d 348, 355 [3 days]; *People v. Ware* (1978) 78 Cal.App.3d 822, 840 [within one week]; *People v. Blum* (1973) 35 Cal.App.3d 515, 519 [29 days]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 731 [93 days]; *People v. West* (1984) 154 Cal.App.3d 100, 105 [9½ months]; *People v. Arias* (1996) 13 Cal.4th 92, 168-9 [10 months]; PHYSICAL LINEUPS: *People v. Thomas* (1970) 5 Cal.App.3d 889, 900 [14 hours]; *People v. Blair* (1979) 25 Cal.3d 640, 662 [5 months].

¹²² (1972) 409 US 188, 201. ALSO SEE *People v. Ware* (1978) 78 Cal.App.3d 822, 839 ["Shortly after the incident she was shown a mug book of some 200 photos and positively stated that none of the pictures was that of her assailant."]; *People v. Nash* (1982) 129 Cal.App.3d 513, 518 ["Of significance in this case is that the victim was shown but did not identify many men before she saw appellant."]; *People v. Brown* (1969) 273 Cal.App.2d 109, 110; *People v. Bauer* (1969) 1 Cal.3d 368, 374 ["Each of the witnesses rejected a number of mug shots and two of them also rejected the participants in another lineup before making the identification."]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 731 ["(The witness) declined to identify anyone out of a photo lineup that did *not* contain a photograph of appellant"]; *People v. Spencer* (1972) 22 Cal.App.3d 786, 796 ["Miss Lawson did not identify anyone in the first lineup, from which appellant was absent"]; *People v. Blum* (1973) 35 Cal.App.3d 515, 519 ["(The witness) was shown a group of six photographs none of which included defendant's picture. (The witness) stated that he was unable

the witness failed to identify the defendant in a lineup or showup in which the defendant was present, there may be reason to question the witness's reliability.¹²³ There may also be problems if the witness identified a filler who did not resemble the defendant.¹²⁴

NUMBER OF FILLERS: The number of fillers in a physical or photo lineup is also an indication of reliability.¹²⁵

SOME WITNESSES ID'D, OTHERS DIDN'T: The fact that some witnesses at a lineup identified the defendant but others did not has been deemed a circumstance that tends to show the procedure was not suggestive.¹²⁶

RIGHT TO COUNSEL

Next to misidentification, the most litigated issue in lineup cases is whether officers violated the defendant's right to have an attorney present at the proceeding. It is, therefore, important that officers and prosecutors know, (1) when a suspect has a right to counsel at a lineup, (2) how to obtain a waiver of the right, and (3) the attorney's duties.

When the right attaches

A suspect has a right to have counsel present at a lineup only if both of the following circumstances exist: (1) the suspect was charged with the crime for which the lineup was being conducted, and (2) the witness will see or hear the suspect in person.

FORMAL CHARGING: A suspect is charged when prosecutors file a misdemeanor or felony complaint against him in any court, or when he is indicted by a grand jury.¹²⁷ Although the point at which a suspect is charged is clearly established and easy to determine, defendants continue to argue their right to counsel was triggered by something other than formal charging—and their arguments are consistently rejected.

For the record, an uncharged suspect does not somehow become "charged" as the result of any of the following:

to identify the robber in any of these photographs."]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.

¹²³ See *United States v. Wade* (1967) 388 US 218, 241 [it is relevant whether there was a "failure to identify the defendant on a prior occasion"].

¹²⁴ See *United States v. Wade* (1967) 388 US 218, 241 [it is relevant whether the witness made "any identification prior to the lineup of another person"]; *People v. West* (1984) 154 Cal.App.3d 100, 105; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197; *People v. West* (1984) 154 Cal.App.3d 100, 105 [the person the witness picked "looks similar to the black and white photograph of defendant"].

¹²⁵ See *People v. Wells* (1971) 14 Cal.App.3d 348, 355 [witness examined "hundred of photographs of various parolees in the area" before picking the defendant's photo]; *People v. Blair* (1979) 25 Cal.3d 640, 660 ["Stroud picked four men, including defendant, from among 39 photographs shown him."].

¹²⁶ See *People v. Sequeira* (1981) 126 Cal.App.3d 1, 16-7 ["Moreover, the mixed results obtained—some witnesses identified appellant while others could not make an identification—also tends to indicate the fairness of the physical lineup procedure."]; *People v. Thomas* (1970) 5 Cal.App.3d 889, 900.

¹²⁷ See *United States v. Wade* (1967) 388 US 218, 236; *Kirby v. Illinois* (1972) 406 US 682, 689; *Moore v. Illinois* (1977) 434 US 220, 228; *Maine v. Moulton* (1985) 474 US 159 170; *McNeil v. Wisconsin* (1991) 501 US 171, 175; *People v. Clair* (1992) 2 Cal.4th 629, 657-8; *People v. Sully* (1991) 53 Cal.3d 1195, 1233-4. ALSO SEE Penal Code §691(c) ["The words 'accusatory pleading' include an indictment, an information, an accusation, and a complaint."].

ARRESTED: The suspect was under arrest for the crime for which the lineup was conducted.¹²⁸

RAMEY WARRANT: A pre-complaint (*Ramey*) warrant for the suspect's arrest had been issued.¹²⁹

FOCUS: The suspect had become the focus of the investigation.¹³⁰

UNCHARGED SUSPECT REPRESENTED: The suspect hired an attorney to represent him in case he was later charged.¹³¹

MIRANDA INVOCATION:: The suspect invoked his *Miranda* right to counsel while officers were questioning him about the crime.¹³²

CHARGED WITH RELATED CRIME: The suspect was charged with another crime that was "closely related" to, or even "inextricably intertwined" with, the uncharged crime.¹³³

There is one exception to the rule that a suspect has a right to counsel only as to charged crimes. Specifically, a suspect has a right to counsel during a lineup for an uncharged crime if, (1) he has been charged with another crime; and (2) the charged and uncharged crimes have the same elements, or one of them is a lesser included offense in the other.¹³⁴

IN PERSON ID: Even if the suspect was charged with the crime under investigation, he does not have a right to have counsel present unless the witness will be viewing him in person or, in the case of a voice-only lineup, listening to him in person. This means there

¹²⁸ See *People v. Anthony* (1970) 7 Cal.App.3d 751, 763-4; *People v. Faulkner* (1972) 28 Cal.App.3d 384, 390; *People v. Webb* (1993) 6 Cal.4th 494, 527; *Hoffa v. United States* (1966) 385 US 293, 310; *People v. Williams* (1980) 114 Cal.App.3d 67, 76.

¹²⁹ See *People v. Johnson* (1992) 3 Cal.4th 1183, 1222-3; *People v. Case* (1980) 105 Cal.App.3d 826, 833-4; *United States v. Ash* (1973) 413 US 300, 303, fn.3.

¹³⁰ See *People v. Clair* (1992) 2 Cal.4th 629, 657; *People v. Hovey* (1988) 44 Cal.3d 543, 561; *U.S. v. Hayes* (9th Cir. 2000) 231 F.3d 663 [Sixth Amendment did not apply when the suspect was the uncharged "target" of federal investigation even though counsel had been appointed to represent him].

¹³¹ See *Moran v. Burbine* (1986) 475 US 412, 430; *People v. Carter* (2003) 30 Cal.4th 1166, 1210 [jail inmate's attorney need not be notified before questioning inmate about uncharged crime committed in jail]; *People v. Duck Wong* (1976) 18 Cal.3d 178; *People v. Wader* (1993) 5 Cal.4th 610, 636 ["Although defendant had obtained counsel in a case that was unrelated to this case, because defendant's Sixth Amendment right to counsel in this case had not attached it could not be violated."]; *People v. Mattson* (1990) 50 Cal.3d 826, 867-9, fn.25; *People v. Mack* (1979) 89 Cal.App.3d 974, 977; *People v. Booker* (1977) 69 Cal.App.3d 654, 664; *People v. Ledesma* (1988) 204 Cal.App.3d 682, 693; *McNeil v. Wisconsin* (1991) 501 US 171, 175; *People v. Duren* (1973) 9 Cal.3d 218, 243 ["(T)he fact that counsel had been appointed to represent defendant on a completely unrelated charge did not make ineffective his clear waiver of counsel."]; *In re Michael B.* (1981) 125 Cal.App.3d 790, 794 ["(B)efore charges are filed, questioning out of the presence of an attorney who already represents the defendant is not absolutely barred, but rather is permitted, provided the Fifth Amendment waiver is valid."]; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1283. NOTE: In *Moran v. Burbine*, supra, (1986) 475 US 412 the Court acknowledged that if the suspect confesses, "his attorney's case at trial will be that much more difficult" but added this fact is not decisive. At p. 431.

¹³² See *People v. Acuna* (1988) 204 Cal.App.3d 602, 607.

¹³³ See *Texas v. Cobb* (2001) 532 US 162; *People v. Slayton* (2001) 26 Cal.4th 1076, 1082; *People v. Martin* (2002) 98 Cal.App.4th 408, 423-5; *People v. Sequeira* (1981) 126 Cal.App.3d 1, 15. ALSO SEE: *People v. Clair* (1992) 2 Cal.4th 629, 658; *People v. Plyler* (1993) 18 Cal.App.4th 535, 547; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1283; *People v. Sully* (1991) 53 Cal.3d 1195, 1234.

¹³⁴ See *Texas v. Cobb* (2001) 532 US 162, 172-4.

is no right to counsel when the witness views a photo lineup or a videotape of a physical lineup, or listens to a tape recording of a voice-only lineup.¹³⁵

The reason the right to counsel does not attach in such circumstances is that the defense will be able to explore the possibility of suggestiveness by viewing the photos or videotape, or listening to the audio tape.¹³⁶ In other words, there is no overriding need to have an attorney present. As the court observed in *People v. Hawkins*, “Any suggestive influences present at a photo-identification in large measure are preserved by the photographic evidence, or readily detectable by cross-examination of the participants.”¹³⁷

Note, however, that a violation of the right to counsel might occur if officers lose the photos or the recording.¹³⁸

Counsel’s role

The attorney’s role at a lineup is very limited. He is to be a “silent observer,”¹³⁹ taking note of any suggestiveness in the lineup procedure so he can later assist the defense in challenging the lineup in court.¹⁴⁰ As explained by Justice Mosk:

[D]efense counsel has no affirmative right to be active during the course of the lineup. He cannot rearrange the personnel, cross-examine, ask those in the lineup to say anything or to don any particular clothing or to make any specific gestures. Counsel may not insist law enforcement officials hear his objection to procedures employed, nor may he compel them to adjust their lineup to his views of what is appropriate.¹⁴¹

RIGHT TO BE PRESENT WHEN ID IS MADE: Because the attorney’s role at a lineup is that of an observer, he has a right to be present throughout the proceedings, including the point at which the witness is asked if he can identify the perpetrator.¹⁴² For example,

¹³⁵ See *People v. Lawrence* (1971) 4 Cal.3d 273, 279-80 [(W)e conclude the right to counsel does not extend to post-arrest photographic identification proceedings.”].

¹³⁶ See *People v. Lawrence* (1971) 4 Cal.3d 273, 278 [“As long as the photographs from which the witness made his identification are preserved the available at trial, counsel for the accused, by using them in cross-examination or prosecution witnesses, can easily reveal the possibility of prejudice. . . .”]; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 791 [(T)he chief difference between a photographic line-up and [a physical lineup] is the ability to reproduce much of what transpired by the production of the photos themselves.”]; *People v. Adair* (1969) 2 Cal.App.3d 92, 96 [“The photographs, with any shortcomings in their quality, lighting, exposure and the like, are available to examine. The manner in which they were exhibited to the witnesses readily can be explored on cross-examination”]; *People v. Lineman* (1970) 5 Cal.App.3d 1, 4; *People v. Bethea* (1971) 18 Cal.App.3d 930, 937; *People v. Malich* (1971) 15 Cal.App.3d 253, 260 [based on a review of lineup photographs, the court determines the procedure was fair].

¹³⁷ (1970) 7 Cal.App.3d 117, 121.

¹³⁸ See *People v. Knight* (1976) 57 Cal.App.3d 515, 518.

¹³⁹ See *People v. Wimberly* (1992) 5 Cal.App.4th 773, 786.

¹⁴⁰ See *United States v. Ash* (1973) 413 US 300, 312; *United States v. Wade* (1967) 388 US 218, 230-1, 236; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 791; *People v. Williams* (1971) 3 Cal.3d 853, 856, 860 (dis. opn. of Mosk, J); *People v. Hawkins* (1970) 7 Cal.App.3d 117, 121; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 785-6; *People v. Carpenter* (1997) 15 Cal.4th 312, 368; *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 221.

¹⁴¹ *People v. Williams* (1971) 3 Cal.3d 853, 860 (dis. opn. of Mosk, J.). ALSO SEE *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 [“As Justice Mosk’s strong dissent, joined by two others, noted, defense counsel must not be allowed to interfere with a police investigation.”]; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 785-6; *People v. Carpenter* (1997) 15 Cal.4th 312, 368 [“Defendant cites no authority that defense counsel must be given time to scrutinize the police reports before the lineup.”].

¹⁴² See *People v. Harmon* (1989) 215 Cal.App.3d 552, 566; *People v. Carpenter* (1999) 21 Cal. 4th 1016, 1046 [court distinguishes *Williams*]; *People v. Malich* (1971) 15 Cal.App.3d 253, 261 [(T)he

in *People v. Williams*¹⁴³ the defendant’s attorney was present when a witness viewed the lineup, but then sheriff’s deputies took the witness into another room “for the purpose of making his identification.” The attorney sought to accompany the witness “and listen to any identification made by him,” but his request was denied on grounds it was against departmental policy. The California Supreme Court ruled this was unlawful because the right to counsel at a lineup includes the right to have the attorney present when officers inquire whether the witness identified anyone.

RIGHT TO BE PRESENT DURING INTERVIEWS: The attorney does not have a right to be present when officers interview a witness after he made or failed to make an ID.¹⁴⁴ Nor does the attorney have a right to be present during interviews with witnesses before the lineup.¹⁴⁵

For example, in *People v. Perkins*¹⁴⁶ the defendant’s attorney left the lineup after a witness failed to identify Perkins as the man who robbed her. A few minutes later, an officer asked the witness “if she saw anyone closely resembling one of the robbers.” She replied that Perkins was robber. Perkins contended this post-ID interview violated his right to counsel, but the court disagreed:

[S]ince the identification process had been completed, Perkins’ counsel had no more right to be present at the interview than he would at any nonconfrontational identification by a victim. No defendant has the right to demand representation by counsel at every interview between the prosecution and its witness.

Similarly, in *People v. Mitcham*¹⁴⁷ a robbery victim who was viewing a physical lineup in Oakland placed a question mark on the lineup card next to the defendant’s number. The OPD investigator did not ask her to explain the question mark immediately after the lineup because it was “standard practice in his office not to discuss lineup details in the presence of defense counsel.”¹⁴⁸

One week later, however, he met with her to find out about the question mark. During the meeting, she said she was “95% sure” that Mitcham was the robber.

On appeal, Mitcham contended a lineup is not “over” until the post-lineup interview was completed. Thus, he claimed the victim’s ID should have been suppressed because it was made before the lineup had been completed. The California Supreme Court disagreed:

The premise of defendant’s argument—that the lineup identification was not complete until [the interview]—is plainly incorrect. The lineup identification

attorney’s exclusion from the actual identification after the lineup emasculates the lineup and vitiates an in-court identification based upon it.”]. EXCEPTION: There is one exception to this rule, although it should not be utilized without good cause: If the attorney was present when the witness viewed the lineup, he need not be present when the identification was made if everything that was said when the ID was made was tape recorded. *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 [“(T)he interviews were tape-recorded, which minimized the concerns that led to the adoption of the *Williams* rule. Unlike *Williams*, counsel here could listen to the recording of the interview, and thus be fully apprised of what occurred.”]; *People v. Carpenter* (1997) 15 Cal.4th 312, 368 [“The [identification] interviews were tape-recorded [because] prosecutors wanted to tape-record the witnesses’ statements, and the lineup itself was not conducive to such recording. The interviews occurred only ‘after any witnesses made any type of identification.’”].

¹⁴³ (1971) 3 Cal.3d 853.

¹⁴⁴ See *People v. Carpenter* (1997) 15 Cal.4th 312, 368-9; *People v. Carpenter* (1999) 21 Cal. 4th 1016, 1045.

¹⁴⁵ See *People v. Carpenter* (1999) 21 Cal. 4th 1016, 1045.

¹⁴⁶ (1986) 184 Cal.App.3d 583.

¹⁴⁷ (1992) 1 Cal.4th 1027, 1067.

¹⁴⁸ NOTE: In discussing this policy, the court said, “Such a policy did not violate defendant’s right to counsel and therefore did not taint the validity of the identification.”

procedure was complete when [the victim] filled out and signed the identification card, indicating her identification of defendant, qualified by a question mark.

Other “right to counsel” issues

WAIVER OF RIGHT TO COUNSEL: A suspect who has a right to counsel at a lineup may waive that right if he has neither requested or accepted the appointment of counsel as to the charged crime.¹⁴⁹ Before obtaining such a waiver, however, officers must advise the suspect of the following rights:

- (1) You have a right to have counsel present at the lineup.
- (2) You are not required to participate in the lineup without counsel.
- (3) If you want an attorney at the lineup but cannot afford one, the court will appoint one for you at no charge.¹⁵⁰

Note that because there are significant differences between the right to counsel at a lineup and the *Miranda* right to counsel during interrogation, a *Miranda* waiver does *not* constitute a waiver of counsel’s presence at the lineup.¹⁵¹

ATTORNEY NOT AVAILABLE OR WON’T PARTICIPATE: If the suspect requests a certain attorney who cannot attend the lineup within a reasonable time, officers may conduct the lineup in the presence of “substitute counsel,” such as a public defender.¹⁵² Another option is to photograph or videotape the lineup without the witness present, then show the photos or videotape to the witness without counsel being present. As noted earlier, there is no right to counsel under such circumstances.¹⁵³

CONSEQUENCES OF VIOLATION: If officers conduct a lineup or showup in violation of the defendant’s right to counsel, prosecutors will not be permitted to present evidence in court that the witness was able to identify the defendant at the lineup or showup.¹⁵⁴ In addition, the witness will be prohibited from identifying the defendant at trial unless the prosecution proves, by clear and convincing evidence, that the in-court identification was independent of the unlawful lineup identification.¹⁵⁵ The circumstances that are relevant in determining whether an in-court ID was independent of the prior ID are essentially the same as those that are relevant in establishing the reliability of an ID, discussed earlier.

¹⁴⁹ See *United States v. Wade* (1967) 388 US 218, 237; *Michigan v. Harvey* (1990) 494 US 344, 352; *Brewer v. Williams* (1977) 430 US 387, 405; *Michigan v. Jackson* (1986) 475 US 625, 631; *Patterson v. Illinois* (1988) 487 US 285, 290, fn.3; *People v. Wells* (1971) 14 Cal.App.3d 348, 354; *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1159-60; *People v. Banks* (1970) 2 Cal.3d 127, 134.

¹⁵⁰ See *People v. Thomas* (1970) 5 Cal.App.3d 889, 897; *People v. Banks* (1970) 2 Cal.3d 127, 136; *People v. Wells* (1971) 14 Cal.App.3d 348, 354.

¹⁵¹ See *People v. Banks* (1970) 2 Cal.3d 127, 134-6; *People v. Schafer* (1970) 4 Cal.App.3d 554, 560.

¹⁵² See *People v. Wimberly* (1992) 5 Cal.App.4th 773; *People v. Nichols* (1969) 272 Cal.App.2d 59, 64. NOTE: If the suspect’s attorney appears at the lineup but, for whatever reason, refuses to be present during the procedure, officers may proceed with the lineup without him. See *People v. Hart* (1999) 20 Cal.4th 546, 625 [“(T)he public defender’s *refusal* to attend the lineup cannot be equated with a *denial* of defendant’s right to counsel.”].

¹⁵³ See *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197, fn.15; *People v. Lawrence* (1971) 4 Cal.3d 273, 278-280; *People v. Lineman* (1970) 5 Cal.App.3d 1; *People v. Rhinehart* (1973) 9 Cal.3d 139, 152-3; *United States v. Ash* (1973) 413 US 300, 317-321.

¹⁵⁴ See *Moore v. Illinois* (1977) 434 US 220, 231; *United States v. Wade* (1967) 388 US 218, 239-241; *Gilbert v. California* (1967) 388 US 263, 272-3; *People v. Diggs* (1980) 112 Cal.App.3d 522, 528.

¹⁵⁵ See *People v. Floyd* (1970) 1 Cal.3d 694, 711; *People v. George* (1972) 23 Cal.App.3d 767, 774; *People v. Diggs* (1980) 112 Cal.App.3d 522, 528; *People v. Malich* (1971) 15 Cal.App.3d 253, 261; *People v. LeBlanc* (1972) 23 Cal.App.3d 902, 906.

WHY THE CONFUSION? Even though the issue has been settled, there continues to be some uncertainty among officers, prosecutors, and defense attorneys as to when a suspect has a right to have counsel present at a lineup. This uncertainty can be traced to some imprecise language in two U.S. Supreme Court opinions, the failure of the Court to reach agreement in a third case, and a California Supreme Court that, in those days, “demonstrated more concern with the rights of criminals than with the rights of innocent victims.”¹⁵⁷

The story begins in 1967 when the United States Supreme Court ruled in *U.S. v. Wade* and *Gilbert v. California* that a suspect has a right to counsel at a lineup pertaining to a crime for which he has been indicted.¹⁵⁶ In 1969, the California Supreme Court interpreted *Wade* and *Gilbert* to mean a suspect has a right to counsel even if he had not been indicted—in fact, even if he was not even charged with the crime under investigation.¹⁵⁷

In 1972, the issue returned to the U.S. Supreme Court in the case of *Kirby v. Illinois*.¹⁵⁸ Although the Court could not agree on a decision, its discussion clearly indicated that a suspect does not have a right to counsel unless he has been charged.¹⁵⁹

In 1981, the issue was back at the California Supreme Court in the case of *People v. Bustamante*.¹⁶⁰ By now, it was apparent that the U.S. Supreme Court was not going to rule that the right to counsel attached before charging. Consequently, the *Bustamante* court ruled that California courts must apply state law in determining when the right to counsel attaches. It then announced that under California law, *all* suspects—charged and uncharged—have a right to counsel at lineups.

One year later, the voters of California—in response to cases like *Bustamante*—passed Proposition 8 which said that evidence can be suppressed only if it was obtained in violation of the U.S. Constitution. Thus, evidence cannot be suppressed on grounds it was obtained in violation of *Bustamante* or any other case based on independent state grounds.

Just in case there was any remaining doubt, the California Supreme Court ruled in the 1992 case of *People v. Johnson* that Proposition 8 abrogated *Bustamante*.¹⁶¹

OTHER LINEUP ISSUES

DEFENDANT’S REQUEST FOR LINEUP: Under certain circumstances officers may be ordered by a court to put a defendant in a physical lineup. This can occur if the defendant files a Motion for Lineup, along with a declaration explaining why, (1) ID will be a material issue in the case, and (2) there is a reasonable likelihood of a mistaken ID that a lineup would tend to reduce.¹⁶² Such motion will, however, be denied if it was not made in a timely manner.¹⁶³

REFUSAL TO PARTICIPATE IN LINEUP: A suspect does not have a right to refuse to participate in a physical lineup, or refuse to speak during a voice lineup, or refuse to wear

¹⁵⁶ See *U.S. v. Wade* (1967) 388 US 218; *Gilbert v. California* (1967) 388 US 263.

¹⁵⁷ *People v. Fowler* (1969) 1 Cal.3d 335.

¹⁵⁸ (1972) 406 US 682.

¹⁵⁹ See *United States v. Gouveia* (1984) 467 US 180, 188-9.

¹⁶⁰ (1981) 30 Cal.3d 88.

¹⁶¹ (1992) 3 Cal.4th 1183, 1222.

¹⁶² See *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625; *People v. Farnam* (2002) 28 Cal.4th 107, 183-4; *People v. Vallez* (1978) 80 Cal.App.3d 46, 56 [“Motions made shortly before trial will generally be denied unless good cause is shown for the delay.”]; *People v. Green* (1979) 95 Cal.App.3d 991, 1004; *People v. Harmon* (1989) 215 Cal.App.3d 552, 568-9. ALSO SEE: *Garcia v. Superior Court* (1991) 1 Cal.App.4th 979, 988.

¹⁶³ *People v. Farnam* (2002) 28 Cal.4th 107, 184.

certain clothing for identification purposes.¹⁶⁴ If such a refusal occurs, the prosecution may be allowed to disclose it at trial as proof of the defendant's consciousness of guilt.¹⁶⁵

To help ensure the admissibility of a refusal, officers should notify the suspect that his refusal to participate in the lineup may be used against him in court as evidence that he knew he would be identified as the perpetrator.¹⁶⁶

Note that if the suspect refuses a request to say something during the lineup, and if he had previously been advised of his *Miranda* rights, officers must also notify him that the *Miranda* right to remain silent pertains only to police questioning—it does not give him a right to refuse to speak at a voice test.¹⁶⁷

APPEARANCE ORDERS: If the suspect is in custody in another county in California, officers may seek an Appearance Order. Such an order permits officers to transport the suspect to their county for an appearing in a lineup. Such an order may be issued upon an *ex parte* declaration that establishes “sufficient cause” to believe the suspect committed the crime under investigation and that a physical lineup is reasonably necessary.¹⁶⁸

SIMULTANEOUS AND SEQUENTIAL LINEUPS: There is currently much discussion and debate about the differences in accuracy between so-called “simultaneous” and “sequential” lineups. In a simultaneous lineup—the customary lineup—the suspect and the fillers are presented to the witness at the same time. For example, in a simultaneous physical lineup the suspect and fillers are all on the stage at the same time. And in a simultaneous photo lineup all the photos are presented together, often affixed to a cutout with slots for each picture.

In a “sequential” lineup, the suspect and the fillers are presented one at a time. After the witness views the first person or the first photo, he is asked if that was the perpetrator. Even if he says yes, the procedure continues until he views everyone in the lineup.

According to some psychologists, a witness who views a simultaneous lineup may tend to compare the people in the lineup with one another when he should be comparing each person with his mental picture of the perpetrator. And they contend this tendency may result in erroneous ID's because, if the perpetrator is not in the lineup, the witness may ID the person who most resembles the perpetrator—even if he was not the perpetrator.¹⁶⁹ On the other hand, it has been noted that although there may be fewer misidentifications with sequential lineups, there may also be fewer correct ID's.¹⁷⁰

In any event, this is a complex subject, based largely on psychology and the interpretation of a growing number of studies. We will be watching for judicial discourse on the subject.

¹⁶⁴ See *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 221; *People v. Hart* (1999) 20 Cal.4th 546, 625; *People v. Huston* (1989) 210 Cal.App.3d 192, 216; *People v. Ellis* (1966) 65 Cal.2d 529, 533.

¹⁶⁵ See *People v. Smith* (1970) 13 Cal.App.3d 897, 910; *People v. Johnson* (1992) 3 Cal.4th 1183, 1222; *People v. Ellis* (1966) 65 Cal.2d 529.

¹⁶⁶ See *People v. Huston* (1989) 210 Cal.App.3d 192, 217.

¹⁶⁷ See *People v. Johnson* (1992) 3 Cal.4th 1183, 1223, fn.9; *People v. Ellis* (1966) 65 Cal.2d 529, 539.

¹⁶⁸ See *People v. Sequeira* (1981) 126 Cal.App.3d 1, 13-15. ALSO SEE: *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 223-4. NOTE: The order should state that, following the lineup, the suspect is to be returned forthwith to the county in which he was in custody. See *Sequeira*, supra, at p. 14.

¹⁶⁹ See, for example, Ebbesen and Flowe, University of California at San Diego, “*Simultaneous v. Sequential Lineups: What Do We Really Know?*”

¹⁷⁰ See Gary L. Wells, Iowa State University, *Does the Sequential Lineup Reduce Accurate Identifications in Addition to Reducing Mistaken Identifications? Yes, but . . .*”