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SUSPECT CHOICES: LINEUP PROCEDURES AND THE ABDICATION OF JUDICIAL AND PROSECUTORIAL RESPONSIBILITY FOR IMPROVING THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Legislators enact laws, law enforcement personnel execute laws, and, within limits, judges interpret both the laws and their execution.[1] Although this operative concept generally shapes the way we think about the criminal justice system, the paradigm is incomplete. As every law student learns in a professional responsibility or legal ethics course, all members of the legal profession share a responsibility for improving the legal system.[2] Thus, while constitutional and statutory rules provide the structural framework within which legal actors operate, systemic obligations to seek and secure justice—defined, in part, by preventing erroneous convictions—directly inform and guide the entire decision-making process.

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1. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818 (1824) ("The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law.").

2. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 (1996) ("[Lawyers] should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients."); *id.* at EC 8-2 ("If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law."); *id.* at EC 8-9 ("[L]awyers should encourage, and should aid in making, needed changes and improvements."); *see also* ABA TASK FORCE ON LAW SCHOOLS & LEGAL EDUC., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT 215 (1992) ("Lawyers play a critical role in the ongoing process of rationalizing and civilizing the law and legal institutions."); Denny Chin, *Access to the Legal Profession for Minorities: Introductory Remarks*, 2 J. INST. FOR STUDY LEGAL ETHICS 49, 49 (1999) ("The ethical lawyer is a moral lawyer, a lawyer who not only complies with Disciplinary Rules, but who also exercises good judgment, is publicly spirited, and aspires to improve society.").

This article considers these institutional responsibilities by examining *People v. Franco*,[3] a New York Supreme Court case in which judicial actors abdicated their obligations to reform the criminal justice system in ways that will guard against erroneous convictions by refusing to implement a more reliable identification procedure. During the pretrial stages of *Franco*, the prosecution sought to place the defendant in a lineup. The defendant, in turn, requested that law enforcement replace the traditional simultaneous lineup procedure they intended to use with a sequential lineup, a method proven to be significantly more effective at reducing the risk of misidentifications.[4] Despite acknowledging the enhanced reliability of a sequential lineup, the prosecution refused to pursue the suggested procedure. Complying with the prosecution's preference, the *Franco* court declined to use its supervisory power toward the same proposed end.

Considering the well-documented incidents of misidentification that plague our criminal justice system, this article contends that both the court and the prosecution in *Franco* abandoned their respective obligations to improve the criminal justice system by failing to implement the suggested reform. Part I briefly describes the pretrial litigation concerning lineup procedures in *People v. Franco*, which, as noted above, ended with both the prosecution and the court refusing to grant the defendant's request for a sequential lineup procedure. Part II follows with an examination of the *Franco* case through the lens of the responsible exercise of judicial and prosecutorial functions. This part begins with the first critical question to emerge from the *Franco* litigation, namely, whether a sequential lineup procedure is, in fact, the better lineup method. Finding that the evidence overwhelmingly supports the defendant's argument, this part continues by exploring whether the responsible exercise of judicial and prosecutorial functions should have resulted in a different outcome. In view of the evidence supporting the greater reliability of the proposed lineup procedure, as well as the duties and powers of judges and prosecutors to seek justice in its various forms, this part highlights the inadequacies of the positions taken by the court and prosecution in *Franco*, and concludes that both actors abdicated their respective obligations by refusing to grant the defendant's request. This article concludes by reflecting on some of the troubling issues raised by the *Franco* case.

3. No. 903/01 (N.Y. Sup. Ct. June 28, 2001), *available at* http://www.nysda.org/Hot_Topics/Eyewitness_Evidence/PeoplevFrancoDecision.pdf [hereinafter *Franco*]. The author assisted in litigation on behalf of the defendant while working as a legal intern at The Bronx Defenders, a public defender office in Bronx County, New York. The opinions expressed in this essay are the author's and not necessarily those of The Bronx Defenders.

4. Franco requested that the sequential lineup be conducted in a "double-blind" manner. As discussed *infra* notes 48–52, a double-blind method increases the reliability of any type of lineup procedure, sequential or simultaneous.

I.
PEOPLE V. FRANCO

In the spring of 2001, the Bronx County District Attorney's Office and the New York Police Department sought to conduct a lineup involving Leo Franco, a 16-year-old suspect accused of assault.[5] Because Franco was already in custody on an unrelated matter, he was under the direct protection of the court and represented by counsel, requiring that the prosecution move to obtain a trial court's order to compel Franco to stand in a lineup.[6] Upon receiving notice that law enforcement officials wanted Franco to participate in a lineup for identification by a possible witness, Franco filed a motion requesting that the trial court modify the prosecution's proposed order seeking a traditional simultaneous lineup procedure and instead direct law enforcement officials to use a sequential lineup procedure.[7] Following the traditional simultaneous lineup procedure, Franco would be placed in a row among five or so known innocents, or "foils," who are not significantly dissimilar to him in appearance.[8]

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5. Under New York law, a suspect may be ordered to appear in a lineup (or provide other non-testimonial evidence) when the prosecution establishes (1) probable cause to believe the accused committed the crime, (2) a "clear indication" that relevant material will be found, and (3) the method used is safe and reliable. *See, e.g.*, People v. Shields, 547 N.Y.S.2d 783, 784 (N.Y. App. Div. 1989). *Cf.* Matter of Abe A., 437 N.E.2d 265, 266 (N.Y. 1982) (holding that a court may order an accused to give a blood sample if the prosecution establishes probable cause to believe the suspect has committed a crime, clear indication that relevant material evidence will be found, and the method used to secure it is safe and reliable).

6. *See* People v. Hawkins, 55 N.Y.2d 474 (N.Y. 1982) (holding that a defendant who has been formally charged with a crime has a right to counsel at a lineup, while a suspect who is merely being placed in an investigatory lineup has no such right). Generally speaking, an attorney's role at a lineup procedure is limited. As the New York Court of Appeals explained in *People v. Wilson*, 680 N.E.2d 598, 601 (N.Y. 1997),

> A defendant has no right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution at a lineup that occurs prior to the initiation of formal prosecutorial proceedings ([*See*] Kirby v. Illinois, 406 U.S. 682, 688–89 [(1972)] (parenthetical citations omitted); People v. Hawkins, 55 N.Y.2d 474, 482 [(N.Y. 1982)] (parenthetical citations omitted)). The Fifth Amendment protection against self-incrimination is also not implicated at a preindictment lineup (citations omitted) [*Id.* at 482–83]. Similarly, there is generally no independent basis in the State Constitution for requiring counsel at investigatory lineups, although a right to counsel does arise after the initiation of formal prosecutorial proceedings (citations omitted) [*Id.* at 487] . . . . Nevertheless, "if a suspect already has counsel, his attorney may not be excluded from the lineup proceedings" [*Id.*].

7. *See* Memorandum of Law in Support of Defendant's Motion for Double-Blind Sequential Lineup, *Franco* (No. 903/01), *available at* http://www.nysda.org/Hot_Topics/Eyewitness_Evidence/PeoplevFrancoDefendantMotion.pdf [hereinafter Defendant's Motion].

8. There is a debate among some social scientists concerning the most effective strategy for selecting "foils" for identification lineups. The debate centers on whether "suspect-matched" foils or "description-matched" foils are most effective in reaching correct positive identifications while minimizing false positive selections. *Compare* Joseph L. Tunnicliff & Steven E. Clark, *Selecting Foils for Identification Lineups: Matching Suspects to Descriptions?*, 24 LAW & HUM. BEHAV. 231 (2000) (finding no significant difference in correct or false positive identifications between suspect and description-matched lineups; noting that results of the authors' studies run contrary to the argument that description-matched lineup is better for reducing false positive identifications than

Under the sequential lineup procedure, the witness would view the defendant and the other foils in sequence, one at a time. In such a procedure the witness would have to decide whether or not each lineup member in turn was the perpetrator. Franco also requested that the procedure be conducted "double-blind," meaning that none of the law enforcement personnel involved—neither the person instructing the witness nor the person directing the lineup members—would know which lineup member was the actual suspect.

In his motion to the court, Franco argued that sequential lineup procedures have demonstrated decreases in the potential for false identifications by as much as fifty percent over traditional simultaneous lineups.[9] If a lineup were to take place, Franco argued, the court should compel law enforcement to utilize the more effective method.[10] In addition to filing a motion with the court, Franco asked the prosecutors and local police to utilize the sequential lineup procedure. Both refused the request.[11]

In response to Franco's motion, the Bronx County District Attorney's Office conceded that a sequential lineup represents "a brave new step in addressing and reducing the mistakes that often result from the traditional, simultaneous lineup procedure currently employed."[12] Despite the ready availability of a more reliable method, the prosecution stressed nonetheless that "[t]he courts do not have general supervisory authority over day-to-day police procedures and investigatory methods."[13] Because "[t]he federal and state Constitution[s] certainly do not require that the most reliable identification procedure be used by law enforcement," the prosecution contended that the judiciary should not "act as an additional policy maker in the early stages of a criminal action" and thereby transform itself into "a hybrid mix of policy maker, legal activist and police officer."[14] Explained Anthony Girese, counsel to the current Bronx District Attorney, "We're not necessarily hostile to this procedure. But we don't think it's an appropriate order for a judge to make."[15]

On June 28, 2001, Acting Supreme Court Justice Steven Lloyd Barrett, while noting that studies certainly "suggest" that sequential lineups "may

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suspect-based method), *with* Gary Wells et al., *On the Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835 (1993) (showing correct positive identifications were higher for description-matched compared to suspect-matched methods, while finding no difference for false positive identifications of foils).

9. Defendant's Motion, *supra* note 7, at 3.

10. *Id.*

11. *See* Interview with David Feige, Trial Chief, The Bronx Defenders, in Bronx, N.Y. (Nov. 19, 2001).

12. Answer in Opposition to Defense's Motion for Sequential Lineup at 3, *Franco* (No. 903/01), *available at* http://www.nysda.org/Hot_Topics/Eyewitness_Evidence/PeoplevFranco ProsecutorMotion.pdf [hereinafter People's Response].

13. *Id.* at 4.

14. *Id.*

15. Shaila K. Dewan, *Lawyer Urges Change in Conduct of Lineups*, N.Y. TIMES, June 28, 2001, at B3.

improve upon the traditional lineup by reducing 'incorrect' identifications," nevertheless denied Franco's motion.[16] Stressing that Franco's claim was not that simultaneous lineups are unconstitutional per se but rather that sequential lineups are a demonstrably better method, Judge Barrett declined to engage in what he deemed "judicial legislation."[17] Short of a cognizable constitutional violation in the administration of a simultaneous lineup, the court in *Franco* declined to "involve itself in assessing and recommending the fine details of how . . . a lineup must be conducted."[18]

By narrowing its ruling to the questions of whether simultaneous lineups are themselves unconstitutional, and whether a defendant has a constitutional right to a more reliable lineup procedure, the court framed the question presented by Franco's motion as one of constitutional necessity.[19] Franco, however, never contended that he possessed a constitutional right to a sequential lineup procedure. Rather, Franco maintained that the court's supervisory power enabled it to order a sequential lineup procedure because the procedure itself was significantly more reliable. The court responded to this assertion by stating that it was forbidden from taking action unless compelled to do so by constitutional mandate.[20]

In support of its argument that the judiciary could not order law enforcement to use one constitutional lineup procedure over another, regardless of the fact that one might be demonstrably better than the other, the *Franco* court relied on the United States Supreme Court's decision in *Illinois v. Lafayette*.[21] In *Lafayette*, the Supreme Court upheld the validity of an inventory search of an arrestee's person at the police station, notwithstanding the fact that the preservation of the arrestee's property could have been achieved in a less intrusive manner.[22] Stressing that the court should only intervene if the constitution so

16. *See Franco*, *supra* note 3, at 5.

17. *Id.* at 4.

18. *Id.*

19. *See id.* In limiting the scope of its inquiry into whether simultaneous lineups were inherently and unconstitutionally suggestive, and whether there is a constitutional right to a "better method" of conducting a lineup, the court in *Franco* critically reframed the legal question. For discussion and insight into the way in which courts reframe or rephrase litigants' legal arguments into terms more amenable to reaching priorities laid out by the courts as opposed to the litigants, see generally ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000), exploring the psychological processes involved in the work of lawyers and judges in creating "categories" and "narratives" and utilizing "rhetorics" in litigating cases and rendering decisions. *See also* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 2–3 (1998) (noting certain techniques such as reframing legal arguments and the particular use of extralegal factors often utilized by judges in response to allegations that they are engaging in judicial policy making in order to support the appearance of judicial integrity).

20. *See Franco*, *supra* note 3, at 4 ("Defendant's application for judicial legislation here, a fortiari, cannot be granted, where the claim is not that the simultaneous lineup is unconstitutional per se, but only that the sequential lineup may be an improvement over the simultaneous lineup as theorized by the social scientists.").

21. *See id.* at 3–4 (citing Illinois v. Lafayette, 462 U.S. 640 (1983)).

22. *See* 462 U.S. 640 (1983).

required, Judge Barrett quoted the following language from *Lafayette*:

> [T]he real question is not what "could have been achieved," but whether the Fourth Amendment *requires* such steps; it is not our function to write a manual on administering routine, neutral procedures of the station house. Our role is to assure against violations of the Constitution. . . . The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means.[23]

In Judge Barrett's view, the court could not order a sequential lineup procedure simply on the basis that it was a more reliable procedure. To do so, the court concluded, would require the court to go beyond its judicial authority and enter into the minutiae of "routine" and "neutral" law enforcement activity.[24]

Judge Barrett did not, however, leave the defense without any options. After commending the defense on its presentation of the evidence in support of sequential lineups, and suggesting that his opinion should not be interpreted as lending full support to the use of simultaneous lineups, Judge Barrett suggested that Franco take his request elsewhere, namely, the district attorney's office and the police precinct. These avenues of relief, of course, had already been pursued without success.[25]

II.
RE-IMAGINING *FRANCO* THROUGH THE LENS OF THE RESPONSIBLE EXERCISE OF JUDICIAL AND PROSECUTORIAL FUNCTIONS

As the foregoing lays out, the critical issues at play in the *Franco* lineup litigation were (1) whether sequential lineup procedures are more reliable than simultaneous lineup procedures, and, assuming that the answer is yes, (2) whether the court and/or the prosecution had an obligation—and, in the case of the court, the power—to implement the superior lineup procedure. This article now examines these questions in order.

A. Sequential Lineups: The Path to Justice in the Franco *Case*

1. The Problems with Eyewitness Identifications

As the Supreme Court has noted, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[26] Indeed, both archival studies and psychological research

23. *Id.* at 647 (emphasis in original), *quoted in Franco*, *supra* note 3, at 3–4.

24. *See Franco*, *supra* note 3, at 3–4 ("[T]his Court declines to engage in a process of determining whether there exists a potentially 'better method' of conducting a lineup, nor will it involve itself in assessing and recommending the fine details of how such a lineup must be conducted").

25. *See* Interview with David Feige, *supra* note 11 and accompanying text.

26. United States v. Wade, 388 U.S. 218, 228 (1967).

support the reality that eyewitness identifications, which are among the most common forms of evidence presented in criminal trials,[27] are often wrong.[28] Although their fallibility is well documented, positive eyewitness identifications are nevertheless often tantamount to a conviction.[29] The Supreme Court has

27. *See* Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 261 (1991) ("[N]otwithstanding its well-recognized unreliability, eyewitness identification testimony is featured frequently and prominently in criminal trials.").

28. As noted by Carl McGowan, a former judge of United States Court of Appeals, eyewitness identification is "conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished . . . ." Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970) (footnote omitted). For a non-exhaustive selection of work documenting mistaken identifications, see, e.g.: EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (reporting a study of twenty-eight cases of mistaken convictions in which defendants were later cleared with DNA evidence, in which the majority of those convictions were predicated on mistaken eyewitness identifications); BARRY SCHECK ET AL., ACTUAL INNOCENCE (2000) (noting that mistaken identifications were significant factors in fifty-two out of sixty-two wrongful conviction cases); C.R. Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RES. SOC. PROBS. & PUB. POL'Y 99 (1987) (implicating mistaken eyewitness identifications in sixty percent of the more than five hundred erroneous convictions studied); Ayre Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 289 (1988) (discussing studies of proven cases of wrongful convictions which indicate that about fifty-two percent are attributable to false identifications); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605–08 (1998) (noting a study of forty cases involving innocent people who were convicted of serious crimes and served time in prison, five on death row, in which thirty-six involved eyewitness identifications where one or more eyewitnesses falsely identified the person); Atul Gawande, *Under Suspicion: The Fugitive Science of Criminal Justice,* THE NEW YORKER, Jan. 8, 2001, at 50, 51–52 (noting a study of sixty-three DNA exonerations of wrongfully convicted people wherein fifty-three involved mistaken identifications, and where almost invariably the witnesses had viewed a lineup in which the actual perpetrator was not present); Daniel Goleman, *Studies Point to Flaws in Lineups of Suspects*, N.Y. TIMES, Jan. 17, 1995, at C1 (discussing a 1993 study of one thousand cases in which the convicted defendant was later proven innocent and where eyewitness error accounted for approximately half the convictions and was the single greatest cause of error). *See also* Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 338 (1997) (supporting the proposition that "eyewitness performance is a matter of serious concern in criminal cases" by examining "results of eyewitness studies conducted under fairly realistic conditions" which yield similar rates of error).

29. *See, e.g., Wade*, 388 U.S. at 228–29 (quoting a scholar's observation that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined") (quoting PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965)); State v. Cromedy, 727 A.2d 457, 461 (N.J. 1999) (noting a study which shows that "jurors tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence") (citing R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 79–89 (1981) (finding that jurors believe eyewitnesses despite poor witnessing conditions)); Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 688 (1992) (noting that "eyewitness studies support the argument that people intuitively accord considerable information value to eyewitness information even when various factors should undermine the accuracy of the eyewitness identifications") (citations omitted); Gary L. Wells et al., *supra* note 28, at 605 ("Cases of proven wrongful convictions of innocent people have consistently shown that mistaken

acknowledged as much, noting that "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries."[30] As one leading expert notes:

> On the one hand, eyewitness testimony is very believable and can wield considerable influence over the decisions reached by a jury; on the other hand, eyewitness testimony is not always reliable. It can be flawed simply because of the normal and natural memory processes that occur whenever human beings acquire, retain, and attempt to retrieve information.[31]

Thus, while it may be a potent prosecutorial tool for securing a conviction, an eyewitness identification is nonetheless highly susceptible to error.

Researchers have postulated a number of explanations for erroneous eyewitness identifications.[32] For example, studies have shown that the experience of being a crime victim, especially when that crime involves violence, produces stress far beyond optimum levels for cognitive functioning, thereby reducing the potential accuracy of an eyewitness's identification.[33] Studies have also shown that certain pretrial identification procedures—e.g., leading questions, positive

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eyewitness identification is responsible for more . . . wrongful convictions than all other causes combined.") (citations omitted); Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 PSYCHOL. PUB. POL'Y & L. 726, 728 (1995) ("In cases where an eyewitness selects someone from a lineup and then testifies that this is the person who committed the offense in question, belief of the eyewitness is tantamount to believing that the defendant is guilty. Hence, the validity of eyewitness identification evidence is critical in cases for which it is offered as evidence."); Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93, 95 (1992) ("Several authors have chronicled cases which show that juries have ignored overwhelming proof of a defendant's innocence and returned guilty verdicts on the basis of questionable eyewitness identification.") (citations omitted); *see also* The Innocence Project, *Causes and Remedies of Wrongful Convictions* (2001), *at* http://www.innocenceproject.org/causes/mistakenid.php (noting that in sixty of eighty-two cases in which innocent persons were exonerated by DNA testing, mistaken identification played a major part in wrongful conviction). *Cf.* Thomas Adcock, *Prosecutor's Specialty is the Innocent*, N.Y.L.J., Mar. 8, 2001, at 1 (explaining why an innocent person accused of a crime she did not commit might falsely confess, author quotes a police officer who explains, "Once you got point-out identification, you got a case.").

30. Watkins v. Sowders, 449 U.S. 341, 352 (1981).

31. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 6–7 (1979).

32. Studies in psychology indicate that memory is a complex process consisting of essentially three stages: acquisition, retention, and retrieval. *See, e.g., id.* at 21–22; Hadyn D. Ellis, *Practical Aspects of Face Memory*, *in* EYEWITNESS TESTIMONY 12, 12–13 (Gary L. Wells & Elizabeth F. Loftus eds., 1984). Studies have shown that in each of these stages, various factors can alter a witness's perception of an event and render it unreliable. *See, e.g.*, 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE 259 (1993) (noting that "[i]naccuracies can be introduced at all three stages"); LOFTUS, *supra* note 31, at 22.

33. *See* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2.08 (2d ed. 1992); Brian R. Clifford & Clive R. Hollin, *Effects of the Type of Incident and the Number of Perpetrators on Eyewitness Memory*, 66 J. APPLIED. PSYCHOL. 364 (1981) (showing that witnesses subject to violence are less accurate in identification); Vaughn Tooley et al., *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. APPLIED. SOC. PSYCHOL. 845 (1987).

feedback from police after making the "correct" selection from a lineup or photo array, or repetitive viewing of the same suspect—can have a distortive effect on the act of retrieving memory.[34] Indeed, the Supreme Court has acknowledged the powerful adverse effect that certain law enforcement procedures can have on the accuracy of eyewitness identification. In *Neil v. Biggers*,[35] the Supreme Court disapproved of the use of certain suggestive identification procedures "because they increase the likelihood of misidentification" and can thereby "violate[] a defendant's right to due process."[36] The admissibility of identification testimony, therefore, is primarily determined by whether the identification is reliable, with particular attention paid to the procedure itself.[37]

2. A Suggestion for Improving Eyewitness Identifications

While the factors mentioned above have been shown to affect the reliability of identifications, social science research of the past two decades strongly indicates that the type of lineup procedure used can also significantly affect the chances of a misidentification. Law enforcement officials have traditionally used simultaneous lineup procedures when presenting a lineup, live or photo, to a potential eyewitness.[38] Tradition notwithstanding, research convincingly

34. *See* LOFTUS, *supra* note 31, at 150–52; LOFTUS & DOYLE, *supra* note 33, §§ 3.04, 3.06, 3.10–3.11-1; Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 LAW & HUM. BEHAV. 323 (1980).

35. 409 U.S. 188 (1972).

36. *Id.* at 198.

37. *See, e.g.*, Watkins v. Sowders, 449 U.S. 341, 347 (1981) ("[I]t is the reliability of identification evidence that primarily determines its admissibility."); Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ."). As noted by Professors Randy Hertz, Martin Guggenheim, and Anthony Amsterdam, although the Supreme Court has not yet ruled "whether an unreliable identification must be suppressed in the absence of suggestive police conduct," some lower federal and state case law suggests that "identifications in which there was no police or other governmental involvement can be so unreliable that their admission at trial would violate due process." RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 250.05, at 678–79 (1991) (citing Green v. Loggins, 614 F.2d 219, 222–23 (9th Cir. 1980); Sheffield v. United States, 397 A.2d 963, 967 n.4 (D.C. 1979), *cert. denied*, 441 U.S. 965 (1979); People v. Blackman, 488 N.Y.S.2d 395 (N.Y. App. Div. 1985)).

38. *See* M.S. Wogalter et al., *How Police Officers Conduct Lineups*, 37 PROC. HUM. FACTORS & ERGONOMICS SOC'Y 640 (1993) (noting that a national survey of respondents from 220 police departments suggested that simultaneous lineups might be conducted as much as ninety percent of the time as opposed to sequential lineups); Gina Kolata & Iver Peterson, *New Jersey Is Trying New Way For Witnesses to Say, 'It's Him,'* N.Y. TIMES, July 21, 2001, at A1 (reporting that in October 2001, New Jersey will be the first state in the nation to adopt the sequential lineup procedure as a statewide policy). *Cf.* NEIL BROOKS, LAW REFORM COMM'N OF CANADA, PRETRIAL EYEWITNESS IDENTIFICATION PROCEDURES (1983) (noting that simultaneous lineup procedures are the most common procedures used by Canadian law enforcement); Ian McKenzie & Peter Dunk, *Identification Parades: Psychological and Practical Realities*, *in* ANALYSING WITNESS TESTIMONY: GUIDE FOR LEGAL PRACTITIONERS AND OTHER PROFESSIONALS (Anthony Heaton-Armstrong et al. eds., 1999) (noting that simultaneous lineup procedures are the most commonly used methods in Western Europe).

shows that when compared to the traditional simultaneous lineup procedure, sequential lineups produce a significantly lower rate of mistaken identifications.[39]

In one of the first empirical studies on sequential lineups, 243 undergraduate students witnessed staged thefts.[40] Five minutes after the staged thefts, half of the witnesses were presented with a simultaneous photo array containing six persons, while the remaining students were shown the six photographs sequentially. Half of the witnesses under each presentation condition viewed photo arrays that included a picture of the culprit ("culprit-present"), while the other half viewed photo arrays that did not include a picture of the culprit ("culprit-absent"). The results of the study revealed that the presentation style of the lineup procedure, simultaneous or sequential, significantly influenced witnesses' identification performances. In the culprit-absent presentation, forty-three percent of those witnesses viewing simultaneous arrays made an incorrect identification, as compared with seventeen percent of those witnesses viewing sequential arrays.[41]

These initial findings have been repeated in numerous other empirical studies.[42] Experts note that the superiority of sequential lineups is consistent

39. *See infra* notes 40–42 and accompanying text.

40. R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556 (1985).

41. *See id.* at 561.

42. *See, e.g.*, BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 127–35 (1995) (reviewing one dozen experimental studies "involving more than 1,800 participants [comparing] the impact of sequential versus simultaneous presentations on identification performance," which "clearly demonstrate that the traditional method of simultaneous presentation carries no benefit in terms of correct identifications when perpetrators are present in an array"); Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281, 284 (1988) (finding that thirty-nine percent of eyewitnesses viewing a simultaneous six-person photographic, culprit-absent lineup identified an innocent person as the criminal, as opposed to a nineteen percent mistaken identification rate by those witnesses who viewed suspects sequentially); R.C.L. Lindsay et al., *Biased Lineups: Sequential Presentation Reduces the Problem*, 76 J. APPLIED PSYCHOL. 796, 800 (1991) (showing that sequentially presented photo arrays successfully reduced false identifications in five different experiments, each aimed at demonstrating the ability of sequential presentation to reduce the singular and/or combined impact of typical lineup biases, such as instruction, clothing, and foil) [hereinafter Lindsay et al., *Biased Lineups*]; R.C.L. Lindsay et al., *Sequential Lineup Presentation: Technique Matters*, 76 J. APPLIED PSYCHOL. 741, 742 (1991) (finding that among subjects shown culprit-absent photo arrays, false identifications were made by twenty percent of subjects who experienced simultaneous presentation and 5.4 percent of subjects who experienced sequential presentation) [hereinafter Lindsay et al., *Technique Matters*]; Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22, 30 (1993) (showing that in a simultaneous culprit-absent photo array, the false identification rate was 72.2 percent, whereas in a sequential culprit-absent photo array, the rate of false identification decreased to 38.9 percent); Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 L. & HUM. BEHAV. 459, 460 (2001) (noting that the "*sequential-superiority effect* has been replicated in experiments across the United States, Canada, the United Kingdom, South Africa, Germany, and Australia"); Edwin Chen, *Jogging the Memory: Making the Eye a Better Witness*, L.A. TIMES, Mar. 3, 1989, at 1 (referring to the 1988 study by Brian L. Cutler and Steven D. Penrod);

with psychological studies that explain why simultaneous lineups are often unreliable, namely because they encourage eyewitnesses to make comparative or relative judgments (i.e., to decide which of several faces most resembles the memory trace).[43] Due in large part to this phenomenon, studies also indicate that under simultaneous lineup conditions, many witnesses who correctly identify the culprit in a culprit-present photo array would simply identify another (innocent) suspect upon the removal of the culprit's photograph.[44] Simply put, simultaneous lineups increase the number of identifications made, whether or not the actual culprit is present. Alternatively, sequential lineup procedures encourage witnesses to make absolute judgments (i.e., to compare a single face in a lineup to their memory of the culprit's face).[45] Studies show that, as a result,

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Identifying Crime Suspects, N.Y. TIMES, May 10, 1988, at C9 (referring to same). *But see* Ebbe B. Ebbesen & Heather D. Flowe, Simultaneous v. Sequential Lineups: What Do We Really Know? (unpublished manuscript) (suggesting that one cannot rule out the possibility that superiority of sequential lineup procedures has to do with a "criterion shift" (i.e., the eyewitness becomes more cautious and less willing to make a choice with the sequential lineup than with the simultaneous lineup procedure) rather than a change in discrimination (i.e., the eyewitness is able to discern more clearly differences between an innocent person and the actual culprit, thereby making the eyewitness less likely to confuse the two)), *at* http://psy.ucsd.edu/~eebbesen/SimSeq.htm (last visited Nov. 16, 2002).

43. *See* R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 L. & HUM. BEHAV. 391, 392 (1997) (citing studies indicating that "[p]resenting witnesses with all lineup members in view at the same time (simultaneous lineup) allows, and possibly encourages, the use of relative judgments"); Lindsay & Wells, *supra* note 40, at 558 (noting that "eyewitnesses tend to choose the lineup member who most looks like the perpetrator relative to the other lineup members"); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 768 (1995) (noting that a relative judgment process governs lineups, wherein "the eyewitness selects the member of the lineup who most resembles the eyewitness's memory of the culprit relative to the other members of the lineup").

44. *See, e.g.*, Asher Koriat et al., *Toward a Psychology of Memory Accuracy*, 51 ANN. REV. PSYCHOL. 481, 509 (2000) (noting that witnesses' use of a relativistic judgment process results in increased rates of false identifications in culprit-absent simultaneous lineups); Avraham M. Levi, *Are Defendants Guilty if They Are Chosen in a Lineup?*, 22 LAW & HUM. BEHAV. 389 (1998) (showing that on average witnesses make an identification about sixty percent of the time from culprit-absent lineups); Lindsay & Wells, *supra* note 40, at 561 (showing that forty-three percent of participants incorrectly identified an innocent person when shown a simultaneous culprit-absent lineup, compared to seventeen percent shown a sequential culprit-absent lineup); Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOL. 553, 560 (1993) (showing that "relative-judgment process will still produce an affirmative answer even in the absence of the actual culprit").

45. *See* R.C.L. Lindsay & K. Bellinger, *Alternatives to the Sequential Lineup: The Importance of Controlling the Picture*, 84 J. APPLIED PSYCHOL. 315 (1999) (reporting research showing that witnesses make more absolute judgments of photographs when they are presented sequentially, lowering the rate of false-positive choices); Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL., PUB. POL'Y & L. 153, 155 (2001) ("Sequential lineups are superior to simultaneous lineups because people are encouraged to make 'absolute' choices; they must decide whether the picture is the target or not, and only then do they move on to the next picture. By showing the eyewitnesses sequential lineups, their ability to compare among the photos is dramatically reduced, although not eliminated, and the use of relative judgment strategies is more difficult."); Steblay et al., *supra* note 42, at 460 ("This one-at-a-time procedure is intended to discourage the eyewitness

sequential lineup procedures decrease the potential for misidentifications without resulting in fewer true-positive identifications.[46]

Although they are the more reliable method, sequential lineup procedures are not more burdensome on law enforcement personnel.[47] In fact, the only difference in protocol between a sequential and simultaneous lineup is that a sequential procedure should always be conducted double-blind.[48] It is well documented that an investigator's unintentional cues, such as body language or tone of voice, may negatively impact the reliability of eyewitness evidence.[49]

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from simply deciding who looks most like the perpetrator. Although the eyewitness could decide that the lineup member being viewed currently looks more like the perpetrator than did the previous person, the eyewitness cannot be sure that the next (not yet viewed) person does not look even more like the perpetrator."); Wells, *supra* note 44, at 561 (explaining that "although an eyewitness could reason that a given lineup member . . . was a relatively better match to the culprit than was a previously presented member . . . , the witness could not be certain that a subsequent lineup member (yet to be viewed) would not prove to be an even better match to the culprit than the one being currently viewed").

46. *See, e.g.*, Cutler & Penrod, *supra* note 42, at 284 (noting the results of an experiment in which eighty percent of subjects who experienced sequential lineup presentations correctly identified the culprit, as compared to a seventy-six percent accuracy rate for subjects who viewed simultaneous presentations); Lindsay et al., *Technique Matters*, *supra* note 42, at 742–43 (noting that lineup presentation style did not significantly influence identification performance when a culprit was present in the photo array); CUTLER & PENROD, *supra* note 42, at 127–36 (reviewing one dozen experimental studies "involving more than 1,800 participants [comparing] the impact of sequential versus simultaneous presentations on identification performance," in which it was decisively shown that "the traditional simultaneous method of presentation clearly fosters substantially more mistaken identifications when the perpetrator is not present in the array"). *But see* Steblay et al., *supra* note 42, at 468–69 (providing a meta-analysis of previous studies on sequential versus simultaneous lineup procedures that suggests that the sequential procedure reduces the chances of mistaken identification with a slight cost in the rate of correct identifications).

47. *See, e.g.*, William Kleinknecht, *Mugshot Rule is Changed to One at a Time*, STAR-LEDGER (Newark N.J.), Oct. 15, 2001, at 15 (quoting Irvington Police Chief Steve Palamara, president of the Essex County Police Chiefs Association, who stated that implementation of sequential lineup procedures "are not a major inconvenience and would not harm investigations"); *see also* Steblay et al., *supra* note 42, at 460 (noting the "simplicity" of the sequential lineup procedure).

48. "Blind" identification procedures can be accomplished through one of two methods. Using the first method, an investigator is unaware which lineup member is the suspect. This requires that an officer who is otherwise uninvolved in the case conduct the identification procedure. The alternative method permits the investigating officer to conduct the lineup procedure but in such a way that she cannot know which member of the lineup the witness is examining at any given time. This can be accomplished in several ways, the use of photographs being the easiest. In a live sequential lineup, the investigating officer remains with the witness while others send the lineup members into the room one at a time. The investigating officer is in a position that prevents her from seeing the lineup members and/or complying with any requests to look at or comment on the lineup members.

49. *See, e.g.*, Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998) (providing studies showing that subjects given confirming feedback at the time of an initial identification were significantly more confident of their identification of a suspect, felt they had a better view of the suspect and paid more attention to the suspect's face, judged that it took them less time to make the identification, and were more willing to testify at trial); Wells et al., *supra* note 28, at 627–29 (noting that a police officer who knows which lineup

Studies have shown that the margin of error for *both* sequential and simultaneous lineups is reduced when the test is done by an officer who is not involved in the investigation and does not know the identity of the suspect.[50] Researchers have suggested that an investigator who knows which lineup member is the suspect can inadvertently or advertently bias the eyewitness through nonverbal behavior such as smiling and nodding.[51] Just as a good social psychological experiment requires that the experimenter with whom the subject interacts is "blind" to the randomly assigned experimental condition, a good lineup test—be it simultaneous or sequential—should minimally require that the investigator conducting the test is "blind" to the identity of the suspect.[52] While double-blind procedures enhance the reliability of lineup procedures generally, such protections are particularly important when conducting a sequential lineup procedure. The possibilities for suggestiveness are in many ways increased in a sequential lineup procedure since the procedure calls for a witness to view each lineup member individually.[53]

Though simultaneous lineups are the traditional model for lineup procedures in the United States,[54] support is growing for what social scientists have been saying all along: sequential lineups are much more reliable than simultaneous lineups.[55] In fact, the United States Department of Justice recently lent support

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member is the suspect can inadvertently bias the eyewitness through nonverbal behavior).

50. *See, e.g.*, Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 253 (2000) (noting that double-blind lineup procedures have been shown conclusively to reduce rates of error in eyewitness identifications generally and assist lineup procedures in becoming "more than an investigator's self-fulfilling prophecy").

51. *See, e.g.*, *id.* at 281 ("The best way to avoid the serious problem of contamination . . . is to have the lineup administered by someone who lacks potentially contami-nating knowledge himself or herself—i.e., through a double-blind procedure. One cannot disclose, even inadvertently, what one does not know."); Wells, *supra* note 44, at 562 (stating that "[i]t is known that people will base decisions on inferences and that conformity, obedience, and com-pliance pressures can be especially strong phenomena in situations in which ambiguity and authority are prominent").

52. *See generally* CUTLER & PENROD, *supra* note 42, at 135; Wells et al., *supra* note 28, at 627 (indicating that a recommendation for using double-blind procedures in conducting lineups is the first among the recommendations made in the official Scientific Review Paper of the American Psychology/Law Society and Division 41 of the American Psychological Association).

53. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 302 (1967) (noting that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup" has been widely condemned); *In re* James H., 34 N.Y.2d 814 (1974) (questioning the practice of displaying a single photograph to a witness because of the danger that such a procedure suggests to the witness that police believe the person shown is the perpetrator).

54. *See supra* note 38.

55. *See, e.g.*, SCHECK ET AL., *supra* note 28, at 256 (including in "A Short List of Reforms to Protect the Innocent" the recommendation that law enforcement utilize sequential presentations for lineups and photo spreads in order to "prevent[] relative judgments and make[] witnesses 'dig deeper' to make the determination"); Michael J. Saks et al., *Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 673 (2001) (recommending sequential lineup procedures to be part of a Model Act intended to reduce erroneous convictions); Leslie Ferenc, *Police Bias Said to Influence Suspect Identification; Psychologist Says Investigators' Zeal Can Result in Mistaken Identity*, TORONTO STAR, July 13, 1997, at A12 (noting

to the adoption of the sequential lineup method. In 1999, the Department of Justice set forth the proper procedures for the use of the sequential lineup in its report, *Eyewitness Evidence: A Guide for Law Enforcement* ("Report").[56] The Report, authored by a commission consisting of law enforcement and identification experts, noted that "[s]cientific research indicates that identification procedures such as lineups and photo arrays produce more reliable evidence when the individual lineup members or photographs are shown to the witness sequentially—one at a time—rather than simultaneously."[57]

As noted above, research over the past two decades conclusively shows that sequential lineup procedures produce significantly lower rates of mistaken identifications than do simultaneous lineup procedures, rendering them far more reliable.[58] As one study states, "The simplicity of the sequential technique,

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that since 1995 many Ontario forces have been using sequential lineups, and that, according to one psychology expert, "[t]he procedure has gained acceptance and credibility because it's been promoted by the Ontario Police College"); A. Barton Hinkle, *Just a Single Change Could Improve Justice Sharply*, RICH. TIMES-DISPATCH, July 31, 2001, at A11 (advocating adoption of sequential lineup procedures, and noting that "[s]equential lineups produce erroneous identifications one-half to one-quarter as often as standard lineups"); Kolata and Peterson, *supra* note 38, at A1 (discussing New Jersey's decision to adopt a sequential lineup procedure due to the procedure's effectiveness in reducing false identifications without reducing the number of correct ones); Graham Rayman, *One Set of Eyes Not Always Enough*, NEWSDAY, July 26, 2001, at A3 (discussing recent exonerations of persons originally convicted largely on eyewitness identifications, and noting that research suggests using sequential lineup methods would reduce mistaken identifications); REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 21 (2002) (recommending sequential lineup procedures in Illinois to reduce risk of error), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf.

56. U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 34–37 (1999) (detailing procedures for sequential photo and live lineups). It should be noted that the report does *not* recommend sequential lineups as *the* preferred method of choice. At first blush, this seems odd considering the positive reviews given to sequential lineup methods by the report's authors. The report explains its hesitation in fully recommending sequential over simultaneous lineup procedures when it states that "although some police agencies currently use sequential methods of presentation, there is not a consensus on any particular method or methods of sequential presentation that can be recommended as a *preferred* procedure . . . ." *Id.* at 9. As one commentator notes, "With all due respect to the Department of Justice, this reasoning [for not recommending sequential lineups over simultaneous ones] is difficult to follow. It is hard to see why a lack of consensus among law enforcement about how to conduct sequential procedures precludes the [report] from recommending a preference for them; moreover, the same literature that demonstrates their lower false-identification rate also amply describes how to conduct them." Judges, *supra* note 50, at 281.

57. U.S. DEP'T OF JUSTICE, *supra* note 56, at 9.

58. It is worth noting that research has found "real world" eyewitness conditions to be far worse than any experimental counterpart due to a host of distracting and often traumatic factors. Thus, conclusions drawn from laboratory studies on misidentifications most likely *understate* the superiority of sequential lineups over simultaneous lineups. *See, e.g.*, Levi, *supra* note 44, at 395–96 (stating that factors such as presence of a weapon, being a victim of physical assault, presence of multiple culprits, a witness's own distracting activity, and minimal attention paid by a witness to a culprit can render actual eyewitness conditions far worse than experimental counterparts); Westling, *supra* note 29, at 101–02 (stating that eyewitness testimony can be influenced by environmental conditions, the observer's state of stress, the mental set of the observer, race, age, sex, and suggestion by the questioner). Studies have found that real crimes involve an average of

along with many promising research outcomes, has made it one of the most important of all the practical contributions of eyewitness research to actual eyewitness evidence collection procedures."[59]

B. Abdication Through Inaction: A Failure to Fulfill Judicial and Prosecutorial Obligations in People v. Franco

In *People v. Franco*, the prosecution, while citing fiscal and personnel constraints, premised its refusal to implement a sequential lineup procedure on the grounds that it could not be ordered to employ sequential lineups by the courts. The court agreed, holding that institutional constraints forbade the judiciary from compelling law enforcement to use one constitutional lineup procedure over another. Thus, at its core, a sequential lineup was not used in *Franco* because the prosecution did not want one and the court felt it could not order one. This article now explores the responsibilities of judges and prosecutors to improve the criminal justice system and argues that both the court and the prosecution in *Franco* failed to fulfill their respective duties by refusing to implement the more reliable lineup procedure.

1. Judicial Obligations

Plainly stated, judges have a duty to seek justice.[60] This duty often manifests itself in the day-to-day activities of courts across the country when, for example, judges suppress evidence that may be highly probative of a defendant's guilt because of its unconstitutional procurement. In those cases where the Constitution does not explicitly order them to do so, judges can rely on their supervisory power as a mechanism through which to seek justice.[61] The judicial supervisory power, sometimes described as inherent power,[62] includes those powers that, though not specifically required by the Constitution or the Congress, are nonetheless "necessary to the exercise of all others."[63] A court choosing to wield its supervisory power in aid of its judicial responsibility to

four such conditions. *See, e.g.*, Kenneth A. Deffenbacher, *A Maturing of Research on the Behavior of Eyewitnesses*, 5 APPLIED COGNITIVE PSYCHOL. 377 (1991).

59. Steblay et al., *supra* note 42, at 460.

60. *See, e.g.*, Bartel v. Riedinger, 338 F.2d 61, 62 (6th Cir. 1964) (holding that a trial judge was "not a mere umpire and that his function was to see that justice was done"); Goss v. Illinois, 312 F.2d 257, 259 (7th Cir. 1963) (stating that "state judges, as well as federal, have the responsibility to respect and protect persons from violation of federal constitutional rights"); Am. Universal Ins. Co. v. Sterling, 203 F.2d 159, 165 (3d Cir. 1953) (holding that "trial in the courts of the United States has gone beyond the point where the trial judge is a mere referee. He sits to facilitate the ends of justice.").

61. *See infra* notes 70–78 and accompanying text.

62. Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) (observing that the "moment the courts of the United States were called into existence . . . they became possessed of [inherent] power").

63. Roadway Express v. Piper, Inc., 447 U.S. 752, 764 (1980) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

"seek justice" might be accused of "judicial activism" or "judicial legislation,"[64] an accusation which is by no means uncontroversial.[65] Nevertheless, as the

64. For definitions of judicial activism, see, e.g.: Charles B. Blackmar, *Judicial Activism*, 42 ST. LOUIS U. L.J. 753, 756 (1998) ("[Activists] are not afraid of disrupting the existing social or economic order. They are impatient with rules about standing, ripeness, and mootness, and announce doctrines that are broader than necessary for the case at hand in order to establish legal rules they consider desirable. They do not feel constrained by precedent. They do not hesitate to tread on the turf of the executive and legislative branches. They are prone to discover new rights not known to the authors of the constitutional text relied on, and supported, if at all, only marginally by the language of the constitution. They are 'result-oriented,' deciding first how the case ought to come out and then looking for snippets in cases which give superficial support.") (citation omitted); Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 17 n.1 (1998) (noting various definitions of judicial activism, including "the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit," and a "result-oriented approach to interpreting the Constitution" (quoting Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996), and citing Jennelle L. Joset, *May It Please the Constitution: Judicial Activism and Its Effect on Criminal Procedure*, 79 MARQ. L. REV. 1021, 1021 (1996))); Joset, *supra*, (defining judicial activism as a process involving result-oriented decisionmaking, implying that the decision is neither justified under the Constitution nor pursuant to precedent). Professor Charles Ogletree, Jr. suggests that "the label [of judicial activist] is most often used when judges make decisions that conflict with the utterer's own political beliefs . . . ." Charles Ogletree, Jr., *Judicial Activism or Judicial Necessity: The District Court's Criminal Justice Legacy*, 90 GEO L.J. 685, 689 (2002) (citing Emanuel Margolis, *U.S. Supreme Court at '99: Jurisprudence or Imprudent Jurists?*, 73 CONN. B.J. 409, 411 (1999) ("Those same Justices, who owed their appointment to condemning the 'judicial activists,' became what their admirers called 'principled judicial activists.'"); Richard J. Neuhaus, *Rebuilding the Civil Public Square*, 44 LOY. L. REV. 119, 122 (1998) ("Both the Right and Left wings cynically observe that the phrase judicial activism means court decisions one does not like."); Jerome J. Shestack, *The Risks to Judicial Independence*, A.B.A. J., June 1998, at 8, 8 ("The charge of judicial activism is employed mostly by ideologues who dislike a judge's opinion and make political capital out of attacking the judge."). *See also* Ronald Tabak & Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus*, 55 ALB. L. REV. 1, 28, 55 (1991) (arguing that while many members of the Rehnquist Court openly criticize "judicial activism," a majority of the Court nevertheless took part in "judicial activism" in its evisceration of federal habeas corpus); Catherine Trevison, *Should Public Opinion Tip the Balance of Justice?*, TENNESSEAN, Oct. 20, 1996, at 1D (quoting law professor Barry Friedman's observation that "the Rehnquist court has been extremely 'activist' to the extent that it has overturned precedents it didn't like. Conservatives don't call them an activist court because they like the result."). It is realistic to acknowledge that the proper role of the judiciary remains forever an open question. *See* Fairfax, *supra* ("Defining judicial activism is problematic due to the lack of consensus among those attempting to articulate its core meaning."); Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 246 (2000) (noting that "there exist wide ranging opinions as to the roles that judges should play within the constraints of the adversarial system"). Illustrating the deep divide between opposing views concerning the proper role of the judiciary, Professor Ogletree points out that Judge William Wayne Justice and Chief Justice William Rehnquist differed markedly in their individual concepts of the judiciary's role. *See* Ogletree, *supra*, at 680 n.15 (noting that "Rehnquist favored sparing use of judicial review, opposed judicial social problem-solving, and criticized judicial disregard for the will of popular government," whereas Justice "argued that the judiciary should override the other branches of government in order to uphold the Constitution, that many Americans do not even support the Bill of Rights, that deference to the will of the majority amounts to judicial abdication, and that public support for a decision is not the same as judicial legitimacy") (citing FRANK KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 100–02 (1991)).

65. *See, e.g.*, Stephen O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era*

following discussion illustrates, a court is empowered and obligated to use its supervisory power when the integrity or reliability of the criminal justice system is placed at risk.

A review of caselaw reveals a number of instances in which a court has utilized its supervisory power in an effort to improve the criminal justice system, lending further support to the argument that the court in *Franco* not only *should* have ordered a sequential lineup but also that it *could* have. For example, in *State v. Scales*,[66] the Minnesota Supreme Court invoked its supervisory power in the name of "the fair administration of justice" when it ordered that all custodial interrogations would thereafter be recorded.[67] Similarly, a Virginia trial court ordered police to electronically record future interrogations in an effort to protect and support the "public perception" of police veracity.[68] Noting concern for "'consistency and reliability' in enforcement of the death penalty," the New Jersey Supreme Court held that it was obliged to consider a capital post-conviction challenge, brought by a public defender on a prisoner's behalf, notwithstanding the prisoner's desire to withdraw the challenge and "voluntarily" be executed.[69]

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of Hatch and Lott, 103 DICK. L. REV. 247, 250 (1999) (discussing attempts to weed out "judicial activists" through the confirmation process); Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 702–04 (1999) (discussing recent attempts by legislators to limit the independence of the judiciary in response to the perceived problem of judicial activism); Patricia M. Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 136–37 (1982) (noting the argument of judicial restraint proponents that courts are ill-equipped to involve themselves in policy decisions).

66. 518 N.W.2d 587 (Minn. 1994).

67. *Id.* at 592.

68. *See* Commonwealth v. Sink, No. CR88-367, 1988 WL 626028, at *15 (Va. Cir. Ct. Aug. 24, 1988) (ruling prospectively that "all interrogation conducted in an interview room where recording equipment is available, or can be made available, should be faithfully recorded from beginning to end—and the use of handwritten questions and answers totally eliminated unless signed and notarized by the suspect").

69. *See* State v. Martini, 677 A.2d 1106, 1112 (N.J. 1996) (holding that despite a capital defendant's desire to abandon appeals and speed the date of execution, "[t]he Court must decide if issues that could not be raised on direct appeal make the prisoner's sentence of death unconstitutional or illegal"); *see also* State v. Hightower, 577 A.2d 99, 117 (N.J. 1990) (citing with approval a lower court's holding that mitigating evidence be introduced at the penalty phase of a capital trial even despite the capital defendant's objections). The Fifth Circuit Court of Appeals recently addressed a somewhat similar issue in *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002). Despite the capital defendant's preference to represent himself during his penalty phase in order to express his desire to be executed rather than receive a prison term, the district court nevertheless appointed an attorney to represent the "public" and offer evidence on behalf of the defendant. United States v. Davis, 180 F. Supp. 2d 797, 798 (E.D. La. 2001) ("The public has a substantial independent interest in being assured of a full and fair sentencing proceeding, in compliance with constitutional and statutory requirements, so that the death penalty is not imposed arbitrarily and capriciously."). The district court in *Davis* noted that "the jurors are not potted plants to be left in the dark by a headstrong defendant with a personal agenda, but rather are the representatives of a civilized society with the 'awesome responsibility' of expressing the value and standards of that society in the most serious and final of all decisions." *Id.* at 807. The Fifth Circuit, however, held that the district court's decision to appoint independent counsel for a pro se defendant at the penalty phase of a capital murder case in order to present traditional mitigating

In *Talley v. Stephens*,[70] a federal district court asserted its supervisory power to prohibit punishment that endangered prisoners' lives, enjoining state prison authorities from inflicting corporal punishment until safeguards were instituted to control indiscriminate whippings.[71]

While the above referenced cases are illustrative of courts utilizing supervisory powers to affect and reform various elements of the criminal justice system, cases from New York are even more instructive when considering the lineup litigation in *Franco*. Most notably, New York courts have specifically utilized supervisory power with regard to placing defendants in lineups.[72] In *People v. Brown*,[73] a New York trial court ordered the police, at the request of the defendant, to conduct a "blank" lineup prior to conducting a lineup that included the defendant.[74] As described by psychologists Gary L. Wells and Eric P. Seelau,

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evidence of a kind that the defendant had specifically declined to present violated the defendant's Sixth Amendment right to self-representation. *See Davis*, 285 F.3d at 381 (holding that "[a]n individual's constitutional right to represent himself is one of great weight and considerable importance in our criminal justice system. This right certainly outweighs an individual judge's limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant.").

70. 247 F. Supp. 683 (E.D. Ark. 1965). In *Talley*, the court was asked to consider a prisoner's claims that he was subjected to corporal punishment, which included being required to pick cotton, whipped up to seventy times with a leather strap, and tormented by guards who shot at his feet for amusement. *Id.* at 685. For a thorough analysis of *Talley* and other prison reform cases, see FEELEY & RUBIN, *supra* note 19.

71. *Talley*, 247 F. Supp. at 689. When *Talley* was being litigated in the mid-1960s, corporal punishment was not yet prohibited under the Eighth Amendment as amounting to cruel and unusual punishment. *Id.* ("It must be recognized, however, that corporal punishment has not been viewed historically as a constitutionally forbidden cruel and unusual punishment, and this Court is not prepared to say that such punishment is per se unconstitutional."). While choosing not to rely on the untested constitutional grounds of the Eighth Amendment in limiting the state officials' actions against the prisoner, the court in *Talley* nevertheless involved itself in the traditionally off-limits arena of the state prison system by use of its supervisory power.

72. *See also* United States v. Caldwell, 465 F.2d 669 (D.C. Cir. 1972) (remanding in the interest of justice after the trial court denied defendant's motion to compel holding a lineup attended by identification witnesses); United States v. MacDonald, 441 F.2d 259, 259 (9th Cir. 1971) (holding that a decision concerning the defendant's motion to require the government to conduct a pretrial lineup "is a matter committed to the sound discretion of the trial judge"); United States v. Ravich, 421 F.2d 1196, 1203 (2d Cir. 1970), *cert. denied*, 400 U.S. 834 (1970) (unanimously upholding a defendant's right to demand a pretrial lineup, noting that "[a] pretrial request by a defendant for a line-up is . . . addressed by the sound discretion of the [trial court] and should be carefully considered"); United States v. Crouch, 478 F. Supp. 867, 871 (E.D. Cal. 1979) (suggesting that "such a power [to order a 'blank' lineup] derives from the Court's general powers to provide the defendant with a lineup when he requests one") (citations omitted). As the late D.C. Circuit Court of Appeals Judge Harold Leventhal stressed, "court[s] ha[ve] an abiding concern for and interest in ensuring a combination of fairness and intelligent and effective techniques in law enforcement. That is the hallmark of a decent society concerned with both order and justice." United States v. Ash, 461 F.2d 92, 103 (D.C. Cir. 1972) (en banc) (internal citations omitted), *rev'd*, 413 U.S. 300 (1973).

73. 523 N.Y.S.2d 551 (N.Y. App. Div. 1988).

74. *See id.* at 552 (holding that the failure to abide by trial court's order was error, although harmless given the facts of the case).

> When using a blank lineup procedure, the eyewitness is not told that there is no suspect in the lineup but is given standard instructions emphasizing that the culprit might not be present. A blank lineup can, therefore, be considered a type of control lineup (or a "lure") to see if the eyewitness is willing or able to resist the temptation to select someone when the actual culprit is not present. Experimental work provides support for the idea that a blank lineup can weed out eyewitnesses who are prone to make mistakes.[75]

Clearly a means for enhancing the reliability of any eyewitness identification, blank lineups have been ordered in other New York cases as well, including *People v. Moses*[76] and *People v. Lopez*.[77] In *Lopez*, the trial court noted that the "[d]emand for a lineup by a defendant, while certainly novel and unique, is neither forbidden by statute or any case law."[78]

There are other examples of New York courts utilizing supervisory power within the criminal justice context. New York trial courts' supervisory power enables them to dictate the order in which witnesses are presented to a grand jury.[79] Similarly, New York trial courts may order the prosecution to instruct grand jurors as to exculpatory defenses.[80] Trial courts may also compel the police department to assign one of its officers to assist the defendant in certain aspects of the defendant's own investigation.[81] In none of these aforementioned instances did the courts rely on a constitutional mandate in rendering their decisions. Rather, in each instance, the court justified its use of the supervisory power by an overriding judicial concern for the fairness and reliability of the criminal proceeding. Indeed, as each of these cases illustrates, not only do judges have an obligation to seek justice, but judges also can and should utilize their supervisory power as they attempt to ensure the most fair and reliable outcomes.

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75. Wells & Seelau, *supra* note 43, at 770.

76. 511 N.Y.S.2d 338 (N.Y. App. Div. 1987) (finding that the police's failure to abide by the judge's order was error, although harmless given the facts of the case). *See also* MIRIAM HIBEL, NEW YORK IDENTIFICATION LAW 169 (2001) (citing *Moses* for the proposition that a court has discretion to order a blank lineup to be held before a lineup in which the defendant is a participant).

77. 382 N.Y.S.2d 609 (N.Y. Sup. Ct. 1976).

78. *Id.* at 610.

79. *See* Morgenthau v. Altman, 449 N.E.2d 409, 409 (N.Y. 1983) (holding, pursuant to section 190.25, subdivision 6 of the New York Criminal Procedure Law, that "[t]he order in which witnesses are presented before the Grand Jury is a matter of procedure, within the supervisory jurisdiction of the court, who, together with the District Attorney, is a 'legal advisor' of the Grand Jury").

80. *See* People v. Brunson, 641 N.Y.S.2d 935, 936 (N.Y. App. Div. 1996) (holding that "[a]s a legal advisor to the Grand Jury, the prosecutor must, where 'necessary or appropriate' . . . instruct the jurors on exculpatory defenses such as justification") (citations omitted).

81. *See* People v. Evans, 534 N.Y.S.2d 640, 641 (N.Y. Sup. Ct. 1988) (granting a defense request for an order "directing the New York City Police Department Auto Crime Division to assign an experienced officer to join in the [defense's] inspection of . . . vehicles for the purpose of ascertaining whether the non-public [vehicle identification numbers] reveal any irregularities").

2. Abdication of Judicial Obligations in Franco

The *Franco* court's rejection of the defendant's request for a sequential lineup rested on the court's presumption that it was constrained from acting. Indeed, the court expressed strong resistance to practicing what it deemed "judicial legislation," a term frequently offered as another definition for judicial activism.[82] As this next part argues, however, the specter of judicial restraint took on exaggerated proportions in the *Franco* case. Although Judge Barrett expressed a sense of powerlessness in the face of a request to compel the use of a sequential lineup, this reticence stemmed from a narrow reading of the breadth of the court's supervisory power rather than from true powerlessness. As a result of this failure of interpretation and vision, the court turned its back both on its duty to improve the legal system and on sound legal principles that supported granting Franco's request.

In rendering his opinion, Judge Barrett cited the Supreme Court's ruling in *Lafayette* for the proposition that the judiciary has no role in affecting law enforcement activities that do not burden constitutional protections.[83] As noted above, *Lafayette* presented the question of whether a post-arrest inventory search of a person's belongings at a police station house violated the Fourth Amendment right to be free of unlawful searches and seizures.

While *Lafayette* offers a strong admonition against judicial interference with "routine, neutral procedures of the station house,"[84] the holding in *Lafayette* is distinguishable from *Franco* in three critical ways. First, the *Lafayette* holding is premised on weighing competing Fourth Amendment factors, namely, an arrestee's right to privacy and to be free of unlawful searches and seizures versus the government's interest in maintaining public safety and managing the administration of local jails. This is wholly different from the competing issues in *Franco*, which pitted an accused's liberty interest in not being misidentified against the potential burden on law enforcement of conducting a sequential lineup procedure. In *Lafayette*, the Supreme Court detailed a host of governmental interests in support of conducting a station house inventory procedure. The majority in *Lafayette* contended, *inter alia*, that a standardized procedure for making a list or inventory of an arrestee's possessions as soon as reasonably possible after the arrestee reaches the stationhouse is justified by the need to prevent theft or claims of theft of the arrestee's property, and to prevent arrestees from harming themselves or others.[85]

In stark contrast, no compelling law enforcement interest in the continued use of simultaneous lineup procedures was offered in *Franco*. The prosecution's argument was merely that "[t]he practical demands of day-to-day law

82. *See supra* note 64 (discussing the notion of "judicial activism").
83. *Franco*, *supra* note 3, at 4.
84. *Lafayette*, 462 U.S. at 647.
85. *See id.* at 646.

enforcement and the budget limitations on these agencies make it infeasible for officials to adopt the most accurate and desirable lineup procedure according to science."[86] Besides this assertion of a scarcity of resources, the prosecution offered no other justification for its preference for the concededly less reliable identification method. The court failed to explore further the government's interest in the use of a simultaneous lineup. As such, it cannot be said that any forthright balancing of competing interests took place.

In fact, while the court in *Franco* expressed concern over the particularities of Franco's proposed order, which it described as "specif[ying] in painstaking detail the specific procedures" for employing a sequential lineup procedure,[87] practice indicates that sequential lineup procedures "are not a major inconvenience and would not harm investigations."[88] Indeed, the court's concern appears unjustified in light of previous cases in which courts have ordered law enforcement to perform very particular lineup procedures.[89] Moreover, in light of the very particular protocols already employed by New York law enforcement when conducting simultaneous lineups,[90] an argument that the proposed procedure was too detailed rings hollow. Even assuming that sequential lineups are more labor-intensive, it is quite reasonable for a court to assert that an accused's interest in his or her freedom outweighs any logistical burdens imposed by the proposed lineup procedure.

Second, as the Court in *Lafayette* notes, an inventory search is a "routine" and "neutral" police procedure that is merely incident to an arrest.[91] The Court in *Lafayette* refrained from delving into the ministerial details of inventory searches because the procedures in question were entirely administrative in nature, not because the Court was prohibited from dictating police procedures in the stationhouse. As the Court noted in its opinion:

> We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the station house. It is evident that a station-house search of every item carried on or by a person who has lawfully been taken into custody by the police

86. People's Response, *supra* note 12, at 3.

87. *Franco*, *supra* note 3, at 3.

88. *See* Kleinknecht, *supra* note 47, at 15.

89. *See supra* notes 72–78 and accompanying text.

90. For example, a 1999 manual for New York patrol officers details over fifty specific guidelines and directives to follow when conducting a simultaneous lineup procedure. *See* NEW YORK CITY POLICE DEP'T, PATROL GUIDE MANUAL § 110-13 (1999 ed.). The proposed order attached to Franco's motion consisted of approximately the same number of steps to follow in the course of conducting a sequential lineup procedure. *See* Defendant's Motion, *supra* note 7.

91. *Lafayette*, 462 U.S. at 647; *id.* at 649 (Marshall, J., concurring) ("The practical necessities of securing persons and property in a jailhouse setting justify an inventory search as part of the *standard procedure* incident to incarceration.") (emphasis added). *Cf.* Delaware v. Proust, 440 U.S. 648, 654 (1979) ("A so-called inventory search is not an independent legal concept but rather an *incidental administrative step* following arrest and preceding incarceration.") (emphasis added).

> will amply serve the important and legitimate governmental interests involved.[92]

Thus, the *Lafayette* holding should not be read for the proposition that the Court has no power to craft relief when the matter concerns police investigatory procedures. Rather, the Court defers to law enforcement personnel on how best to manage the property of arrested persons, a decision that is qualitatively different from deferring to law enforcement on the most effective way to investigate the guilt or innocence of a suspect.

In support of this understanding of *Lafayette*, the Supreme Court has clearly stated elsewhere that inventory searches are—and must be—unrelated to case-related investigations, further buttressing the notion that "routine" and "neutral" inventory searches can remain off limits to court supervision.[93] On the other hand, an eyewitness identification procedure, and any subsequent identification or non-identification of the accused, is always related to an investigation. Indeed, a positive identification invariably plays a critical role in the prosecution of a case.[94] As a result, lineups demand a high level of scrutiny with regard to their implementation. The *Franco* court's reliance on *Lafayette* is misplaced in part because the rights in question are so qualitatively different.

A third important distinction between *Lafayette* and *Franco* is that the relief sought in *Lafayette* occurred after the administrative inventory search had been conducted. In contrast, Franco was merely requesting a prospective modification of the prosecution's proposed order compelling the defendant to stand in a lineup. Such a prospective modification of the court's own order falls squarely within the judiciary's ability to navigate and facilitate the administration of justice.

In failing to acknowledge the significant differences between the *Franco* case and the Supreme Court's holding in *Lafayette*, the *Franco* court effectively insulated itself from the well-established and clearly defined role of courts as

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92. *Lafayette*, 462 U.S. at 648.

93. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367, 372 (1987) (finding that an inventory search was legal when conducted for the administrative purpose of inventorying the contents of a vehicle to safeguard them rather than "for the sole purpose of investigation"); *see also* South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (approving a police inventory search of a locked automobile, finding that "there is no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive").

94. *See supra* note 29 (describing the powerful role that identifications play in determining the outcome of criminal cases). Indeed, the *failure* of a witness to positively identify a defendant after viewing the defendant's picture or upon seeing the defendant participate in a lineup constitutes relevant material under *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g.*, People v. Robinson, 721 N.Y.S.2d 252, 253 (N.Y. App. Div. 2001) (approving the trial court's ruling that a witness's failure to identify the defendant's photograph constituted *Brady* material); People v. Torres, 735 N.Y.S.2d 316, 317 (N.Y. App. Div. 2001) (agreeing with the defendant that a photo array that was shown to an eyewitness who was unable to identify the defendant from an array constitutes *Brady* material, and should have been provided to the defendant in response to a pretrial discovery demand).

supervisors of the criminal justice system.[95] As a result, the court abdicated its institutional responsibility to reform the criminal justice system in a way that might guard against an erroneous conviction.

3. Prosecutorial Obligations

Prosecutors are granted largely unfettered discretion to administer their duties in the pursuit of justice.[96] Although prosecutorial discretion must abide by constitutional and statutory prescriptions, such judicial standards suggest a floor below which protections may not fall rather than a restrictive ceiling.[97] As a result, a prosecutor is under no constitutional or statutory dictate to choose one constitutional lineup method over another. That said, prosecutors, like all members of the bar, have a responsibility to improve the legal system[98] and to seek justice.[99] It is this responsibility, combined with the special duties required of prosecutors, that informs how prosecutors should act.

One former prosecutor describes the role of the prosecutor as being "the guardian of the integrity of the process."[100] Indeed, a prosecutor is more than

95. *See, e.g.*, McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of . . . minimal historic safeguards . . . ."); Bartel v. Riedinger, 338 F.2d 61, 62 (6th Cir. 1964) ("[Trial j]udge was not a mere umpire. His function was to see that justice was done."); Am. Universal Ins. Co. v. Sterling, 203 F.2d 159, 165 (3d Cir. 1953) ("Trial in the courts of the United States has gone beyond the point where the trial judge is a mere referee. He sits to facilitate the ends of justice."); *see also* People v. White, 620 N.Y.S.2d 436, 437 (N.Y. App. Div. 1994) (holding that a trial court's role "includes the obligation to encourage clarity in the development of the proof") (citations omitted).

96. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124–29 (1998) (noting that prosecutors possess unilateral authority to determine subjects of investigation and seemingly de facto authority to determine the suspect's innocence or guilt and sentence, where appropriate); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000) ("[Prosecutors] have the luxury and burden of developing [certain administrative] standards for the exercise of public authority. . . . And, as such, they allocate resources in the pursuit and disposition of cases according to their own best judgment of the demands of justice."); Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 531 (1999) ("Indeed, prosecutors maintain considerable influence, if not total control, over investigations, arrests, indictments, and sentences.") (citing Robert H. Jackson, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)); *see also* Uviller, *supra*, at 1715 (noting the gradual accumulation of prosecutorial power in jurisdictions such as New York, stating that "as courts increasingly deferred to the judgment of the prosecutor who, presumably, represented the interests of the law-abiding community, the prosecutor gradually displaced the court as the arbiter of a just resolution") (citations omitted).

97. *Cf. McNabb*, 318 U.S. at 340 (noting that judges, who have judicial discretion and duties analogous to prosecutors, are not limited to "minimal historic safeguards" in "establishing and maintaining civilized standards" of judicial administration).

98. *See supra* note 2 (noting professional responsibilities).

99. *See generally infra* notes 100–108 and accompanying text.

100. Uviller, *supra* note 96, at 1704. *See also* United States v. Francis, 170 F.3d 546, 553

simply an adversarial player in a criminal proceeding. As Justice George Sutherland's famous articulation concerning the role of the prosecutor states:

> The [prosecuting a]ttorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[101]

In explaining the prosecutorial function, then-member of the New Jersey Supreme Court Justice William Brennan, Jr. quoted the Canons of Professional Ethics: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."[102]

Although it is well established that prosecutors have a unique responsibility to "do justice," justice is certainly not a self-defining term.[103] For example, some prosecutors believe that securing convictions fulfills their function as prosecutors.[104] H. Richard Uviller, a former prosecutor, notes that "even the best of the prosecutors—young, idealistic, energetic, dedicated to the interest of justice—are easily caught up in the hunt mentality of an aggressive office. . . . [T]he earnest effort to do justice is easily corrupted by the institutional ethic of combat."[105] While the adversarial process may foster a combative attitude amongst all parties involved, such a limited notion of the prosecutorial duty is nevertheless clearly violative of the prosecutorial duty.[106] Indeed, as one

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(6th Cir. 1999) ("[Prosecutors] must be zealous advocates and enforcers of the law while, at the same time, acting in a manner that ensures a fair and just trial.") (citations omitted).

101. Berger v. United States, 295 U.S. 78, 88 (1935), *overruled on other grounds*, Stirone v. United States, 361 U.S. 212 (1960); *see also* United States v. O'Connell, 841 F.2d 1409, 1428 (8th Cir. 1988) ("[T]he prosecutor's special duty as a government agent is not to convict, but to secure justice.") (citation omitted).

102. State v. Bogen, 98 A.2d 295, 296 (N.J. 1953) (quoting CANONS OF PROFESSIONAL ETHICS Canon 5 (1908)).

103. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) ("The 'do justice' standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct."); David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3026 (1999) (noting that ethical standards provide very few specific duties of the prosecutor); Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1266 (2000) (noting that "[t]he phrase 'seek justice' . . . is vague and leaves a great deal of latitude for individual interpretation") (citing English, *supra* note 96, at 555).

104. *See, e.g.*, George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 109 (1975) (providing an empirical study showing the tendency of prosecutors to view conviction as the ultimate end to be pursued); Brenda Gordon, Note, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 222 (1999) ("Ordinarily, a prosecutor's measure of success is largely determined by his or her conviction rate; therefore, the prosecutor who wishes to be reelected (or to maintain his or her appointment) will seek to satisfy the public on these matters.").

105. Uviller, *supra* note 96, at 1702.

106. *See* Morales v. Portuondo, 165 F. Supp. 2d 601, 612 (S.D.N.Y. 2001) (criticizing the

commentator aptly remarks on the literature concerning the prosecutorial duty, "These writings identify the prosecutor as essentially the surrogate for a client, the sovereign, whose ends are to ensure the fairness and reliability of both the criminal justice process and the outcomes of that process."[107] Inherent in the prosecutorial duty to ensure fairness and reliability is the duty to protect the innocent.[108]

4. Abdication of Prosecutorial Obligations in Franco

In *Franco*, the prosecution's failure to utilize a lineup procedure invariably shown to reduce misidentifications violated that office's professional prosecutorial duty to ensure reliability and fairness. Conspicuously absent from the prosecution's arguments against a court-ordered sequential lineup was any suggestion that protecting against the possible misidentification of an innocent person should constitute a factor in the court's calculus for deciding the issue. This failure is particularly glaring when one considers that the prosecution conceded not only that "eyewitness evidence is not infallible," but also that sequential lineups offer "a brave new step in addressing and reducing the mistakes that often result from the traditional, simultaneous lineup procedure currently employed."[109] Thus, the failure of the prosecution in *Franco* to link the increased reliability of sequential lineup procedures with concerns for the reliability and fairness of the criminal justice process reveals an unacceptable disconnect between prosecutorial duty and action.

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actions of the Bronx Assistant District Attorney, noting that "[a] prosecutor's fundamental obligation is 'to seek justice, not merely to obtain a conviction[,]'" and that prosecutors "are not merely partisan advocates, but public officials charged with administering justice honestly, fairly and impartially") (quoting People v. Miller, 539 N.Y.S.2d 782, 784 (N.Y. App. Div. 1989) and People v. Heller, 465 N.Y.S.2d 671, 674 (N.Y. Sup. Ct. 1983)); Galin, *supra* note 103, at 1267 ("It is clear from the language of the Model Code of Professional Conduct that the duty of the prosecutor goes beyond simply gaining convictions, and that 'seeking justice' is about more than simply convicting the guilty.") (internal citations omitted).

107. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 635 (1999). *See also* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 698 (1992) ("If prosecutors truly accept their obligation to define the public interest they represent, the apparent conflict between zealous advocacy on behalf of the state and 'seeking justice' disappears.").

108. *See* United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., concurring and dissenting) ("Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime."); STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEFENSE FUNCTION Standard 3-1.2, cmt. at 4 (1993) ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty . . . ."); *see also* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001) (noting that "the prosecutor has the overriding responsibility not simply to convict the guilty but to protect the innocent"); Green, *supra* note 107, at 613 (arguing that "[t]he prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent").

109. People's Response, *supra* note 12, at 2–3.

When presented with data concerning a clear way to enhance the reliability of a critical investigative tool—the eyewitness lineup procedure—prosecutors should be particularly keen on fulfilling their "special role . . . in the search for truth in criminal trials."[110] Unlike defense counsel's role as unequivocal advocate for an individual client, the prosecutor retains the critical responsibility of neutral inquiry into all aspects of a case.[111] Nothing can justify a prosecutor's failure to approach each case with the utmost concern for the truth.[112]

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110. Strickler v. Green, 527 U.S. 263, 281 (1999). *See also Wade*, 388 U.S. at 256–57 (White, J., concurring and dissenting) (noting that law enforcement officers "must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be."); English, *supra* note 96, at 558 (arguing that prosecutors "must engage in rigorous scrutiny of the available evidence and make a reasoned judgment regarding the suspect's guilt. This scrutiny must involve being personally satisfied of the suspect's guilt before instituting charges. Otherwise, prosecutors abdicate their responsibilities and violate their ethical duties."). Former prosecutor H. Richard Uviller discusses the prosecutor's role at length:

> The prosecutor should be assured to a fairly high degree of certainty that he has the right person, the right crime . . . . To reach that point of assurance, the prosecutor should approach the case handed to him with a working degree of suspicion. The good prosecutor—like any good trial lawyer—is skeptical of what appears patent to others, and curious concerning details that seem trivial to the casual observer.

Uviller, *supra* note 96, at 1703.

111. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate . . . ."); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1996) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 215 (1990) ("This is not to say that the prosecutor's ethical standards are 'higher,' but only that they are different as a result of the prosecutor's distinctive role in the administration of justice."); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 322 (2d ed. 1995) (stressing that "prosecutors have a dual role as advocates and ministers of justice"); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.4, at 765 (1986) ("The most striking difference between a prosecutor and a defense lawyer or any non-governmental lawyer is that a prosecutor is much more constrained as an advocate."); Uviller, *supra* note 96, at 1696 (describing the prosecutorial process as "'adjudicative' as distinct from 'adversary'" and arguing that prosecutors should be "detached from the demands of zealous advocacy"); *id.* at 1704 ("The mindset with which the prosecutor should approach this task is different from the advocate shoring up a somewhat equivocal case; it is the mindset of the true skeptic, the inquisitive neutral."). *But see* Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1453 (2000) (arguing that descriptions of different ethical standards of public prosecutors are often overstated and that "in many, perhaps most, instances the standard of conduct for the prosecutor is identical to the standard for the criminal defense lawyer and the civil advocate"); *cf.* H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 279–305 (1996) (noting that, in the author's experience, judges often appear to be quite content with prosecutors fully engaged as adversaries).

112. *See* English, *supra* note 96, at 554 (noting that because the "trier of fact—be it a judge or a jury—will occasionally make erroneous factual conclusions . . . [and] the fact that the system and the people who operate the system make mistakes, the prosecutor's duty not to put an individual at risk of being mistakenly convicted becomes even more important"); Galin, *supra* note 103, at 1269 (stressing that "[t]he duty to see that an innocent person is not sent to prison lies primarily with the prosecutor") (citations omitted). H. Richard Uviller, who served as an Assistant District Attorney in New York County from 1954 to 1968, concedes, "Looking back on my own courtroom days, I now realize that I was weakest in this essential characteristic of the best of the breed; in a word, my gullibility and compassion dulled my suspicion and lulled my doubts." Uviller, *supra* note 96, at 1703. *Cf.* English, *supra* note 96, at 558 (arguing that "when a prosecutor argues inconsistent

Prosecutorial responsibility and power must compel prosecutors to recognize that their duties amount to more than simply satisfying what the Constitution minimally requires.[113] By rejecting Franco's informal and formal requests to implement the more reliable sequential lineup procedure, the prosecution failed to uphold the mantle of public prosecutor.

*C. Coda: Post-*Franco *Rulings Concerning Sequential Lineup Procedures*

Since the court's ruling in *Franco*, at least seven other New York trial courts have weighed in on whether to grant a defendant's request for a sequential lineup procedure. A brief review of each case reveals that the question ultimately decided in *Franco*—whether a court can or should compel law enforcement to implement a sequential lineup procedure at the request of the defendant—remains an open one.

In November 2001, a Kings County trial court granted a defendant's motion to compel law enforcement to utilize a sequential lineup procedure in *In re Investigation of Thomas*.[114] While noting that "the concept of separation of powers" counseled against exercising judicial discretion in law enforcement matters,[115] the court issued a strong statement in favor of judicial supervisory power. As a preliminary matter, the court cited overwhelming evidence establishing the superiority of the sequential lineup method over the simultaneous lineup procedure.[116] The court then stressed that not only

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factual theories in successive trials, the prosecutor creates too great a risk that an innocent person will be convicted. Placing an innocent person in danger of conviction is unacceptable because our criminal justice system is based on the fundamental principle that it is far worse to convict an innocent person than to let a guilty person go free.").

113. *See* Uviller, *supra* note 96, at 1704–05 ("But a firmly based charge that a woeful mistake was made, that an innocent person was convicted, is not to be taken lightly. . . . All efforts must be bent to the diligent investigation of the claim and, if substantiated, it is incumbent upon the people's representative, the guardian of the integrity of the process, to urge immediate remedy to assist the court in righting the wrong."). For merely one example of a prosecutor abandoning his dispassionate, justice-seeking role, see John Tierney, *Prosecutors Never Need to Apologize*, N.Y. TIMES, July 27, 2001, at B1, reporting on a story involving two prisoners who served thirteen years in prison and were later cleared of any wrongdoing, in which Bronx Assistant District Attorney Allen P.W. Karen "fought so hard to keep [the prisoners] in prison that the judge rebuked him for misstating parts of the case" (reporting on Morales v. Portuondo, 165 F. Supp. 2d 601, 612 (S.D.N.Y. 2001) (admonishing prosecution for being "more intent on protecting a conviction than in seeing that justice was done")). *See also* RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2c, at 503–06 (4th ed. 2001) (listing cases in which a writ of habeas corpus was granted on grounds of prosecutorial or police suppression of evidence or other improper discovery-related grounds); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 410–15 (2000–2001) (discussing various forms of prosecutorial misconduct).

114. 733 N.Y.S.2d 591 (N.Y. Sup. Ct. 2001).

115. *Id.* at 596 ("Generally, a court should not interfere with pre-indictment investigatory procedures by the executive branch. Interference with executive prerogatives should be undertaken only where necessary.").

116. *Id.* ("[T]he scientific community is unanimous in finding that sequential lineups are fairer and result in a more accurate identification. The court has been unable to find a single

satisfaction of "rules of evidence and the constitution," but also "accuracy" should be a central concern for the court when weighing the competing interests involved.[117] Noting the scientific advances in the area of identifications over the past two decades, the court stressed that

> [a] potential defendant should undergo the most accurate identification procedure possible under the circumstances of the case and should not be required to undergo a less fair procedure where there are fairer procedures available merely because the executive branch of government has been slow to keep up with scientific knowledge.[118]

In addition, the court in *Thomas* noted that given the prosecution's failure to provide any information surrounding the particular circumstances of the alleged identification, there was more than a "minimal possibility" of misidentification.[119] Lastly, the court dismissed any notion that conducting a sequential lineup would constitute an inconvenience.[120]

Without a doubt, the *Thomas* decision offers a forceful rebuttal to *Franco*.[121] Yet shortly after the *Thomas* decision, a New York County case, *People v. Martinez*,[122] reached a different result. In *Martinez*, the court followed the *Franco* holding in denying two defendants' motions to order a sequential lineup procedure. The trial court in *Martinez* stressed concerns similar to those of the *Franco* court, noting, "I agree with the *Franco* court's conclusion that in

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scientific article criticizing the sequential lineup or criticizing the scientific method used by the psychologists in their experiments.") (internal citation omitted).

117. *Id.*

118. *Id.*

119. *Id.* Here, according to the court, the Kings County District Attorney's Office failed to provide information that would have established that there was little question about the alleged perpetrator of the crime. According to newspaper reports, there were apparently a total of six witnesses to the alleged shooting—including some who knew Rahim Thomas—in addition to an alleged confession given by Thomas. *See* Robert D. McFadden, *Judge Orders Rare Lineup of Suspects One at a Time*, N.Y. TIMES, Nov. 9, 2001, at D5 (noting that "[b]esides Mr. Thomas' confession, . . . there were six witnesses to the shooting"); Graham Rayman, *State Judge Orders Use Of Sequential Lineup: Brooklyn DA Weighing Use in Select Cases, in Lieu of Group Method Used by Cops for Decades*, NEWSDAY, Nov. 10, 2001, at A24 (reporting that "Rahim Harris [sic] appeared in the station house three days after the murder and confessed[, and that i]n addition, according to prosecutors, there were six alleged witnesses"). The court acknowledged that the prosecution had informed the court of six witnesses, some of whom may have known Thomas. The court also acknowledged the fact that Thomas had confessed. The court responded to these facts, however, by emphasizing the lack of information surrounding both the confession and the extent of the witnesses' observations. *Thomas*, 733 N.Y.S.2d at 597.

120. *Thomas*, 733 N.Y.S.2d at 597 ("The additional inconvenience of requiring law enforcement agents to conduct a double blind sequential lineup . . . is minimal if not nonexistent. . . . There will . . . be no economic effect on law enforcement agencies in conducting the double blind lineup.").

121. Notably, the motion requesting a double-blind sequential lineup in *Thomas* very closely resembled that filed in *Franco*. *Compare* Affirmation in Opposition to Order to Show Cause, *Thomas* (No. 42374/2001), *available at* http://www.nysda.org/Hot_Topics/Eyewitness_Evidence/ThomasDefendantMotion.pdf, *with* Defendant's Motion, *supra* note 7.

122. Nos. 6403/01, 6402/01, 2001 WL 1789315 (N.Y. Sup. Ct. Nov. 28, 2001).

deference to the separation of powers, the judicial branch of government should not direct the executive branch to employ one particular constitutional identification procedure over another."[123] The *Martinez* court also questioned the extent to which sequential lineup procedures were, in fact, more reliable than simultaneous procedures.[124]

Shortly after *Martinez*, a Kings County decision, *People v. Alcime*,[125] also denied a defendant's request for a lineup. In contrast to *Franco* and *Martinez*, the court in *Alcime* rejected the prosecution's separation of powers argument, noting "it is unclear to this Court how the prosecution can on the one hand assert that this is an issue to be construed under the separation of powers doctrine, yet at the same time maintain that '. . . it should be decided by the legislature and prosecutors, not the courts.'"[126] The court continued, noting that "[w]hat is irrefutable under [the separation of powers] doctrine is that the 'law,' whether classified as policy or enacted de facto or de jure, is the exclusive province of the judiciary to interpret."[127] Despite rejecting this argument, which controlled the decisions in both *Franco* and *Martinez*, the *Alcime* court stressed that "although ameliorative measures in eyewitness identification procedures seem unquestionably warranted, the New York Courts are bound by antiquated review policies that do not adequately address and were not designed to deal with prospective concerns."[128] Thus, while at once acknowledging "the hazards of unwarranted prosecution and wrongful conviction" brought about by unreliable identification procedures, the court in *Alcime* held that it was, as an institution, nevertheless prohibited from improving the procedure.[129]

In March 2002, in *People v. Wilson*,[130] another Kings County trial judge issued a ruling that fell somewhere in between the previous rulings in *Franco*, *Thomas*, *Martinez* and *Alcime*. Stating that it had "no interest in or intention of micro-managing the District Attorney's affairs or interfering with his discretion of whom, what or when to prosecute," the court in *Wilson* noted that it would "instead adhere[] to its traditional role of balancing the petitioner's interest in investigating and prosecuting those who commit crimes against a suspect's liberty interest."[131] While asserting that "[e]ven the well-placed deference afforded to classic lineup procedures must yield if inconsistent with unam-

123. *Id.* at *1.

124. *See id.* at *4 (noting that "[even] if I were to consider directing a particular method of lineup, I would not order a sequential lineup because its superiority to traditional lineups has not been established").

125. No. 33058/2001, 2002 WL 264371 (N.Y. Sup. Ct. Feb. 7, 2002).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. 741 N.Y.S.2d 831 (N.Y. Sup. Ct. 2002).

131. *Id.* at 833.

biguous scientific evidence,"[132] the court in *Wilson* nevertheless refused to order a sequential lineup procedure. Unlike the court in *Thomas*, the *Wilson* court viewed the "body of evidence [concerning the superiority of sequential lineups] [a]s neither unequivocal or complete."[133] Although it found the absolute benefits of a sequential lineup procedure unclear, the *Wilson* court did order the prosecution to implement its traditional simultaneous lineup procedure in a double-blind fashion.[134]

In the month following *Wilson*, a Staten Island trial court ordered, in a ruling from the bench, that police conduct a sequential lineup procedure in the case of Kevin Affon.[135] As was the case of Franco, Affon was already in custody on an unrelated charge when the prosecution moved to compel his participation in a lineup, precipitating the defendant's request for a double-blind sequential procedure.[136] Similar to the *Thomas* decision, the court failed to require that the lineup be conducted in a double-blind manner.[137] However, in a dissimilar follow-up, the prosecution in Affon's case proceeded with the court-ordered sequential lineup while the *Thomas* prosecution skirted compliance by not conducting a lineup at all.[138] The prosecution in Affon's case maintained that compliance with the order did not signal a prosecutorial shift towards use of sequential lineups,[139] perhaps demonstrating an effort to keep legitimately encroaching judicial supervision at bay.

In September 2002, an Erie County trial court rejected a defendant's request that the court order a sequential lineup procedure, agreeing with the prosecution that simultaneous lineups are "legally 'reliable'" under New York law.[140] Similarly, in October 2002, a Bronx County trial court denied a defendant's motion for a sequential lineup, finding that the procedure was "unnecessary to insure fair treatment during identification procedures."[141]

The foregoing cases concerning sequential lineups reveal critical departures among New York trial courts in interpreting everything from social science to the scope of the judicial supervisory power. While these current fissures among

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132. *Id.*

133. *Id.* at 834.

134. *Id.* (noting that "[i]n light of the apparent unanimity of expert opinion as to the benefits and superiority of double-blind testing, the branch of the respondent's application to have the lineup conducted in a double-blind fashion is granted. In doing so, any officer who accompanies the witness into the viewing area shall not know which participant is the target of the investigation.").

135. Tom Perrotta, *First Sequential Lineup is Held in Staten Island*, N.Y.L.J., Apr. 29, 2002, at 1.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.*

140. *See* Matt Gryta, *Special Lineup Rejected for Slaying Suspect*, BUFF. NEWS, Sept. 24, 2002, at B3.

141. *In re* Taylor, N.Y.L.J., Oct. 4, 2002, at 21 (N.Y. Sup. Ct. Oct. 4, 2002).

trial courts fail to answer whether the *Franco* court correctly decided Franco's request for a sequential lineup procedure, this article nevertheless reiterates its position that the court in *Franco* got it wrong. As noted, social science overwhelmingly supports the superiority of sequential lineups over simultaneous ones. Contrary to Judge Barrett's expressed fears of "judicial legislation," straightforward interpretation of existing law empowered him to order law enforcement to utilize one lineup method over another. Moreover, both Judge Barrett and the prosecution were obligated to pursue the lineup method more likely to reduce the chances of a misidentification.

III.
THE LESSONS OF *FRANCO*: REFLECTIONS ON JUDICIAL AND PROSECUTORIAL RESPONSIBILITIES

People v. Franco presented an opportunity for both the prosecution and the court to take an important step toward reducing the likelihood of a miscarriage of justice. However, both parties balked at providing the necessary leadership in this area of judicial reform. Despite a responsibility to seek fairness and justice rather than mere convictions, the Bronx District Attorney's Office refused to implement a lineup method that the office itself proclaimed to be a significant step toward reducing misidentifications. Despite a clear mandate to utilize its supervisory power to maintain integrity and fairness in the administration of the criminal justice system, the court in *Franco* unnecessarily limited its own power to compel law enforcement to do what the prosecutor's office would not. The court could have followed a straightforward legal interpretation allowing for the judiciary to act on this matter. Such an action would have demanded no rewriting of any legislation,[142] merely a modification of an existing procedure.[143]

As this article highlights, courts and prosecutors are vested with critical responsibilities to promote reliability and fairness in the administration of the criminal justice system. However, these duties are rendered inconsequential if they are not acted upon. In discussing prosecutorial responsibilities, one former Assistant United States Attorney notes:

> One reason to ask why prosecutors should seek justice is to give meaning to a phrase that might otherwise seem to be an entirely empty vessel. Drawing insight into the justifications for the duty enhances the

142. *See* Thomas v. Arn, 474 U.S. 140, 148 (1985) ("Even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with . . . statutory provisions.").

143. It should be noted that a sequential lineup procedure has been approved by at least one New York court even prior to the ruling in In re *Thomas*. *See* People v. Blue, 631 N.Y.S.2d 232, 233 (N.Y. Sup. Ct. 1995) (denying the defendant's motion to suppress identification evidence, finding that the use of a sequential lineup procedure was not unduly suggestive and that "it may even be argued that the procedure used actually produces a greater possibility of reliable identification than a traditional photo-array in which all of the photographs are exhibited together").

> prospect for constructing an understanding of "doing justice" that adds something to the substance, and not just the vocabulary, of discussions about the scope and limits of prosecutors' ethical responsibilities in both the narrow and broad senses.[144]

Failure to do more than simply pass the buck violates this critical obligation by which prosecutors are bound.[145]

While judicial restraint is certainly necessary to ensure institutional legitimacy,[146] the proposed threat of "judicial legislation" presented in *Franco* was, as noted, greatly overstated. Instead of presenting a case for judicial restraint, the situation in *Franco* presented an opportunity for the court to engage its supervisory power in a legitimate and reasonable manner to reach a decision in the best interests of the criminal justice system. Courts have a clearly defined role and responsibility to utilize their supervisory power in instances where justice demands it. Moreover, state courts, generally speaking, have broader authority to utilize their supervisory power than do federal courts. While Article III courts are constrained by federal justiciability principles in determining whether they can or should resolve particular disputes, state courts have more flexibility to take a greater role in the administration of justice.[147] As one commentator notes, support for such involvement historically stems from the courts' "expertise with respect to legal questions," and that "'judges seem to have the best opportunity of becoming acquainted with the deficiencies of the law.'"[148]

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144. Green, *supra* note 107, at 618 (internal citations omitted).

145. It is unlikely that a prosecutor would face sanctions for this kind of apathy. *See* English, *supra* note 96, at 555 (noting that "[w]hile courts cannot reverse convictions on the basis of an ethics violation, they frequently highlight these violations to lend credibility to their analyses"). Nevertheless, the responsibility exists and must be acted upon. *See* Green, *supra* note 107, at 616–17 (contending that "prosecutors generally acknowledge the professional codes, with their elaboration of special prosecutorial responsibilities, as a source of guidance, if not of binding obligations with regard to prosecutorial conduct" (citing, *inter alia*, NATIONAL PROSECUTION STANDARDS Standard 1.5 (Nat'l Dist. Attorneys Ass'n 1991) ("At a minimum, the prosecutor should abide by all applicable provisions of the Rules of Professional Conduct or Code of Professional Responsibility as adopted by the state of his jurisdiction.")); *id.* at Standard 6.2 cmt. ("The prosecutor's obligation to comply with the ethical code and rules of his jurisdiction is a fundamental and minimal requirement.")).

146. *See, e.g.*, CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. trans. & eds., Cambridge University Press 1989) ("Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator.").

147. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1834, 1873 (2001) ("State supreme courts today, to a greater extent than federal courts, . . . directly participate in the administration of justice—regulating the legal profession, establishing procedural rules, and working with the other branches on law reform.") (footnotes omitted).

148. *Id.* at 1873 n.214 (quoting Amasa M. Eaton, *Recent State Constitutions* (pt. 2), 6 HARV. L. REV. 109, 120 (1892)).

In addressing apparent problems with eyewitness identifications, particularly lineup procedures, there will continue to be a glaring disconnect between responsibility given and responsibility taken in the absence of affirmative acknowledgment by legal actors. Instead, one burning question that emerges from *Franco* and other decisions similarly rejecting defendants' requests for sequential lineup procedures is simply this: if not in the courts, then where can an individual compelled to participate in a lineup seek assurance that only the most reliable procedure will be used? Although the obvious responses are local district attorney's offices, the police precincts, or the state legislature, the answer is not so simple. Since the sequential lineup litigation in New York began in February 2001,[149] neither the prosecution nor the police have been willing to grant a defendant's request.[150] While New Jersey Attorney General John J. Farmer, Jr. recently ordered all New Jersey law enforcement to utilize sequential lineups rather than simultaneous ones,[151] such an executive initiative will likely not work in other jurisdictions.[152]

The fact that judges and prosecutors are empowered and obligated to ensure reliability and fairness in the criminal justice system makes the *Franco* case all the more distressing, since leaders of the system must pioneer change if change is to come. Dana Schrad, executive director of the Virginia Association of Chiefs of Police, stated recently that most law enforcement departments in Virginia will continue to use the traditional simultaneous lineup procedures instead of sequential lineup procedures largely because "[p]olice . . . don't jump into the deep end on changes like this until they feel like it's accepted by the prosecutors and the court systems and that they've covered all those bases. If

149. According to David Feige, Trial Chief, The Bronx Defenders began litigating this issue in February 2001 in the case of *People v. Jose Penaro.* Interview with David Feige, *supra* note 11.

150. *Id.* (explaining that every informal request by The Bronx Defenders seeking the implementation of a double-blind sequential lineup has been rejected by both the police and prosecution). In fact, the first judge to be approached with a request for a sequential lineup procedure refused even to accept the defendant's petition. Dewan, *supra* note 15. It is worth noting that several times upon being approached with a request to utilize a double-blind sequential lineup procedure, the Bronx District Attorney's Office has decided not to use lineups at all. *Id.*

151. Memorandum from John J. Farmer, Jr., Attorney General, State of New Jersey, to All County Prosecutors et al., regarding Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

152. *See* Kleinknecht, *supra* note 47, at 15 (noting that "New Jersey was the perfect testing ground for [implementing] the new [sequential lineup] procedures" because "[i]t is the only state in which the attorney general supervises and sets policy for all of the county prosecutors . . . . In states that have elected county prosecutors, each county has discretion over such matters."); Kolata & Peterson, *supra* note 38, at A1 ("George A. Grasso, the New York City Police Department's deputy commissioner in charge of legal affairs, said group lineups were based on long-established case law and could be particularly hard to change in New York's sprawling [law enforcement] system."); Rocco Prascandola, *Cutting Edge: Criminal Lawyers Fight for New Lineup*, LEXISONE *at* http://www.lexisone.com/news/nlibrary/n112801e.html (Nov. 26, 2001) (noting that while New Mexico authorities have expressed interest in possibly adopting the sequential lineup procedure, "New Mexico's Attorney General does not have the authority over that state's police departments that his New Jersey counterpart does").

there's been any hesitance, it's usually because they like to err on the side of caution." [153] Without direction from the courts and prosecutors, one can expect little progress in this area.

While Judge Barrett's decision in *Franco* meant that law enforcement could place Franco in a lineup of its choice, the opinion left open the possibility that Franco might, should he be positively identified in a simultaneous lineup, be able to introduce expert testimony to challenge the reliability of the simultaneous lineup procedure.[154] Although somewhat encouraging, a "post-identification" challenge to the reliability of simultaneous lineups represents a weak attempt to address the critical problem, since a defendant's right to such a hearing is available only after an identification is presumably made.[155]

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153. Frank Green, *Eyes Might Not Have It; Witness Testimony Sometimes Wrong, DNA Shows*, RICH. TIMES-DISPATCH, Nov. 5, 2001, at B1.

154. *See Franco*, *supra* note 3, at 6 (noting that "as no lineup has yet been conducted and no identification made . . . the Court reserves decision as to . . . whether to receive expert testimony regarding sequential lineups at a *Wade* hearing and/or trial").

155. As a general rule, New York has two requirements for the admissibility of scientific expert evidence. The first requirement is that expert testimony must "'aid a lay jury in reaching a verdict.'" People v. Lee, 750 N.E.2d 63, 66 (N.Y. 2001) (quoting People v. Taylor, 75 N.Y.2d 277, 288 (N.Y. 1990)). In assessing the probative value of such testimony, courts consider whether the witness possesses scientific knowledge beyond the range of ordinary training. *See* People v. Miller, 694 N.E.2d 61, 65 (N.Y. 1998) (stating that expert testimony may be admissible "where the conclusions to be drawn from the facts 'depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence'") (quoting People v. Cronin, 458 N.E.2d 351, 352 (N.Y. 1983)); DeLong v. County of Erie, 457 N.E.2d 717, 722 (N.Y. 1983) (stating that expert testimony "is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror"); People v. Phillips, 692 N.Y.S.2d 915, 918 (N.Y. Gen. Term 1999) (stating that experts must possess "scientific knowledge beyond the range of ordinary training"). The second requirement is that expert testimony must be based on a scientific principle which has been "'*sufficiently established to have gained general acceptance in the particular field in which it belongs.*'" People v. Wesley, 633 N.E.2d 451, 454 (N.Y. 1994) (alteration in original) (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)). For jurisdictions generally allowing expert testimony on eyewitness identification, see, e.g.: *Ex parte* Williams, 594 So. 2d 1225 (Ala. 1992) (ruling that expert testimony on eyewitness identification may be admissible but refusing to admit it in this case); Skamarocius v. State, 731 P.2d 63 (Alaska Ct. App. 1987) (holding that expert testimony should have been admitted and granting a new trial to the defendant); State v. Chapple, 660 P.2d 1208 (Ariz. 1983) (same); People v. McDonald, 690 P.2d 709 (Cal. 1984) (same); Campbell v. People, 814 P.2d 1 (Colo. 1991) (holding that expert testimony on eyewitness identification may be admissible in some cases and remanding to the trial court to determine if testimony should be admitted in this case); Green v. United States, 718 A.2d 1042, 1049–55 (D.C. 1998) (stating that expert testimony on eyewitness identifications is not per se inadmissible); Johnson v. State, 526 S.E.2d 549 (Ga. 2000) (noting that expert testimony may be admissible, although it was not admitted in this particular case); State v. Pacheco, 2 P.3d 752 (Idaho Ct. App. 2000) (same); Cook v. State, 734 N.E.2d 563 (Ind. 2000) (same); State v. Schutz, 579 N.W.2d 317 (Iowa 1998) (reversing a district court's refusal to allow expert testimony on eyewitness notification and remanding to the trial court for a new trial); Echavarria v. State, 839 P.2d 589 (Nev. 1992) (finding that expert testimony should have been admitted, but failure to do so was harmless error); State v. Gunter, 554 A.2d 1356 (N.J. Super. Ct. App. Div. 1989) (finding that the testimony may be admissible and remanding the case); People v. Lee, 750 N.E.2d 63 (N.Y. 2001) (noting that expert testimony concerning eyewitness identifications may be admissible); State v. Cotton, 394 S.E.2d 456, 459 (N.C. Ct. App. 1990), *aff'd*, 407 S.E.2d 514 (N.C. 1991) (noting that

Courts should seek to prevent error, as opposed to merely allowing for a diagnosis of what might have gone wrong after the fact. Gary Wells, an identifications expert, explains that

> [e]xpert testimony can, in targeted cases, pressure the system to use better procedures, such as double-blind lineup testing and the sequential lineup rather than the simultaneous lineup. But it should not be the purpose of expert testimony merely to raise doubt about the guilt of a defendant in a given case. Expert testimony does nothing to address the misidentification problem unless it helps the legal system improve its

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the admission of expert testimony on eyewitness identification is within the discretion of the trial court); State v. Buell, 489 N.E.2d 795 (Ohio 1986) (holding that expert testimony may be admissible, although it was not admitted in this particular case); State v. Whaley, 406 S.E.2d 369 (S.C. 1991) (holding that the trial court abused its discretion by excluding expert testimony where the only evidence against the defendant was the testimony of two eyewitnesses); State v. Hamm, 430 N.W.2d 584 (Wis. Ct. App. 1998) (finding that expert testimony should have been admitted, but failure to do so was harmless error). For states generally precluding such evidence, see, e.g.: Utley v. State, 826 S.W.2d 268, 270–71 (Ark. 1992) (holding that admission of expert testimony regarding eyewitness identification at trial "could have hindered the jury's ability to judge impartially the credibility of the witnesses and the weight to be accorded their testimony" and observing that state appellate courts had long upheld the trial court's refusal to allow such expert testimony); State v. McClendon, 730 A.2d 1107 (Conn. 1999) (finding expert testimony regarding eyewitness identification inadmissible); Johnson v. State, 438 So. 2d 774 (Fla. 1983) (same); People v. Enis, 564 N.E.2d 1155 (Ill. 1990) (finding no abuse of discretion in excluding eyewitness expert testimony); State v. Gaines, 926 P.2d 641 (Kan. 1996) (finding expert testimony regarding eyewitness identification inadmissible); Gibbs v. Commonwealth, 723 S.W.2d 871, 874 (Ky. Ct. App. 1986) (rejecting the claim that the trial court erred in refusing to admit expert testimony concerning eyewitness identification on procedural grounds, but stressing that "such expert testimony has long been excluded by Kentucky courts as invading the province of the jury in assessing the credibility of witnesses") (citing Pankey v. Commonwealth, 485 S.W.2d 513 (Ky. 1972)); State v. Stucke, 419 So. 2d 939 (La. 1982) (holding that the prejudicial effect of expert testimony regarding eyewitness identification outweighed its probative value); State v. Rich, 549 A.2d 742, 743 (Me. 1988) (upholding the exclusion of expert testimony and finding no abuse of discretion in the trial court's finding that the effects of stress on eyewitness reliability are "not beyond the common knowledge of the ordinary juror"); State v. Miles, 585 N.W.2d 368, 371–72 (Minn. 1998) (holding that it was not an abuse of discretion to exclude expert testimony); Commonwealth v. Simmons, 662 A.2d 621 (Pa. 1995) (finding that expert testimony on the reliability of eyewitness identification was excludable); State v. Gardiner, 636 A.2d 710, 714 (R.I. 1994) (finding that it was not an abuse of discretion to exclude expert testimony); State v. Coley, 32 S.W.3d 831 (Tenn. 2000) (finding that expert testimony proffered by the defendant concerning the reliability of eyewitness identification was per se inadmissible); Currie v. Commonwealth, 515 S.E.2d 335 (Va. App. 1999) (finding that expert testimony was properly limited by trial court). In federal court, the decision to admit or exclude expert testimony concerning eyewitness identification is generally within the discretion of the trial judge. *See, e.g., In re* Mathis, 264 F.3d 321 (3d Cir. 2001) (finding that the district court abused its discretion by not admitting expert testimony on eyewitness identifications into evidence, although failure to do so was harmless error); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984) (finding that the decision to admit or exclude expert testimony was within the discretion of the trial court). *But see* United States v. Holloway, 971 F.2d 675 (11th Cir. 1992) (finding expert testimony on eyewitness identification per se inadmissible). *See also* Cindy J. O'Hagan, Note, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 757 (1993) (noting that "[f]ederal courts have been very reluctant to admit expert testimony on the unreliability of eyewitness identifications").

> methods for collecting the evidence. Most defense attorneys who retain eyewitness experts are not interested in improving the way that lineups are conducted; they are interested only in raising doubt about their client's guilt.[156]

Moreover, once an identification has been made it is extremely rare for an identifying witness to realize his or her mistake and retract the identification.[157] Therefore, while it is certainly better to allow such expert testimony than to disallow it, minimizing the chance of error in the first instance should be a court's principal concern.

The legal community has made efforts to safeguard against wrongful convictions, particularly when dealing with eyewitness identifications.[158] Research demonstrates that a sequential lineup procedure is the next positive step toward reducing misidentifications. Of course, a sequential lineup procedure is not the only way to further improve lineup procedures, nor is it any guarantee that misidentifications will be prevented once and for all.[159] That said, the use of sequential lineups represents an unmistakably wise and simple step toward a more reliable criminal justice system.

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156. Gary L. Wells, *My Concerns About Wall Street Journal Article on Eyewitness Experts*, *at* http://www.psychology.iastate.edu/faculty/gwells/wallstreetcomment.htm (last visited Nov. 16, 2002).

157. *See, e.g.*, United States v. Wade, 388 U.S. 218, 229 (1967) ("[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 . . . ." (quoting Williams & Hammerman, *Identification Parades, Part I*, 1963 CRIM. L. REV. 479, 482)).

158. *See* Devenport et al., *supra* note 28, at 339 (noting safeguards such as "the presence of counsel at postindictment, live lineups, opportunities for motions to suppress identifications, cross-examination of identifying witnesses, and expert psychological testimony about factors that influence eyewitness memory") (citations omitted).

159. Other suggestions for improving identification procedures include "context reinstatement," where the witness recalls the criminal event. *See* Roy S. Malpass & Patricia G. Devine, *Guided Memory in Eyewitness Identification*, 66 J. APPLIED PSYCHOL. 343, 349 (1981); Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89, 99–100 (1984).