Eyewitness Testimony: Improvements to a Basic Law Enforcement Process That Will Help Prevent Wrongful Convictions

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Abstract

To date there have been 204 exonerations of persons who were convicted on eyewitness testimony alone. In the majority of these cases the only evidence presented at trial was the testimony of an eyewitness. Since the advent of DNA testing many of these eyewitness testimony convictions have been overturned, which proves that eyewitness testimony can be flawed. In 1998 Attorney General Janet Reno formed a panel to review and improve practices for gathering eyewitness testimony. For over 30 years, psychologists have conducted research in the field of eyewitness testimony. Their research has shown that human memory is fragile and should be treated carefully. Their research has also demonstrated that the lack of training of law enforcement interviewers can actually add to false identifications. Recently, the psychology research community has joined with the law enforcement community to develop some best practices that can easily be adapted into law enforcement procedures and help reduce mistaken identifications. Local State Attorney's were interviewed for input on how to best implement these new procedures. Additionally, a pilot program will be suggested for the Hillsborough County Sheriff's Office.

Three Tampa Bay area State Attorneys were interviewed and presented the proposed changes to current lineup procedures. All of the State attorneys supported and procedure change if it could improve eyewitness reliability.

Introduction

Since the beginning of law enforcement, suspects have been identified, arrested, and convicted based solely on eyewitness testimony. Long before the advent of trace evidence, fingerprint evidence or DNA evidence, law enforcement officers had only eyewitness testimony to depend on. Many of these cases resulted in life sentences. In a few cases the ultimate penalty was paid: death. Although many scientific advances in law enforcement have since occurred, some fundamental techniques have remained the same.

One of these techniques is the eyewitness identification of suspects. For over 30 years, psychologists and the scientific community have been studying the reliability of eyewitness identification evidence. The scientific research has revealed that more than 75% of all eyewitness identifications may be in error (Wells, Olsen, 2003, p. 278).

Researchers also found that police interview skills were lacking. In some cases poor interview skills actually added to the mistaken identification of suspects. For years researchers warned that these mistaken identifications were

leading to convictions of innocent people. However, it was not until the late 1990s that criminal justice personnel took the research seriously. This new attitude was generated by the advancement of DNA testing, which began exonerating previously convicted people. Since most criminal prosecutions do not have DNA or other trace evidence for juries to sift through, it was believed that some advancement should be made in the area of eyewitness identifications.

Although, law enforcement has mostly embraced these needed changes, prosecutors have been slow to accept the researcher's information (Wells, Malpass, Lindsay, Fisher, Turtle, Fulero, 2000, p. 591).

Literature Review

To date there have been 204 exonerations of persons convicted on eyewitness testimony. It has also been confirmed that the greatest contributor to wrongful convictions has been the misidentification of a suspect by an eyewitness (Innocence Project). The need for improving the process in which eyewitness identifications are made became apparent in 1989. DNA testing exonerated 28 people who had been given life sentences. The common denominator in these cases was that the wrongful convictions were based largely on eyewitness identifications. The following is a synopsis of three of the more notable cases in which eyewitness identification lead to significant prison sentences for wrongly accused persons. In the case of Ronald Cotton, he was actually convicted twice on flawed eyewitness identifications.

Kirk Bloodsworth (Baltimore, Maryland)

Factual background. On July 25, 1984, a 9-year-old girl was found dead in a wooded area. She had been beaten with a rock, sexually assaulted, and strangled. Kirk Bloodsworth was convicted on March 8, 1985, of sexual assault, rape, and first-degree premeditated murder. A Baltimore County judge sentenced Bloodsworth to death.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- An anonymous caller tipped police that Bloodsworth had been seen with the girl earlier in the day.
- A witness identified Bloodsworth from a police sketch compiled by five witnesses.
- The five witnesses testified that they had seen Bloodsworth with the little girl.
- Bloodsworth had told acquaintances he had done something "terrible" that day that would affect his marriage.
- In his first police interrogation, Bloodsworth mentioned a "bloody rock," even though no weapons were known of at the time.

- Testimony was given that a shoe impression found near the victim's body was made by a shoe that matched Bloodsworth's size.

Postconviction challenges. Bloodsworth's attorney filed an appeal contending that police had withheld information from defense attorneys. After a second conviction more sophisticated DNA testing became available.

Conclusion. The DNA testing results concluded that Bloodsworth's DNA did not match any evidence associated with the conviction. Bloodsworth was pardoned in June of 1993 (United States Department of Justice, 1996).

Leonard Callace (White Plains, New York)

Factual background. In January 1985 a teenage girl was walking to her car in the parking lot of a shopping center. She was accosted by two men at knife point and forced into a nearby car. One man, allegedly Callace, sexually assaulted the victim repeatedly while the other man watched from the front seat. The second man was never identified. A Suffolk County jury took 1 hour to convict Leonard Callace of sodomy (four counts), sexual abuse (three counts), wrongful imprisonment, and criminal possession of a weapon. Callace rejected a plea bargain that would have given him 4 months in prison if he pled to a lesser charge. On March 24, 1987, Callace was sentenced to 25 to 50 years in prison.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- A sketch by police artists resembled Callace.
- The victim identified Callace from a photo array and made an in-court identification.
- The blood group of the semen was type A, the same as Callace's.
- Callace's alibi was uncorroborated.

Postconviction challenges. Callace's conviction was affirmed on appeal and leave to appeal to the court of appeals was denied. While in prison, Callace learned about DNA testing and how it was used to free a former inmate (see case summary of Charles Dabbs). He asked his attorney about the original trial evidence.
Callace's attorney remembered two things from the original trial record. First, the victim had just picked up her jeans from the cleaners. Second, the victim spit out semen onto the jeans after one of the assaults. Therefore, any semen on those jeans would

have come from the assailant; if it did not match Callace's, he could be freed. The defense used this information to secure the jeans from the prosecution for DNA testing at Lifecodes, Inc. On June 27, 1991, a Suffolk County Court judge granted Callace's motion to consider DNA tests as "new evidence" (573 N.Y.S.2d 137). The judge also ruled that if the samples did not match, he would hold a hearing to consider postconviction relief for Callace.

Conclusion. DNA testing on semen stains did not match Callace's. On October 5, 1992, Callace was released from prison. Callace served almost 6 years of his sentence (United States Department of Justice, 1996).

Ronald Cotton (Burlington, North Carolina)

Factual background. In two separate incidents in July 1984, an assailant broke into an apartment, severed phone wires, sexually assaulted a woman, and searched through her belongings, taking money and other items. On August 1, 1984, Ronald Cotton was arrested for the rapes. In January 1985, Cotton was convicted by a jury of one count of rape and one count of burglary. In a second trial, in November 1987, Cotton was convicted of both rapes and two counts of burglary. An Alamance County Superior Court sentenced Cotton to life plus 54 years.

Prosecutor's evidence at trial. Cotton's alibi was supported by family members. The jury was not allowed to hear evidence that the second victim failed to pick Cotton out of either a photo array or a police lineup. The prosecution based its case on several points:

- A photo identification was made by one of the victims.
- A police lineup identification was made by one of the victims.
- A flashlight in Cotton's home resembled the one used by the assailant.
- Rubber from Cotton's tennis shoe was consistent with rubber found at one of the crime scenes.

Postconviction challenges. Cotton's attorney filed an appeal. The North Carolina Supreme Court overturned the conviction because the second victim had picked another man out of the lineup and the trial court did not allow this evidence to be heard by the jury. In November 1987 Cotton was retried, this time for both rapes. The second victim had decided that Cotton was the assailant. Before the second trial, a man in prison, who had been convicted for crimes similar to these assaults, stated to another inmate that he

> had committed Cotton's crimes. The superior court judge refused to allow this information into evidence, and Cotton was convicted of both rapes and sentenced to life. The next year Cotton's appellate defender filed a brief that did not argue the failure to admit the second suspect's confession. The conviction was affirmed. In 1994 two new lawyers, at the request of the chief appellate defender, took over Cotton's defense. They filed a motion for appropriate relief on the grounds of inadequate appeal counsel. They also filed a motion for DNA testing that was granted in October 1994. In the spring of 1995, the Burlington Police Department turned over all evidence that contained the assailant's semen for DNA testing.
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> *Conclusion.* DNA testing determined that Cotton's DNA did not match the evidence presented at trial. On June 30, 1995, Cotton was officially cleared of all charges and released from prison. In July 1995 the governor of North Carolina officially pardoned Cotton (United States Department of Justice, 1996).

As a result of these and other cases, Attorney General Janet Reno requested the criminal justice community highlight the use of DNA evidence. By this time it was evident that DNA evidence could both convict and exonerate suspects. As a result of the analysis of these cases, it was determined that well over 80% of wrongful convictions were linked to eyewitness's mistaken identity (Wells et al., 2000 p. 590). The discovery of these eyewitness mistaken identifications lead to formation of another working group. In 1998 the Attorney General ordered a panel to be formed to improve the accuracy of eyewitness identification.

A technical working group was formed which included 6 eyewitness researchers, 17 law enforcement personnel, 6 prosecutors, and 4 defense lawyers. In total, 33 criminal justice professionals and social science researchers participated in this working group. The goal of this working group was to come up with a new set of guidelines that law enforcement could use to help ensure better accuracy in eyewitness identifications. After more than one year of meetings held across the nation, a final draft was reviewed in May of 1999. The final product was *Eyewitness Evidence: A guide for Law Enforcement* published in October of 1999. The guide has been distributed nationwide as a tool for law enforcement to help reduce mistaken identifications of suspects.

Since the 1970's social science researchers have been studying the reliability of eyewitness accounts. To date, there have been well over 2000 publications in the research community addressing eyewitness reliability issues.

Some of the more notable researchers are Dr. Gary L. Wells, Ph.D., Psychology Department, Iowa State University, Dr. Roy S. Malpass, Ph.D., Department of Psychology, University of Texas at El Paso, Dr. Rod C. L. Lindsay, Ph.D., Department of Psychology, Queens University, Kingston, Ontario, Canada, Dr. Ronald P. Fisher, Ph.D., Department of Psychology, Florida

International University, and Dr. John W. Turtle, Ph.D., Department of Psychology, Ryerson Polytechnic University, Toronto, Ontario, Canada.
These researchers also participated in the Attorney General's technical working group studying eyewitness evidence. Additionally, they are experts in eyewitness testimony, line-up procedures, cognitive interview techniques, and the fragility of human memory.

Even with the tremendous advances in DNA and trace evidence analysis, eyewitness identifications are still largely responsible for a suspect's arrest. It is estimated that more than 200 people a day are identified as suspects from eyewitness identification (Wells et al., 2000 p. 584). Scientific research on eyewitness testimony can be placed into two broad categories: event memory and identification memory. Event memory is the witness's ability to recall details of a critical event. Identification memory is the eyewitness's ability to identify the suspect in a crime from a photo spread or a live lineup. There are several variables that can affect the accuracy of an eyewitness's ability to make an identification. One of these is the amount of violence or the use of a weapon by the suspect. These types of stressors can have effects on an eyewitness's memory. Research has also revealed that there is no difference between male and female witnesses. Overall the gender of a witness does not affect their ability to identify a suspect. However, in some cases females may remember more details of the crime. On the other hand the age of a witness does tend to have an effect on a witness's ability to identify a suspect. Typically, young children and older adults tend to make more mistaken identifications (Wells et al., 2000 p. 584).

In many instances a witness may not know that a crime has just been committed. This situation results in a witness who may not be paying attention to a particular situation. Research has also shown that the use of a weapon by a suspect tends to draw a witness attention away from a suspects face. Overall, the amount of time that a suspect's face is in view is not critical for eyewitness identification (Wells, Olsen, 2003 p. 282). Other variables that will affect eyewitness identifications are lighting conditions and whether a suspect wore a disguise at the time of the offense.

Distinctive faces can play a part in the accuracy of eyewitness identifications. Distinctive faces are more likely to be accurately recognized. Faces that are highly attractive or highly unattractive are also easier to recognize than those of average attraction (Wells & Olsen, 2003 p. 282).

In many cases, eyewitnesses have the necessary information to recall an event to assist law enforcement in apprehending a suspect. Research has proven that in many cases law enforcement actually hinders its own investigation by the use of improper eyewitness interview techniques. Research has also established that the human memory is very fragile and malleable. The human memory can actually be reshaped by misleading questions after a traumatic event, such as a violent crime. This malleability and reshaping can lead to mistaken memories being stored in a witness's long-term memory. The long term memory is what an eyewitness draws on for identification purposes at a later date. If this long term memory has been supplied with misleading information, it

can lead to mistaken identifications. Ultimately, this altered information is stored in the long term memory and becomes incorporated into the existing information. This mistaken information is then reported back, in the form of eyewitness testimony, as if it was actually witnessed (Fisher & Geiselman, 1992).

Law enforcement officers compound this problem through improper interviewing practices. This can occur at the first responder level or at the follow-up level of investigations. Some of the causes affecting the accuracy level of witnesses are asking questions too quickly, asking closed ended questions (yes/no answers), frequently interrupting the eyewitness, asking questions in an inflexible order, and asking predetermined questions (Fisher & Geiselman, 1992).

Law enforcement officers, while receiving training in suspect interviews, receive little or no formal training in the proper techniques of interviewing cooperating witnesses (Patenuade, 2003 p. 178). The majority of what is learned is taught by senior officers who themselves have had no formal training in the process.

The cognitive interview process was developed by Dr. Ronald P. Fisher and Dr. Edward Geiselman and is a system for conducting interviews. If applied correctly, this process can enhance an eyewitness's ability to recall events. The cognitive interview process involves addressing social dynamics between the officer and the eyewitness, the eyewitness memory, and communication between the officer and the eyewitness. The law enforcement officer can further this process by asking open ended questions, allowing the eyewitness to answer questions in a narrative format, and to answer in the order that the eyewitness recalls the event. One of the cognitive interview techniques used is to have a witness put an event into the proper context. This is done by having the witness start at the beginning of their day and following through until the time of the incident. This allows the witness to set the mood and setting of the event that they witnessed, which enables them to have the event in the proper context. A variation of this process is to have the witness change the sequence in which the event occurs. In this technique, the witness's memory is stimulated to recall different portions of the event, which allows the witness to recount areas they may feel are inconsequential. Officers should not interrupt the eyewitness as they describe the event. If the eyewitness pauses during the narrative, the officer should allow them the moment, while the eyewitness is processing information for specific details. After the eyewitness has concluded their narration the officer should then follow-up with more direct or closed ended questions (Bennett & Hess, n.d.). The officer should avoid asking leading questions because these types of questions tend to cause the eyewitness to want to fill in the gray areas. This filling in of information then becomes misleading details in the eyewitness's long term memory. Using the cognitive interview method tends to cut down on the misleading information and can in some cases produce 35% to 75% more information than does the standard "nothing but the facts ma'am" interview used by many law enforcement officers (Wells et al., 2000 p. 584). These methods of obtaining more accurate and detailed information become critical when it is time for a witness to make a suspect identification such as a lineup or photospread.

The lineup procedure involves the use of multiple subjects for a witness to review in person. After the witness has reviewed all the subjects, the witness is asked if they are able to make an identification of the suspect that they observed. The lineup generally consisted of six individuals, one of which is believed to be the perpetrator of the crime being investigated. The six individuals would lineup on a stage or similar display area. The individuals would, one at a time, step forward and make one quarter turns, until they had turned a complete circle. In some cases the individuals may be required to speak a phrase that was used by the suspect at the time of the crime. To protect their identity, witnesses would view the lineup from a darkened area of the room or from behind a one way glass. The witnesses would then make an identification of the suspect of the crime based on their own recollections. This process has been used for decades. Some law enforcement agencies consider the live lineup a best practice for eyewitness identification of suspects.

Over approximately the past thirty years the trend of performing live lineups has declined. Currently, the most common practice in law enforcement is to present what is known as a photographic lineup or photospread. This process involves the use of photographs, which are generally arrest booking photographs, for display in the photographic lineup. Computer programs have also been developed to aid in the preparation and permanent electronic storage of the photospread. The process consists of preparing six booking photographs that generally resemble one another. One of the six photographs would be of the suspect in the investigation; the other five photographs used are referred to as “filler” photographs. When the final six photographs are chosen, they are then printed on one sheet of 81/2 X 11 paper. The photographs appear in two rows of three photographs each. This system allows the law enforcement officer to take the photographic lineup anywhere. The photospread can easily be transported to witnesses instead of having to arrange a live lineup, which can be very time consuming. The photo lineup is one of the most widely used forms of eyewitness identification (United States Department of Justice, 1999).

One of the more critical areas involved in presenting a photospread to an eyewitness is the disclaimer that the suspect in the crime may not be present. Researchers have determined that eyewitnesses often feel compelled to make a selection, even if they are not certain that the suspect may appear in the photospread. This tendency for the eyewitness to feel compelled to make an identification leads to flawed identifications (Wells, Small, Penrod, Malpass, Fulero, & Brimacombe, 1998).

Witness confidence is another critical area of eyewitness testimony. Simply put, this is the amount of confidence an eyewitness shows in their identification of a suspect. Research has found that eyewitness confidence is directly related to the accuracy of an identification. The timing of this statement of accuracy is also very important. The eyewitness’s statement of accuracy should always be obtained prior to law enforcement making any statements regarding the eyewitness’s choice of photographs. A law enforcement officer who makes a statement such as, “that’s who we thought it was” or “you picked the right photo” tends to bolster a witness’s confidence. This type of situation created by law

enforcement is referred to as “unconscious hints” (Wells & Olsen, 2003 p. 285). In cases of mistaken identity, the bolstering of an eyewitness by a law enforcement officer tends to solidify the mistaken information in the mind of the eyewitness. This mistaken confidence is additionally compounded when the eyewitness testifies in court. The eyewitness’s mistaken confidence in court is then represented to a jury as a high level of confidence on the part of the eyewitness.

Dr. Gary L. Wells is a professor of Psychology at Iowa State University and is an expert in eyewitness testimony. Dr. Wells has been conducting research on eyewitness testimony for over twenty five years. Dr. Wells suggests that misidentification of suspects by eyewitnesses can be greatly reduced. Dr. Wells, through many years of research, has developed a new way of conducting police lineups. This procedure is applicable to the live lineup and the photospread and the procedures for the two is the same for both (Wells & Olsen, 2003 p. 281).

Dr. Wells believes that showing a witness a photospread with six photographs on the same page simultaneously causes the witness to subconsciously pick a photograph based on the process of elimination. Wells states that this process of elimination is one of the main reasons for the misidentification of suspects, as well as the fact that witnesses are not told that they do not need to make a selection of a suspect photo if none were present. Through his research, Wells has found what he believes is a better way to present photographs to witnesses. Wells suggests that a sequential process of presenting photographs tends to lead to a more accurate identification of a potential suspect. This procedure still involves the use of six photographs. However, the photographs are shown one at a time and the witness is not allowed to compare any two photographs. This helps eliminate the witness’s tendency to use the process of elimination to identify a suspect. Instead, the witness must rely on their cognitive recollection of the suspect. Additionally, Wells states that this sort of “blind testing” tends to lesson any “unconscious hints” given to witnesses when law enforcement officers are showing the photospread (Wells & Olsen, 2003 p. 285).

To make identifications even more reliable Wells suggests using the “double blind testing” method. This involves the use of six photographs that will be shown in a sequential manner. Additionally, the photographs, which include the suspect photograph, are placed into separate envelopes. The envelopes are in turn given to a law enforcement officer with no knowledge of the case. This officer, who does not know the target photo, takes the photographs to the witness, who then views the photographs. Unconscious hints can be eliminated by introducing a new officer who does not know which envelope contains the photograph of the suspect (Wells & Olsen, 2003 p. 289).

Through his research, Dr. Wells asserts, that if these new practices for displaying photo lineups were widely used, the possibility of witnesses misidentifying suspects would be greatly reduced (Wells & Olsen, 2003 p. 291).

Another area in which researchers have concern is the building of facial composites. A composite is the use of a series of facial features that are

compiled based on an eyewitness's recollection of a suspect's facial features. The facial features or foils are compiled in a manner in which the eyewitness can go through the process of elimination to select the correct features that most closely resemble a suspect.

Research has proven that face composites can actually be harmful in eyewitness identifications. The research suggests that building a facial composite by eyewitnesses can be very difficult. The research has also found that the majority of the composite likenesses of suspects do not match that of the actual suspect and that all eyewitnesses perceive facial features differently (Wells, Charman, & Olson, 2005).

By building a poor composite likeness of the suspect the chances are greater that the eyewitness will be less likely to identify the correct suspect. It is believed that creating an incorrect likeness creates a second memory of the suspect for the eyewitness. The first effect of this process is that the blended memory creates a new face that has some of the characteristics of the original face and some of the composite face. The second effect is that the original memory of the suspect face is replaced by the composite face, yielding only one face which is now that of the composite.

This new face memory based on a composite face can be particularly dangerous when a suspect is identified based on their likeness to a composite. If the suspect's face resembles the composite face closely enough, there is a greater than average chance the suspect could be mistakenly identified.

The research does not suggest that law enforcement curtail the use of composites. However, there has been no research on how often composites manage to assist law enforcement in identifying a suspect. The evidence is also clear that composites can lead to no suspect identification, due to the altering of the original memory of a suspect's face (Wells, Charman, Olsen, 2005).

As far back as records go, law enforcement has relied on eyewitness testimony to identify, prosecute, and convict suspects of crime. To a large extent the eyewitness evidence procedures have not changed much over the last 30 years. Even with the most modern scientific techniques of collecting trace evidence and advancements of DNA evidence, many criminal cases rely solely on eyewitness testimony. In many cases the only evidence that exists is the testimony of an eyewitness. The introduction of DNA testing in the late 1980's has proven that in many cases, eyewitness testimony was flawed. The Attorney General ordered a study of the cases in which DNA testing exonerated the convicted persons. The cases all had the same common denominator: flawed eyewitness testimony. Subsequent to this study, the Attorney General ordered advancement in the area of accuracy of eyewitness testimony. A large portion of improving eyewitness accuracy involved the analysis of research in the area of eyewitness testimony. It was learned that researchers had been conducting research in this area for over 30 years. The researchers provided information on conducting lineups, photospreads, cognitive interview procedures, and eyewitness confidence levels. The research provided new techniques for improving the accuracy level of eyewitness testimony. Convicting innocent persons on flawed eyewitness testimony only ensures that the guilty remain free.

Method

The purpose of this research is to determine if there are potential flaws in the current way eyewitness evidence is gathered, interpreted, and memorialized. In particular, the ways in which eyewitnesses are shown live and photographic lineups. The data was collected by way of personal interviews conducted with three Tampa Bay area prosecutors office. Additionally, interviews were conducted with representatives of law enforcement agencies that had transitioned from a simultaneous to a sequential lineup process.

The prosecutors were asked about their personal experiences involving the misidentification of suspects by eyewitnesses. Were the prosecutors offices familiar with the Department of Justice publication dealing with the collection of eyewitness evidence, and how their attorneys used this information. If a pilot program should be initiated to test feasibility by using a small group or if a blanket change should be made with all area law enforcement agencies. How best to begin the implementation of the new process and how to inform the judges and defense attorneys of these proposed changes.

The law enforcement agency queried had specifically made the transition from a simultaneous lineup to a sequential one. Areas of discussion were, was the transition made as a result of court ordered or statutory mandate or if made voluntarily. If made voluntarily, what prompted the change? How these agencies made the initial transition, training of officers, updating standard operating procedures, and informing prosecutors, judges, and defense attorneys of the changes.

Results

The below listed Tampa Bay area State Attorneys were interviewed concerning the material discussed in the literature review portion of this paper.

1. Honorable Jerry Hill, State Attorney for the 10th Judicial Circuit serving Polk, Hardee, and Highlands Counties.
2. Honorable Mark A. Ober, State Attorney for the 13th Judicial Circuit, serving Hillsborough County.
3. Honorable Bernie McCabe, State Attorney for the 6th Judicial Circuit, serving Pinellas and Pasco Counties.

These three State Attorney's Offices are responsible for the prosecution of criminal cases presented by more than 54 Florida law enforcement agencies.

Ten questions were formalized from the research information provided in the literature review and presented to the respective State Attorneys. All three State Attorneys related personal accounts of criminal cases that had problems due to flawed eyewitness testimony. All agreed that some of the most difficult cases to prosecute were cases involving eyewitness testimony without any corroborating evidence. In addition, with such great advances in forensic technology, juries are very hesitant to convict solely on eyewitness testimony.

None of the State Attorneys queried were familiar with the extensive research done in the area of eyewitness testimony. When questioned about the

existence of the eyewitness guide, none was familiar with it either. However, it should be noted that the guide was originally developed and published for use by law enforcement agencies. The State Attorneys were all interested to hear that over 30 years of research had been conducted in the area of eyewitness testimony. They unanimously agreed that if valid scientific research suggested that the sequential lineup procedure could improve eyewitness testimony, that this change would do no harm in the prosecution process. Certainly, the process of using the double blind procedure could help eliminate any non-verbal cues inadvertently given by law enforcement officers and could enhance the prosecution process. Since there is no universal procedure for administering lineups, the attorneys believe that the change to the sequential procedure should be left up to individual law enforcement agencies. All agreed that the change to the sequential procedure could easily be integrated into training programs at the respective State Attorney's offices. By having law enforcement officers thoroughly trained and educated on the sequential procedure the officers could easily articulate the procedure at any deposition or to a jury during a trial. In house training of prosecutors could be provided by their respective offices. They also agreed if research proved the double blind sequential procedure superior to current practices of conducting lineups that no test program would be necessary. Law enforcement could simply change their internal procedures and begin the new process.

Captain Kenneth Patenaude of the Northampton Massachusetts Police Department was responsible for the conversion from the simultaneous to the sequential lineup procedure at his agency. He was also a member of the original planning panel for the development of the Eyewitness Guide for Law Enforcement. During the process he became more involved and educated in the collection of eyewitness evidence and the procedures for the sequential lineup process; he would in turn impart this information to his commanders and the local District Attorney. This ongoing dialogue made the transition to the sequential procedure much easier. After rewriting internal departmental policies for the use of the sequential lineup process he conducted training at every level in his department. The policy at the Northampton Police Department specifies the use of the double blind procedure. Additionally, he provided training in the sequential lineup procedure to his local District Attorney's Office. Captain Patenaude also related that the states of New Jersey and North Carolina have mandated the use of sequential lineups.

Currently, the state of New Jersey is utilizing a best practices method for the sequential procedure which was ordered by the Office of Attorney General for their state. Lori Linskey, Deputy Attorney General for New Jersey Division of Criminal Justice was interviewed as to the adoption of the double blind sequential procedure in her state. The Attorney General's ruling came as the result of several exonerations due to flawed eyewitness testimony. After much research the Attorney General's Office, who has authority to set law enforcement policy in the state, adopted the double blind sequential procedure. The statewide mandate was issued to all law enforcement agencies and it outlined the procedures for photo and live lineups (see appendix C). The Attorney General's ruling also

provided for training of new officers as well as tenured officers. Additionally, training was given to local prosecutors on the new law enforcement procedures.

Christine Mumma, Executive Director of the Chief Justice's Commission on actual innocence provided an overview of the adoption of the process by the state of North Carolina. Like New Jersey her state experienced several high profile exoneration cases that were based largely on eyewitness testimony. After conducting their own research, the North Carolina Justice Academy Training and Standards adopted the sequential lineup procedure as a best practices model. The new procedure was taught at the state training academy and at annual retraining for all law enforcement in the state. On March 1, 2008, a legislative mandate ordering the use of the double blind procedure by all law enforcement officers will become law in their state.

Discussion

There has been over 30 years of social science research in the area of eyewitness testimony. Part of this research suggests that law enforcement should form new procedures in the way eyewitnesses are interviewed and how they view physical and photographic lineups. The research suggests that transitioning to a sequential double blind procedure can help reduce false identifications. Years of practical testing on the part of the social science community tends to validate this theory. Prosecutors interviewed agreed that there is no statutory obligation for law enforcement officers to show lineups simultaneously. Likewise, no harm could be found in using a sequential procedure to present suspect photos to a witness of a crime. Furthermore, the use of the double blind procedure would help eliminate any non-verbal cues inadvertently given by a law enforcement officer. The prosecutors also agreed that if a law enforcement officer properly articulated the sequential lineup procedure in court it may tend to strengthen the eyewitnesses credibility to a jury.

Over the years advances in law enforcement technology and forensic sciences have changed significantly. One fact, however, has remained the same: some cases rely heavily on eyewitness testimony. Most of the technological and forensic changes have come with expensive price tags. The simple procedural change from a simultaneous to a sequential lineup does not. It simply requires a law enforcement procedural change and only involves the writing and adopting of a new police policy. A thoroughly written policy on the sequential procedure would be self explanatory and require little training to implement. Moreover, this simple policy change could result in the avoidance of the wrongful conviction of an innocent person.

Recommendations

In compiling the research material mentioned in the literature review portion of this paper some best practices for improving the photo and live lineup procedures were identified. Law enforcement agencies considering a change in their procedures should consider some of the following:

- Include only one suspect photo in each lineup.
- Select filler photos that generally fit the witness's description of the suspect.
- If available, use a current photo of the suspect that most resembled his appearance at the time of the crime.
- Use at least five filler photos
- Do not use photos that unduly stand out.
- Use photos that are free of any distinguishing marks such as booking numbers.
- If practical use the double blind procedure.
- Instruct the witness that the lineup presented may or may not include the suspect.
- Instruct the witness that features such as facial hair, weight, and hair style change and may appear different in the lineup.
- Advise the witness that the photos will be shown in a sequential order, and further explain the process as needed.
- Advise the witness to take as much time as they feel necessary to view each photo.
- Advise the witness to view all photos in the lineup.
- Document any witness statement as to any identification, note any physical or emotional reactions by the witness and if given, record a statement of confidence.
- Document the method used to present the photo lineup to the witness.
- Document the date, time, and location of the procedure.
- Have the witness sign the photo they identified.
- Should the witness make a non-identification or a mis-identification document this as well.
- Instruct the witness not to discuss their testimony or an identification of a suspect with any other witness.
- Provide training/information on the new procedure to local prosecutors and defense bar.

Captain J.R. Burton has been with the Hillsborough County Sheriff's Office since 1980. He is the Deputy Division Commander for the Criminal Investigations Division which is responsible for the Latent Investigation of all violent crime in the county. J.R. is the Chairperson of the FBI's National Advisory Board for Violent Crime Apprehension Program (ViCap). He is also the Southern Director for the International Homicide Investigators Association. J.R. has a Bachelor's Degree in Criminal Justice from St. Leo University.

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APPENDIX A

Personal Interview Questions for State Attorneys

1. What experience have you had involving court cases where a person was wrongfully convicted base on eyewitness testimony?

2. Are you aware of any cases where a person was wrongfully convicted on eyewitness testimony?

3. Are you familiar with any research done in the area of improvements to eyewitness testimony?

4. Have you seen the Eyewitness Evidence Guide?

5. Would you be willing to test the process in your Circuit?

6. What law enforcement agency would you use to test the process?

7. How would you facilitate this change in your Circuit?

8. How would you get other agencies in the Circuit to convert to the sequential lineup process?

9. How would you suggest informing the judges in the Circuit about the change?

10. How would you suggest informing the defense attorneys about the change?

APPENDIX B

Personal Interview Questions for Law Enforcement

1. Was the transition to a sequential lineup procedure made as a result of a statutory mandate or was it made voluntarily?

2. If made voluntarily what prompted the change?

3. How did you make the transition from the simultaneous procedure to the sequential procedure?

4. What training did you provide your agency with regard to transitioning to the sequential procedure?

5. How did inform and educate the prosecutor's office regarding the sequential procedure?

6. How do you recommend spreading the word in the law enforcement community regarding the use of the sequential lineup process?

7. Do you know of any states that have a legislative mandate to use the sequential lineup procedure?

APPENDIX C

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
PO Box 080
TRENTON, NJ 08625-008
(609) 292-4925

DONALD T. DIFRANCESCO
Acting Governor

JOHN J. FARMER, JR
Attorney General

April 18, 2001

TO: ALL COUNTY PROSECUTORS
COL. CARSON J. DUNBAR, JR., SUPERINTENDENT, NJSP
ALL POLICE CHIEFS
ALL LAW ENFORCEMENT CHIEF EXECUTIVES

Re: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures

It is axiomatic that eyewitness identification evidence is often crucial in identifying perpetrators and exonerating the innocent. However, recent cases, in which DNA evidence has been utilized to exonerate individuals convicted almost exclusively on the basis of eyewitness identifications, demonstrate that this evidence is not fool-proof. In one 1998 study of DNA exoneration cases, ninety percent of the cases analyzed involved one or more mistaken eyewitness identifications.[1] The attached *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, which incorporate more than 20 years of scientific research on memory and interview techniques, will improve the eyewitness identification process in New Jersey to ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence. These Guidelines apply to both adult and juvenile cases. With these Guidelines, New Jersey will become the first state in the Nation to officially adopt the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence Guidelines*.

Components of these Guidelines are already being utilized by many of our law enforcement officers, such as instructing witnesses prior to lineups or photo identifications that a perpetrator may not be among those in a lineup or photo spread and, therefore, the witness should not feel compelled to make an identification. Two procedural recommendations contained in these Guidelines are particularly significant and will represent the primary area of change for most law enforcement agencies. The first advises agencies to utilize, whenever practical, someone other than the primary

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[1]Of 40 cases analyzed, 36 of the subsequent exonerations involved convictions that were based on one or more erroneous eyewitness identifications. Wells, G.L., M.Small, S.D. Penrod, R.S. Malpass, S.M. Fulero, and C.A.E. Brimacombe. "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads." *Law and Human Behavior*, Vol. 22, No. 6. 1998.

investigator assigned to a case to conduct both photo and live lineup identifications. The individual conducting the photo or live lineup identification should not know the identity of the actual suspect. This provision of the Guidelines is not intended to question the expertise, integrity or dedication of primary investigators working their cases. Rather, it acknowledges years of research which concludes that even when utilizing precautions to avoid any inadvertent body signals or cues to witnesses, these gestures do occur when the identity of the actual suspect is known to the individual conducting the identification procedure. This provision of the Guidelines eliminates unintentional verbal and body cues which may adversely impact a witness' ability to make a reliable identification.

I recognize that this is a significant change from current practice that will not be possible or practical in every case. When it is not possible in a given case to conduct a lineup or photo array with an independent investigator, the primary investigator must exercise extreme caution to avoid any inadvertent signaling to a witness of a "correct" response which may provide a witness with a false sense of confidence if they have made an erroneous identification. Studies have established that the confidence level that witnesses demonstrate regarding their identifications is the primary determinant of whether jurors accept identifications as accurate and reliable.[2] Technological tools, such as computer programs that can run photo lineups and record witness identifications independent of the presence of an investigator, as well as departmental training of a broader range of agency personnel to conduct lineups and photo identifications may also assist agencies and departments with staff and budget constraints in implementing this recommendation.

The Guidelines also recommend that, when possible, "sequential lineups" should be utilized for both photo and live lineup identifications. "Sequential lineups" are conducted by displaying one photo or one person at a time to the witness. Scientific studies have also proven that witnesses have a tendency to compare one member of a lineup to another, making relative judgements about which individual looks most like the perpetrator. This relative judgement process explains why witnesses sometimes mistakenly pick someone out of a lineup when the actual perpetrator is not even present. Showing a witness one photo or one person at a time, rather than simultaneously, permits the witness to make an identification based on each person's appearance before viewing another photo or lineup member. Scientific data has illustrated that this method produces a lower rate of mistaken identifications.[3] If use of this method is not possible in a given case or department, the Guidelines also provide recommendations for conducting simultaneous photo and live lineup identifications.

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[2] Cutler, B.L., and S.D. Penrod. "Mistaken Identification: The Eyewitness, Psychology, and the Law," New York: Cambridge University Press, 1995; Wells, G.L. and Bradfield, A.L., "Distortions in Eyewitness Recollections: Can the Post-identification Feedback Effect be Moderated?", *Pyschological Science*, 1999.

[3]Wells, G.L., M.Small, S.D. Penrod, R.S. Malpass, S.M. Fulero, and C.A.E. Brimacombe. "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads." *Law and Human Behavior*, Vol. 22, No. 6. 1998.

Although the Guidelines are fairly self-explanatory, their implementation will require a steep learning curve. To that end, training will be conducted. To accommodate appropriate training, the Guidelines will become effective within 180 days of the date of this letter. However, I would encourage you to implement the Guidelines sooner, if possible. I am requesting that each County Prosecutor designate key law enforcement personnel and police training coordinators to work with the Division of Criminal Justice to train your staff as well as the local law enforcement agencies within your jurisdiction.

While it is clear that current eyewitness identification procedures fully comport with federal and state constitutional requirements, the adoption of these Guidelines will enhance the accuracy and reliability of eyewitness identifications and will strengthen prosecutions in cases that rely heavily, or solely, on eyewitness evidence. The issuance of these Guidelines should in no way be used to imply that identifications made without these procedures are inadmissible or otherwise in error. Your cooperation is appreciated as all members of our law enforcement community strive to implement these procedures. Should you have any questions regarding the implementation of these Guidelines, please contact the Division of Criminal Justice, Prosecutors & Police Bureau, at 609-984-2814.

Very truly yours,

John J. Farmer, Jr.
Attorney General

Attachment
cc: Director Kathryn Flicker
Chief of Staff Debra L. Stone
Deputy Director Wayne S. Fisher, Ph.D.
Deputy Director Anthony J. Zarrillo, Jr.
Chief State Investigator John A. Cocklin
SDAG Charles M. Grinnell, Acting Chief,
Prosecutors & Police Bureau

ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES

PREAMBLE

While it is clear that current eyewitness identification procedures fully comport with federal and state constitutional requirements, that does not mean that these procedures cannot be improved upon. Both case law and recent studies have called into question the accuracy of some eyewitness identifications. The Attorney General, recognizing that his primary duty is to ensure that justice is done and the criminal justice system is fairly administered, is therefore promulgating these guidelines as "best practices" to ensure that identification procedures in this state minimize the chance of misidentification of a suspect.

I. COMPOSING THE PHOTO OR LIVE LINEUP

The following procedures will result in the composition of a photo or live lineup in which a suspect does not unduly stand out. An identification obtained through a lineup composed in this manner should minimize any risk of misidentification and have stronger evidentiary value than one obtained without these procedures.

A. In order to ensure that inadvertent verbal cues or body language do not impact on a witness, whenever practical, considering the time of day, day of the week, and other personnel conditions within the agency or department, the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case. The Attorney General recognizes that in many departments, depending upon the size and other assignments of personnel, this may be impossible in a given case. In those cases where the primary investigating officer conducts the photo or live lineup identification procedure, he or she should be careful to avoid inadvertent signaling to the witness of the "correct" response.

B. The witness should be instructed prior to the photo or live lineup identification procedure that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification.

C. When possible, photo or live lineup identification procedures should be conducted sequentially, *i.e.*, showing one photo or one person at a time to

D. In composing a photo or live lineup, the person administering the identification procedure should ensure that the lineup is comprised in such a manner that the suspect does not unduly stand out. However, complete uniformity of features is not required.

E. **Photo Lineup**. In composing a photo lineup, the lineup administrator or investigator should:

1. Include only one suspect in each identification procedure.

2. Select fillers (nonsuspects) who generally fit the witness' description of the perpetrator. When there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.

3. Select a photo that resembles the suspect's description or appearance at the time of the incident if multiple photos of the suspect are reasonably available to the investigator.

4. Include a **minimum** of five fillers (nonsuspects) per identification procedure.

5. Consider placing the suspect in different positions in each lineup when conducting more than one lineup for a case due to multiple witnesses.

6. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.

7. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.

8. View the array, once completed, to ensure that the suspect does not unduly stand out.

9. Preserve the presentation order of the photo lineup. In addition, the photos themselves should be preserved in their original condition.

F. **Live Lineups**. In composing a live lineup, the lineup administrator or investigator should:

1. Include only one suspect in each identification procedure.

2. Select fillers (nonsuspects) who generally fit the witness' description

of the perpetrator. When there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.

3. Consider placing the suspect in different positions in each lineup when conducting more than one lineup for a case due to multiple witnesses.

4. Include a **minimum** of four fillers (nonsuspects) per identification procedure.

5. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.

II CONDUCTING THE IDENTIFICATION PROCEDURE

The identification procedure should be conducted in a manner that promotes the accuracy, reliability, fairness and objectivity of the witness' identification. These steps are designed to ensure the accuracy of identification or nonidentification decisions.

A. Simultaneous Photo Lineup: When presenting a simultaneous photo lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

2. Confirm that the witness understands the nature of the lineup procedure.

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

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

5. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

6. Document in writing the lineup procedure, including:

   a. Identification information and sources of all photos used.
   b. Names of all persons present at the photo lineup.
   c. Date and time of the identification procedure.

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

Sequential Photo Lineup: When presenting a sequential photo lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

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

   a. Individual photographs will be viewed **one at a time**.
   b. The photos are in random order.
   c. Take as much time as needed in making a decision about each photo before moving to the next one.
   d. All photos will be shown, even if an identification is made prior to viewing all photos; **or** the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).

3. Confirm that the witness understands the nature of the sequential procedure.

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

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

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

7. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

8. Document in writing the lineup procedure, including:

   a. Identification information and sources of all photos used.
   b. Names of all persons present at the photo lineup.
   c. Date and time of the identification procedure.

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

C. Simultaneous Live Lineup: When presenting a simultaneous live lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

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

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

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

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

6. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

7. Document in writing the lineup procedure, including:

   a. Identification information of lineup participants.
   b. Names of all persons present at the lineup.
   c. Date and time of the identification procedure.

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

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

Sequential Live Lineup: When presenting a sequential live lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.

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

   a. Individuals will be viewed **one at a time**.
   b. The individuals will be presented in random order.
   c. Take as much time as needed in making a decision about each individual before moving to the next one.
   d. If the person who committed the crime is present, identify him or her.
   e. All individuals will be presented, even if an identification is made prior to viewing all the individuals; **or** the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).

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

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

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

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

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

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

9. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."

10. Document in writing the lineup procedure, including:

    a. Identification information of lineup participants.
    b. Names of all persons present at the lineup.
    c. Date and time the identification procedure was conducted.

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

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

E. Recording Identification Results

When conducting an identification procedure, the lineup administrator or investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained from the witness. Preparing a complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings. When conducting an identification procedure, the lineup administrator or investigator should:

1. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he or she is.

2. Ensure that the results are signed and dated by the witness.

3. Ensure that no materials indicating previous identification results are visible to the witness.

4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

Dated: April 18, 2001, effective no later than the 180th day from this date.