

Improving eyewitness identification

Editor's note:

Del. Lt. Ken Patenaude worked alongside 33 criminal justice professionals and social science researchers to look at the processes of collecting eyewitness evidence and examine how current procedures could be improved. As a result, the National Institute of Justice Technical Working Group published "Eyewitness Evidence: A Guide for Law Enforcement." While Patenaude says the guide made some very necessary procedural improvements, he believes there are still more improvements to be made.

Since 1989, DNA technology has proven time and time again (some 137 exonerations to date) that the criminal justice system has flaws. As a result of the first 28 exoneration cases, studies were con-

ducted and findings were published in "Convicted by Juries, Exonerated by Science," a mid-1990s National Institute of Justice research report that indicated there were several reasons why so many people were wrongfully convicted. The areas of concern or flaws that led to these wrongful convictions were identified as bad science, defense and/or prosecutorial malfeasance or misconduct, and police misconduct. However, the majority of these wrongful convictions were based on faulty eyewitness identifications — evidence that prosecutors most commonly rely upon even today.

Police officers receive very little, if any, training on how to conduct a lineup or photo array identification process. Traditionally, experienced detectives or supervisors show new officers what they have been doing

over the years and what the court allows — and that is the extent of the training. This process is usually as simple as putting together six to eight photographs based on the description given by the victim/witness and/or the suspect's characteristics. The photographs are then placed into a file folder and the victim is asked to look at the photos and tell the investigator if he recognizes the perpetrator. The process has not changed in decades. DNA technologies, as well as eyewitness identification research, has proven the need for change beyond a reasonable doubt. Law enforcement must be accountable to the innocent, as well as the victim. Formal training programs for eyewitness identification procedures must be implemented.

A valuable resource to help improve eyewitness identification procedures is the U.S. Department of Justice, National Institute of Justice "Eyewitness Evidence: A Guide for Law Enforcement," 1999. (See www.ncjrs.org.) The guide made some necessary procedural improvements in comparison to past practices.

However, not all of the researchers' recommended procedural changes found their way into the guide. I believe now that the publication should have documented the researchers' recommendations for conducting sequential procedures for live lineups and photo arrays as the preferred method for conducting eyewitness identifications. Also, blind administration of lineups should have been the recommended practice whenever feasible. The changes recommended in this article and within the guide are very reasonable and easy to implement. More importantly, they are procedurally sound and will strengthen any investigation



and lessen the potential for mistaken identifications.

Human memory as evidence

Try to think of eyewitness evidence (human memory) as a form of trace evidence. Compare eyewitness evidence to other trace evidence forms such as blood, hair, fingerprints, saliva and semen. Police officers know that blood, hair and body fluids are subjected to deterioration, mishandling and contamination. The same trace evidence issues can arise with eyewitness accounts. Officers must learn to appreciate the fragility of human memory. Human memory is not like a video recorder. We cannot just hit the play button and wait for the incident to be played back for us by the witness. We cannot expect him to supply us with all the necessary details to assist us in our investiga-

tion. Eyewitness accounts need to be gathered as soon as possible before that evidence begins to deteriorate and before the eyewitness memories are contaminated by other witness accounts, police officers and media reports. We also must understand that memory is subjective. What one witness may have seen may be significantly different than what another witness may have seen.

U.S. Department of Justice,
National Institute of Justice
"Eyewitness Evidence: A Guide
for Law Enforcement" is
available at www.ncjrs.org.

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Eyewitness Evidence A Guide for Law Enforcement



research report

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Consider this case example. One afternoon in downtown Northampton, a 15-year-old boy stabs a 16-year-old boy to death in a high traffic area. As investigators arrive at the station to begin their follow-up investigation, they are greeted by an officer who proudly announces, "Hey Lieutenant, all your witnesses are in the lobby." Having so many witnesses willing to assist the police is wonderful. However, there are approximately a dozen witnesses crowded into a lobby that is about 12 feet by 14 feet. The dilemma is getting the witnesses separated as soon as possible to prevent post-event contamination. You do not want witnesses sharing stories and accounts of what they saw. If one person mentions that he saw the guy wearing a Boston Red Sox hat to another witness who may not have seen the baseball hat, this may now

become that witness's memory. This is known as post-event contamination and can be very damaging to an investigation.

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Let's consider another important concept regarding eyewitness information. Confidence does not always equate to accuracy. Many variables at the scene are important to consider when evaluating the accuracy and confidence of your witness. Variables that you cannot control are the duration

that the witness was exposed to the perpetrator, the lighting conditions, the distance from the witness to the perpetrator, and the condition of the witness at the time of the incident. Variables that you can control are the interviewing techniques, the witness instructions provided prior to presenting a lineup and/or photo array, and the gathering of a statement of confidence from the witness. (How sure are you?) If all these factors are considered, an improved evaluation of the accuracy and confidence of a witness can be measured. This will result in reducing the possibility for misidentifications.

Cognitive interviewing techniques for the cooperative witnesses

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OPINION

eyewitness evidence. You can gather more accurate information and details from a witness if you use cognitive interviewing techniques. Utilizing cognitive interviewing techniques not only increases the amount of information gathered, but more importantly, ensures the accuracy of that information. Ronald P. Fisher, Ph.D., and Ed Geiselman, Ph.D., authors of "Memory-Enhancing Techniques for Investigative Interviewing," suggest the following to improve the amount as well as the accuracy of information obtained from the witness: (1) establish a rapport with the cooperative witness (the social dynamics component), (2) facilitate the witness memory and thinking to assist in recalling more accurate information, and (3) improve communication between the witness and interviewer. This book published by Charles C. Thomas Publisher in 1992 provides principles for effective interviewing and identifies techniques to avoid. The authors believe that when police officers use proper questioning techniques, they elicit a narrative response and more information. Many of the techniques described in this publication can assist any police officer in eliciting much more information from a cooperative witness than can be obtained by using the "fill in the box," canned questions.

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Human memory does not always work in a way that accommodates the first responder on the scene. The police officer usually wants a description of the perpetrator from head to foot. The human memory does not work like this. We must learn to let the witness give a description in the way the witness remembers the events and avoid interrupting. An officer can accomplish this by asking an open-ended question that promotes a narrative response. Telling the witness that this is his story to tell and then asking open-ended questions will assist in a narrative response, which should not be interrupted. A first responder must allow for the witness to work through a pregnant pause because the witness may be attempting to remember more details. As police officers, we are action-oriented and feel the need to fill the voids. Be patient and do not interrupt the witness. When the witness is having problems recalling certain events, you can assist in the memory retrieval process by asking him to remember the incident from a different perspective. Learn to break old habits of firing questions that only require one-word or short answers. If we take our time and promote memory recall, we can gather more information as well as increase the accuracy of the information.

Proper witness instructions

What has been taken for granted over the years with the identification process are the instructions given to witnesses prior to the presentation of a suspect at a show-up, photo array or live lineup. Inherently, when an officer is about to show a witness a small group of individuals (six to eight) or photographs, the witness concludes that the police have a suspect. (He thinks: "Why else are they showing me only a few photographs?") He feels obligated to find the suspect and pick him out of the lineup. This may not be a problem when the perpetrator is in the lineup. It becomes a problem when the perpetrator is absent, which then may lead to a misidentification. We can improve identification procedures by first giving proper instructions to witnesses prior to any presentation of individuals or photographs. It is important to tell the witness the perpetrator may or may not be in the lineup. This can be a crucial point in the process. We also must tell the witness it is just as important to exonerate the innocent as it is to identify the guilty party and that if he doesn't recognize the perpetrator in the lineup, the investigation will continue. This can relieve the witness from feeling pressured to select someone in the lineup.

Sequential versus simultaneous lineups

During a simultaneous lineup procedure, the witness views all individuals or photographs at the same time. When you present all members of the lineup at one time and the perpetrator is absent, frequently the witness begins the process of elimination and may select the one person who looks most like the perpetrator. In any lineup, there is usually one person or photograph that looks more like the perpetrator than the others. The witness begins to eliminate all others by comparison before selecting the one that looks closest to the actual perpetrator. This is also known as the process of relative judgment, which can lead to misidentifications when the perpetrator is absent from the lineup.

Using a sequential method, photographs and/or individuals are presented one at a time. The sequential process allows the witness to make a decision about each member before looking at the next. It reduces the comparison process (relative judgment) when the photos/individuals are shown one at a time.

In 2001, I rewrote the Northampton Police Department's policy that mandates sequential lineups and it is believed the Northampton Police Department is the first in the country to do so. In 1999, the Northampton Police Department began using sequential lineups in order to test them in actual cases. Based upon the feedback from detectives, using the sequential lineup method and the research on that subject, the Northampton Police Department concluded that the sequential method was the best practice for presenting lineups. While we have had fewer hits, the identifications are much stronger. The investigators are comfortable with the selections made and are prepared to respond to any defense motion or provide court testimony regarding the procedures

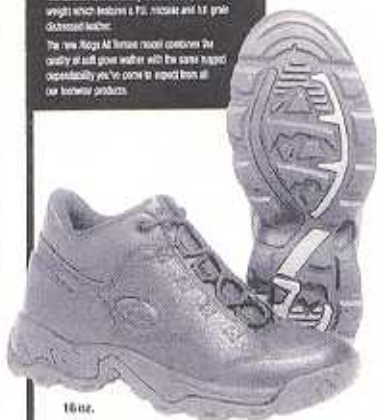
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Gathering a witness statement of confidence

The gathering of a witness's statement of confidence before saying anything to the witness about his selection can diminish what is called witness bolstering. We have all made some sort of remark or gesture reaffirming when a witness selects our suspect. This type of reaction by a police officer can lead to wrongful convictions and imprisonment. Consider the Ronald Cotton and Jennifer Thompson case. Jennifer Thompson selected Ronald Cotton from a photo array and then picked him out again in a live lineup in response to

an officer saying, "That's who we thought it was." It was this reactionary statement that convinced Jennifer Thompson that she had

Avoid saying anything suggestive to a witness until you have obtained a confidence statement.

picked out the right suspect that had raped her. Once your victim or witness senses that he has selected your suspect, he begins to gain a confidence that he has identified the right person. This, of course, could

lead the witness to making a misidentification. Ronald Cotton served 10 years of a double life sentence before he was exonerated by DNA evidence.

Obtaining a confidence statement

Avoid saying anything suggestive to a witness until you have obtained a confidence statement. It could be something he says during the lineup process such as: "That's the guy who shot me." You may hear something like, "He has No. 3's nose but his hair is more like No. 6." The confidence statement may not be so confident but it could be very helpful to the investigation. You may learn that the suspect you identified is not the perpetrator. However, you learn more about the features of the perpetrator.



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Blind administration of the lineup or photo array

One last procedural point that will improve the identification procedure is having an array presented to the witness by a police officer who does not know which photo is the photo of the suspect. This also was a sticking point for some members of the TWG, and it may be more difficult for small departments with few officers. Although the researchers had the best intentions, the message seemed clear that this procedure would suggest that the police cannot be trusted. However, this is a good procedure that does not intimate the potential of police misconduct but rather eliminates any inadvertent cues that the investigator may give to the witness. If the administrator of the lineup is unaware of who the suspect is, he cannot unintentionally cue the witness or bolster the witness's confi-

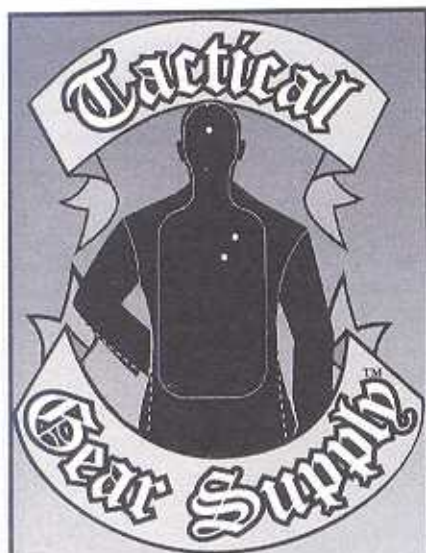
dence by making inappropriate comments about the witness's selection.

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It's time for change. DNA technology and social science researchers have shown that we need to do a better job of collecting eyewitness evidence in the future. I never want to be that

police officer or investigator who was responsible for convicting an innocent person of any crime. Convicting the innocent assures the guilty remain free. It also erodes the public's faith in law enforcement agencies and the criminal justice system as a whole. ■

Lt. Ken Patenaude is a 25-year veteran of the Northampton (Massachusetts) Police Department. He has commanded the Detective Bureau as a detective lieutenant for the past 10 years. He has specialized training in homicide investigations, child sexual assaults and hostage/crisis negotiations. He has a master's degree in criminal justice administration and has taught the subject of eyewitness evidence procedures in several states. He can be reached at kpatenaude@city.northampton.ma.us.



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