

Arresting the Right Person; The Role of the Police in Eyewitness Identification Reform

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Most police chiefs understand that their departments should have an updated policy on eyewitness identification and that their officers, particularly their detectives, should receive training on procedures for show-ups, photo arrays and line-ups. The purpose of this article is to provide chiefs with a clear roadmap for achieving these goals.¹

The “eureka” moment in a criminal investigation may be the phone call from the lab that the DNA is a match, or that a latent print was left by the suspect. But in cases with scant forensic evidence, it is often the identification of the suspect by an eyewitness, known among detectives as a “positive ID” or a “pick”. However, a shadow has been cast over these so-called positive identifications, brought to light by the advent of DNA.

To date, 267 prisoners in 34 states, including Massachusetts, have been freed after DNA evidence proved they were convicted for crimes they did not commit. Alarming, 75% of these defendants were convicted after an eyewitness mistakenly identified them as the perpetrator.² In other words, faulty identifications by witnesses account for more wrongful convictions than all other causes combined.

Things may actually be worse than they appear. Most exonerated defendants had been serving time for homicides and sex assaults, crimes that frequently yield DNA evidence. If so many were serving time for these crimes, how many are in prison for crimes like robberies and aggravated assaults, where DNA evidence is not as common?

It gets worse. While erroneous convictions ruin the lives of innocent defendants and taint the reputation of the courts and the police, they also leave true perpetrators on the street to continue offending. The DNA that exonerated 111 of those 267 defendants identified the actual perpetrators, and those 111 were eventually convicted of committing over 80 violent crimes *in addition* to the ones that sent innocent people to prison. Among those 80 crimes were 20 murders and more than 50 rapes, all committed while the wrong people sat behind bars.³

Some factors impacting the ability of an eyewitness to identify an offender are beyond the control of the police. So-called “estimator variables” such as lighting, the amount of time a witness observes an offender, whether the offender is of a different race, and the amount of stress felt by the witness during the crime are factors over which the police have no control. However, “system variables” such as the procedures used during the showing of a photo array can have significant impact.

Although researchers have questioned the reliability of eyewitness recall for more than 100 years, the DNA exonerations that began in the late 1980’s proved a basis for those reservations. So in 1999, the National Institute for Justice convened The

Technical Working Group for Eyewitness Evidence, a task force of criminal justice professionals including police. The group's report, Eyewitness Evidence: A Guide for Law Enforcement called on the police to standardize operating procedures and served as an outline for police training. Ten years later, the Boston Bar Association published Getting it Right, Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts. The report was the result of work performed by a task force of defense attorneys, prosecutors, and police officers that came to strongly support the adoption of reform in four general areas, including eyewitness identification. In the fall of 2010, the Massachusetts Major City Chiefs announced that it supported the work of the Boston Bar task force and the implementation of its recommendations.

The full scope of the reform measures is too complex to fully explore here. But chiefs who have read about the issue know that the reports call for officers to read specific instructions to a witness before the witness is shown a suspect at a show-up or in a photo array. This recommendation actually facilitates the department's compliance with a Massachusetts evidence discovery rule that requires the police to disclose what the officer said to the witness prior to an identification procedure.⁴ Other procedures urge that photos in an array should be shown one at a time, and that arrays should be shown by an officer who does not know which photo is of the suspect (blind administration). It is this last recommendation that most stirs the ire of veteran detectives, and it did the author's as well. But when presented during training, the concept behind the change begins to make sense and is easily implemented, even in very small agencies.

Calls for reform are coming from the Supreme Judicial Court and the Massachusetts legislature. In 2009, the SJC warned in *Commonwealth v. Silva-Santiago* that the police should adopt modern eyewitness protocols, including standardized instructions to be given to a witness. "We decline at this time to hold that the absence of any protocol or comparable warnings to the eyewitnesses requires that the identifications be found inadmissible, but we expect such protocols to be used in the future."⁵ (A year later, Jesus Silva-Santiago was retried and acquitted of the murder.⁶)

On Beacon Hill, a lengthy bill filed by Senator Cynthia Stone Creem would mandate specific steps for every type of eyewitness identification procedure used by the police, and would allow a judge to suppress an identification if police did not comply with the statute.⁷ Most New England states have similar legislative efforts underway. Rhode Island and Connecticut have bills pending, and the Vermont legislature has tasked that state's Law Enforcement Advisory Board with promulgating best practices.

Clearly, the best course for law enforcement is to act now, on its own volition, rather than having police procedure dictated by a curative jury instruction or a legislative mandate.

There could be civil repercussions as well. According to Jack Collins, General Counsel to the Mass Chiefs of Police Association (MCOPA), if either the courts or the legislature adopt procedural requirements, as is likely to happen, "(d)epartments with an out of date policy will have a very tough time convincing a court that they were unaware

of the new protocols. Similarly, if a department has a detective and he or she has not been trained in the industry's best practices, any motion for Summary Judgment based on 'Qualified Immunity' is likely to fail. If a department allows officers to conduct a photo array, line-up, show-up, or other eyewitness identification procedure and fails to be sure all such officers are properly trained, in addition to a challenge in the criminal case, a claim for negligent training is likely to result."⁸

Police chiefs who want to address the issue of eyewitness identification can do so in two steps; implement a new department policy and train officers, particularly detectives, in the new procedures. Preliminary results of a new MCOPA survey are encouraging; most chiefs responding indicate that they have issued new policies and send their detectives to training.

Department Policy

Every police department should have a written policy on eyewitness identification that incorporates recommended reform measures. A sample policy that incorporates the reform protocols is available from the author. Among other provisions, an updated policy should incorporate the following:

1. Before conducting any identification procedure, the police obtain and document a complete description of the suspect.
2. Formal instructions are given to eyewitnesses prior to all identification procedures. The witness instructions should follow the recommendations of the NIJ, specifically that the person who committed the crime may or may not be the person who has been stopped (for a show-up) or is in the lineup or photo array, that it is just as important to clear an innocent person, that individuals may not appear exactly as they did on the date of the incident, that regardless of whether or not an identification is made, the investigation will continue, and that the officer will ask the witness to state in his or her own words how certain he or she is of any identification.
3. Patrol officers and detectives carry or have immediate access to cards containing witness instructions for use during show-ups.
4. Barring unusual circumstances, photo arrays are shown by "blind" administrators - that is, officers who do not know which of the individuals in a lineup or array is the suspect.
5. The individuals in the array or lineup are presented to the witness one at a time, rather than simultaneously.
6. At the conclusion of an identification procedure where the witness has made an identification, the officer asks the witness to describe his or her level of certainty about the identification.

7. Officers are required to submit a report on every identification procedure, whether or not a subject is selected, including the instructions given, the exact words spoken by the eyewitness, and the witness' statement of certainty.
8. The department turns over to the district attorney's office documents containing the instructions given to the witness, as well as the responses of eyewitnesses and their statements of certainty.

The sample policy and the witness instruction documents that go with it are provided electronically to every officer who attends the MPI course on Eyewitness Identification. In addition to the tenets above, it also includes procedures for voice identification and guidelines for the use of mug books (paper and electronic), composites and sketches.

Training

1. All patrol officers and supervisors should receive basic training about eyewitness identification procedures to include managing witnesses, show-up procedures, blind administration and photo arrays.
2. Detectives and other officers who conduct follow-up investigations should receive advanced training in eyewitness identification to include recognition memory, cognitive interview techniques, variables affecting eyewitness recall, procedures for show-ups, photo arrays, line-ups and voice identification procedures, and issues related to composites and sketches. A one-day course, as well as some on-line training and a sample Policy & Procedure, are currently available through the Municipal Police Institute. (see www.MPItraining.com)
3. Roll call training on eyewitness identification should be provided to all sworn personnel at least annually.

The modernization of eyewitness identification policies and protocols can be easily accomplished by the police chief who wants to do so. Training and model policies are readily available. The techniques used by the police in this area have a profound effect on victims, witnesses, defendants and on society itself. We should take the opportunity to embrace reform lest it be thrust upon us. It is the right thing to do.

¹ In full disclosure: the author is an MPI instructor who conducts training courses on this topic.

² The Innocence Project,
http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php

³ Ibid.

⁴ Mass. R. Crim. P. 14 (viii).

⁵ Comm. V. Silva-Santiago 453 Mass. 782 (2009).

⁶ “Brockton Man Acquitted of Murder”, Boston Globe, August 13, 2010

⁷ See Senate Bill 689: “Evidence of a failure to comply with any of the provisions of this statute shall be considered by the trial courts in adjudicating motions to suppress eyewitness identification.”

⁸ Atty. Jack Collins, until recently the Interim Executive Director of MPI: www.MPItraining.com