

Eyewitness Identification Task Force
Wednesday, November 16, 2011

Minutes

Attendees

Members:

Justice David Borden, Senator Eric Coleman, Representative Gerald Fox III, Representative John Hetherington, Senator John Kissel, Dr. David Cameron, Richard Colangelo, Attorney Michelle Cruz, Attorney Deborah DelPrete Sullivan, Attorney Robert Farr, Executive Director Thomas Flaherty, Attorney Karen Goodrow, Chief State's Attorney Kevin Kane, Chief Duane Lovello, Lt. Regina Rush-Kittle, Dean Bradley Saxton, Attorney Lisa Steele

Staff:

Ms. Deborah Blanchard, Ms. Sherry Haller, Dr. Ron Schack, Mr. Alex Tsarkov

Minutes of Previous Meeting and Introduction of Speakers

Justice David Borden, Chair of the Task Force, called the meeting to order at 10:16 a.m. Justice Borden asked members to review the minutes of the November 2, 2011 meeting. He asked that a motion be made to accept the minutes. A motion was made by Senator Kissel, seconded by Senator Coleman, and unanimously passed.

Justice Borden welcomed William G. Brooks III, Deputy Chief of the Wellesley Police Department and Michael Fabbri, Middlesex County District Attorney and thanked them for traveling to Connecticut to share their expertise with the Task Force.

Deputy Chief Brooks' Presentation

By way of background, Chief Brooks stated that he has been in the police department for 34 years. He became involved with police training in 2005, writing the policy on sequential line-ups with the Middlesex District Attorney's Office, and instituting a training program at the Detective's Basic Training Course.

Chief Brooks then discussed the difference between relative vs. absolute judgment. When showing a witness photos simultaneously, the witness makes comparisons among the photographs rather than in the sequential process where the witness is more likely to identify the actual offender.

Chief Brooks cited the American Judicature Society's (AJS) recent research report as excellent work and noted that the AJS study found witnesses were more likely to use relative judgment with the simultaneous array. He also stated that identification of fillers is a concern and "bad for the system".

Chief Brooks noted that simultaneous vs. sequential line-ups should not be considered in a vacuum. Police officers are now moving toward the use of cognitive interviews - asking the witness to "sit back and talk about what happened" as opposed to disrupting the witness' memory by asking a barrage of questions. He also spoke about the use of composites, citing Professor Wells' finding that composites can skew a witness' memory, making the identification less accurate with a photo array later on.

He stated that, whenever possible, line-ups are preferable because the witness can view the accused from different angles and with different facial expressions. He also noted that double blind sequential line ups (live arrays), where participants enter the room one at a time, much like a photo array, are helpful. He mentioned that a variety of blinded techniques work and that double blind is not always necessary. He cited, by way of example, the folder shuffle as one technique that is accepted by the Innocence Project. Chief Brooks stated that in his department, a second officer is used to show the array. The patrol officer reads the instructions, introduces the second officer, and then the second officer shows the photographs.

Chief Brooks also noted that his department has been using the sequential methods since 2005 with no implementation issues. He stated that clear policies are important and training is vital, He advocated that new detectives be trained within 6 months of their assignment. He further stated that it was important for police to be pushing for these reforms as it makes police better investigators and witnesses.

District Attorney Michael Fabbri's Presentation

Attorney Fabbri began his remarks by stating that he has been a prosecutor for 26 years, including overseeing the child abuse unit and now as chief of homicide. Attorney Fabbri also conducts a number of training programs on eyewitness identification.

He noted that his office treats identification evidence like other evidence: how to capture, preserve and present it. The use of sequential line-ups was established in Massachusetts by case law only, there is no legislative mandate. In 2002, 2003, Suffolk County began dealing with a number of DNA challenges and began studying the issue of identification. Around this time, the Supreme Court changes the discovery rules to require more detailed information regarding identification.

The District Attorney's Office began to hold trainings on the new rules of discovery and recommended that police departments in Middlesex County adhere to the following protocol: advisements be provided; blind or double blind; sequential rather than simultaneous (not mandated) in every identification case. Attorney Fabbri stressed that these three steps were to go hand-in-hand.

Since that time, 54 cities and towns have adopted all three procedures. Attorney Fabbri concurred with Chief Brooks that it was important for law enforcement to take the lead. He noted that a task force in Massachusetts will soon be established and one of its responsibilities will be to determine what procedures are being used throughout the rest of the Commonwealth. He also spoke about his preference for using sequential vs. simultaneous stating it preserves integrity, and that science and research show it is more reliable.

Questions

Justice Borden thanked both guests for their presentations and asked Task Force members if they had any questions. Dean Saxton asked Chief Brooks to further discuss the blind process where the patrol officer brings another officer into the procedure. Specifically, Dean Saxton was interested in whether the witness was there for the conversation. Chief Brooks responded that the detective comes in to get the results and to wrap up the procedure only, The Chief stressed the importance of there being no feedback between law enforcement and the witness between the identification process and the confidence statement. In addition, it was noted that a numerical scale is not used, rather the witness is asked how certain h/she is and then the confidence statement is taken.

Dean Saxton asked about the number of laps used. Chief Brooks stated that if the witness asks to see a photo again, the police officer will allow one more lap of the entire array rather than one photo. He also noted that accuracy is related to response latency, i.e., how much time it takes for a witness to respond. If the identification is made under 12 seconds, there is a high accuracy rate. Dean Saxton also asked about audio or videotaping. The Chief responded that neither is in their policy, however if the array is shown in an interview room, a recording device is used.

Attorney Fabbri noted that after a second lap, the sequential array begins to look like a simultaneous array and provides an element of suggestibility. He noted it is made clear at the beginning of the process that the police cannot tell the witness whether h/she is right or wrong in their identification.

Attorney Goodrow noted that the AJS study examined decision-making timeframes as it relates to response latency and the importance of recognition memory rather than thought processing in the identification. She also noted that in the second lap there is reshuffling, which helps to insure a cleaner identification.

Attorney Fabbri stated that although district attorneys on the county level have the authority to control homicide investigations completely only, his office felt they had the obligation to train police on other cases as well. Anecdotally, police departments are doing advisements and blind/double blind and there may be some mixed responses to sequential

Dr. Cameron asked Chief Brooks what has to be provided to courts regarding the discovery rule - what was said to the witness, instructions and also whether other departments are beginning to record the eyewitness identification process. He noted Rule 14 which states that the prosecution must turn over to the defense the instrument forms (signed by the witness and the officer) which then goes into the discovery file. The Chief stated that most police departments have forms similar to the ones that his county uses, either laminated cards where the Miranda rights are on the back and show-ups on the front or notebooks for each police officer with information contained within. The key is to find something that officers will carry with them on the street. He also noted that, regardless of the size of a police department, there is always a way to show an array without influencing the witness. Chief Brooks stated that the double blind process can be easily done.

Dr. Cameron asked about the Dallas, TX approach where there is a video recording of all identifications, even if it is a sequential array, in order to make sure the officer does not accidentally suggest a particular person in the line-up. Chief Brooks replied that it was the next logical step. The research on micro-expressions indicates that people will get an impression of what another thinks with very little expressiveness underscoring the importance of the array being conducted in such a way that the police officer does not know the identification of the suspect.

Attorney Steele asked whether the suspect is always in the middle of the pack. Chief Brooks responded that the police officer knows it is a random array.

Chief Lovello asked if there have been any plausible explanations from any police departments regarding the use of blind vs. double blind. Attorney Fabbri stressed wanting to make it as easy as possible for police departments to employ the blind or double blind approach and that training has reduced concerns.

Representative Hetherington asked what the eyewitness is told about a second view. Police Brooks stated that the police officer lets the witness know that the array can be showed one more time. Attorney Fabbri noted that in those circumstances when a second officer cannot make it, the first officer will show the array as best as h/she can.

Attorney Farr asked about the show-up policy and when they are allowed. Chief Brooks stated show-ups are allowed within two hours and that case law in Massachusetts is very strong on this point. Attorney Farr asked when Chief Brooks' department uses an array, for example if the suspect knows who committed the crime. Chief Brooks noted that that the array is used primarily for stranger identifications.

Attorney Farr also asked about showing victims the mug book. Chief Brooks stated that it is never done in his department and that showing a victim 400 random persons does more harm than good. However, he felt it did have value if there are a specific set of photos (for example, gang members) where an identified population is the focus of the investigation. He also noted that there is the risk of unconscious transference, where the person may make an identification because h/she had seen the photo previously - even though it is not the offender. Chief Brooks cited the Santiago case where the victim was shown a mug book and then a photo array. The victim incorrectly selected the person in the photo array due to the previous sighting in the mug book. Chief Brooks also noted that that in photo arrays, fillers should not look like the suspect, but rather look like the description made by the witness.

Attorney Farr asked whether juries are told specifics about the arrays. Attorney Fabbri stated that presently there are not standard instructions, but that the new commission will be examining this area. Attorney Farr asked whether the best methods currently available can potentially create a false sense of security. Attorney Fabbri stated that the chances are minimized, but there is still the possibility of an error.

Chief State's Attorney Kane asked whether the 2005 policy changes were gradually implemented or rolled out at once. Chief Brooks responded that the policy was rolled out. The Chief also mentioned that updates to the policy in 2010 were made that focus on cautions in using composites.

Attorney Kane asked about how the training and implementation worked out. Chief Brooks stated that, while there were many "progressive thinking" detectives in the trainings, he did find that some officers were initially skeptical. Attorney Kane asked about specific features contained in their policy. Chief Brooks responded that the issue of a second lap was one of the features. Chief Brooks stressed the importance of training, it being an interactive process, and the need for regular updates, He stated some policies are mandated and some suggested. Chief Brooks noted that the second lap was an example of a mandate. Attorney Kane asked about shuffling photos. Chief Brooks stated it was not a mandate, just a sound idea and that the key question is always "will this policy help or hurt?".

Attorney Kane asked Attorney Fabbri about the impact of using a second lap in court. Attorney Fabbri stated that there have been no challenges to-date. He also did not think the issue of relative judgment would be raised as long as the police did not go beyond a second lap. Attorney Kane asked about whether either the blind or double blind process could work in order to offer more flexibility to police departments. Attorney Fabbri suggested language stating “a process which insures that the person presenting the array does not know who the suspect is in any way” makes the intent clear whether a blind or double blind process is used.

Attorney Kane also asked about showing a single photograph rather than an array. Chief Brooks stated that showing a single photograph was dangerous. Attorney Kane asked about the show up time limit and Chief Brooks stated that the 2 hour policy in Massachusetts is what is accepted as a reasonable amount of time.

Attorney DelPrete Sullivan asked whether there was any pushback from witnesses for extra laps. Chief Brooks said no and also stated that when the shuffle occurs the second time around the suspect could end up in a different order in the pile.

Attorney DelPrete Sullivan also asked about making a note of anything said by the witness during the procedure. Attorney Fabbri stated that in the forms developed by his office there is a section to record the order of the photos, what was said (noting audio or video) and a place for the witness and officer to sign if they agree that the information on the form is correct. The importance of describing the instructions in the beginning of the process was stressed.

Dean Saxton asked about simultaneous vs. sequential and whether it would be appropriate to explain the problem of relative judgment to the witness in the beginning of the process, in order to make the witness more self-aware. Attorney Fabbri replied that the issue of relative judgment may not be directly stated, but that the witness is told in other ways. Chief Brooks agreed, stating that statements by the police, such as “the person may or may not be in the photos you are about to see...”.

Dr. Cameron asked whether sequential works when there are multiple perpetrators and, if so, how. Chief Brooks stated that there are 5 fillers for every subject. He noted that it is not so much how many suspects are in the array rather how many offenders the police are trying to identify. The Chief noted that a department could also have a separate array for each offender.

Dr. Cameron, stated that there have been cases where expert testimony about the reliability standard have been called into question and asked about the impact of this in Massachusetts. Attorney Fabbri stated that the present law leaves it to the judge’s discretion as to whether to allow experts in this area. At present Attorney Fabbri does not see judges allowing it, but did not know whether that will change once the new commission begins its work. He stated that one of the tasks for the new commission will be to come up with jury instructions.

Attorney Goodrow asked if police ask the witness whether any of the photos look familiar, not necessarily the perpetrator. She noted that it was an extra set in the computer program created within the AJS study. Chief Brooks stated that it was not done and did not think it necessary.

Other Business

Justice Borden thanked both presenters for their assistance and excellent presentations. He stated, due to time constraints, that the remaining agenda items - the proposed workplan, police survey results, and legislative work group presentation - be postponed until the next meeting. Justice Borden also noted that he contacted Professor Steven Clark in California who had raised concerns about the AJS study. The professor will be sending his views in writing and Justice Borden will be inviting the co-author of the AJS study, Dr. Dysart, to a meeting of the Task Force to respond. Justice Borden also noted that the work plan will be revised to add Attorney Farr's suggestion to address the issue of show-ups.

Attorney Farr also asked if a further breakdown in the data of the AJS study could be obtained specifically on the numbers of victim and non-victim witnesses who took part in the study. Justice Borden stated he would ask Dr. Dysart.

Date of Next Task Force Meeting

Justice Borden stated that the next meeting date will be Wednesday, November 30th. With no further business to address, Justice Borden asked for a motion to adjourn. Chief State's Attorney Kane made the motion. It was seconded by Director Flaherty and unanimously passed.

The Task Force adjourned at 12:22 p.m.