

**The Bill Blackwood
Law Enforcement Management Institute of Texas**

**Obscured Justice:
The Eyewitness Problem**

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**By
Daniel G. Tripp**

**Mansfield Police Department
Mansfield, Texas
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ABSTRACT

There is no greater cause for concern in the police profession than the revelation that an innocent person has been convicted of a crime. The common measure of success for a police professional involves the pursuit, apprehension, and conviction of those who commit crime in society. However, it is every bit as important for that same professional to protect those who are wrongfully accused of a criminal offense. What was once thought to be the “holy grail” of solving a case may not be as reliable as once thought. The use of eyewitness identifications is one of the most common methods of securing a conviction of those accused of crime. However, with the advent of DNA testing, and the subsequent reversals of convictions, this method has begun to show its inherent pitfalls. In short, witnesses to crime sometimes get it wrong when it is time to pick an individual out of a lineup or photo spread. This can be a culmination of many factors, most of which appear completely unintentional on the part of the witness. There is, however, a manner in which the use of eyewitness testimony can be made much more reliable and less subject to unintentional persuasion.

Through the use of stringent policies, such as the one modeled by the Bill Blackwood Law Enforcement Management Institute of Texas program, police agencies can be assured of accurate use of the eyewitness identification process and avoid the potential for erroneously convicting an innocent person.

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INTRODUCTION

There are certain philosophies that lead an individual to pursue law enforcement as a profession and that serve as the foundation for a successful career in the field. Undoubtedly, some of those critical philosophies include one's desire to serve the public, to display integrity, to provide justice and to protect the innocent. Police professionals over the past three decades have made great strides in molding police agencies into a much more respected and accountable facet of the public governmental function. This has largely been accomplished through extensive training, the acceptance of better police practices, the reliance on better technology, a willingness of open communication with the public, and the innovative thought process. Although police practices have moved forward at an incredible pace over the last 30 years, unfortunately, some agencies are still willing to accept some antiquated tactics in the performance of the job function.

One such area that has been largely ignored until very recently, is the reliance on outdated eyewitness identification tactics in the arrest of alleged perpetrators and their subsequent prosecution. In fact, statistics showed that comprehensive policy regarding the use of eyewitness procedures was present in only 12% of departments in the entire state of Texas as recently as June 2011 (Kuhles, 2011). Some of the latest exonerations, and the information gathered in the aftermath of such events, have solidified the historic fallibility of eyewitness information when proper procedures are ignored. Mistaken eyewitness identifications contributed to a staggering 73% of the 311 wrongful convictions in the United States overturned by post-conviction Deoxyribonucleic Acid (DNA) evidence ("Causes of Wrongful Convictions," 2014). In

fact, misidentification by eyewitness is noted as the leading contributing factor in DNA confirmed wrongful conviction cases when compared to other issues such as faulty forensic science, false confessions, and the use of informants (“Causes of Wrongful Convictions”, 2014). One is left to wonder the magnitude of eyewitness misidentifications in cases where DNA evidence was not available at the time of the offense or was not collected for other reasons.

Until DNA analysis became widely accepted in the court system, there were few elements of physical evidence with which to positively prove the innocence of the accused. Of course there were fingerprints, blood analysis, and hair sampling but until DNA analysis, only a segment of the public could be excluded from the suspect pool. One expert in the field explains the exclusionary principles of DNA sampling in these terms, “Your DNA sequence is unique amongst all DNA sequences of any human that has ever lived and will live for quite some time to come” (Lander, 1992 para. 2). With the indisputable accuracy of DNA testing leading to exonerations of those accused by eyewitnesses of a crime, one must infer that the eyewitness identification process is, in itself, flawed to some degree.

Although recent changes in Texas law now require all police agencies in the state to have adopted a comprehensive policy in regards to eyewitness identification procedures by September 1, 2012, not all agencies have been quick to accept the best practice standards outlined in a model policy. As part of the new legislation, the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) was tasked with the construction of this model policy and providing training suggestions for agencies around the state to adopt. The same legislation, however, failed to mandate the use of

this specific policy for all agencies in Texas. Instead, agencies are permitted to use the model policy to develop their own practices that resemble it, but they do not necessarily accept all of the best practices encouraged by it. The wording in the legislation is somewhat ambiguous and does not specifically outline the particular scientific methods to be used. Furthermore, some other language in the new law under Texas Code of Criminal Procedure, Section 38.20 ("Photograph," 2015) indicates some methods only need to be employed "if practical."

The model policy involves three main areas of concern and addresses the most acceptable manner in handling each. These areas include the procedures for photographic lineups, physical "live" lineups, and field "show-ups". The model policy developed by LEMIT is comprehensive and was developed with the support of prosecutors, defense attorneys, an appellate court judge, law enforcement agencies, as well as researchers and scholars who have studied the issue for decades ("Eyewitness Identification Model Policy", 2014). Every agency in the state of Texas, regardless of size, should adopt the best practice standards outlined in the LEMIT model policy for eyewitness identification procedures.

POSITION

When analyzing why eyewitnesses make errors in picking out photographs of the accused, one must first look at the manner in which a majority of police agencies have historically handled the selection process. The most common police practice has been to provide the eyewitness with a series of photographs containing the likely suspect, shown simultaneously along with others of similar appearance who are not suspected in the crime (Schuster, 2007). It is then left up to the eyewitness to choose who they

believe is the suspect if possible. Traditionally, these lineups have been set up and conducted by the investigating officer who is well aware of the identity of the suspect in the lineup. However, in situations such as this, there is scientific data that shows the administrator of the lineup conducted in this fashion may unintentionally cue the witness to which lineup member he or she should identify (as cited in Rodriguez, 2014).

In some such cases, officers conducting the lineup might go over the photos numerous times with a witness who is having difficulty in making a selection. This might pressure the witness into thinking that they are not doing "a good job" in picking out the suspect. An officer may also ask the witness if there were features about a particular photograph that might be similar in nature to the suspect image they had in their mind. In this instance, the witness may be led to a particular photograph being singled out by the officer for comparison. It has also been common practice to not explain to the witness that the suspect might not be in the particular set of photos. Obviously, if a witness is shown only one set of six photographs and asked to pick the suspect, they will feel more pressure to make a selection based on a feeling of it being a "now or never" scenario or feeling that the suspect must be one of the six individuals on the page. Another snare regularly noted is that after selection of a particular individual is made, the officer will perhaps reassure the witness that they made the right choice when the "correct" suspect was selected. Although this was oftentimes well-meaning on the part of the officer, it may have affected the choice and confidence level of the witness. A witness believing they were somewhat certain that the individual was their perpetrator will likely have a much higher level of certainty after receiving praise or

reassurance from the officer that they correctly identified the suspect (Wells & Olson, 2003).

"Double blind" administration of lineups as well as a sequential method for displaying photo lineups eliminates some of the pitfalls mentioned above. A true double blind lineup simply means that the witness nor the administrator knows the identity of the suspect in the lineup. This eliminates the unintentional clues the officer might give a witness as to the identity of the "correct" suspect. The use of sequential photograph comparison is also critical. Instead of showing the witness all photos at the same time, they are presented one by one to the witness. Sequential photo lineups, used in one scientific study, led the American Judicature Society to conclude that the sequential method significantly reduces the selection of "fillers" (false identifications) in lineups, while not significantly reducing the number of positive identifications (McGough, 2012). Furthermore, the use of clear instructions prior to the beginning of the photo lineup is critical as well.

Some of these pre-process interview instructions are mentioned by the LEMIT model policy. They include indicating that the suspect might not be present in any of the photographs, that all photos will be shown regardless if a selection is made, that the investigation into the crime will continue even if a selection is not made, that they not feel as though they must make an identification, and that the exclusion of innocent persons is important as well ("Eyewitness Identification Model Policy", 2014). When a witness does make an identification during a photo lineup, the final step should include a statement from the witness selecting an individual out of a sequential lineup. The model policy is also clear that the officer should get a indication from the witness as to

the level of certainty they have regarding the identification of the individual and record their findings.

Another area of concern is the live lineup procedure. Sequential viewing in this regard is critical as well. Suspect and fillers are displayed to the witness one at a time, not together in one room as was traditional. A study recent study showed that individuals asked to pick a suspect after viewing a fictional crime made 22% fewer false identifications when using sequential over simultaneous live lineups. This same test concluded that data indicated that the sequential is "a more rigorous test, a higher standard, and when the witness identifies the suspect, the results can be better trusted." (Steblay, Dysart, & Wells, 2011, p.43). By using this method for live identifications, the witness is less likely to draw conclusions based upon the appearance of the other individuals in the room. For example, the individual may not look exactly the same as the witness remembers him, but he does appear more like the suspect in their memory than any of these other individuals.

Live lineups also need to be handled in the blind manner much like those in photographic lineups. The administrator of this type of lineup also has the possibility of giving clues to the witness, even unintentionally. One common error mentioned in one study indicated that administrators using this method are more likely to steer witnesses away from fillers, perhaps unintentionally. Specifically mentioned was that administrating officers may urge the witness to "take their time" when selecting fillers instead of the alleged suspect. In this manner, the officer is, in reality, cluing the witness they have selected the wrong individual (Wells & Olson, 2003). Also of concern is when the investigating officer, who having knowledge of the identity of the suspect, is

allowed in the physical presence of the witness during the lineup. If the witness were to look at the officer who is also observing the individuals in the lineup, they might infer the correct selection to be the one the officer is looking at more often than the others or that incites a kinesiological reaction from the administrator. Once again, the model policy addresses each of these concerns and provides a manner of conducting live line ups that produces a high level of accuracy, protection of the innocent, and maintaining the integrity of the investigation.

The final area to be addressed is the need for reform in the matter of field showups. Field showups are normally completed when a suspect is apprehended in proximity and within a reasonable time frame of the alleged crime. The alleged perpetrator(s) is then displayed for an eyewitness to the crime for identification purposes. In this method, there are no fillers used and the eyewitness simply indicates whether the person being displayed is the person who committed the crime. Officers should be particularly careful when deploying the field showup tactic since, according to many studies, they are inherently the most unreliable of the three methods of eyewitness identification. One study even showed that the percentage of lineup misidentifications was 14% while the percentage of showup misidentifications was a much more unacceptable 53% (Luria, 2007). Although this is likely the simplest form of using an eyewitness, there are still issues that often arise from this form of identification. One study labels the use of showups as an "inherently suggestive procedure" because only one individual is shown (Lawson & Dysart, 2014 p. 55). However, the same report concedes that this can be an effective manner in which innocent individuals can be cleared without unnecessary delay. This procedure has been around throughout the

history of policing and is unlikely to disappear anytime soon, so the interest turns to how this procedure can be made more neutral in nature and how biases can be at least somewhat contained. Historically, showups involve the officers involved in the case either bringing the suspect back to the scene of the crime or bringing the witness to the location of the arrest. Although initially this might not appear important which of these manners is used, in reality there has been research that indicates otherwise. Some manners or locations of display have an appearance of guilt.

The Wisconsin Supreme Court stated, "Showups conducted in police stations, squad cars or with the suspect in handcuffs that are visible to any witness, all carry with them inferences of guilt" (*State v. Dubose*, 2005). Officers should also avoid showing the suspect multiple times to witnesses of the crime (Luria, 2007). As with photographic lineups the witness may feel compelled to make a selection if the administrator is insistent that the process continue. There are other instances where the courts have frowned on the procedures deployed by investigating officers in field showups. Luria also pointed out that in these cases, the officers engaged in conduct such as making the showup subject wear the same clothing as the described suspect, the officers making the subject say the same words the culprit used during the crime, making statements to the witness that the police believe the subject of the showup committed the crime, displaying the subject in a jail cell, and presenting the subject simultaneously to multiple eyewitnesses (Luria, 2007). All of these practices should, to some degree, incite some type of question in the officer's mind as to the validity of an eyewitness identification using these practices.

Using the guidelines of the LEMIT model policy, many of the pitfalls of field showups can be avoided. When using field showups, the officer should employ certain procedures. The separation of witnesses to avoid the discussion of identification of a perpetrator is critical. The officer should document a witness description of the suspect prior to showup and make certain the time frame between the offense and the showup is reasonable (less than 2 hours). The practice of transporting the witness to the suspect's location should be implemented to avoid the suspect arriving handcuffed in the back of a police car. Restraining the suspect in front of the witness is discouraged unless necessary for safety. Once an identification is made by one witness, the officer is encouraged to moving to the photo lineup or live lineup for the remainder of the witnesses. The officer should also provide clear instructions to the witness prior to showup, including the fact that the subject detained may not be the culprit. Once an identification has been made, the officer should encourage the witness to determine, in their own words, how certain they are about the identification. The officer is discouraged from having the witness view the suspect multiple times. Also, the officer should avoid having the suspect perform for the witness such as having them repeat words used by the culprit. When dealing with an individual who is not proficient in English or when hearing impaired, the officer should ensure the use of a qualified interpreter. Finally, ensuring the identification is captured on video if at all possible.

If video recording of the event is not possible, have it captured on an audio recording. If neither video or audio recording is possible, an explanation why neither was done is imperative. Each of these practices are logical and ethical in nature and a

professional police agency should have no issue with accepting any of these procedures.

COUNTER POSITION

One may argue that reform in eyewitness procedures, particularly adoption of the model policy outlined by LEMIT, may reduce the number of correct identifications by eyewitnesses and thus allow guilty persons to escape prosecution. While it might be true that a few field studies have found some of the methods deployed in the model policy to be contrary to the laboratory testing listed, these results have been inherently flawed to some degree. Take for instance the Illinois Field Study, which was a multi-jurisdictional field study examining the effectiveness of the sequential, double-blind lineup method (Mecklenburg & Baily, 2008). This study concluded that this type of procedure resulted in 9.2% filler identifications versus the much lower 2.7% misidentification rate noted when using the simultaneous, non-blind method. On the surface, this might appear to discredit the more conservative methods recommended by the model policy. In reality, however, this study may have been flawed from the very inception. First, one must look at the neutrality of the police department conducting the study. Many officers of the agency chosen for this study (Chicago PD) openly declared their dislike of the double blind sequential lineup calling it “useless” and a “bad idea” (Winzeler, 2008, p. 1608). Although later studies indicated that there was no evidence of wrongdoing on the part of any police officers during the testing period, an independent party being present could have made the findings concrete and serve as a concrete source of objectivity moving forward.

Winzeler (2008) also pointed out that the Mecklenburg report appears to have failed in its foundation of objectivity. He reported that there were obvious inferences of police bias and inappropriate tactics used throughout the report. Because of the shortcomings of this study from its inception, one would have to surmise that the findings are at the very least inconclusive. Gary Wells, a renowned expert in the field, indicated that the data collected in this research is well out of line with any other study conducted in a controlled laboratory setting (Wells, 2007). He stated that where the the Mecklenburg study showed misidentifications in simultaneous, non-blind scenarios in the 0% to 3% range, nearly all other studies conducted on the matter show around a 20% misidentification rate using the same method. It is unknown why there is such disparity. Wells (2007) stated, "Ultimately, it might be that the sequential procedure does not prove superior to the simultaneous procedure, but the study reported by Mecklenburg was flawed in ways that prevent any such conclusion" (p. 1). Furthermore, he concluded that had the Mecklenburg report indicated filler identifications for non-blind sequential identifications at the 20% rate commonly accepted as accurate, then the 8% filler identifications noted in their blind sequential data would have looked very good in comparison.

In contrast, a report released in 2012 found witnesses were able to identify a suspect 25% of the time in simultaneous lineups versus 27% in sequential lineups (McGough, 2012). This same study went on to indicate a much lower rate of misidentifications, 18% versus 12% when using sequential over simultaneous methods. This study concluded that this supported "decades of laboratory testing which indicates

that sequential lineups reduce mistaken identification without significantly reducing accurate identifications" (McGough, 2012, p. 33)

Another area of dispute is whether the procedures outlined in the model policy are necessary at all since the the duty to convict those responsible for horrible crimes outweighs the potential of an occasional wrongful conviction. An officer might be conflicted as to what is more damaging, a wrongful conviction or a wrongful acquittal. Certainly the public has expectations for police to solve crime in their jurisdiction and bring those responsible to justice. However, there is a balance to this philosophy. Police must ensure that they hold the correct person accountable for the crime. Nothing could potentially harm the public's perception of a police agency more than a wrongful conviction. One author stated that a wrongful conviction might shake the confidence of the public to such a degree that all convictions in a particular area are harder to obtain, since those who would make up the jury pool have developed mistrust in their police department (Perry, 2008).

Once the public has lost its confidence that the police agency is a fair and equitable agent of justice, the damage may take years to correct. Furthermore, the actual perpetrator of offense remains at large to commit more crime and potentially torment more victims. Most would contend that only the most corrupt officer would intentionally attempt to convict an innocent party of a crime. That is not where the problem lies. Rather, it is a lack of best practice procedures being accepted by police agencies that make such errors more common. The public is starting to take notice. As mentioned, the advent of DNA analysis has made it possible for the first time in history to be positively correct in assessing guilt or innocence. Once exoneration is made

using this technology, and eyewitness credibility is questioned in the aftermath, public support for its use wanes. Therefore police, as stewards of its use, must be vigilant in the manner in which police deploy eyewitness use in solving cases if police want to preserve its existence at all. Over the past decade, support for the death penalty has decreased significantly in this country in part to the public awareness surrounding wrongful convictions. One researcher stated, "exonerations have inspired a new public attitude towards the death penalty, because they demonstrate vividly that a human-designed institution cannot be free from error" (Baumgartner, 2013, p. 3). It is, in large part, law enforcement's responsibility to make the public confident that justice is being served in the arrest and conviction of the accused.

RECOMMENDATION

It is clear that due to recent findings regarding the reliability of eyewitness identifications, it is imperative that police agencies across Texas consider adopting a restrictive policy like that of the model policy developed by LEMIT. Although recent legislation lacked the strength in wording to force such adoption, police administrators should demand the most stringent of guidelines for these type cases. As public support for capital punishment wanes, leaders of government must ask themselves why the balance has shifted to a more liberal view of the alleged criminal. One could argue that it is due to the fact that for the first time in the history of crime and punishment, those accused of serious crimes have been unequivocally found to have been misidentified by their accusers. Those agencies that turn a blind eye to this issue are further exacerbating the problem by potentially setting up further exonerations in the future and eroding confidence of the public moving forward.

While few would argue that eyewitness identification is still a very valuable part of a criminal investigation, it should not be viewed as the "holy grail" of a case.

Eyewitness identification should rather be viewed as a piece of a puzzle which, when placed together with other critical facts, reflect a total summation of a thorough investigation. The public has learned to demand more of its police force and prosecuting attorneys than a simple finger point of a witness. It demands that police take the time to support the testimony of those called upon to identify those responsible for the most serious crimes. Those who argue that restrictions in handling of eyewitnesses will result in fewer arrests should ask themselves how they would feel if they or a member of their family were wrongfully accused by an eyewitness of a serious crime. An officer who feels this way should further remember why they chose to join the police profession. It is the ultimate responsibility of every officer who wears the badge and takes the oath of office to not only tirelessly pursue those who harm citizens and bring them to justice, but to furthermore protect the innocent. Sometimes the innocent are not just those who have been victims of crime. Many times, the innocent are those who have been wrongfully accused. It is just as much law enforcement's responsibility to protect them. As Daniel Webster stated, "Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together."
(Whipple, 1914)

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