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Eyewitness Identification Procedures: The Fifth Rule

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The National Institute of Justice recently published a report of the first 28 cases in which convicted felons were exonerated by DNA evidence after varying numbers of years in prison. Remarkably, all of these cases contained one or more false eyewitness identifications (Connors, Lundregan, Miller, & McEwan, 1996). To those unfamiliar with the hundreds of published studies on the subject, this disclosure may come as something of a shock. To members of the scientific community, however, it suggests the humbling possibility that our research has underachieved in its impact on the criminal justice system. The time has come for eyewitness researchers and experts to move out of the laboratory and courtroom—and into the police station. The time has come to use all that we know to improve the procedures used to conduct the lineups and photoarrays that too often give rise to mistaken identifications. In this light, the guidelines put forth by Wells, Small, Penrod, Malpass, Fulero, and Brimcombe (1998) represent a most important, insightful, and necessary step.

The four recommendations—for double-blind lineup testing, nonbiased instructions, the matching of distractors to the witness's description, and the immediate assessment of confidence—are ideally suited to minimize many potential problems. But what about the potential negative impact of failing to elevate—and hence, relegating—other prescriptions to "rule" status? The rationale for limiting the number of rules is commendable, as is the need to ensure that these rules be relatively independent of one another, feasible, and easy to justify. But there is one recommendation (already being implemented in some precincts) that the authors considered and did *not* propose that is arguably the most important rule of all: the videotaping of the lineup and witness identification. There are two reasons for this proposed addition.

First, we need to acknowledge that the circumstances surrounding lineup identifications are often not accurately preserved or represented in police reports and testimony. As with others who serve as eyewitness experts, I have had more than one occasion to observe that descriptions of the process given by investigators are often inconsistent with statements made by the witnesses themselves or even with videotapes when these are available (in my own experience, for example, I have

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seen police and witnesses differ in their recollections of the instructions given). This problem is also particularly evident in relation to confession evidence, where detectives very often misreport what transpired behind the closed doors of the interrogation room. There is no *a priori* reason to assume that these disparities are the product of willful deception. In both contexts, errors may well result from the kinds of innocent mistakes and faulty memories that plague eyewitnesses themselves. In *United States v. Wade* (1967), for example, the U.S. Supreme Court footnoted a case described as "striking" in which everyone who was present at the lineup disagreed as to what had occurred—including who identified whom. Distortions in memory aside, errors may also innocently result from the kinds of cognitive and behavioral confirmation biases that routinely contaminate the processes of social perception. Convinced that a suspect is guilty, police investigators may inadvertently procure support for that hypothesis; hence the need for double-blind lineup testing.

Realistically, we should also not turn a blind eye to the possibility that the disparities in reporting sometimes betray deliberate efforts to obtain an identification of—or confession from—a preferred suspect. Indeed, let's not be naive about the nature of this "dirty little secret" (Cloud, 1994). Over the years, many prominent legal scholars, including Alan Dershowitz, Jerome Skolnick, and Irving Younger, have written openly about the epidemic of police perjury, or as Slobogin (1996) calls it, "testilying." In a recent survey of Chicago prosecutors and judges as well as defense attorneys, Orfield (1992) found that these respondents as a group estimated that perjury occurs in 20% of all cases. Fully half of the state's attorneys who were questioned believed that prosecutors know or have reason to know that police fabricate evidence in their reports. In an earlier study, Orfield (1987) had found that 76% of police surveyed admitted that police shade the facts in cases regarding probable cause. In light of this problem, and the fact that investigators may also more innocently misrecall the procedures they had followed in a particular case, we should recognize that while it is useful to recommend nonbiased instructions, immediate assessments of confidence, and so on, we can only then *hope* that the procedures followed will be honestly and accurately described. In this regard, it helps to realize, as has been argued for the videotaping of interrogations (Cassell, 1996), that a complete audiovisual record of the lineup and identification will also serve to protect the police from frivolous and unwarranted defense claims of bias when none existed. In short, to the extent that there is no proposed mechanism for the monitoring and enforcement of the four rules, these guidelines will not achieve their maximum desired impact.

The second reason for videotaping the identification process is to preserve the most complete possible record of the event for judges, juries, and attorneys. As it now stands, defense counsel are seldom present during identifications, in part because defendants do not have a right to counsel at preindictment lineups and photoarrays (e.g., *United States v. Ash*, 1973). Moreover, research suggests that attorneys lack knowledge of and sensitivity to certain types of procedural biases (Brigham & Wolfskiel, 1983; Stinson, Devenport, Cutler, & Kravitz, 1997). Videotape would thus provide the only objective means of checking on lineup composition, instructions, postidentification feedback, and other relevant factors for

subsequent review and analysis. In this regard, a videotape of the identification process would also give decision-makers access to other potentially diagnostic information, some of which cannot be anticipated (e.g., offhand remarks made by investigators, questions or statements made by witnesses). A videotaped record would, for example, reveal how—and how quickly—a given witness had made his or her selection—often a better cue than self-expressions of confidence. Indeed, research indicates that accurate witnesses are more likely than inaccurate witnesses to make identifications quickly (Kassin, 1985; Sporer, 1993) and to describe the process as one of automatic recognition rather than an elimination of alternatives (Dunning & Stern, 1994).

Wells et al. (1998) agree that the videotaping of lineups is a desirable procedure, but that they "are not willing to make videotaping one of the core rules at this time (p. 640). Specifically, they express pragmatic concerns about the effectiveness, cost, and logistics of a videotaping requirement. Is videotaping a perfect safeguard that cannot, in clever ways, be circumvented? No. In Great Britain, the Police and Criminal Evidence Act of 1986 mandated that all custodial interviews with crime suspects be videotaped—a requirement that may have ironically increased the practice of conducting interrogations in police cars and other noncustodial settings (Gudjonsson, 1994). Similarly, in the aftermath of the U.S. Supreme Court's 1966 landmark ruling in *Miranda v. Arizona*, law enforcement officials developed techniques that increase the likelihood of a waiver, leading roughly 80% of all crime suspects—guilty and innocent alike—to waive their rights and submit to questioning (Leo, 1996). No deterrent is perfect, but of course, each is better than its alternative.

Another logistical concern is that three cameras operating in synchrony would be necessary to triangulate the important features of the identification—one focused on the lineup, a second on the witness, and a third on the investigator. In an ideal world, this arrangement would be most desirable. But a single camera focused on the lineup provides not only a visual record of the array and procedure (e.g., in a live situation, it would reveal the amount of time during which each of the members was called forward), but an auditory record of the instructions given, questions asked, verbal feedback, and the witness's response latency. Based on my own limited experience, it is clear that this single-camera recording method is already common practice in some police departments. Would such a requirement meet with resistance in other quarters? Perhaps. But if we are to propose rules seriously designed to maximize the accuracy of eyewitness identification evidence, it would seem self-defeating to stop short of this primary, albeit limited, means of enforcement out of a fear that the police community would find it displeasing. The police found *Miranda* warnings displeasing too, but what's right is right.

Still another logistical issue that is raised concerns the cost of a videotaping requirement. Truly, I do not believe that this is a serious impediment—particularly following from the argument that a single camera stationed on a tripod is preferable to none at all. Today, in contrast to just a decade ago, the technology is inexpensive, readily available, and already in use in other contexts. Many departments routinely videotape crime scenes for evidentiary purposes in cases involving homicide, arson, and other felonies. Some even tape car stops and street searches. In fact, on the basis of a recent National Institute of Justice survey, it is estimated that one sixth

to one third of all large police and sheriffs' departments in the United States now videotape at least some interrogations, and that this number is increasing (Geller, 1993).

Recommending that lineups be videotaped without elevating this suggestion to rule status may undermine the only vehicle that is available on this front: voluntary compliance. One could argue the constitutional point that the Sixth Amendment Confrontation Clause entitles a defendant to the taping of all critical investigative events—an argument made in connection with the presence of counsel safeguard at lineup identifications by Justice Brennan in *United States v. Wade* (1967): "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him" (p. 235). Over the years, however, the courts have rejected this "critical stage" analysis (e.g., *United States v. Ash*, 1973). Legislative reform offers yet another possible avenue. In recent years, two states—Minnesota and Alaska—have moved to require that all criminal interrogations be videotaped, with similar legislation under consideration in at least one other state of which I am aware. At this point, however, there does not appear to be the same outcry of support for a videotaping requirement of eyewitness lineups. The point is, if videotaping is seen as a move in the right direction, its implementation would have to be voluntary—and should be encouraged, not inadvertently undermined.

To summarize, videotaping serves two essential functions: (1) establishing an objective record of the procedures followed independent of police self-report, and (2) providing the judge (for suppression hearing purposes), the attorneys (for advocacy purposes) and the jury (for fact-finding purposes) with an objective electronic record of the witness's decision—and the context in which that decision was made. Wells et al. (1998) reasonably argue that videotaping is not, like the other rules, a procedure that directly improves eyewitness performance. This may be true. But to the extent that videotaping serves as a record-keeping deterrent against violating the proposed core rules, and to the extent that it preserves events that might otherwise fade from memory, its practical utility is clear: It would serve as an "enforcer." Indeed, the four rules without a videotaping requirement may prove to have too weak a grip, much like four fingers without an opposable thumb. Absent Rule #5, the existing recommendations may ultimately have less impact than they deserve.

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