Reforming Eyewitness Identification Procedures to Reduce the Risk of Mistaken Eyewitness Identification

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In 1998, U.S. Attorney General Janet Reno, concerned about the growing recognition of the role of mistaken eyewitness identification in the conviction of innocent citizens who were later exonerated by DNA, formed a panel representing law enforcement, prosecutors, defense lawyers, and eyewitness scientists. This working group authored Eyewitness Evidence: A Guide for Law Enforcement, a booklet published by the Department of Justice’s Office of Justice Programs. The Guide was the first in a wave of reforms of eyewitness identification procedures. The wave has gained momentum, and many states and police departments have since authored their own guidelines and policies.

In a 2009 chapter in my edited volume Reform of Eyewitness Identification Procedures (American Psychological Association press), Andrew Smith and I collected and reviewed reform guidelines and policies produced by the justice departments in the U.S., Canada, and the U.K., the states of Illinois, New Jersey, North Carolina, and Wisconsin, various police departments in California, Maryland, Massachusetts, and two associations: the American Bar Association and the International Association of Chiefs of Police. In the nine or so years since we wrote that chapter, other states and police departments have adopted reforms, and some existing policies have been updated. Indeed, in early 2017, the U.S. Department of Justice, which got the reform ball rolling, issued an updated guide. In this article, I discuss the common reforms and then the implication of reforms for attorneys who handle eyewitness identification cases.

It is important to understand why eyewitnesses identify suspects from lineups in the first place. The most obvious reason is that the eyewitness recognizes the perpetrator from the crime. Perhaps less obviously, the eyewitness might be guessing which person is the suspect by comparing the lineup members to one another to find the one who looks most like the perpetrator. Alternatively, the eyewitness might cue into subtle verbal or non-verbal cues by the investigator to figure out the suspect’s identity.

Why would an eyewitness attempt to guess the suspect’s identity? Some eyewitnesses might do so because their victimization leads them to seek closure in the case. Some eyewitnesses might believe that the police think they have the perpetrator and desire to cooperate with the investigation. Some eyewitnesses might feel that they are expected by the investigator to attempt an identification. Research on eyewitness identifications in actual crimes reveals that 25% or more of identifications are of fillers rather than the persons under investigation, suggesting that guessing occurs with substantial frequency. To the extent that guessing can be seen by a factfinder as a viable explanation for an eyewitness identification, the fact finder will be less sure that the eyewitness identification is the product of an eyewitness’s memory for the perpetrator.
Summary of Best Practices and Guidelines

Best practices in identification procedures help rule out guessing as an explanation for an eyewitness identification and increase the likelihood that a positive identification is attributable to the eyewitness’s memory for the perpetrator. I turn now to describing some of the best practices and explain how they help rule out guessing. I use the term “lineups” to refer to both live lineups and photographic lineups, as the principles and practices are very similar. Some guidelines have separate sections for live and photographic lineups, as there are some procedural issues that are unique to live lineups. Showups are another form of identification test, and I discuss them last.

When composing a lineup, there should be only one suspect and a set of fillers—people who are not suspects. Some guidelines require a minimum of five fillers, some require more. An eyewitness with a weak memory (or no memory) for the perpetrator and who is inclined to make an identification will have a smaller chance of correctly guessing the suspect’s identity when there are fillers in the lineup (assuming the fillers are well chosen). The more fillers used, the more difficult it is to identify the suspect by guessing.

Not all fillers are created equal. Fillers are effective at drawing guesses away from the suspect only if the fillers can reasonably be mistaken for the perpetrator. A filler who does not resemble the perpetrator (or the suspect) is easily dismissed by an eyewitness who is inclined to guess. Poorly selected fillers, therefore, do little to help rule out guessing and may in fact increase guessing to the extent the choice becomes obvious. Guidelines typically include language such as fillers should match the general description of the perpetrator as given by the eyewitness. Relatedly, guidelines also typically include recommendations that the suspect and fillers be presented in a manner so that no person or photo stands out in an unusual way. The rationale is that a lineup member who stands out draws the eyewitness’s attention and provides a clue for an eyewitness who is inclined to guess. For example, if the suspect’s photo is a driver’s license photo and the fillers are booking photos, the suspect’s photo stands out and makes it easier for the eyewitness to identify the suspect by guessing.

Instructions to eyewitnesses play an important role in reducing guessing. Guidelines typically include the use of instructions that explain to the eyewitness that the perpetrator might not be present in the lineup (e.g., “The lineup may or may not contain the perpetrator”). Some instructions go further and explain that it is important to not implicate innocent people. The idea is to discourage the eyewitness from guessing, and the research shows that such instructions are highly effective. There is an important caveat, however. These instructions can be completely undermined if preceded by more personal comments about the case. For example, if an investigator in the course of conversation says to the eyewitness something like “we think we have the perpetrator,” or “you got a good look at the perpetrator and should be able to identify him,” these more personalized comments encourage an eyewitness to make an identification and may neutralize the beneficial effects of the more standardized admonition. Indeed, comments such as these might take place in conversations that occur well before the
lineup takes place, so it is important to understand the full nature of the communication between the investigators and the eyewitness.

I mentioned above that one source of information that an eyewitness might rely upon when attempting to guess the suspect’s identity is information from the investigator. The investigator might inadvertently provide verbal or nonverbal cues regarding the suspect’s identity. For this reason, many guidelines recommend the use of blind (sometimes called “double-blind”) lineups. A blind lineup is one in which the investigator conducting the lineup does not know the suspect’s identity — and informs the eyewitness that he or she doesn’t know the suspect’s identity -- and therefore cannot inadvertently cue the eyewitness regarding which lineup member is the suspect. Some guidelines also allow for the use of functionally blind lineups, in which photos are handed to the suspect in a stack of shuffled envelopes or folders so that the investigator does not know which photo the eyewitness is viewing at any one time. Self-guided computer-administered lineups may also serve the purpose of reducing or eliminating investigator influence.

Some guidelines recommend – or allow – the use of sequential lineups, in which the eyewitness sees only one lineup member at a time rather than all at once (i.e., a simultaneous lineup). The rationale for the sequential lineup is that it reduces guessing. In a simultaneous lineup, eyewitnesses have a tendency to identify the lineup member who best resembles the perpetrator. Inevitably, one lineup member (often the suspect) will look more like the perpetrator than do the fillers. In a sequential lineup, it is much more difficult to compare the lineup members to one another, so the eyewitness is more inclined to compare each lineup member to his or her memory for the perpetrator. The research shows that sequential lineups leads to a reduced risk of false identification than simultaneous lineups.

Many guidelines also require the investigator to document the eyewitness’s level of confidence in the identification. Research shows that eyewitness confidence is malleable and that learning more information about the culpability of the suspect can inflate confidence. An eyewitness who is moderately confident at the time of the identification (the level of confidence that should count) can become very confident by the time of the trial. Documenting confidence at the time of the identification and before providing the eyewitness with feedback or more information provides a record that can be used to guard against the powerful influence of inflated confidence. Guidelines vary, however, in how confidence should be assessed. Some guidelines recommend the assessment of confidence in the eyewitnesses’ own words. Others require writing down exactly what the eyewitness says and noting any observations by the investigator.

Last, it is common for guidelines to include procedures for documenting lineups, including the preservation of photographs, identification forms, and confidence statements. Some guidelines suggest the use of video recording of identification procedures, and in my experience this is happening with increasing frequency.
Showups are a special form identification tests in which the eyewitness views the suspect, usually live, and usually in close proximity in space and time to the crime. Showups are often regarded as sometimes necessary but inherently suggestive. They are sometimes necessary because their outcome might determine whether a suspect is detained or released. Because showups are close in time to the crime, memory decay for the perpetrator is minimized. Showups are inherently suggestive because there are no fillers; showups, therefore, provide no protection from guessing. An eyewitness who is inclined to make an identification will have no difficulty guessing which person is the suspect, for there is only one person. Unlike with well-conducted lineups, with showups, it is very difficult to rule out guessing as an explanation for an eyewitness identification.

It is also important to note that there are situations in which even well-conducted lineups that closely follow best practices provide questionable evidence of a suspect’s culpability. These situations include when the eyewitness claims to be familiar with the suspect from prior to the crime (e.g., I know him from around the neighborhood), when the eyewitness claims to have seen the suspect between the crime and the identification (e.g., the second sighting or the social media identification), and when there were prior identification tests before the lineup (e.g., the lineup followed a showup or a previous lineup). I am currently writing an article about the use of lineups in cases like these. A draft of the article is available up on request.

Implications of Best Practices and Guidelines for Resolving Eyewitness Identification Cases

I have been serving as a consult and expert witness in cases involving eyewitness identification for more than 25 years. Over time we have all become more knowledgeable about eyewitness memory, the risk of mistaken eyewitness identification, and its role in wrongful conviction. Since the reform movement began I have seen, with increasing frequency, eyewitness identification procedures that resemble all or most of the best practices described above, and very recently, recorded eyewitness identification procedures. I still continue to see identification procedures that use few of the best practices, particularly in states or departments that have not yet reformed their procedures.

In cases that use best practices in identification procedures (and the perpetrator was a stranger and there was no interim sighting or identification), the eyewitness’s identification of the suspect leaves little room for any other interpretation than the eyewitness recognized the perpetrator from memory. The lineup contained good fillers. The eyewitness was discouraged from guessing through instructions, and guessing was made more difficult through sequential presentation. The lineup was administrated by an investigator who did not know which lineup member was the suspect and therefore could not cue the eyewitness regarding the suspect’s identity. Despite these safeguards, the eyewitness picked out the suspect. This is a strong identification. It is certainly possible that the eyewitness made a very lucky guess or that the innocent suspect was a clone of the perpetrator, but these explanations are not very
compelling. It will be difficult to successfully challenge a strong eyewitness identification like this.

One typical method of challenging eyewitness identifications is to focus on the poor conditions under which the eyewitness viewed the perpetrator in the first place. This focus is most fruitful, however, when the lineup identification can be explained by guessing (i.e., some combination of the use of a showup, inadequate fillers, non-blind lineup administration). When guessing is ruled out as an explanation and memory for the perpetrator seems like the most viable explanation for a lineup identification, the quality of the viewing conditions at the time of the crime may seem to the factfinder to be less important. A factfinder might reasonably conclude that no matter how impoverished the viewing conditions, the eyewitness was able to pick out the suspect from a fair lineup in which guessing his identity was very difficult or impossible, and the suspect, therefore, must be the perpetrator.

It behooves the lawyer, therefore, to carefully scrutinize the procedures used to procure an eyewitness identification of the defendant. This means obtaining the recording (if any), all police reports, witness statements, and reports and testimony of the eyewitness and officers involved in the eyewitness identification. It is useful to obtain the department’s policy and procedures concerning lineups and to compare them with modern best practices. If the department’s procedures do not resemble best practices, why not? What risks do the accepted procedures carry for false identification? Sometimes the procedures used violate required procedures – a point that can be explored in questioning. In some cases, it might be useful to call upon a psychologist with expertise in eyewitness memory to educate the factfinders tasked with evaluating the identification. An expert can also be helpful in explaining how impoverished viewing conditions can interfere with an eyewitness’s ability to form a memory for a perpetrator and subsequently recognize him. An expert can also explain the complex relation between eyewitness confidence and accuracy and how confidence can become inflated.

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