

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

**Acceptance of Eyewitness Identification Policies and Procedures:
An Emergent Issue in Law Enforcement**

**A Leadership White Paper
Submitted in Partial Fulfillment
Required for Graduation from the
Leadership Command College**

**By
Michael Scott Zella**

**Texas Department of Criminal Justice – Office of Inspector General
Huntsville, Texas
May 2015**

ABSTRACT

Eyewitness testimony is a critical component in the arrest and prosecution of a suspect engaged in a criminal act. As law enforcement professionals, it is imperative that the eyewitness identification of the suspect be as accurate as possible. Eyewitness identification policies and procedures have been legislatively mandated in some states to include Texas. Law enforcement personnel should embrace eyewitness identification policies and procedures in a united effort to reduce the number of wrongful criminal convictions.

Law enforcement professionals should embrace eyewitness identification policies and procedures to reduce the number of mistaken eyewitness identifications, enhance the reliability and objectivity of eyewitness identifications, and eliminate post-identification feedback. Staffing shortages and the changing of existing procedures within the organization should not inhibit the implementation of the statutorily regulated eyewitness identification policies and procedures.

Law enforcement is ultimately tasked with protecting and serving the community for which they serve. It is equally important to law enforcement, the community, and all stakeholders involved that the correct person is convicted of the crime for which charged. The implementation of proper eyewitness identification policies and procedures can significantly reduce erroneous eyewitness identifications. In conclusion, research supports that strict adherence to statutorily required policies and procedures regarding eyewitness identification can reduce the number of wrongful criminal convictions.

TABLE OF CONTENTS

	Page
Abstract	
Introduction	1
Position	2
Counter Position	8
Recommendation	10
References	12

INTRODUCTION

Prior to accepting the role of a police officer, all sworn law enforcement personnel in the United States are bound by the "Law Enforcement Code of Ethics." Contained in the "Law Enforcement Code of Ethics" is the following wording, "Respect the Constitutional rights of all men to liberty, equality, and justice" (n.d., para. 1). The primary role of law enforcement is to safeguard the lives of the innocent and the relentless pursuit of criminals. Law enforcement plays a critical role in the pursuit of justice. Meaning, the initial criminal investigation, evidence collection, subsequent follow-up investigations, arrest, and testifying in the criminal trial all are responsibilities associated with law enforcement. In an effort to fulfill law enforcement's sworn duty of liberty, equality, and justice, law enforcement is tasked with presenting the suspect of the crime to prosecutors. Investigations which positively identify the correct suspect(s) are law enforcements ultimate goal; however, erroneous witness identifications have emerged as a significant problem to the law enforcement community. In 2008, the Innocence Project had assisted in the release of 220 individuals from prison with a majority of the number being released after the year 2000, with the State of Texas encompassing 40 of the 220 total (Holmes & Weaver, 2010). Mistaken eyewitness identifications contributed to approximately two-thirds of wrongful convictions reported within the Innocence Project numbers (Holmes & Weaver, 2010).

Witnesses properly identifying the correct suspect(s) during a criminal investigation are a vital component to the criminal justice system. However, eyewitness testimony has come under attack and is not as accurate as once believed based on research regarding memory recollection as well as the wrongful convictions based on

eyewitness identification testimony. Eyewitness identification policies and procedures are being implemented across Texas to address the issues related to the identification of suspect(s). Policies and procedures are being implemented in hopes of reducing the number of mistaken identifications; enhance the reliability and objectivity of eyewitness identifications; and the elimination of post-identification feedback. The changes in eyewitness identification procedures have been met with resistance from law enforcement; however, a full implementation of specific evidence-based guidelines will bring credibility back to witnesses so vital to the criminal investigations conducted by law enforcement of today. Law enforcement should embrace eyewitness identification policies and procedures in a united effort to reduce the number of wrongful criminal convictions.

POSITION

Law enforcement officers have been relying on eyewitness identifications as a part of the criminal investigation process for decades. As reported by the Innocence Project (2013), to date, there has been a total of 307 post-conviction exonerations as a result of DNA exonerations; however, many of those convictions were based on eyewitness identification testimony. In Texas alone, 39 innocent individuals were exonerated and erroneous eyewitness identification was listed as the primary reason for the conviction (Innocence Project, 2013). The Innocence Project (2013) stated, “Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly 75% of convictions overturned through DNA testing” (para. 1). The reported numbers by the Innocence Project are staggering and law enforcement must unite together and embrace policies and procedures to reduce the

number of mistaken identifications. Brewer and Palmer (2010) stated that identification by an eyewitness can be very persuasive for the members assessing the guilt, whether it is the judge or the jury. According to Brewer and Palmer (2010), research has shown that witnesses can often make unintentional mistakes as it pertains to eyewitness identification; however, law enforcement are not immune to mistakes when it comes to the investigation and the presentation of the suspect line-up procedures.

Policies and procedures with law enforcement agencies should be created or modified to coincide with existing evidence based research regarding eyewitness identification. Evidence based research in the arena of eyewitness identification does not definitively show that changing policies and procedures consistent with research guidelines will completely eliminate mistaken identifications; however, it is promising that it will aid in the reduction of mistaken identifications by witnesses. To be effective, policies and procedures should be restructured in the following areas: “lineup construction; lineup presentation; and recording the witness’s decision” (Brewer & Palmer, 2010, p. 78).

As stated by Wells and Turtle, lineups containing only one suspect have been found more effective in the reduction of mistaken identifications (as cited in Brewer & Palmer, 2010). Each lineup should contain an adequate number of fillers. The Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT) (n.d.) defined filler as “Non-suspect photographs or persons. Fillers are selected to both fit the description of the perpetrator provided by the witness and to ensure that no individual or photo stands out” (p. 2). Characteristics of fillers can overly influence the decision of the witness when attempting to select a suspect (Brewer & Palmer, 2010). For example,

the suspect in the case is a white male and the fillers selected are all black males. Another example, would involve a witness who describes the suspect as having very distinguishable blue eyes. When constructing the lineup, law enforcement would be mistaken in putting suspects in the lineup with all brown eyes. In the selection of fillers, all individuals contained "should be of the same sex and race, and should be similar in age, height, weight, and appearance" (LEMIT, n.d., p.3). Ultimately, fillers should not cause any one person in the lineup to distinctively stand out.

Equally important to the lineup construction is the way in which the lineup is presented to the witness. Brewer and Palmer (2010) stated that because of the interaction between the witness and the lineup administrator, social influences come into play. The witness, when presented with a lineup, will often be biased and choose to select a suspect from the lineup presented rather than reject all persons in the lineup as a whole. It is imperative that the administrator of the lineup, if possible, not be the investigating officer. If not possible, the lineup administrator must not have any knowledge of what suspect photograph is being shown to the witness; thus eliminating the unintentional cues displayed by law enforcement to the witness. LEMIT (n.d.) defined blind administration procedures as "the person administering the lineup or photo array does not know who the suspect is" (p.1) and defined a blinded photo array procedures as "the person who administers the photo array knows who the suspect is, but each photo is presented so that the administrator cannot see or track which photograph is being presented to the witness" (p.1). Brewer and Palmer (2010) stated that the blind procedure is more likely to be more effective in the reduction of mistaken identifications than that of the blinded procedure. Brewer and Palmer (2010) and the

LEMIT (n.d.) clearly outlined the two best known forms of lineup presentation are simultaneous and sequential. Simultaneous presentation occurs when a witness is shown all of the lineup participants at once, whereas, a sequential presentation they are shown one at a time. Debates over whether or not simultaneous or sequential better aids in the reduction of mistaken identifications have been extensive; however, research has shown that sequential presentations have produced fewer mistaken identifications (Brewer & Palmer, 2010). Sequential presentation is superior based on the fact that the witness is called upon to compare the image of the suspect in their mind to the single picture shown to them. In contrast, the simultaneous presentation causes the witness to choose a suspect from the group that best fits the suspect description in their minds. LEMIT (n.d.) suggested that it is important to inform the witness that the suspect may or may not be included in the sequential photo array being shown. This procedure could potentially eliminate the possibility of the witness being compelled to identify an individual out of the lineup being presented.

Additionally, after the construction and presentation of the lineup are concluded, the recording of the witness's decision are crucial to the investigation. Brewer and Palmer (2010) suggested three key essential ingredients that are recommended at the time the identification is made by the witness: "the exact response made by the witness, the witness's confidence in their decision, and how long the decision took" (p.86) to make. An exact statement made by the witness at the time of the identification can be crucial to the investigation. Statements such as, "I am 100% positive" or "That could be him" are examples of this. Obviously, the "That is him" statement should carry more weight in the courtroom than the "That could be him" statement. Recording the

confidence in the decision such as I am “100 % positive” or “I am 75% positive” could have an impact on the suppression of the witness testimony. Research done by Douglass and Jones (2013) indicated that confidence in the defendant’s guilt increased as the level of confidence of the witness increased. Lastly, the time it takes for the witness to identify the suspects can truly effect mistaken identifications. Brewer and Palmer (2010) stated that decisions made within 10-12 seconds were nearly always correct. Law enforcement investigators should consider the length of time it takes for a witness to identify a suspect and should have some reservations about the accuracy if the witness took an extended period of time making the identification.

Another position point to consider is the proper construction and presentation of a lineup can have a positive benefit in the proper identification of a suspect by a witness. Schuster (2007) stated that “Eyewitnesses play a vital role in the administration of justice in this country” (p.1) Evidence presented by the Innocence Project (2013) listing a total of 309 individuals being exonerated from prisons across the country and mistaken eyewitness identifications playing a role in 75% of the wrongful convictions is not acceptable. A witness true account of the offense should hold high credibility with law enforcement, prosecutors, and the court. However, when an innocent man is released from prison after being wrongfully convicted, it sheds light into the fact that standardized eyewitness identification procedures should be adopted and strictly followed by law enforcement. The collaboration between researchers, law enforcement, prosecutors, defense attorneys, civil rights organizations, and the courts regarding eyewitness identification standardized policies and procedures is essential to bringing back the reliability to the powerful submission of eyewitness identification into the

courtroom. Standardized policies and procedures throughout the United States should be legislatively mandated to all law enforcement. In doing so, the reliability and objectivity of the eyewitness identification can be a useful tool in the prosecution of the suspect. Additionally, standardized policies and procedures will aid in the reduction of mistaken eyewitness identifications and help keep the innocent from doing prison time for a crime they did not commit.

Lastly, a structured policy and procedure regarding eyewitness identification should incorporate the elimination of post-identification feedback. Basically, post-identification feedback involves the administrator of the lineup providing feedback at the conclusion of the interview by making comments such as: Good choice or good Job. Extensive research was done regarding the negative consequences of post-identification feedback in the area of eyewitness identification by Douglass, Neuschatz, Imrich, and Wilkinson (2010). The research by Douglass et al. (2010) indicated that post-identification feedback is influential in the decision making process of the witness and effects their judgment. This study by Douglass et al. (2010) showed a direct correlation between the confidence of the witness; thus, increasing the jurors willingness to convict. The study by Douglass et al. (2010) consisted of two experiments and post-identification feedback was given to the participants. The participants who were provided with post-identification feedback were overwhelmingly convinced they had selected the proper suspect; however, their choices were incorrect. The current age of technology now allows for lineups to be generated electronically with specific guidelines that will eliminate human errors such as post-identification feedback (MacLin, Zimmerman, & Malpass, 2005). Post-identification feedback research has

shown it should be of great concern for law enforcement and the criminal justice community. Post-identification feedback from the lineup administrators creates a bias and is extremely influential in the decision making process of the witness. Whether manually or electronically, law enforcement should strictly follow policy centered guidelines to eliminate the use of post-identification feedback.

COUNTER POSITION

On the other hand, the creation and stringent guidelines associated with the implementation of policies and procedures concerning eyewitness identification put additional strains on the law enforcement community. The research recommendation concerning the utilization of a blind administrator during the lineup presentation poses significant problems especially in regards to smaller to mid-size law enforcement agencies. Staffing issues come into question and the availability of another law enforcement officer unknowing to the investigation is a scarcity. From the 1960's to the 1990's, law enforcement was a desired professional that provided excellent benefits (Woska, 2006). Factors contributing to the decline in the desire to enter the law enforcement field could be contributed to the following: (1) Increasing number of students seeking higher education and professional careers, (2) Availability of private sector employment, (3) Negative publicity, and (4) Recruits joining the war effort (Woska, 2006). According to Woska (2006), 80% of the 17,000 police agencies across the United States have vacancies they are unable to fill.

Although staffing issues is a major concern, law enforcement, whether short-staffed or not, should be above reproach. Investigations conducted by law enforcement agencies should be without bias to ensure the proper suspect is being charged with a

crime. Evidence based research clearly shows that mistaken identifications are more prevalent when specific guidelines concerning the lineup construction and presentation are not strictly followed (Brewer & Palmer, 2010). Law enforcements primary goal is to ensure the victim is protected and justice is done. Law enforcement must work diligently, against all odds, to accomplish this mission regardless of staffing concerns.

An equally important consideration is the resistance to change dynamic in the law enforcement community that can be difficult to overcome. The acceptance and implementation of structured policies and procedures regarding eyewitness identification could be considered a significant change in the current way of doing things. Human nature will push people to resist the change in order to maintain normalcy; and change can be seen as a threat to the previous practices (Austin & Claassen, 2008).

On the other hand, resistance to change can be conquered with the implementation of a value-based leadership style. In essence, treat people with respect. According to O'Toole (1995), value-based leaders enable others to lead by sharing information, by fostering a sense of community, and by creating a consistent system of rewards, structure, process, and communication. A successful organization will undergo all types of changes and true leadership is the key essential ingredient to successfully maneuver through the change. The implementation of eyewitness identification policies and procedures is undoubtedly a change that will be met with some resistance; however, an effective leader(s) can overcome the resistance.

RECOMMENDATION

The two most important goals of a law enforcement officer are the protection of a victim as well as ensuring the correct suspect is brought to justice. In doing so, any changes to policies and procedures to ensure the two goals are achieved should be embraced with open arms by law enforcement. Policies and procedures regarding eyewitness identification are being implemented which drastically change policies and procedures currently in place in small, medium, and large law enforcement agencies around the country. Such policies and procedures, supported by evidence-based research, will decrease the number of mistaken eyewitness identifications through stringent procedural guidelines (Brewer & Palmer, 2010). Consistency in the policies and procedures, validated by evidence-based research, will “enhance the reliability and objectivity of eyewitness identifications” (LEMIT, n.d., p.4). Additionally, policies and procedures eliminating the utilization of post-identification feedback will significantly reduce the witness bias as it pertains to the identification of the suspect.

The implementation of policies and procedures regarding eyewitness identification will encounter resistance from law enforcement, specifically in the area of staffing shortages and simply resistance to change. Staffing shortages should not be considered as a valid counter for the implementation of the new procedures as the primary concern for the law enforcement officer should be to ensure the correct suspect is identified. Change, in any form or fashion, is difficult to overcome; however, an effective leader can persevere and lead his / her troops to success.

As of September 1, 2012, law enforcement agencies in Texas are statutorily required to have implemented eyewitness identification policies and procedures fulfilling

all requirements under Texas law. The Texas Legislature required LEMIT to create eyewitness identification policies and procedures consistent with statutory guidelines. Texas law requires that law enforcement agencies can either adopt the policy created by LEMIT or adopt a similar policy containing all statutory requirements (LEMIT, n.d.).

Law enforcement organizations in Texas have at their disposal eyewitness identification policies and procedures consistent with statutory requirements and other states should follow suit. Training has been provided by LEMIT to transition law enforcement officers into the new process. Ultimately, law enforcement officers should embrace the eyewitness identification policies and procedures. In doing so, there will be a significant reduction in the number of mistaken eyewitness identifications. By embracing statutorily required policies and procedures regarding eyewitness identification, law enforcement will ultimately bring back the credibility to the eyewitness in a criminal investigation and ensure the properly accused is brought to justice.

REFERENCES

- Austin, M. J., & Claassen, J. (2008). Impact of organizational change on organizational culture: Implications for introducing evidence-based practice. *Journal of Evidence-Based Social Work, 5*(1/2), 321-359. doi:10.1300/J394v05n01-12
- Law Enforcement Management Institute of Texas. (n.d.). LEMIT eyewitness identification model policy. Retrieved from <http://www.lemitonline.org/publications/ewid.html>
- Brewer, N., & Palmer, M. A. (2010). Eyewitness identification tests. *Legal & Criminological Psychology, 15*(1), 77-96. doi:10.1348/135532509X414765
- Douglass, A., & Jones, E. E. (2013). Confidence inflation in eyewitnesses: Seeing is not believing. *Legal & Criminological Psychology, 18*(1), 152-167. doi:10.1111/j.2044-8333.2011.02031.x
- Douglass, A., Neuschatz, J. S., Imrich, J., & Wilkinson, M. (2010). Does post-identification feedback affect evaluations of eyewitness testimony and identification procedures? *Law & Human Behavior (Springer Science & Business Media B.V.), 34*(4), 282-294. doi:10.1007/s10979-009-9189-5
- Holmes, A. E., & Weaver III, C. A. (2010). Eyewitness memory and misinformation: Are remember/know judgments more reliable than subjective confidence?. *Applied Psychology In Criminal Justice, 6*(1), 47-61.
- Innocence Project. (2013). Eyewitness misidentification. Retrieved from <http://www.innocenceproject.org/news/CauseView1.php>
- Law Enforcement Code of Ethics. (n.d.). Retrieved from <http://lawenforcementcodeofethics.com/>

MacLin, O. H., Zimmerman, L. A., & Malpass, R. S. (2005). PC eyewitness and the sequential superiority effect: Computer-based lineup administration. *Law & Human Behavior, 29*(3), 303-321. doi:10.1007/s10979-005-3319-5

O'Toole, J., (1995). *Leading change*. New York, NY: Jossey-Bass.

Schuster, B., (2007). Police lineups: Making eyewitness identification more reliable. *National Institute of Justice, 258*, 2-9.

Woska, W. J. (2006, October). Police officer recruitment: A public-sector crisis. *Police Chief Magazine, 73*(10), 1-6.