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Eyewitness Identification Reform

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ABSTRACT

Eyewitness identification has always been a cornerstone of criminal investigation. However, exonerations of persons convicted based on these witness accounts have proved human memory is not infallible. Anyone, no matter how well meaning, can make mistakes. Memory can be influenced by various factors, and there is more research in that field addressing the issue (National Institute of Justice, 1999). Eyewitness identification reform is relevant to contemporary law enforcement as DNA evidence has proven the actual innocence of hundreds of imprisoned persons, which has lead to their exonerations. This has been accomplished largely through the efforts of such organizations as The Innocence Project. This is a national litigation and public policy group that works through DNA testing to exonerate persons they believe may be wrongfully convicted of crimes. The Innocence Project also champions criminal justice reforms that may prevent similar incidents in the future. Not only have persons been found to be unjustly incarcerated for crimes they did not commit, but some actual perpetrators have been freed to continue their criminal acts. In addition, law enforcement has been on the defensive in this important issue, and each new exoneration undermines the people's faith in the professionalism of their police and, in some cases, even their credibility.

The position of the researcher is that there should be basic, minimal standards regarding eyewitness identifications in order to ensure innocent persons are protected and criminal prosecutions strengthened. These reforms will serve to increase professionalism in policing and work towards restoring confidence not only in law enforcement, but the criminal justice system as a whole. The types of information used

to support the researcher's position are a review of articles, Internet sites, periodicals, and journals.

The conclusion drawn from this position paper is that there are scientific and field studies supporting the reform of eyewitness identification procedures (Mecklenburg, 2006; O'Toole, 2006; Wells, 2006). Numerous agencies have already instituted changes. Those departments do not report any negative impact on personnel, nor significant training or budgetary concerns. In short, they have more confidence in the new methods with no adverse affects to efficiency.

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INTRODUCTION

Eyewitness identification, or more appropriately named faulty eyewitness identification, is an issue that should concern all of law enforcement. Reform is needed now to reduce the opportunity for false identifications. No longer can agencies be content with the traditional methods of performing lineups for the purpose of suspect recognition. Oftentimes, reliance on the memories and credibility of witnesses/victims has served as the main or even sole evidence in felony cases. However, numerous high profile DNA exonerations of individuals across the country have called into question long-followed practices involving photo or in person identifications. DNA has cleared persons of crimes of which they were accused after having served years in prison. This has called current mainstream police practices into question. Some even doubt law enforcement's credibility or, at the very least, their competence.

No one would oppose reducing the possibility of innocent persons being arrested, prosecuted, and convicted, and ultimately serving a sentence for a crime they did not commit. When this happens, all of society suffers: the wrongly accused, the victim, and the entire criminal justice system. When an innocent person is prosecuted, the guilty party retains their freedom and, with it, the ability to continue to prey on others. The states of North Carolina, Wisconsin, and New Jersey have already mandated legislative changes in addition to local jurisdictions such as Denver, Colorado; Boston, Massachusetts; and Dallas, Texas (Gaertner & Harrington, 2009). Texas law enforcement should be leading the way in reforming these practices. Not contributing to improving policies will relegate policing to watching the game from the sidelines as others, such as legislators, courts, and special interests, which may not

have as deep of an understanding of investigative practices and policing in general, mandate changes. Law enforcement must take the lead on this crucial issue so that they are the authors of their own destiny, but most importantly, because it is the correct course of action.

Of this country's 250 exonerations over the last 20 years, 74% have been attributed at least in part to mistaken eyewitness identifications (The Innocence Project, n.d.). There has been a growing amount of scientific research which illustrates that basic, systematic change in performing eyewitness identification procedures will result in marked improvement in their accuracy (Wells, 2006). Contemporary protocols are easily accessible to any law enforcement agency from a wide variety of sources, such as the U.S. Department of Justice, the Innocence Project, the IACP, and the American Bar Association. More precise eyewitness identifications will enhance opportunities for the criminal justice system to punish the guilty and simultaneously protect the innocent. Eyewitness identification reform is needed now. Agencies should have basic minimal standards in place to protect the innocent and strengthen criminal prosecutions.

POSITION

On February 4, 2010, Freddie Peacock became the 250th DNA exoneration in the United States (The Innocence Project, n.d.). This number alone must at the very least cause the criminal justice system to pause long enough to ponder the possibilities of reform. With so many innocent persons falsely imprisoned, there must be better methods available to prevent similar incidents from occurring in the future. If 250 cases exist where DNA was available, it stands to reason there are countless other cases which have occurred through the years and across the country where DNA evidence

was lost or never existed at all. The Innocence Project (n.d.) stated that 84% of exonerations were people convicted of sexual assault, 29% of murder, and 16% of both. Eyewitness identifications were at least partially responsible in 76% of these cases. What may surprise some is that in 38% of all cases, the person in question was identified by multiple eyewitnesses. Additionally, no one should believe this is an issue pervasive only in older cases from the 80s or before. One should note that in 67% of the exonerations, the innocent person was convicted after 2000.

Several changes can easily be implemented in most agencies that will greatly reduce the possibility of false eyewitness identification. One of the first is to have a blind administrator (Wells, 2006). In other words, the person administrating the lineup has no knowledge as to who the police suspect in the lineup is. This type of procedure in social and medical sciences is referred to as “double-blind” testing. The best example would be the testing of new drugs where a placebo is used. The patient is not aware whether they are receiving a placebo or the actual drug.

The same holds true for any medical personnel directly involved and thus the term double-blind (Wells, 2006). This protocol prevents any unintentional influence over the results by the tester. This is not to say a double-blind procedure is necessary due to law enforcement maliciously influencing the outcome of lineups. However, law enforcement must acknowledge that every human is subject to personal bias and beliefs. This may lead them to unintentionally relay those feelings through verbal and non-verbal communication to the eyewitness viewing the lineup. Double-blind will strengthen a case as it does not leave the police or prosecution open to claims of either intentionally or otherwise influencing the eyewitness.

A second change and one of the most basic to initiate is establishing a set of instructions to be used at each lineup. As early as 1999, the National Institute of Justice [NIJ] (1999) recommended that prior to administrating a lineup, law enforcement should give specific instructions to the witness. The NIJ stated this would improve the accuracy and reliability of any identification made. The purpose of the instructions is to remove any obligation the eyewitness feels that he/she must make identification (i.e. if the police are showing me these, then one must be the suspect). One instruction states that the person showing the lineup has no knowledge as to the identity of the suspect (blind-administrator). This deters the eyewitness from looking to the police officer, consciously or not, for any clues. In fact, the person is told the suspect may or may not be present in the lineup, and they need not identify anyone (American Bar Association, 2004). The eyewitness is told that regardless of an identification being made, the police will continue to investigate the incident.

Another simple and easily initiated reform is for the administrator not to provide any immediate feedback to the eyewitness if identification is made. Instead, the eyewitness will be asked to write out a statement of certainty. This is a written expression in the person's own words as to how positive they are as to the identification (NIJ, 1999). The administrator, by not confirming the photo selection prior to obtaining the statement, will serve not to artificially reinforce the individual's confidence in their selection. In addition, videotaping those lineups performed at the station will serve to eliminate any accusations that the eyewitness was unduly influenced by the administrator. If this cannot be done due to budget constraints or the identification being held off site, an audio recording is recommended.

COUNTER POSITION

As with any new idea, eyewitness identification reform is not without its critics. Skeptics of reforms point to a variety of issues with the proposed changes. These arguments include doubts as to the increased reliability of new procedures, the perceived burden that would be rendered on departmental resources, and the belief among some that the majority of good officers are being unfairly blamed for the mistakes of a few.

The most controversial of the proposed reforms are sequential, double-blind lineups, be they in person or by photo. This involves the person showing the lineup (administrator) not having knowledge as to the identity of the police suspect in the lineup. In other words they are “blind.” The purpose of being blind is to decrease the opportunity for the administrator to give any clues, intentional or not, to the eyewitness. In addition, the photos are shown sequentially. The purpose of the sequential showing of suspects is to decrease relative judgments. During the procedure, the eyewitness must view each photo, one at a time, and compare it to their memory of the event. This is compared to viewing six photos or suspects simultaneously and making a determination as to who looks the most like the suspect (Klobuchar, Steblay & Caliiuri, 2006).

One of the main counterpoints to reform regards the validity of the existing scientific research that supports it. This is in specific reference to the claims of increased reliability derived from sequential, double-blind identifications. A report written for the legislature of the state of Illinois by Mecklenburg (2006) is the most publicized document that supports the position. This report resulted from a one year

field study in that state of the sequential, double-blind method. This study involved three jurisdictions within Illinois: Chicago-population of 3,000,000; Joliet-population 130,000; and Evanston–population 75,000.

The study was prepared by Sheri Mecklenburg on behalf of the Illinois State Police. Mecklenburg serves as the general counsel of the Chicago Police Department. Mecklenburg's (2006) report advised that in Chicago and Evanston, the traditional method of a simultaneous, non-blind photo array, administered by a "not-blind" detective, produced a lower rate of identifications of innocent fillers and a higher rate of identifications of suspects than did the lab-generated "double-blind, sequential" technique. Ultimately, the report recommended no changes be implemented on the basis of laboratory science. The Mecklenburg report asserted that by performing an actual field study, the double-blind sequential model proved to be inferior to current simultaneous procedures, or at the very least, further analysis on the matter needed to be done.

Other arguments against proposed reforms take such views as any changes would pose an undue burden on law enforcement resources (Mecklenburg, 2006). Officers in general would be punished for the mistakes of a few, and new procedures would only allow more opportunities for defense attorneys to argue for their clients based on perceived procedural flaws by police (Casey, 2009). The Mecklenburg (2006) report stated that the subject department's belief was that blind, sequential lineups adversely affected their ability to share information and cooperate both internally within their respective organizations and externally with other agencies.

Nearly 80% of the respondents in the Mecklenburg (2006) report claimed difficulty in locating a blind administrator for a photo lineup. Additionally, not one of the respondents expressed the belief that the sequential, double-blind method improved performance in their job. One-third believed their ability to perform the job was actually hampered by the new procedures. In fact, 15% thought the changes substantially interfered. Attempts to introduce reforms in other states have also been opposed. The Houston Police Officer's Union recently lobbied against changes in Texas (Casey, 2009). They painted last year's reform bill before the Texas Legislature as unjustly placing blame on the vast majority of good officers for the errors of a few and creating technicalities for attorneys to argue in defense of their clients.

Despite this resistance to change, there is much evidence which discredits most, if not all, the arguments against reform. First, one must look closely at the Mecklenburg (2006) study. The intent of the Illinois legislature was that the Illinois State Police run the project. However, the state police passed the responsibility on to the Chicago Police Department. This was done despite the fact that officials in that department had voiced their disagreement with double blind, sequential lineups (O'Toole, 2006).

Secondly, the Mecklenburg (2006) report showed that the police involved in the study received training before the start date on the nature and intent of the project. This being so, they would have had reason to anticipate what researchers were looking for and the outcome that would occur if the sequential, double-blind process exhibited better results than current procedures. Doing this flies in the face of current scientific methodology due to the fact that it would afford an opportunity for administrators to change their behavior to affect the outcome. The probability of influencing the outcome

obviously being higher in those situations with the non-blind administrators (simultaneous control group).

The most serious flaw in the Mecklenburg (2006) report appeared to be the failure to conduct sequential and simultaneous procedures under the same conditions. If nothing else, for the purposes of comparison, the study should have included a third study group (simultaneous, blind). This would have at least met the legislative mandate that the study employ objective scientific methodology. Another huge shortcoming in the study's methodology is that whenever a police suspect was selected, it counted as a correct identification (O'Toole, 2006). In other words, with this line of thinking, the Mecklenburg (2006) report would have to consider all DNA exonerations as "correct" identifications. Given that the Illinois Legislature authorized the report in response to the large number of wrongful convictions in the state, this appears to be a major omission indeed.

The other arguments against reform are also without merit. The Richardson, Texas Police Department (a jurisdiction of 100,000 residents) instituted sequential, double- blind lineups in October of 2008. There has been no evidence that these procedures have unduly burdened that agency or provided grounds for defense attorneys to use as technicalities to assist in their defense. Quite to the contrary, it has strengthened the professional image of that department, and they are recognized as the leader in eyewitness identification reform in Texas (Smith, 2008). Members from that agency have even travelled to the state capital and testified that they believe the new procedures to be a viable and effective means to enhance eyewitness identification.

In addition, a year-long pilot project conducted by the Hennepin County Attorney's office in Minnesota revealed that the new procedures could be implemented by both large and smaller agencies without affecting efficiency (Klobuchar et al., 2006). That study, which ended in November of 2004, involved Minneapolis, population 380,000, and three smaller cities in that county (Bloomington, 86,000; Minnetonka, 52,000; and New Hope, 21,000). The overall county itself has a combined area population of 1.1 million. Minneapolis and Bloomington police implemented blind sequential line ups in less than a month, Minnetonka PD in less than a week, and New Hope in less than two weeks (Klobuchar et al., 2006).

As more time has elapsed, evidence has mounted in favor of the changes. In 2005, Ramsey County in Minnesota also launched a year long pilot program (Gaertner & Harrington, 2009). Ramsey County has ten police agencies and a total population of 493,215. Saint Paul is the largest jurisdiction. Believing the project to be successful and the reforms involving blind sequential lineups sensible, they were formally adopted countywide in April of 2006. Gaertner & Harrington (2009) stated of the reforms, "the county concluded that it is feasible, practical, and superior to past eyewitness identification procedures" (p.130).

CONCLUSION/RECOMMENDATION

Law enforcement in a modern, democratic society must have the support of the people they police. Today, more than ever, officers must work in partnership with all segments of the community to accomplish goals of protecting and serving the public. In order to be successful, citizens must view their police as a professional, competent, and ethical force. A nation exposed to numerous news reports year after year of persons

being imprisoned for crimes they did not commit will not have that level of confidence in the police. They will see continued false imprisonments as evidence of law enforcement's laziness, incompetence, or the convict someone/anyone mentality.

Also, these exonerations took place due to DNA evidence scientifically proving, without a doubt, the person's innocence. However, one must think of the countless other individuals who are incarcerated for offenses based on eyewitness testimony where DNA evidence does not exist. All of the exonerated persons have been sentenced for committing either murder, sexual assault, or both. DNA is commonly collected in these cases. However, DNA is not usually a piece of evidence in most robberies for example. Even in the murder and sexual assault cases, there are situations where the DNA has been lost. The true number of individuals who have been and may still be imprisoned for a crime they did not commit may never be known. Taken together with the true perpetrators who were left in society to continue to offend and the eyewitnesses who are victimized once more when they discover the wrong person has been convicted, one can clearly see the high cost to all involved. All of society loses.

Through the experiments, field studies, and real life implementations involving the proposed reforms, one can see that it is realistic to initiate the vast majority of these reforms in most agencies. There is no demonstrated detrimental affect on efficiency, little or no increased cost, officers have a higher level of confidence in the methods, and prosecutions are strengthened. The criminal justice system, victims, and the general citizenry all desire the same goals: the protection of the innocent, justice for victims, strong prosecutions of criminal offenders, and increased confidence of the nation.

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