

Posted 11/8/14

WHEN SEEING *SHOULDN'T* BE BELIEVING

A long-awaited report offers best practices in eyewitness identification

By Julius (Jay) Wachtel. On September 28, 1990, a 16-year old white girl was sexually attacked by a masked man in a Dallas motel room. She said that her assailant was Michael Phillips, a thirty-two year old black man who did maintenance work at the motel. He was arrested within days. Phillips protested his innocence. But his accuser later picked him out from a “six-pack,” a photographic lineup with six photos side by side. One was of Phillips.

Thirteen years earlier, when he was nineteen, Phillips served time for burglary. Although he had since kept out of trouble, a public defender suggested he plead guilty to avoid a possible life sentence. So that’s what he did. Phillips was released in 2002, a convicted sex offender.

Five years later the Dallas D.A. formed a unit to tackle the problem of wrongful convictions. They began having old rape kits tested, something that wasn’t done in Phillips’s case because he pled guilty. Lo and behold, DNA from the attacker’s semen DNA not only excluded Phillips, but turned out to be a perfect match for the DNA of another resident of the motel, a man who resembled Phillips. Alas, he cannot be prosecuted because the statute of limitations has lapsed.

On July 25, 2014, a judge exonerated Phillips. Under Texas law he will get \$80,000 for each of his twelve years of wrongful imprisonment, and the same amount yearly for life. Phillips, who suffers from sickle-cell anemia and is confined to a wheelchair, plans to leave the nursing home where he has been sharing a tiny room with another resident, and perhaps travel. “Hang on to your faith,” he told reporters. “The Father works in his own time, and like the good song says: He may not come when you want to, but He’s always on time.”

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During the evening hours of August 7, 1977, a Metairie, Louisiana woman was attacked while walking to her apartment. She managed to fight off her assailant, but not before he bit her neck and ripped off her dress. He fled before police arrived. The victim described him as black, bare-chested, and wearing black shorts.

A security guard directed officers to an apartment in the same complex. Nathan Brown, the resident, was one of the complex’s few black residents and had tangled with the guard before. Brown answered the door. Officers had him take off his shirt and put on black shorts. They then staged a “showup,” in essence parading Brown by the victim. She positively identified him as her assailant, and later testified to that effect at trial.

Brown denied everything. He insisted that he had been home playing with his 2-year old daughter. Five persons corroborated his account.

No matter – victim ID carried the day. Jurors found Brown guilty and a judge sentenced him to 25 years.

More than a decade later, through the intervention of the Innocence Project, tests were performed on the victim's dress (miraculously, it was still in evidence.) DNA in saliva stains positively matched a different black man. He happens to be in a Mississippi prison, doing time for an unspecified crime.

On September 3, 2014, a judge exonerated Brown and set him free. He had served seventeen years for a crime he didn't commit.

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Eyewitness misidentification has long bedeviled America's criminal justice system. According to the Innocence Project, mistaken identifications were involved in a stunning 72 percent of convictions that were later reversed due to DNA testing. In a new, comprehensive report, the National Academy of Sciences tries to bring order to the chaos.

NAS reviewed a number of witness ID techniques. Perhaps the two most common are photo arrays, a series of usually six photos, one normally of the suspect, and show-ups, one-on-one viewings that take place in the field and are normally staged by beat cops. Each procedure raises two important concerns: accuracy of recall and witness suggestibility.

Accuracy of recall

- Should photo arrays be shown simultaneously, all at once, or sequentially, one at a time?
- What is the maximum amount of time that should pass between an incident and a show-up?

Witness suggestibility

- Officers administering arrays are usually involved in the investigation. To minimize the possibility that they may purposely or inadvertently convey cues, two procedures can be used: single-blind and double-blind. In single-blind, photos are shuffled so the officer doesn't know which photo is being viewed. In double-blind, the officer is also unaware of the suspect's identity.
- During show-ups, witnesses might feel pressured to identify persons who are handcuffed or sitting in the back of a police car. Field situations can make it difficult to create neutral, non-suggestive settings or bring in uninvolved officers.

Certain factors are thought to always affect the accuracy of identifications. Witnesses may be distracted by the presence of a weapon. Stress and fear can negatively impact memory and vision. Cross-racial identifications can be tricky. Length of an observation is also important, as is the lag between the observation and its recall.

Using our own words (don't blame NAS!) here are some of its key recommendations:

- Inform officers about identification issues at the academy and through in-service training. Require in-depth coursework for investigators.

- Prevent officers from suggesting the “correct” choice by using double-blind procedures when showing photo arrays. If the cop doesn’t know who the suspect is, that’s as good as it can get.
- Develop and use standard witness instructions.
- Document, verbatim, the level of confidence that a witness has in his or her judgment. Resist the urge to give feedback. Videotape the process.
- Judges should conduct pre-trial inquiries to determine if witness identifications were done in accordance with best practices, and if not, whether lingering concerns should be addressed with expert testimony and a hearing.
- Inform jurors about every occasion when witnesses were asked to make an identification, and of their level of confidence each time.

There is a lot more in the report, including a detailed overview of Federal and State witness identification laws and court decisions, a summary of pertinent research on vision and memory, and a painfully technical discussion of issues in measuring eyewitness performance. As one might expect, the report ends by recommending a national research initiative on witness identification, and even sets out a comprehensive agenda.

Well, it’s about time. Considering all the innocents who have been locked up, and all the guilty who should have been, but were left to roam around and victimize some more (for a few head-spinners, check our prior posts) the report comes in a bit late. But it’s nonetheless highly welcome.