

Posted 12/7/08

## CAN WE OUTLAW WRONGFUL CONVICTIONS? (PART II)

### *Legislator proposes banning showups and recording all interrogations*

*By Julius (Jay) Wachtel.* Do you enjoy getting scared out of your wits? Then you'd love the Lone Star State. According to the [Justice Project](#), the place that gave us the groundbreaking horror film [The Texas Chainsaw Massacre](#) has been at the forefront of another spine-tingling exercise: [locking up the innocent](#). For an example that will stand your hair on end look no further than [Billy Miller](#).

No one claims that Billy was a nice guy. In 1983, on parole for armed robbery, he was staying with friends when early one morning police came knocking. They were looking for a suspected rapist, although with a different first name. At 3 a.m. cops had Miller step outside for a "showup," a one-on-one procedure commonly used soon after a crime occurs. The victim, who was sitting in a patrol car, instantly identified him. He was convicted and spent twenty-two years in prison before DNA tests proved his innocence. The woman who pointed him out has since gained a lengthy record for prostitution and other minor crimes.

At least [three of the 18](#) wrongful convictions uncovered in Dallas County during the past years were caused by flawed showups. Critics of the procedure argue that presenting only one person for a look-see is unduly suggestive. As Miller's case demonstrates, bringing the witness to the suspect (instead of the other way around), as the [National Institute of Justice](#) recommends, may not be enough. Texas State Senator Rodney Ellis, who recently introduced a package of bills to reform his State's justice system, has gone so far as to suggest that [showups be banned](#) altogether.

What's wrong with that? Consider the environment of policing. Officers frequently encounter persons matching suspect descriptions in the vicinity of a crime. Sometimes they're in a vehicle, sometimes on foot. Under the rules of [stop-and-frisk](#) police can temporarily detain persons if there is reasonable suspicion that they committed a crime. Doesn't it make sense to bring a victim or witness by for a look, right then and there? Sure, officers can take a picture, let the suspect go and show the victim or witness a photo lineup later. But by then the witness's memory will have faded and the perpetrator -- if indeed he or she is the guilty party -- will be long gone, along with any evidence that prompt action might have turned up.

Instead of recommending that showups be done away with altogether the National Institute of Justice has offered [guidelines](#) to reduce their suggestibility. It's advised, for example, that suspects not be viewed while seated in the back of patrol cars, and that if there are multiple witnesses only one participate in the showup while the rest view photo lineups. And of course police should admonish the witness that this might not be the right person, take careful notes of what's said and even record the event.

Recording showups? Well, why not? As cases move through the system subtle pressures from police and prosecutors can make witnesses overconfident, turning a tentative "maybe" into a definite "that's the one!" Taping their initial reaction preserves an unimpeachable record of the original degree of certainty should it inflate over time.

Taping police-citizen encounters has become routine. Many officers carry miniature recorders and drive patrol cars with video cameras. Interview rooms equipped with recording devices are commonplace. Concerns that improper questioning techniques can precipitate false confessions have led a few States to enact laws that strongly encourage recording interrogations. [Maryland](#) police must "whenever possible" make "reasonable efforts" to record in-custody interrogations of persons charged with murder and rape. [Nebraska](#) has a similar law that applies only to "places of detention." Police in [Washington D.C.](#) must record custodial interrogations of persons charged with crimes of violence, but only when a suspect is interviewed in a room that has the appropriate equipment.

[Senator Ellis has introduced a bill](#) that would ramp things up a significant notch, at least in Texas. Police would be required to record all "custodial interrogations" for felony crimes, period. On pain of inadmissibility, entire interviews would have to be recorded, not just the actual confessions. But imagine that a patrol officer detains someone in the field. Although "custodial" has a broader meaning than arrest, the legislation leaves both "custodial" and "interrogation" undefined and makes no exception for place or circumstance. Accordingly, questioning anyone who may have been involved in wrongdoing without whipping out a tape recorder would invite litigation. It's just such ambiguities that cause experienced officers to shake their heads.

There is another pressing issue. Interrogations can continue for hours and, occasionally, days. But busy prosecutors and public defenders don't have the time to watch videos and listen to tapes. If the Senator's bill passes as written detectives couldn't file the simplest felony case without sending along verbatim transcripts, and in complex cases or those with multiple suspects, reams of transcripts. Departments would require legions of secretaries to commit interrogations to paper. Who would

pay? If “custodial interrogation” means what it seems to mean one thing is certain: should the bill become law police will probably do a lot less of it.

Neither is recording a panacea. It seems that something always “happened” before the cameras started rolling. And even if everything is captured on tape, whether questioning was unduly coercive or suggestive isn’t always clear. In 1993 [three Arkansas teens](#) were convicted of the brutal murder of three boys in what police described as a “Satanic ritual.” Two of the accused got life and one was sentenced to death (they are still in prison awaiting the outcome of appeals.) There were no witnesses or physical evidence. Instead, the convictions were due to a taped [confession](#) by one of the accused, a developmentally disabled youth who was interviewed outside the presence of his parents or a lawyer. His account, which he has since recanted, was preceded by hours of interrogation that weren’t recorded and, if one believes the detectives, in which no notes were kept. What’s more, as a defense expert pointed out, a transcript of what *was* taped has police repeatedly -- and successfully -- prodding the teen to change his responses so they are consistent with their theory of the case. It’s impossible to watch the court video (included in a [commercial DVD](#) of the case) without taking pity on the pathetically vulnerable youngster as he struggles to please the cops. In the end his “confession” was admitted as evidence, with catastrophic consequences for himself and his friends.

Technology can help. But at the end of the day the best “cure” lies in the knowledge, skills and abilities of police and prosecutors. Given the perils of witness identification and confessions, it’s appalling that few if any agencies have incorporated what’s known about these pressing issues into pre-service and in-service training. Remember that for each innocent person convicted a guilty person goes free. Considering the imperatives of public safety, the practicalities of law enforcement, the limits of law and technology, and the difficulty (some would say, futility) of promoting change in the insular worlds of policing and prosecution from the outside, it seems more important than ever to spur reform from within.

Is anyone listening?