I’ll Never Forget That Face . . . (But I Might Not Remember It Accurately)

Jules Epstein
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Mistaken eyewitness identification testimony is a leading cause of most wrongful convictions.

By Professor Jules Epstein

Mistaken identification cases are “high profile” in the media. This has resulted in significant part from DNA exonerations. The scientific conclusiveness of DNA as proof of innocence has permitted a retrospective assessment of “what went wrong” in those cases. And “what went wrong” in a substantial proportion of those cases was a reliance on eyewitness identification testimony. According to the Innocence Project, as of November 2006 “over 75% of the 183 post-conviction DNA exonerations in the U.S. involve mistaken eyewitness identification testimony, making it the leading cause of these wrongful convictions.”

But it is not just in 183 cases. For more than a century, every study of wrongful convictions has shown that mistaken identification is the major culprit, usually at a rate of roughly two-thirds of the cases studied. And FBI statistics of DNA examinations in sex offenses show a startlingly high rate of mistaken identifications: in over 10,000 cases where crime scene DNA was tested against suspects’ DNA, the exclusion rate [the rate at which the DNA showed the suspect could not have contributed the evidence] was 20 percent.

The numbers show the prevalence of this problem, but not its cause. And the cause has five demonstrable components — problems with perception and memory, improper police evidence gathering, juror over-valuing of eyewitness testimony, bad lawyering, and judicial decisions and practices that are contrary to the known science.

Perception and Memory: The simple problem is that the mind is not a video or digital recorder; it neither perceives all details nor retains those it did see in a pristine, unalterable state. How do we know this? In the past three decades, over 2,000 peer-reviewed studies have shown that several factors impede accurate perception and recall:

- Weapons Focus: When a firearm or knife is present, crime witnesses look at the weapon, not at the perpetrator’s face.
- Own-Race Bias: It remains a sad but true fact that witnesses are better at identifying persons of their own race than of other races.
- Stress: Very high levels of stress impair the accuracy of eyewitness testimony. This is true even where the witness is a trained police officer or member of the military.
- The Memory Drop-Off: Accurate recall of an event drops sharply after a several hour period.
- Confidence/Accuracy: Although many witnesses maintain that they, personally, are “100% sure” of their identification, the correlation between their confidence and the accuracy of their identifications is low.

Police Evidence Gathering: An abundance of studies has shown that when police conduct interviews or lineups, their words or gestures can contribute to mistaken identifications. Asking “did the man have a big mustache” may implant that feature onto the witness’ memory; and telling witnesses to look for “the perpetrator in the lineup” can suggest that the perpetrator is in the group being looked at, and thus cause the witness to pick someone, not necessarily the right person.

Juror Over-valuing of Eyewitness Testimony: Jurors believe eyewitnesses (usually crime victims), as they seem sincere and have no apparent motive to lie or pick the wrong person. In one mock jury study, 72% of the jurors found the subject
guilty when there was one eyewitness. A separate set of jurors were given the same one-witness evidence and were told that the eyewitness was legally blind; the percentage of jurors voting guilty dropped only to 68%.

**Bad Lawyering:** Too many cases involve lawyers who have not studied the psychology of eyewitness evidence and who use cross-examination techniques designed to expose the dishonest witness when what they are confronting is an honest but mistaken witness.

**Judicial Decisions:** The law’s development is currently running twenty to thirty years behind the clear science. The standard for suppressing eyewitness testimony as unreliable has no regard for how memory works or how police conduct may influence witnesses. Jury instructions also fail to keep pace with the science, and many jurisdictions prohibit or limit the use of expert witnesses to explain why an eyewitness’ claim might be unreliable.

So, where and how are remedies being sought? Many legislatures, police departments, and state agencies have adopted guidelines for police investigation in identification cases, particularly in how to interview witnesses and conduct lineups. New Jersey has adopted these on a statewide basis, including the requirement that lineups be conducted “blind,” i.e., by a detective who does not know which person is the suspect.

Advanced training in how to litigate a case of mistaken identification is being provided nationally, and across Pennsylvania, for defense lawyers. In the courts, resources are being amassed to press for better jury instructions, greater acceptance and use of experts, and a more science-based standard for assessing whether eyewitness testimony should be admissible.

Much is occurring, but much more is needed, particularly in terms of education for judges, juries, and police. And until these changes are implemented, we will continue to see headlines like those from Delaware in September 2006 when two people were wrongly identified from bank robbery surveillance photos: “Police, again, accuse the wrong man.”

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