

EYEWITNESS IDENTIFICATION AND INNOCENCE

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Wilbert Jones was exonerated on October 11, 2018. He was wrongfully imprisoned for forty-five years, ten months, and one day for a crime he did not commit. The only evidence against Mr. Jones was the testimony of a single eyewitness, and she made a mistake. A mistake that could have been prevented. A mistake that cost a young man his youth, and his dreams of having a family and doing meaningful work.

Mr. Jones was nineteen years old when police arrested him in the middle of the night at his home.¹ Except for an arrest for trespassing when he was sixteen, Mr. Jones had no other run-ins with the police. He was taken to the jail and ordered to pick out four men, who were then placed into a lineup with him. Mr. Jones could hardly read and was a special education student until he dropped out of school in the eighth grade at the age of seventeen. He was not advised by the police that he could ask for a lawyer. He was ordered to stand with the other men in a lineup. Unbeknownst to him, he was a suspect in a rape that occurred more than three months prior.

The rape victim described her perpetrator as a black male, 5'9" in height, with a prominent gap in his front teeth and a soft voice. Mr. Jones is 5'3"—shorter, not taller than the victim. He does not have a prominent gap between his two front teeth. His voice was not described as soft by the victim when he was ordered during the lineup to speak the words that the perpetrator spoke to the victim. Regardless, the victim tentatively selected Mr. Jones as the man who raped her but with caveats: he is shorter than her perpetrator; his voice is rougher than the soft voice of her perpetrator; and she was only 98% sure of her identification. But the victim's uncertainty became 100% certain by trial. Mr. Jones was convicted

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1. The following facts are taken from Wilbert Jones's trial transcript, Case No. 90,052 in the 19th J.D.C. (on file with author).

of a crime he did not commit and was sentenced to spend the rest of his natural life in prison without the possibility of parole. Nearly forty-six years later, Mr. Jones was released from prison when District Judge Richard Anderson from the 19th Judicial District ruled that the State's evidence used to convict Mr. Jones was "severely lacking,"² and that the State violated Mr. Jones's fundamental, constitutional rights by withholding from Mr. Jones and his trial counsel critical, exculpatory evidence—evidence about an alternative suspect who likely was the true perpetrator—that supported Mr. Jones's innocence.³

The eyewitness identification mistake that led to Mr. Jones's wrongful conviction could have been prevented. Police procedures have evolved since Mr. Jones was arrested and placed into a lineup, and these procedures, developed based on scientific research, have been shown to decrease the likelihood of eyewitness misidentifications. We cannot turn back the clock for victims of wrongful convictions like Mr. Jones, but we must demand, moving forward, that law enforcement use scientifically proven, evidence-based procedures when conducting eyewitness identifications to prevent wrongful convictions.

Mistaken eyewitness identification is a leading contributor to wrongful arrests and convictions. In nearly 70% of 363 convictions overturned by DNA evidence nationwide, eyewitness misidentification played a role in the original wrongful conviction.⁴ In Louisiana, fourteen out of fifteen DNA exonerations involved mistaken eyewitness identifications.⁵ Two of these men were sentenced to death.⁶ In addition, in seventeen non-DNA Louisiana cases, innocent men were sentenced to life in prison due to mistaken eyewitness identifications.⁷ Public safety is threatened when law enforcement focuses on an innocent person instead of the real perpetrator. Of the 158 cases where the true perpetrators were identified by DNA, these actual perpetrators went on to commit 150 additional violent crimes.⁸

2. *Jones v. Hooper*, No. 90,052, at 12 (19th J.D.C. La. Oct. 31, 2017).

3. *Id.* at 13–14.

4. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Feb. 6, 2019).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Wrongful conviction cases, together with over forty years of scientific research, demonstrate that eyewitness identification testimony is fallible, susceptible to inaccuracies, and yet is so convincing that, when it is wrong, it poses a serious risk of convicting an innocent person. Scientific research findings show how eyewitness memory and perception work, how identification can go wrong, and what can be done to improve accuracy in the courtroom setting. The research findings establish that the police procedures that are used to obtain an identification play a significant role in the reliability of that identification. This is not surprising given that when police have an eyewitness and a suspect, they have many choices as to how to present the suspect to the eyewitness to see if an identification can be made. If the police employ scientifically supported best practices—which provide an accurate test of witness memory, free from suggestion—they can maximize the possibility of the witness making an accurate identification, while reducing the risk that the witness will make a mistaken identification.

Recently, an important report from the National Academy of Sciences (NAS) recommended that law enforcement adopt certain scientifically supported practices for obtaining identifications from eyewitnesses.⁹ The NAS report is the product of the Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts, a distinguished committee comprised of judges, scientists, legal scholars, prosecutors, and defense lawyers. The NAS report is the most comprehensive evaluation of the scientific research in the area of eyewitness memory and perception and the application of that research to law enforcement practices. The NAS report recommends a set of police procedures that are designed to make witness identifications more reliable: double-blind or blinded administration of lineups; neutral pre-lineup instructions to deter eyewitnesses from assuming that the suspect is present in the procedure; fair lineup composition that ensures the suspect does not stand out; and recording of the eyewitness's confidence statement immediately following an identification.¹⁰ The ways in which identification procedures are administered by law enforcement are known in the scientific community as system variables. Applying scientifically based

9. NATIONAL RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 3–5 (2014), <https://www.innocenceproject.org/wp-content/uploads/2016/02/NAS-Report-ID.pdf> [hereinafter NAS REPORT].

10. *See generally id.*

system variables improves the accuracy of eyewitness identifications in the ways discussed below.

BLIND OR BLINDED ADMINISTRATOR

Identification procedures conducted by an administrator who knows the identity of the police suspect (non-blinded procedures) have been shown to reduce the reliability of resulting identifications, while also inflating witnesses' confidence in their selections.¹¹ Research shows that lineup administrators familiar with the suspect may leak that information "by consciously or unconsciously communicating to witnesses which lineup member is the suspect"¹² through words ("take your time"; "look carefully at all of the images"), gestures (slight nods), hesitations, smiles, and the like.¹³ Even seemingly innocuous actions can influence a witness's behavior.¹⁴ To reduce such an effect, the NAS report recommends blinded identification procedures where the administrator is not aware of the identity of the suspect and does not know anything about the case.¹⁵

FAIR LINEUP CONSTRUCTION

How an officer selects the photographs to be included in a lineup can affect the accuracy of the identification. Constructing a lineup is much like creating a multiple-choice exam question. The officer selects who they believe to be the correct answer, the suspect, along with alternative options, the fillers. Filler choices can impact witness selection and accuracy. Research shows that fillers should fit the description of the suspect provided by the eyewitness and not be composed of those who look most similar to the suspect's photograph.¹⁶ The fillers should also ensure that the

11. NAS REPORT, *supra* note 9, at 24–25, 106–07; *see also* Steblay, Wells & Douglass, *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 PSYCHOL. PUB. POL'Y & L. 1, 1 (2014); Sara M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 LAW & HUM. BEHAV. 70, 71 (2009).

12. *See* NAS REPORT, *supra* note 9, at 18; Greathouse & Kovera, *supra* note 11, at 71.

13. *See generally* Greathouse & Kovera, *supra* note 11; Jennifer Dysart, Victoria Z. Lawson & Anna Rainey, *Blind Lineup Administration as a Prophylactic Against the Postidentification Feedback Effect*, 36 LAW & HUM. BEHAV. 312 (2012).

14. *See generally* Dysart, Lawson & Rainey, *supra* note 13.

15. *See generally* NAS REPORT, *supra* note 9.

16. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998); Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45

suspect does not stand out or is the person who most closely matches the witness's description of the perpetrator, placing that suspect at a greater risk of misidentification.

NEUTRAL PRE-IDENTIFICATION INSTRUCTIONS

Scientific research and literature show that the likelihood of misidentification is reduced when witnesses are properly instructed prior to participating in an identification procedure.¹⁷ Proper instructions include telling witnesses that the perpetrator may or may not be present, that the investigation will continue whether or not an identification is made, and that it is equally important to clear innocents as it is to identify the perpetrator.¹⁸ If such an instruction is not given, an inference arises that the suspect is present in the lineup and the witness must simply deduce who it is. Witnesses may assume that the police would not conduct an identification procedure without a suspect, that the suspect is one of the persons in the photographic lineup, and that it is their job to pick the right person. The risk of misidentifying an innocent suspect who looks more like the perpetrator than the other lineup members increases when such instructions are not provided.

RECORDING OF CONFIDENCE STATEMENTS

Information received by witnesses both before and after an identification procedure, whether from the media, other eyewitnesses, family, friends, or police during the investigation or identification procedure(s), can affect their memory of the event. In addition, the identification procedure itself can increase witnesses' confidence in their selections. Post-identification feedback is the feedback witnesses receive after they make an identification about the accuracy or inaccuracy of their decision. Confirming post-identification feedback can falsely inflate witnesses' confidence in the accuracy of their identifications and their recollection of the event itself. Research has shown that confirming feedback increases "the *appearance* of reliability

(2006); U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

17. NAS REPORT, *supra* note 9, at 3, 18, 26–27, 72–73, 79; Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 575, 595 (2005).

18. NAS REPORT, *supra* note 9, at 12, 18, 20, 73. *See generally* Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283 (1997).

without increasing reliability itself.”¹⁹ To guard against such an effect and to establish a baseline for witness confidence, the NAS report recommends the recording of a confidence statement from the eyewitness at the time of the identification.²⁰

In the Spring of 2018, the Louisiana Sheriff’s Association (LSA) promulgated a model policy on eyewitness identification procedures that incorporates all of the recommended, scientifically based procedures explained above.²¹ The LSA decided to take the lead on this issue after meeting with Innocence Project New Orleans (IPNO) and learning of their intent to introduce legislation during the 2018 session to mandate the use of evidence-based best practices by law enforcement that twenty-eight other states have already adopted, including Texas. Working with the Louisiana District Attorney’s Association, the LSA, and IPNO, Louisiana State Senator Wesley Bishop introduced Senate Bill 38, which requires all Louisiana law enforcement agencies—331 total—to adopt the LSA’s model policy or write their own policies incorporating the key system variables discussed above by the end of January 2019.²² Senate Bill 38 was approved by both the Louisiana senate and the house with overwhelming support, and on May 23, 2018, Governor John Bel Edwards signed Act 466 into law.²³

Act 466 is the beginning and not the end of efforts to reduce the risk of convicting the innocent by mistaken eyewitness identifications. Successful implementation of Act 466 also requires the courts to step up and do their part in evaluating the reliability and admissibility of eyewitness evidence under constitutional and other legal grounds. Act 466 explicitly provides judges with the discretion to consider whether eyewitness evidence should be suppressed and withheld from a jury as unreliable when law enforcement fails to comply with any of the evidence-based best practices articulated in Act 466. If the eyewitness evidence was not collected and tested using scientifically based procedures, should the jury be allowed to consider such evidence? Would trace

19. Steblay, Wells & Douglass, *supra* note 11, at 1 (quoting *State v. Lawson*, 291 P.3d 673 (Or. 2012)).

20. NAS REPORT, *supra* note 9, at 72–74; International Association of Chiefs of Police, *Eyewitness Identification Model Policy* (2010) [hereinafter *IACP Model Policy*]; U.S. DEPT OF JUSTICE, *supra* note 16, at 27, 33, 35, 37.

21. *IACP Model Policy*, *supra* note 20.

22. S.B. 38, 2018 Leg., Reg. Sess. (La. 2018).

23. Act No. 466, 2018 La. Acts (codified at LA. CODE CRIM. PROC. arts. 251–253 (2018)).

evidence, such as fingerprints or DNA, collected and tested using procedures that fell outside of scientific standards and best practices be permitted for consideration by a jury? Such evidence would not be reliable, and its probative value would be outweighed by prejudice. Eyewitness evidence should not be treated differently, particularly because “centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect, and that of all of the various kinds of evidence, it is the least reliable, especially where unsupported by corroborating evidence.”²⁴ Judges must carefully assess and analyze eyewitness evidence, a leading contributor to wrongful convictions, and must have the courage to embrace the science endorsed by these procedures. The likelihood of convicting the innocent would decrease if judges prohibited unreliable, scientifically unsound eyewitness evidence from being presented to the jury.

The burden of ferreting out unreliable identifications and preventing wrongful convictions should not only rest with the courts. Prosecutors must also do their part. They wholeheartedly supported Act 466 and got behind the science in support of eyewitness identification reforms. When a case involving stranger eyewitness identifications comes across their desks, prosecutors must determine whether law enforcement used the best practices to conduct the identification procedures as mandated by Act 466. If law enforcement failed to do so, the prosecutor should not give them a pass and conduct business as usual but must analyze the identification evidence and determine whether it is truly reliable and trustworthy given the way it was collected. If any questions about reliability are raised, prosecutors must decide whether to accept or dismiss the charge, given the importance of the identification evidence and the existence or lack thereof of other corroborating evidence, and if they accept the charge, whether to use the identification evidence to build and support their case. Prosecutors are duty-bound to seek justice, not convictions.²⁵ Any identification evidence collected in disregard of scientific procedures should give prosecutors pause, and they must have the courage to dismiss charges or choose not to use the unreliable

24. *State v. Jackson*, 248 So. 3d 1279, 1283 (La. 2018) (citing *Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir. 1978)).

25. The interest of the prosecutor in a criminal prosecution “is not that [they] shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

evidence to build and present their cases.

Defenders must vigorously challenge eyewitness identification evidence. Eyewitness testimony is powerful and persuasive. Jurors credit eyewitness testimony even in the face of contrary evidence, often crediting an eyewitness despite, for example, a lack of physical evidence connecting the defendant to the crime or alibi evidence. Defenders must insist that the law not ignore scientific principles and developments, and prevent jurors from being exposed to unreliable evidence that violates due process. For example, social science research demonstrates that there is little correlation between witness confidence and the accuracy of the identification;²⁶ however, witness certainty has a substantial influence on jurors.²⁷ As such, defenders must use scientific research to challenge the reliability of identification evidence exposed to confirmatory or post-identification feedback leading to inflated certainty and confidence.

The burden of successful implementation of Act 466 falls not just on law enforcement but also on judges, prosecutors, and defenders. Everyone must do their part to ensure that an innocent person is not mistakenly identified and wrongfully convicted. Wilbert Jones spent nearly forty-six years in prison for a crime he did not commit. The only evidence used by the State to convict Mr. Jones was the testimony of a single eyewitness. Act 466 opens the door for scientific principles and developments to assist in achieving more accurate convictions so that tragedies like Mr. Jones's occur with much less frequency.

26. Report of the Special Master at 34, *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (available at <https://www.physics.smu.edu/pseudo/Eyewitness/NJreport.pdf>); *see also* *State v. Lawson*, 291 P.3d 673, 704 (Or. 2012); *State v. Guilbert*, 49 A.3d 705, 715–41 (Conn. 2012).

27. Report of the Special Master, *supra* note 26, at 33–34.