Eyewitness identification: 'I noticed you paused on number three.'

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Abstract
An eyewitness to a crime is the most damaging evidence the government can present in a criminal trial. The impact on the jury of a witness pointing to the defense table and saying “that is the man right there – I will never forget his face” is overwhelming. The prosecutor can often support the veracity of the identification by providing testimony that the witness previously identified the accused in some sort of a photo spread. If the witness is a victim, police officer or some other witness sympathetic to the government, the testimony usually goes something like this: “The officer showed me the lineup and I picked the defendant before the spread hit the table.”

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This article is published as Nettles, W., Nettles, Z. & Wells, G.L. "Eyewitness identification: 'I noticed you paused on number three.' The Champion, (1996): 10-12, 57-59. Posted with permission.
Champion

November, 1996

Feature

*11 EYEWITNESS IDENTIFICATION: 'I NOTICED YOU PAUSED ON NUMBER THREE.'*

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An eyewitness to a crime is the most damaging evidence the government can present in a criminal trial. The impact on the jury of a witness pointing to the defense table and saying "that is the man right there -- I will never forget his face" is overwhelming. The prosecutor can often support the veracity of the identification by providing testimony that the witness previously identified the accused in some sort of a photo spread. If the witness is a victim, police officer or some other witness sympathetic to the government, the testimony usually goes something like this: "The officer showed me the lineup and I picked the defendant before the spread hit the table."

The jury is led to believe that the decision by the witness to pick the same person whom the government believes committed the offense is a decision made solely by the eyewitness based upon his or her independent memory of the perpetrator's face. In fact, the decision to pick the suspect is often a product of police procedures that are likely to produce an outcome that is consistent with the expectations of the police. The expectations of the police can be so powerful that the behaviors of those administering the photo spread can supplant the independent memory of the witness.

Many defense lawyers have had eyewitness cases that have seemed puzzling to them in one way or another. In some cases, for instance, the eyewitness stated earlier to police that he or she did not get a look at the perpetrator's face, or didn't think that he or she could identify the perpetrator, or gave a description that was so vague that the eyewitness appeared to have no clear memory at all. Nevertheless, the eyewitness identified the suspect from a photo spread or a lineup and is now quite certain of the identification. How could it happen that, shortly after the crime, the eyewitness seemed to have a poor memory, but, later the eyewitness identified the defendant confidently? Does memory get better with time? No. Fortunately, research and theory in scientific psychology provides one answer to what is happening in many cases of this type. Psychologists who have studied eyewitness identification argue that the very methods used by the police in conducting a lineup or photo spread can be the source of 1) an eyewitness' decision as to whom to identify and 2) the eyewitness' confidence in his or her identification.

Many psychologists are appalled by the procedures used by police in conducting lineups and photo spreads -- and the tendencies of defense lawyers and courts to overlook these problems. [FN1] The idea that the methods used by police investigators might be contributing to eyewitness error has been taken seriously by psychologists since at least 1978. [FN2] Witnesses viewing lineups and photo spreads are especially vulnerable to suggestion.

Three scientific principles help illuminate the nature of the problem. An understanding of these three principles can place a defense lawyer in a better position to provide the jury with an alternative explanation for why the witness chose the accused from the photo spread. To the extent that the three principles described here seem applicable to the defense lawyer's case, we recommend that the defense lawyer retain a psychologist as an expert to educate the judge and jury on these principles.
The first principle is that people are influenced by the expectations of other people. This principle is exemplified by the Experimenter Expectancy Effect.

The second principle is that people often do not realize they are being influenced. This principle underscores the importance of telling the witness the suspect may or may not be in the lineup.

The third principle is that people can be made to feel confident that their memory is accurate even if it is inaccurate. This principle relates to the principle of Confidence Malleability. By educating the judge through pretrial motions and educating the jury through cross and direct testimony, the defense lawyer can begin to undermine the common belief that the witness's decision to choose the accused was based upon the witness's independent memory. The defense lawyer can show the jury that the procedure the police chose to use was so suggestive that it could easily overpower the witness's independent memory.

**Experimenter Expectancy Effect**

"There is extensive literature demonstrating that interviewers unintentionally transmit information to their subjects." [FN3] An interviewer (or experimenter or tester) can make the subject respond with the desired outcome. This is known as the Experimenter Expectancy Effect. This effect has been found in numerous studies and everyday life situations. The only way to keep the interviewer from affecting the outcome of the interview is for the interviewer to be unaware of the desired outcome. This is known as a "blind" testing procedure. In a blind procedure neither the tester nor the person being tested knows the expected result. When testers know the desired outcome, they tend "to obtain results they expect, not simply because they have correctly anticipated the response but rather because they have helped to shape the response, through their expectations." [FN4]

The cues suggesting the experimenter's expectations are usually covert, often quite subtle, and can include visual signals such as raised eyebrows, change of posture or auditory cues such as a change in voice tone. [FN5] These cues are especially powerful when the investigator and the witness are in close physical proximity and a verbal exchange occurs. [FN6]

The need for blind testing procedures in scientific research is so widely acknowledged that scientific experiments are commonly rejected for publication if the interviewer knew the desired outcome. The tester may try to mask his or her expectations. Nevertheless, these expectations will inadvertently leak to the subject. The Experimenter Expectancy Effect does not presume that the interviewer intentionally leads the eyewitness or that the interviewer is even aware that he or she is influencing the eyewitness. Nor does *12 the Experimenter Expectancy Effect assume that the eyewitness has conscious awareness that the interviewer is influencing his or her behavior. Given the power and importance of the Experimenter Expectancy Effect, psychologists say, "The officer conducting the lineup or photo spread should not be knowledgeable of whom the police suspect in the case." [FN7]

In a scientific experiment, failure to keep the investigator blind as to the desired response of a given subject being tested could be sufficient grounds for peer rejection of the results. In police stations, the investigator who administers the photo spread almost always knows which photo would confirm his hypothesis, if only the eyewitness would chose it.

Although most of the influence in administering lineups and photo spreads is likely to be nonverbal, it is surprising how often there is direct verbal influence. A common complaint of police investigators is that eyewitnesses look at a photo spread or lineup and appear reluctant to choose anyone. When this happens, the officer administering the lineup or photo spread will sometimes direct the eyewitness' attention to the suspect by saying "I noticed that you paused on number three." Did the eyewitness pause on number three? We will never know unless there was a video recording of the session. Nevertheless, the message to the eyewitness is clear; the officer would not have said this unless number three is the suspect. From this point on, the eyewitness would be unable to distinguish between his or her own memory and what came from the officer's suggestion.

The state can easily avoid tainting eyewitness identification evidence by having a "blind" individual present the lineup. The investigator can observe through a one-way mirror or closed-circuit camera. A blind procedure, at no
cost to the state, will prevent the lineup from being tainted by the Experimenter Expectancy Effect. The burden is on the government to prove the procedure it used is not "unnecessarily suggestive and conducive to irreparable mistaken identification." [FN8] The remedy to provide an untainted procedure is simple and inexpensive. Therefore the procedure currently being used by law enforcement is "unnecessarily suggestive." [FN9] This violates the Supreme Court's express prohibition against the use of procedures that are "unnecessarily suggestive." [FN10]

**Importance of Telling the Eyewitness that the Suspect May or May Not Be in the Lineup**

Controlled studies show it is essential for the investigator to warn the eyewitness the actual suspect may or may not be present in the lineup. [FN11] Eyewitnesses seem to approach the lineup or photo spread situation with the assumption that the perpetrator is present and that their task is to pick someone. Studies show that eyewitnesses often select someone even when the actual suspect is not in the lineup unless they are explicitly warned that the actual suspect might or might not be in the lineup. Failure to warn the eyewitness the actual suspect might or might not be in the lineup reinforces the eyewitness' tendency to "approach the lineup with the assumption that the suspect is in the lineup and that their task is to decide which lineup participant is the culprit." [FN12]

A lineup administrator's failure to mention the actual suspect might not be present in the lineup strongly suggests to the eyewitness that the response of "none of the above" is unacceptable. The failure of the investigator to inform the eyewitness that the perpetrator may be absent produces a suggestive, unreliable lineup. Researchers feel "The logic behind the 'might or might not be present' recommendation is so powerful and important that it seems unlikely that anyone could seriously debate the necessity of including the statement." [FN13]

**Confidence Malleability**

There is only a modest correlation between the confidence displayed by a witness in making an identification and the accuracy of the identification. "There is considerable evidence that false identifications are often asserted [by the eyewitness] with as much confidence as accurate identifications." [FN14] Nevertheless, a jury believes the confidence shown by the eyewitness is an excellent indication of the accuracy of the identification. Studies prove that mock jurors rely heavily on witnesses' confidence when making belief decisions but are not able to differentiate between accurate and inaccurate statements. [FN15]

The degree of confidence displayed by the witness is an issue of fact the jury uses to decide how much weight to give the eyewitness' testimony. At first thought, this seems quite reasonable. But what about the fact that it is possible for the police to increase the confidence displayed by the witness, which then serves to increase the believability of the witness? [FN16] The effect of increasing a witness' confidence is called the Confidence Malleability Effect. Confidence malleability refers to the tendency for an eyewitness to inflate his or her confidence in a false identification because someone else has suggested to the eyewitness that the identification made by the eyewitness was correct. In one study, the confidence of eyewitnesses who had made false identifications from a photo spread was inflated an average of 25 percent when it was suggested to the witness that his or her choice was correct. [FN17]

The police can inflate the confidence of an eyewitness by telling the witness he or she has chosen the person suspected of the crime. In most cases once the witness has displayed any tendency toward choosing the suspect the officer will inform the witness that the person he or she has chosen is the suspect. By telling the witness he or she has made the correct decision the officer has tainted the witness' memory. Once the officer tells the witness he or she made the "correct" decision, the witness will forever be more confident of the choice he or she made. If the witness also views the accused later at pretrial court hearings or repeatedly views the accused in the media, the image encountered in these settings often becomes the perpetrator's face in the witness' mind. The jury will then see a witness who is confident and will give weight to the confidence the witness displays on the stand. The jury's confidence in the witness is based not on the witness' own memory but on the police procedures that influenced the memory. An eyewitness with an inflated confidence level appears to the jury to be more believable. Once the officer tells the witness that he or *57* she made the correct decision, any eyewitness confidence the witness may display is tainted. The United States Supreme Court has decided that once an eyewitness testimony is tainted it is not admissible. [FN18]
Historically, evidence that has been obtained through suspect procedures has been excluded. Tainted evidence is not reliable evidence. For a conviction to be sustained it must be supported by and founded upon reliable evidence. Again, the state can easily avoid tainting the confidence of the eyewitness by asking the eyewitness at the time of the identification how confident he or she is in the identification, before there is any chance that someone would tell the eyewitness about the "correctness" of the identification. As with the identification itself, the question of the eyewitness about his or her confidence should be asked by someone who does not know whether the eyewitness identified the suspect.

In Mapp v. Ohio, [FN19] the United States Supreme Court extended the exclusionary rule to the states via the Fourteenth Amendment. In later cases when the Court was faced with improperly obtained or tainted evidence it has decided the proper remedy was exclusion. The Supreme Court decided that a trial court must suppress evidence seized during an improper arrest. [FN20]

In all of these cases, the state attempted to use tainted evidence. In each case the Supreme Court mandated that due process required the trial court to suppress the tainted evidence. Similarly, in cases where suggestive identification procedures are used, the identification is tainted and due process requires that the court suppress the fruits of those procedures, including the testimony of the eyewitness.

**Pretrial Hearing**

If the government intends to introduce evidence of an out of court identification procedure such as a photo lineup, a hearing must be held. The defendant is entitled to this hearing, out of the presence of the jury, pursuant to Neil v. Biggers. [FN21] The purpose for the hearing is for the court to hear evidence to determine the likelihood of misidentification. In making this determination, the court gives the trial court five factors to consider. This hearing also provides the defense with an opportunity to ask open-ended questions. During this hearing the defense lawyer can learn what the witness would say in front of the jury. The scope of the questions is only limited by the factors set forth in Neil v. Biggers.

During this pretrial hearing it is important to establish several facts. First, the officer who presented the photos knew which one was the suspect. Before the defense can argue Experiment Expectancy Effect, the defense must establish that the officer knew which person in the lineup was the suspect.

Second, establish that the officer was in close proximity to the witness when the lineup was presented. This is important because the Experiment Expectancy Effect is most powerful when the officer and the witness are in close proximity.

Third, establish exactly what was said when the lineup was presented to the witness. The defense should not be satisfied with the answer that begins, "Well I don't know, something like..." Insist the officer tell you exactly what was said to the witness. With a little insistence the officer will usually have to admit he or she does not recall exactly what was said. This allows the defense to argue the witness was not told the suspect "may or may not" be present in the lineup. Therefore, the witness felt undue pressure to succumb to the effect of Experiment Expectancy Effect.

Fourth, establish what was said during the time the witness was viewing the lineup. Often, it is asserted that nothing was said or that the witness cannot recall what was said. Remember, however, that nothing actually had to be said in order for the officer to have led the witness. Explore questions about where people stood, the touching of photos, the officer's tendency to move around and the behaviors of people in the room, especially those who knew which one was the suspect.

Fifth, establish what was said after the witness made a choice from the photo lineup. It is important to know whether the officer told the witness he or she made the "correct" decision.

While establishing the information above, you should also take the opportunity during the hearing to conduct a discovery and press the witness for exact details. Again, the questions that may be asked are limited only by the rather broad confines of Neil v. Biggers, supra. These factors provide the defense lawyer with plenty of room to
explore exactly what the witness knows about the event. If the witness strays from the information given in police reports or investigative notes it is usually best to not confront the witness during the hearing. Instead, make a note of the discrepancy. During the trial you can then document how the witness' memory has changed. It is very effective to be able to show the jury that at the time of the incident the investigative reports say the witness initially thought the perpetrator looked like x, y and z. Later, while the witness was under oath, the witness said the perpetrator looked like a, b and c. During the hearing, it is important to press the witness to describe every possible detail of the perpetrator. [FN22]

**Proper Frame of Mind for Trial**

Often, defense lawyers perceive the adverse eyewitness as a willing participant in a police attempt to convict their client. This often causes the lawyer to harbor an animosity toward the witness. The jury, on the other hand, sees the witness as an innocent bystander who was dragged into court to help the government in its prosecution. Because the jury perceives the witness as an innocent bystander, it is important that the defense lawyer treat the witness accordingly. The defense lawyer should not portray the witness as a liar. The witness may be incorrect without being dishonest. The defense lawyer should portray the witness as someone who has been fed misinformation. The eyewitness is mistaken because the police, by using suggestive procedures, have given him or her incorrect information. With this understanding the lawyer should attack the belief itself rather than attack what the witness believes.

**Opening**

During opening it is important that the defense lawyer take away the sting of the government's case. To do this the lawyer must first tell the jury that there is no doubt that the eyewitness, when prompted by the government lawyer, will dutifully turn and point to the accused. The government will have the jury believe this indicates the eyewitness is correct. Argue to the jury that the witness' in-court identification only shows that the witness knows which person in the courtroom is on trial. The accused may be dressed in a sweater or open collared shirt and be surrounded by lawyers. There is no doubt which person is the accused.

Tell the jury the trial is not a contest to see if the witness can identify the accused as the government would have the jury believe. Tell the jury that you will provide it with *58 another reason why the witness is able to pick the accused. The reason has nothing to do with who committed the crime. The reason the accused was chosen is because of three well-known scientific principles. Tell the jury the evidence will show that the police investigating the case knew nothing about these three important principles. Because the police investigating the case knew nothing about these principles an innocent person is seated at the defense table. Briefly explain the principles to get the jury interested. Tell the jury it probably does not know anything about these important principles, but it is critical for it to know about these principles before it decides the defendant's fate. Because you, the defense lawyer, thought the jury would want to know about these principles you got an expert. The expert will explain these principles. Once the jury understands these principles, they will see why it is possible that the defendant is innocent.

**Cross of the Police Officer**

With the information gathered from the pretrial hearing, the defense lawyer should know exactly what the officer will say on cross. This allows the defense lawyer to ask such questions as:

"You are the person who put this lineup together?"

"Because you put the lineup together, you knew which of the photos was the suspect?"

"Knowing which of the photos was the suspect, you presented the lineup to the witness?"

"Once you presented the lineup to the witness you don't know exactly what you said to the witness do you?"

"You were present while the witness viewed the lineup?"
"Once the witness chose the suspect you put in the lineup, you said he or she made the correct choice?"

"You took no steps to protect against the Experimenter Expectancy Effect?"

"The reason you took no steps to guard against the Experimenter Expectancy Effect is because you don't know anything about it?"

"You took no steps to prevent the effects of Confidence Malleability?"

"The reason you took no steps to prevent against effects of Confidence Malleability is because you don't know anything about it?"

The proper frame of mind is that the police officer conducted the photo spread in the manner he did because he does not know any better. In the event the officer tries to rely on the "it is not our policy" position, focus your cross on the policy. Ask the officer what steps his policy takes to prevent against Experimenter Expectancy Effect. The response will typically be there are no steps or that he does not know what that means. If he answers that he does not know that that means you are free to assert since he did not know what it means it is safe to assume he took no steps to guard against the principle's effects.

Your questioning of the officer in front of the jury should reveal the investigator did not tell the witness the suspect may or may not be in the lineup. There is usually little need to explore this area further. This leaves the defense lawyer in the position to argue in closing that if the officer had known about the importance of telling the witness the suspect may or may not be present surely he or she would have taken the proper precautions. Further questioning at this point, beyond getting the officer's admission that the instruction was not given, will only give the officer an opportunity to latch on to the concept and suddenly "remember" that, although he did not use the exact phrase, he did tell the witness the suspect may not be present.

The questioning of the officer should reveal to the jury that the witness was told by the officer that the choice the witness made during the lineup procedure was the "correct" one. It should also reveal that the officer who presented the photo lineup knew which photo was the suspect. During questioning, it is useful to get the officer to admit he knew nothing about any of the three principles discussed here. This makes the expert witness' testimony more relevant and more interesting to the jury.

Cross of the Witness

The proper frame of mind when crossing the witness is that the witness is just wrong. The witness has been led astray by the procedures the government chose to use. It is wrong to treat the witness as someone who is not telling the truth. The witness believes he or she is telling the truth. It is up to the defense lawyer to show the jury that the witness is unable to give an accurate account of what happened. All discrepancies in the witness' testimony must be pointed out to the jury. These discrepancies are evidence that the witness' memory is changing. The reason it is changing is because the witness' memory can be manipulated. The jury simply cannot rest a conviction on a memory that is ever-changing. In closing the defense lawyer can argue the jury has had the opportunity to watch the witness' memory change during the course of the investigation and trial.

Direct Examination of the Expert

Before an expert's testimony may be admitted the defense must first show the expert testimony meets the standards set forth in Fed. R. Ev. 702. [FN23] In many states, the courts have precluded the defense from using expert eyewitness testimony to discuss such issues as weapon focus or cross racial identification. However, this is different. Here the defense is providing expert testimony that is relevant to the weight and credibility the jury should give the procedure the government chose to use in conducting the photo lineup. In Crane v. Kentucky, [FN24] the state used coercive procedures to extract a statement from the defendant. The trial court refused to allow the defense to present testimony regarding the coercive tactics. The Supreme Court said ". . . whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation Clause of the Sixth Amendment ..., the Constitution guarantees criminal defendants a meaningful opportunity to present a
complete defense." [FN25] Before the jury can decide the proper weight and credibility to assign any evidence, Due Process, Compulsory Process and the Confrontation Clause all require that the defense be allowed to provide evidence about the coercive nature surrounding the taking of the statement. [FN26]

In Crane, the Supreme Court held the defense has a right to educate the jury about the coercive procedures used to obtain the confession. Likewise, the defense has a right to educate the jury about the coercive procedures used to conduct a photo lineup. When the government chooses to use a suggestive procedure to obtain evidence, the defense has a right to provide information and opinion evidence to allow the jury to decide properly the weight to give the result of the suggestive procedure. In a case where the government has chosen to use a coercive technique to conduct a photo lineup Crane provides the defense with a constitutional right to present evidence so the jury can decide how much weight and credibility to assign the photo lineup. The expert should be allowed to tell the jury that the procedure the government has chosen to use has the potential to produce an invalid result. The expert can testify that if a scientific study were to be conducted in a similar fashion the scientific community would reject the results because of the methods used to gather the information.

*59 The expert can tell the jury the purpose of a photo lineup is to gather information. The procedure the government chose to use to gather this information was flawed because the three principles were ignored. Any collection of evidence must guard against the potentially tainting influences of Experimenter Expectancy Effect. The expert must give a lay person's description of this principle. Make sure the jury understands that the effects are so subtle that neither the officer nor the witness would be aware that the witness was being influenced. The expert can then tell the jury how easy it would have been for the government to guard against Experimenter Expectancy Effect. All the government had to do was to make sure the officer presenting the photo spread did not know which photo belonged to the suspect. During cross the government may ask the expert for some specific examples of the Experimenter Expectancy Effect that occurred during this particular procedure. The expert can point out that we will never know exactly what went on during the procedure because the government chose not to record the procedure. Because the government chose not to videotape the procedure, the expert can only base his/her opinion upon the facts that he/she knows. The fact is the person presenting the lineup or photo spread knew which person was the suspect. When the presenter knows which person is the suspect, he or she cannot help but give the witness subtle clues which effect the procedure.

The direct examination should next focus on the importance of telling the witness that the suspect may or may not be in the lineup. The expert must make the jury understand that by failing to give the instruction that the suspect may or may not be present the witness is likely to believe that it would be unacceptable for the witness to provide the answer that he/she does not see the suspect. The Experimenter Expectancy Effect, coupled with the witness' belief that he or she must pick someone, will produce an unreliable result. The jury must be made to understand that, in effect, the witness is being told by the government "we have the guy and that is him right there. It is your job to pick him."

The expert should address the principle of Confidence Malleability. Since the government chose not to record the identification procedure, the confidence of the eyewitness at the time of the identification cannot be assessed. The expert should explain that the confidence the witness shows on the stand is no indication of the reliability of the eyewitness' memory. The jury should be made to understand that studies show juries tend to place a lot of weight on the degree of confidence displayed by the witness. In a case where the witness has been told he or she made the correct decision, however, the jury should assign no significance to the fact the witness appeared confident on the witness stand. The confidence that was displayed by the witness was a product of the confidence bolstering procedure that the government chose to use.

The expert should conclude his or her testimony with an opinion as to the reliability of the procedure the government used. The expert can testify that a violation of any of the principles would make the procedure suspect. Violation of any two (or all three) of the principles renders the procedure especially unreliable.

**Closing**

If the defense lawyer has conducted the trial correctly, the jury has become educated on the principles discussed above. With an educated jury the defense lawyer can discuss the reasons why the procedure the government used
produced a faulty identification. Remind the jury what it was told during the opening. It was told the witness would be confident. The investigators did not take any steps to guard against Experimenter Expectancy Effect. The investigators did not tell the witness the suspect may or may not be in the photo spread or lineup. Before the trial the jury may not have assigned much importance to any of these principles. Now the jury knows why the improper identification procedure can result in a person standing accused of a crime he or she did not commit.

'I Will Never Forget His Face'

When the state conducts a photo spread or lineup and fails to tell the eyewitness that the suspect may or may not be present it fails to guard against the tainting effects of Experimenter Expectancy Effect and it fails to guard against the tainting effects of Confidence Malleability, and a false identification will likely occur. The defense lawyer must explain to the jury that eyewitness identification and such statements as "That is him, I will never forget his face" are not, according to scientific evidence, as trustworthy as they may sound and can lead, if unchallenged, to the conviction of an innocent person.

NOTES


FN4. Id. at 377.


FN9. Id.

FN10. Id.


FN13. Id.


FN15. Accuracy, Confidence, And Juror Perceptions In Eyewitness Identification, Wells, G. L., Lindsay, R. C. L., & Ferguson, T. J., JOURNAL OF APPLIED PSYCHOLOGY, 64, 440-448 (1979).


FN17. Id.


FN25. Id. at 690.


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