POLICE IDENTIFICATION PROCEDURES:
A TIME FOR CHANGE

Lt. Kenneth Patenaude*

In the spring of 2004, I received a phone call from a representative of the New York Innocence Project, a group of lawyers and law students dedicated to helping those unjustly convicted in criminal court. As Detective Bureau Commander for the Northampton Police Department in Massachusetts, this would seem to be an unusual or surprising phone call—considering it was coming from the "dark side," a.k.a., defense counsel. After brief introductions, I was asked to prepare a short presentation about my experiences with the U.S. Department of Justice, National Institute of Justice (NIJ), Technical Working Group for Eyewitness Evidence (TWG), and how those experiences led to the incorporation of new eyewitness evidence procedures within the Northampton Police Department.

In 1998, I was invited by the Department of Justice to work with a small group of criminal justice professionals to develop improved procedures for the collection and handling of eyewitness evidence. The goal

---

* Detective/Lieutenant, Northampton Police Department, 29 Center St., Northampton, MA 01060. A twenty-eight year veteran and departmental hostage negotiator with over twenty years of supervisory experience. He has sixteen years of detective bureau experience and has been commander for the past thirteen years. Lt. Patenaude holds a Master's Degree in Criminal Justice Administration.

Lt. Patenaude has been recognized for his outstanding service as a member of the National Institute for Justice, Technical Working Group for Eyewitness Evidence. He also played a key role in developing Eyewitness Evidence: A Guide for Law Enforcement, a guide on how to conduct criminal investigation interviews, showups, and lineups. Lt. Patenaude is a published author and co-author of the eyewitness evidence instructional guide and training manual, as well as an eyewitness evidence article, and various departmental policies for the Northampton Police Department.

Lt. Patenaude has lectured for numerous criminal justice agencies and organizations across the country. He has been invited to speak for a number of District Attorney's offices, law enforcement agencies, as well as the Northampton Criminal Public Defense Attorney's office. Lecture topics have included domestic violence, crime scene protection, Massachusetts Firearms Laws and most extensively on eyewitness evidence procedures.

1 The Technical Working Group (TWG) for Eyewitness Evidence was established in 1998 by the U.S. Department of Justice in Washington, D.C., to develop best practices for handling and collecting eyewitness evidence. TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter NIJ GUIDE].
was to generate more accurate and reliable eyewitness evidence for evaluation by the criminal justice community. The project was inspired by recent cases in which DNA evidence was used to overturn convictions that were based primarily on eyewitness evidence. The project culminated in the NIJ publication, *Eyewitness Evidence: A Guide for Law Enforcement* (NIJ Guide) and its accompanying training manual, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (NIJ Trainer's Manual).

Throughout my career as an investigator, I treated eyewitness accounts with care, knowing that witnesses make mistakes. After my Department of Justice experience, I had a much better understanding of how and why witnesses' details could be distorted or in some cases, wrong. These Department of Justice publications offer the law enforcement community a written set of procedures that give some structure and consistency to the process of collecting and handling eyewitness evidence. The outcome, a blend of social sciences, courtroom tenets, and investigative practices and experiences, is a workable set of procedures to reduce the possibility that misidentifications will lead to wrongful convictions.

For the past several years, I have been actively involved with training investigators, attorneys and judges in the best practices for collecting and handling eyewitness evidence. Of the police officers I trained, the vast majority said that they had never received formal training in eyewitness identification procedures, and that their departments do not have eyewitness evidence policies. Most investigators indicated that they learned their identification procedures from their predecessors-procedures which were based on longstanding practice. The lawyers attending these training programs were also unaware of any police procedures related to the handling of eyewitness evidence.

I strongly suggest to the law enforcement community that agencies adopt policies and training programs that will provide police with the proper procedures for the collection and handling of eyewitness evidence. The policy and training program should cover topics such as:

---

2 Id.

3 TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT (2003) [hereinafter NIJ TRAINER'S MANUAL].

4 See id. at v; NIJ GUIDE, supra note 1, at iii (proposing a set of common procedures that, though not universally applicable, may increase the accuracy and reliability of witness identification in many cases).
understanding human memory, the use of cognitive interviewing techniques, and the best practices for administrating photo arrays and live lineups.

Law enforcement officials should know that more than 170 individuals have been exonerated since the inception of DNA technology.5 The most important question we need to ask ourselves is: how were over 170 innocent individuals wrongfully convicted? There are many factors involved in these wrongful convictions, such as bad science, incompetent defense attorneys, prosecutorial malfeasance, and police misconduct—to name a few. The most common factor is eyewitness error by confident but mistaken eyewitnesses.6 Eyewitnesses have a great deal of influence in criminal investigations and even greater influence with juries. The investigators and police administrators who are responsible for conducting criminal investigations, upon looking at these exoneration cases and well-established social science research, must realize that eyewitness testimony is not infallible. The NIJ Guide offers practical improvements to current police practices that "can decrease the number of wrongful identifications and should help to ensure that reliable eyewitness evidence is given the weight it deserves in legal proceedings."7

I began the process of educating members of the Northampton Police Department at the ground level, by writing a policy dealing specifically with the handling and collection of eyewitness evidence. Using the newly published NIJ Guide, I developed a training program to introduce the new policy. This policy replaced the longstanding practices for collecting eyewitness evidence, which were never put in writing. The training program highlighted the changes in our procedures, and provided explanations and reading materials in support of the mandated changes. As part of this training, officers were given a copy of the NIJ Guide,8 a published article authored by a number of social science researchers,9 as well as the U.S. Department of Justice publication, Convicted by Juries, Exonerated by Science, which highlights the first twenty-

6 Id.; see also Gary L. Wells et al., From the Lab to the Police Station, 55 AM. PSYCHOLOGIST 581, 586 (2000).
7 NIJ GUIDE, supra note 1, at 2.
8 Id.
9 Wells, supra note 6.
eight exoneration cases. The publications and training emphasized the need for change, and provided officers with information about the numerous factors that contributed to the many mistaken, but confident, eyewitness accounts. In particular, the training program highlighted the fact that eyewitness testimony is not infallible.

As with most new policies, the administration monitored implementation of the new procedures. After a year, I surveyed the investigators who used the new eyewitness procedures on many occasions. They were more comfortable using the new sequential identification procedures, and more confident with the results obtained under these procedures than they had been under the old policy. We concluded that simultaneous procedures, although accepted for decades by the courts, could contribute to misidentifications due to the influence of relative judgment processes—which may occur when a witness compares lineup subjects to one another instead of relying on his or her memory of the perpetrator. As a result of the investigators' comfort and confidence with the sequential identification process, the department changed its policy to mandate that only sequential procedures are used in future identification processes.

Under the new policy, the department strongly preferred that the double-blind administration procedure be applied by our officers. In 2003, we made an additional modification to the policy, by making the blind administration of photo arrays the mandatory, rather than preferred, method of presentation. Although there was a concern that costs and personnel shortages would prevent smaller departments from effectively utilizing the blind administrator, these problems never materialized for the Northampton Police Department. We are very comfortable with our current policy, and feel that we have made every attempt to reduce the chance that misidentification will lead to wrongful convictions in our jurisdiction.

It is essential that law enforcement investigators and administrators change the way that eyewitness evidence is collected and preserved. There are 170 compelling reasons to change the predominant practices for handling eyewitness evidence. There are over 170 people who were fortunate enough to be exonerated by evidence that was collected at the scene of their alleged crime. But how many other innocent people are still in prison or jail without the possibility of exoneration based on

DNA or other evidence? Police administrators must have the fortitude and commitment to develop the best practices for collecting and preserving eyewitness evidence. These changes begin at the recruit level with proper and consistent training.

To bring structure and consistency to an antiquated system, law enforcement agencies that do not currently have an eyewitness identification policy should institute one. This policy should be based on social science research, the NIJ Guide, and sound police practices.