

New Jersey courts taking the lead to inform jurors about the fallability of eyewitness testimony

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Once again, New Jersey steps to the forefront of progressive thinking with regard to certain criminal justice issues. While there are certainly areas of our criminal justice system that need improvement, we should also take the time to salute our system when it takes a step forward into modern reality. This marks one such occasion.

The New Jersey Supreme Court recently released an enhanced jury instruction regarding eyewitness testimony, a new court rule, and revised an existing court rule. These developments were the result of work done by a committee formed by the Court following its decision in *State v. Henderson*. In *Henderson*, the Court adopted the report of a Court-appointed Special Master commissioned to study the reliability of eyewitness testimony, and determined that scientific:

evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised. Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.

Cases in which individuals imprisoned based upon eyewitness testimony have later found to be innocent based on DNA evidence, and compelling stories on [60 Minutes on the subject](#), have helped frame a nationwide criminal justice debate on how courts should address the inherent fallibility of eyewitness evidence.

THE NEW COURT RULE AND THE AMENDMENT TO THE DISCOVERY RULES

By and large, the new court rule and the amendment to the criminal discovery rules codifies what has been [established practice](#) in New Jersey. Even so, it is significant that the Court has now established set procedures for all courts, prosecutors, and law enforcement personnel to follow if an out-of-court identification procedure is to be placed before a jury.

First, the new court rule, Rule 3:11, will require, as a precondition for admissibility at trial, that any out-of-court identification procedure be recorded, electronically if possible, or in writing if not possible, to memorialize:

1. the place where the procedure was conducted;
 2. the dialogue between the witness and the officer who administered the procedure;
 3. the results of the identification procedure, including any identifications that the witness made or attempted to make;
 4. if a live lineup, a picture of the lineup;
 5. if a photo lineup, the photographic array, mug books or digital photographs used;
 6. the identity of persons who witnessed the live lineup, photo lineup, or showup;
 7. a witness' statement of confidence, in the witness' own words, once an identification has been made;
- and

8. the identity of any individuals with whom the witness has spoken about the identification, at any time before, during, or after the official identification procedure, and a detailed summary of what was said. This includes the identification of both law enforcement officials and private actors who are not associated with law enforcement.

If police do not record the identification procedure, or have a good explanation for why the identification procedure was not recorded, the out-of-court identification may be ruled inadmissible at trial.

Second, the Court also amended the criminal discovery rules to require prosecutors to provide the defense attorney with all information and reports about the identification procedure.

THE NEW PATTERN JURY INSTRUCTION

While it is laudable that the new court rule and the amendment to the discovery rule will standardize how police record identification procedures and allow defense access to the documents generated, significantly more important is the Court's new pattern jury instruction for eyewitness testimony. Our courts have relied upon pattern jury instructions on a wide array of legal principles for years, with those pattern instructions available for all to see on the Court's website. The new pattern jury instruction on eyewitness testimony will acquaint jurors with scientific information about the reliability and accuracy of eyewitness testimony.

The new pattern jury instruction on eyewitness evidence is lengthy, and we will not publish it in its entirety here. Listed below are some of the highlights of what juries will now be told about eyewitness identification evidence:

- Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.
- A witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.
- Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.
- The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.
- You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.
- A person is easier to identify when close by. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.
- Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.

- The influence of alcohol can affect the reliability of an identification. An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who drank a small amount of alcohol.
- The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification.
- If facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.

When it comes to evaluating the reliability of out-of-court identifications, such as identifications made from in-person line-ups or from photographic arrays, juries will be instructed on the following important considerations:

- A suspect should not stand out from other members of the lineup. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness's confidence in the identification because the selection process seemed so easy to the witness. It is, of course, for you to determine whether the composition of the lineup had any effect on the reliability of the identification.
- Lineups should include a number of possible choices for the witness, commonly referred to as "fillers." The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness's memory. A minimum of six persons or photos should be included in the lineup.
- When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during the identification process and, if so, whether that affected the reliability of the identification.
- A "showup" is a process where the defendant was the only person shown to the witness at that time. Even though such a procedure is suggestive in nature, it is sometimes necessary for the police to conduct a "showup" or one-on-one identification procedure. Although the benefits of a fresh memory may balance the risk of undue suggestion, showups conducted more than two hours after an event present a heightened risk of misidentification. Also, police officers must instruct witnesses that the person they are about to view may or may not be the person who committed the crime and that they should not feel compelled to make an identification. In determining whether the identification is reliable or the result of an unduly suggestive procedure, you should consider how much time elapsed after the witness last saw the perpetrator, whether the appropriate instructions were given to the witness, and all other circumstances surrounding the showup.
- A lineup administrator who knows which person or photo in the lineup is the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will identify the suspect, even if the suspect is innocent. For that reason, whenever feasible, live lineups and photo arrays should be conducted by an officer who does not know the identity of the suspect.
- You should consider what was or what was not said to the witness prior to viewing a photo array. Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence.
- Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.

Look for courts across the country to follow New Jersey's lead on this important subject. A fair and balanced criminal justice system not only convicts the guilty, but clears the innocent. These developments are a step further toward that goal.

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