

Eyewitness Error and Wrongful Convictions

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Wrongful Convictions

- ▶ To date, 259 people have been exonerated in the United States by post-conviction DNA testing.
- ▶ Texas leads the nation with 43 DNA exonerations.

43 DNA Exonerations in TX

1. Gilbert Alejandro, 3.5 years incarcerated, exonerated in 1994
2. Kevin Byrd, 12 years incarcerated, exonerated in 1997
3. Ben Salazar, 5 years incarcerated, exonerated in 1997
4. A.B. Butler, 16 years incarcerated, exonerated in 2000
5. Roy Criner, 10 years incarcerated, exonerated in 2000
6. Carlos Lavernia, 15 years incarcerated, exonerated in 2000
7. Anthony Robinson, 10 years incarcerated, exonerated in 2000
8. David Pope, 15 years incarcerated, exonerated in 2001
9. Calvin Washington, 11 years incarcerated, exonerated in 2001
10. Mark Webb, 10 years incarcerated, exonerated in 2001
11. Richard Danzinger, 11 years incarcerated, exonerated in 2002
12. Chris Ochoa, 11.5 years incarcerated, exonerated in 2002
13. Victor Thomas, 15 years incarcerated, exonerated in 2002
14. Wiley Fountain, 16 years incarcerated, exonerated in 2003
15. Donald Good, 13.5 years incarcerated, exonerated in 2004
16. Josiah Sutton, 4.5 years incarcerated, exonerated in 2004
17. Entre Karage, 6.5 years incarcerated, exonerated in 2005
18. Brandon Moon, 17 years incarcerated, exonerated in 2005
19. Keith Turner, 4 years incarcerated, exonerated in 2005
20. George Rodriguez, 17 years incarcerated, exonerated in 2005
21. Arthur Humphrey, 17.5 years incarcerated, exonerated in 2006
22. Billy Miller, 22 years incarcerated, exonerated in 2006
23. Eugene Henton, 1.5 years incarcerated, exonerated in 2006
24. Billy Smith, 19 years incarcerated, exonerated in 2006
25. Larry Fuller, 19.5 years incarcerated, exonerated in 2007
26. Andrew Gossett, 7 years incarcerated, exonerated in 2007
27. Greg Wallis, 17 years incarcerated, exonerated in 2007
28. James Waller, 10 years incarcerated, exonerated in 2007
29. James Giles, 10 years incarcerated, exonerated in 2007
30. Steven Phillips, 24 years incarcerated, exonerated in 2008
31. Ronald Taylor, 12 years incarcerated, exonerated in 2008
32. Charles Chatman, 26.5 years incarcerated, exonerated in 2008
33. Michael Blair, 13.5 years incarcerated, exonerated in 2008
34. Thomas McGowan, 23 years incarcerated, exonerated in 2008
35. Patrick Waller, 15.5 years incarcerated, exonerated in 2008
36. Ricardo Rachell, 5.5 years incarcerated, exonerated in 2009
37. Timothy Cole, 13 years incarcerated (passed away in prison), exonerated in 2009
38. Johnnie Lindsey, 27 years incarcerated, exonerated in 2009
39. James Woodard, 27 years incarcerated, formally pardoned in 2009
40. Jerry Lee Evans, 23 years incarcerated, exonerated in 2009
41. Michael Green, 27 years, exonerated 2010
42. Allen Wayne Porter, 19 years incarcerated, exonerated in 2010
43. Cornelius Dupree, 30 years incarcerated, exonerated in 2011

The 43 Texas DNA exonerees spent over 600 years in prison for other people's crimes.

Eyewitness Error

- ▶ Nationally, more than 75% of wrongful convictions exposed by DNA involved incorrect eyewitness identifications.
- ▶ In Texas, it 86%!

"Any wrongful conviction is a tragedy because it leaves the guilty unpunished and condemns the innocent to prison, or death."

-- Wallace B. Jefferson, Chief Justice of the Texas Supreme Court

Texas Reckons with the Problem

- ▶ 2001 – Passed law creating path to post-conviction DNA testing
- ▶ 2005 – Began funding innocence projects at the four public law schools
- ▶ 2008 – CCA created the Criminal Justice Integrity Unit, led by Judge Barbara Hervey
- ▶ 2009 – Created the Timothy Cole Advisory Panel on Wrongful Convictions

Criminal Justice Integrity Unit

- ▶ An ad hoc committee created in 2008 by Judge Barbara Hervey of the Texas Court of Criminal Appeals.
- ▶ “Created to review the strengths and weaknesses of the Texas criminal justice system. Furthermore, the TCJIU’s purpose is to bring about meaningful reform through education, training, and legislative recommendations.”

TCJIU on Eyewitness Reform

- ▶ “TCJIU recognizes that one of the leading causes of false convictions is erroneous eyewitness identifications. TCJIU urges the legislature to address this issue during this session of the legislature. It is the position of the TCJIU that instituting reforms in the eyewitness identification procedures used by law enforcement agencies throughout Texas should have the highest priority of any efforts in the area of wrongful convictions.”

Tim Cole Advisory Panel on Wrongful Convictions (TCAP)

In 2009 the Texas Legislature created a bipartisan group charged with assisting the Task Force on Indigent Defense with preparing a report with recommendations for preventing wrongful convictions

Cole Panel Recommendations

- ▶ Electronic Recording of Custodial Interrogations
- ▶ Eyewitness Identification Procedures
- ▶ Open-File Discovery
- ▶ Writs based on new Scientific Evidence
- ▶ Further clarification of DNA access
- ▶ Building upon/Expanding Innocence Projects' Role

The Limits of DNA

The overwhelming majority of criminal cases do not have DNA evidence which can clearly identify a perpetrator.

Eyewitness Memory Research

Eyewitness evidence is similar to trace physical evidence, in that it must be collected carefully, according to scientifically sound protocols.

If not, the reliability and evidentiary value of an identification can be compromised or ruined.

Enhancing Reliability

- ▶ Research has constructively identified strategies for reducing the risk of mistaken identification.

- ▶ Better procedures for conducting photo and live lineups can substantially reduce the risk of error.

Reform Successfully Implemented

- ▶ A growing number of jurisdictions have successfully implemented eyewitness protocol reforms, including:
 - Dallas
 - Austin
 - North Carolina
 - New Jersey
 - Wisconsin
 - . . . among others.

Support for Reform

- ▶ International Association of Chiefs of Police
- ▶ American Bar Association
- ▶ U.S. Department of Justice

Texas Police Lack Policies

- ▶ Most law enforcement departments in Texas do not have clear written procedures for conducting photographic or live lineups.
- ▶ A November 2008 study by The Justice Project found that only 12% of Texas law enforcement agencies have any written policies or guidelines for the conduct of photo or live lineup procedures.
- ▶ Most jurisdictions in Texas fail to implement widely endorsed best practices that have been proven to increase the reliability of eyewitness evidence.

Pending TX Legislation

- ▶ Does not “hard code” police procedures into statute.
- ▶ Requires adoption and implementation of written policies that meet certain conditions.
- ▶ Provides for the development of model policy.
- ▶ Remedy for non-compliance?

Pending TX Legislation

- ▶ HB 215 & SB 121 would require all law enforcement agencies to adopt and implement written policies for the conduct of live and photographic lineups which are informed by scientific research and incorporate best practices for reducing the risk of misidentification.
- ▶ Also provides for a model policy to be developed as a resource to local jurisdictions.

Pending TX Legislation

- ▶ The bill explicitly provides that if police fail to follow the requirements, such a failure does NOT by itself result in an identification being inadmissible.
- ▶ HB 215 is based on the consensus recommendation of the Timothy Cole Advisory Panel on Wrongful Convictions (TCAP).
- ▶ Legislation virtually identical to HB 215 passed the Texas Senate (CSSB 117) unanimously in 2009 but died on the House calendar at the end of the 81st Session.

Key Elements of Reform Protocol

- ▶ 1. Instructions to witnesses
- ▶ 2. Filler selection and lineup composition
- ▶ 3. Documentation of witness confidence
- ▶ 4. Prevention of inadvertent influence
- ▶ 5. Preventing reinforcing feedback.
- ▶ 6. Avoidance of repeated suspect exposure.
- ▶ 7. Strict limits on show-ups
- ▶ 8. Sequential presentation option

Cautionary Instructions

- ▶ Regardless of whether the true perpetrator is in a lineup, an eyewitness may feel pressure to make an identification.
- ▶ Witnesses should be instructed that the perpetrator may or may not be included in the lineup and that they should not feel compelled to make an identification.
- ▶ This removes some of the pressure to choose a suspect when the culprit may not be in the lineup.
- ▶ Extensive research has demonstrated that cautionary instructions reduce incorrect identifications with no decrease in correct picks.

Fair Lineup Composition

- ▶ Only one suspect in each lineup, with at least five fillers.
- ▶ Fillers should be selected to resemble the witness's description of the perpetrator.
- ▶ The suspect or the suspect's photo should not unduly stand out and should be presented in a uniform format to that of the fillers.

Neutral Blind Administration

- ▶ The person who administers the photo or live lineup to a witness should not know the identity of the suspect.
- ▶ The purpose of keeping the administrator "blind" as to which person in the lineup is the suspect is to prevent the administrator from unintentionally influencing the results.
- ▶ This is generally done inadvertently through verbal or non-verbal behavior. Witnesses may be very motivated to make an identification and seek to interpret the behavior of the lineup administrator for cues about the suspect, even if no such cues exist. A double-blind protocol also eliminates the problem of investigators interpreting ambiguous witness comments and other behavior through the lens of their theory of a suspect's guilt.

Avoid Repeated Exposure of Suspect to Witnesses

- ▶ There is an inherent risk in repeatedly presenting a witness with a suspect or a suspect's photograph.
- ▶ In some exonerations, a witness did not identify a suspect in an initial lineup but subsequently identified him in a later lineup (in which the only common person was the one wrongfully convicted).
- ▶ Because of the fragile nature of witness memory, particularly the possibility of "memory transference" between events, multiple exposures undermine the reliability of an identification.

Documentation

- ▶ Witness degree of certainty must be documented immediately and in the witness's own words, prior to any feedback regarding the witness's identification.
- ▶ Witness reports of confidence have been shown to be highly malleable, leading to inflated self-reported certainty between a line-up and trial.

Sequential Presentation

- ▶ An eyewitness viewing a lineup tends to make a judgment about which individual looks most like the perpetrator relative to the other members of the lineup.
- ▶ This natural tendency toward "comparison shopping" is problematic when the suspect in the lineup is not in fact the perpetrator.
- ▶ Presenting the photos or lineup members one at a time discourages the tendency to judge the lineup members against each other and to make an identification through a process of elimination, in favor of a more direct comparison of each person to the witness's memory.

Show-ups

- ▶ Never should conduct a show-up if there is probable cause to arrest
- ▶ Prior to the show-up, the witness should provide officers with as complete a description of the suspect as possible.
- ▶ Show-ups should not be conducted when the suspect is in a cell, handcuffed, or dressed in jail clothing.
- ▶ Show-ups should not be conducted with more than one witness present at a time
- ▶ Suspects should not be required to put on clothing, speak words, or perform other actions mimicking the perpetrator.
- ▶ Words or conduct by the police that may suggest to the witness that the individual is or may be the perpetrator should be scrupulously avoided. For example, one should never tell the witness that the individual was apprehended near the crime scene, that the evidence points to the individual as the perpetrator or that other witnesses have identified the individual as the perpetrator.

Conclusion

- ▶ Eyewitness evidence has proven much less reliable than once believed.
- ▶ We cannot do without it, so we must ensure that procedures are in place to make it as reliable as possible.
- ▶ More careful protocols for collecting eyewitness memory evidence will reduce the risk of error.
