



Behavioral Science Research Leads to Department of Justice Guidelines for Eyewitness Evidence

by Elaine Cassel

“The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification,” noted Justice Brennan in United States v. Wade.¹ While the criminal justice system necessarily relies heavily on the testimony of eyewitnesses to develop leads, identify suspects, and establish the circumstances of a crime,² the malleability of eyewitness testimony has long been of interest to cognitive psychologists. More than twenty-five years ago University of Washington psychologist Elizabeth Loftus, a leading contributor to memory research, published the results of her first experiment demonstrating the suggestibility of eyewitnesses.³ She has continued to conduct research in many areas of eyewitnesses testimony, including the controversial area of “repressed” childhood memories.⁴ Others who have contributed significantly to eyewitness research include Roy Malpass, who studies how law enforcement procedures influence eyewitness recall and identification,⁵ and Solomon Fulero, specializing in the effect of eyewitness testimony on juror decision-making.⁶

However great these research contributions, they have been slow to find their way into law enforcement investigative procedures. Now, almost a quarter century after Loftus published the first research on the limitations of eyewitness accounts, the United States Department of Justice has promulgated voluntary guidelines for use by law enforcement personnel when gathering eyewitness evidence, Eyewitness Evidence: A Guide for Law Enforcement.⁷ The guide owes its existence to a 1996 Justice Department sponsored study, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial⁸, which identified 28 persons who were wrongfully convicted largely on the basis of eyewitness testimony. Disturbed by that report, Attorney General Janet Reno established a multidisciplinary panel of law enforcement professionals, psychologists, criminologists, prosecutors, and defense attorneys to recommend law enforcement practices and procedures for collecting and preserving eyewitness evidence.⁹

The guidelines cover the gamut of investigations—from taking 911 calls reporting crimes, obtaining preliminary statements from

and conducting formal interviews with eyewitnesses, preparing and presenting “mug” books and composite images, conducting lineups and showups, and preserving records of witness interviews. Though the guidelines vary with each procedure, several general rules apply.¹⁰ Investigators should: (1) ask open-ended questions; (2) refrain from asking leading or suggestive questions; (3) separate witnesses during interviews and instruct them not to discuss the details of the incident with other witnesses; (4) caution witnesses about listening to or reading media reports of the crime; (5) not disclose that they have identified a suspect; and (6) encourage witnesses to contact the investigator if they recall more details. Procedures for mug books, composites, and lineups emphasize nonsuggestiveness and uniformity and similarity of photos and live subjects.¹¹ In her introduction to the guide, Reno expresses the hope that all law enforcement investigators will adhere to the recommended practices insofar as they are feasible and that jurisdictions will utilize the procedures in developing their own protocols.¹²

The trial record in Strickler v. Greene, a Virginia case before the U.S. Supreme Court on appeal of the 4th Circuit’s denial of a petition for a writ habeas corpus, demonstrates how law enforcement can “taint” eyewitness recollection by using procedures and practices that the guidelines specifically admonish against.¹³ The Court denied the petition of Tommy David Strickler, convicted and sentenced to death by a 1991 Augusta County jury of capital murder, abduction, and robbery in the death of Leanne Whitlock. At the heart of the petition was whether the prosecution’s failure to turn over Brady evidence in Harrisonburg Police Detective Daniel Claytor’s files warranted reversal of the conviction. The Court upheld the Fourth Circuit’s denial of the petition (that had been granted by the District Court), finding that the Brady material would not have changed the outcome of the conviction and sentence. However, the majority admitted that the testimony of Anne

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Stoltzfus, the only so-called witness to Whitlock's abduction from a Harrisonburg shopping mall, was a compelling "narrative" filled with vivid detail, and that the undisclosed evidence would have severely impeached or entirely discredited her trial testimony.¹⁴

Appealing to the juror's natural tendency to give great weight to the testimony of eyewitnesses¹⁵, the prosecutor said in his closing argument, "[W]e are lucky enough to have an eyewitness who saw [what] happened out there in that parking lot. [In a] lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Mrs. Stoltzfus was there, she saw [what] happened."¹⁶ But just what Stoltzfus saw, what she recalled as her own recollection, and what she testified to from her own memory (as opposed to "memories" based upon the assistance she received Harrisonburg Police Detective Daniel Claytor) is conjecture.¹⁷ Stoltzfus credited her vivid trial account to her "exceptionally good memory" and to the "very close contact with [petitioner that] ... made an emotional impression" on her. She had "absolutely no doubt" about seeing Strickler abduct Whitlock.¹⁸ Yet, Detective Claytor notes that the Court agreed should have been produced to defense counsel revealed the following: (1) Stoltzfus could not identify Whitlock two weeks after the crime during her first interview with Claytor; (2) Stoltzfus identified Whitlock two weeks after her first meeting with Claytor only after spending several hours with Whitlock's boyfriend "looking at current photos" of the victim;¹⁹ (3) early in the investigation she could not identify the perpetrators;²⁰ (4) in a letter written to Claytor three days after their first interview Stoltzfus admitted that she had not remembered even being at the mall, but that her daughter had helped "jog" her "vague memory";²¹ (5) in a note to Claytor, Stoltzfus only vaguely described the getaway car that she so vividly recalled at trial, and she failed to mention the license plate number that she testified she dictated to her daughter, a passenger in her car;²² (6) in a letter to Claytor, Stoltzfus thanks him for his "patience with her sometimes muddled memories" and notes that "it would have been nice if I had remembered all this at the time and simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on..."²³ In a letter to the Harrisonburg Daily News-Record that appeared after the trial, Stoltzfus summarized Claytor's role in scripting her testimony: "It never occurred to me that I was witnessing an abduction. In fact, if it hadn't been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn't realize it. What sounded like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture"(emphasis supplied).²⁴ Detective Claytor's files contained riveting examples of Stoltzfus' minimal actual recall, a totally understandable phenomenon for events that take us by surprise.²⁵ What is troubling, however, is how Stoltzfus' threadbare recollection became whole cloth. The guidelines directly address the techniques that resulted in this unreliable testimony finding its way into the most grave of criminal proceedings—a trial for capital murder.

In Strickler's case, the Court held that there was sufficient evidence other than Stoltzfus' testimony to justify conviction and imposition of the death penalty. But in September, 1998, Illinois death row inmate Anthony Porter was two days from execution when Northwestern University Journalism students, led by Professor David Protess, convinced the Illinois Supreme Court that they had found the perpetrator of the pair of 1982 murders

for which Porter was about to die. The key evidence against him had been a witness who testified to having seen Porter shoot the victims. After the students used the trial transcript of the eyewitness and others to reenact the crime in the Chicago park where it took place, they were convinced that the eyewitness account was implausible. They set out to find the real killer. They did. And he, Alstony Simon, confessed that he shot the victims during a disputed drug transaction.²⁶

Not all eyewitnesses are unreliable.²⁷ Neither do all inaccurate accounts lead to wrongful conviction. Given the nature of memory, eyewitness testimony can never be totally accurate and reliable. However, law enforcement investigators who follow the procedures outlined in the guide will assist eyewitnesses in accurate recall, lessen the possibility of wrongful identifications, and help insure that judge and jury will hear the most reliable eyewitness testimony possible, given the fallibility of human memory. Defense attorneys will be watching—and listening.²⁸ 🍷

ENDNOTES

- 1 United States v. Wade, 388 U.S. 218, 228 (1967)
- 2 Even though eyewitness testimony is important in civil trials, this article is limited to criminal cases.
- 3 Elizabeth Loftus and J. C. Palmer, Reconstruction of Automobile Destruction: An example of the Interaction Between Language and Memory, 13 *Journal of Verbal Learning and Verbal Behavior*, 585-589 (1974). Loftus and Palmer studied how wording of questions influenced memory retrieval. In one experiment, subjects were questioned after viewing a film of a automobile collision. Groups of subjects responded differently when asked how fast the cars were going when they "smashed" (40.8 mph), "collided" (average response of 39.3 mph) "bumped" (38.1 mph), and "hit" (34.0 mph). In another study Loftus and a colleague showed a film of an accident scene. Subjected who were asked "Did you see the broken headlight?" were two to three times more likely to answer "yes" than subjects who were asked "Did you see a broken headlight?" There was *no* broken headlight! Elizabeth Loftus and George Zanni, Eyewitness Testimony: The Influence of the Wording of a Question, 5 *Bulletin of the Psychonomic Society*, 86-88 (1975).
- 4 Loftus, former President of the American Psychological Society, is a popular and frequent expert witness, testifying in more than 200 civil and criminal trials, including those of serial killer Ted Bundy, and accused child killer George Franklin, whose murder conviction based upon his daughter's alleged recovered memory of the event many years prior to the occurrence was eventually reversed on appeal. Among her publications (some with colleagues), those most helpful to attorneys include: Eyewitness Testimony (rev.) (1996); Ten Cases of Eyewitness Identification: Logical and Procedural Problems, 18 *Journal of Criminal Justice*, 291-305 (1990) (with W. Wagenaar); Behold with Strange Surprise: Judicial Reactions to Expert Testimony Concerning Eyewitness Reliability, 56 *UMKC Law Review*, 1-45 (1987) (with N.G. Schneider); Expert Testimony on the Eyewitness, in Eyewitness Testimony: Psychological Perspectives (with Gary Wells, Eds.), pp. 273-282 (1984); and Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 65 *Journal of Applied Psychology*, 9-15 (1980).
- 5 See Enhancing Eyewitness Memory in Psychological Issues in Eyewitness Identification, 177-203 (S. L. Sporer, R.S. Malpass, & G. Koehnken, eds., 1996); Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 *Journal of Applied Psychology* 482-489 (1981); with P.G. Devine, Measuring the Fairness of Eyewitness Identification Lineups, in Evaluating Witness Evidence, 81-102 (S.M.A. Lloyd-Bostock & B.R. Clifford eds., 1983).
- 6 The Role of Behavioral Research in the Free Press/Free Trial Controversy: Another View 11 *Law and Human Behavior* 11, 259-264 (1987); with S.D. Penrod, Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?, 3 *Forensic Reports*, 233-2599 (1990).
- 7 Technical Working Group for Eyewitness Evidence. Eyewitness Evidence: A Guide for Law Enforcement (1999) [hereinafter Eyewitness Evidence]. Available online at <http://www.ncjrs.org>.
- 8 Edward Connors, Thomas Lundregan, Neal Miler, & Tom McEwen. Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (1996). Available online at <http://www.ncjrs.org>.
- 9 Eyewitness Evidence, *supra*, at 2. Malpass, Fulero and Gary Wells (see note 5, *supra*) were the only behavioral scientists on the panel. Wells' contribution to the study of eyewitnesses include, What Do We Know About Eyewitness

- Identification, 48 *American Psychologist*, 553-571 (1993); with T.J. Ferguson & R.C. Lindsay, The Tractability of Eyewitness Confidence and its Implications for Triers of Fact, 66 *Journal of Applied Psychology* 688-696 (1981); with M.R. Leippe, How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications?, 66 *Journal of Applied Psychology* 682-687 (1981); and with S.M. Rydell and E.P. Seelaw, The Selection of Distracters for Eyewitness Lineups, 78 *Journal of Applied Psychology* 835-844 (1993).
- 10 Although research related to eyewitness deals with the three stages of memory—encoding, storage, and retrieval—the research that forms the basis the NJ recommendations addresses how law enforcement procedures impede and sometimes taint the eyewitnesses’ recall of their experiences.
- 11 Eyewitness Evidence, *supra*, at 11-25.
- 12 Eyewitness Evidence, *supra*, at 2.
- 13 Strickler v. Greene, ___ U.S. ___, 119 S. Ct. 1936, 67 USLW 3683 , 67 USLW 4477 (1999).
- 14 Both majority (*Id.* at 1954) and minority opinions (*Id.* at 1961) note the vivid detail of her “recollection” and the impact of the narrative framework within which it was presented. Justice Souter references the empirical research indicating the power of the narrative presentation of testimony in citing Elizabeth Loftus and J Doyle, Eyewitness Testimony: Civil and Criminal 5 (3d ed. 1997). See *Id.* at 1961.
- 15 Jurors overestimate the validity of eyewitness testimony because they are either insensitive to or unaware of the factors that compromise eyewitness accuracy. Lawrence W. Wrightsman, Michael T. Nietzel, & William H. Fortune, Psychology and the Legal System, 174 (4th ed. 1998). Jurors are insensitive to the biases introduced by police investigative procedures and the factors that interfere with accurate encoding and retention of information. See B. L. Cutler, S.D. Penrod, & H. R. Dexter, Juror Sensitivity to Eyewitness Identification Evidence, 14 *Law and Human Behavior* 185-192 (1990). See also, B.L. Cutler, & S.D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law (1995).
- 16 *Id.* at 1953.
- 17 The majority concluded that the notes from Claytor’s files would have enabled petitioner’s trial counsel to totally or substantially discount Stoltzfus’ testimony (*Id.*, at 1953), entirely discredit it (*Id.* at 1953), “severely” impeach it (*Id.* at 1955, 1961) or entirely exclude it (*Id.* at 1955). However, the majority found that petitioner had failed to establish the reasonable probability of a different result, the standard for vacating the conviction on habeas petition. *Id.* at 1953, 1955.
- 18 *Id.* at 1944. Empirical research suggests that witness’ confidence in memory is not, as is mistakenly and ironically stated by the dissent (*Id.* at 1959), indicative of accuracy and reliability. See R.K. Bothwell, K.A. Deffenbacher, & J.C. Brigham, “Correlation of eyewitness accuracy and confidence : Optimality hypothesis revised.” *Journal of Applied Psychology*, 72, 691-695. That confidence is an indicia of reliability is often cited in some jury instructions, based upon rulings in Neil v. Biggers, 409 U.S.188 and Manson v. Braithwaite, 432 U.S. 98 (1997).
- 19 *Id.* at 1944. By the time she testified, Stoltzfus expanded her description of the victim to a “college kid who was ‘singing and happy.’” *Id.* at 1945.
- 20 *Id.* at 1944.

- 21 *Id.* at 1945.
- 22 *Id.* at 1945. She testified that she “tore into little pieces” the note card onto which her daughter allegedly wrote down the license plate number before she talked to Claytor.
- 23 *Id.* at 1945.
- 24 *Id.* at 1950.
- 25 Cutler & Penrod, *supra* note 14.
- 26 John McCormick, “Coming Two Days Shy of Martyrdom”, *Newsweek* (February 15, 1999) visited at online at <http://www.newsweek.com/nw-srv.issue/07-99a> on November 6, 1999.
- 27 However, Justice Frankfurter once noted, “What is the worth of identification testimony even when contradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent and not due to the brutalities of ancient criminal procedure.” *The Case of Sacco and Vanzetti* 30 (1927), quoted in *United States v. Wade*, *supra*, note 1, at 328.
- 28 Behavioral science research, including that of psychologists, sociologists, and criminologists, contribute significantly to research applicable to the juvenile and criminal justice systems. See, for instance, “Psychologists Help National Institute of Justice Shape Federal Response to Crime,” *American Psychological Society Observer*, at 16 (September 1999), quoting Christy Visher, science advisor to the Director of the National Institute of Justice, “Psychology is a critical discipline for NIJ in that it is very important to the study of crime in both the developmental sense and in the understanding of interventions.” The reports discussed herein are just two examples of hundreds of research reports, fact sheets, and policy papers based upon the research of eminent psychologists, sociologists, and criminologists sponsored and published by research agencies within the Department of Justice Office of Justice Programs (OJP), including the National Institute of Justice (NIJ), the Bureau of Justice Statistics (BJS), and the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Government funding for behavioral research increased with the passage of the Violent Crime Control and Law Enforcement Act of 1994, which allowed NIJ to expand its initiatives into areas such as causes, treatment, and prevention of drug use and violence. Many publications are available online at the National Criminal Justice Reference Service (NCJRS) web site (see notes 7 and 8) or through links to individual agencies from the Department of Justice web site, <http://www.doj.gov>. Numerous online databases for social and behavioral science research can be accessed through the Virtual Library of Virginia (VIVA) databases in public and university libraries. Portions of VIVA are available through the Internet, but most of the research databases can be accessed only through institutional servers. Reliable, scholarly search engines available online can be found at <http://www.clas.ufl.edu/users/gthursby/psi/> (psychology links maintained by the University of Florida) <http://info.lib.uh.edu/indexes/psych.htm> (a megasite for psychology indexes, abstracts, and bibliographies maintained by the University of Houston), and a site with links to sociology databases maintained by McMaster University (Canada), <http://www.mcmaster.ca/socscidocs/w3virtsoclib/database.htm>.

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