

# THE NATIONAL ACADEMIES

*Advisers to the Nation on Science, Engineering, and Medicine*

## **Opening Statement**

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**Co-chair, Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts  
National Academy of Sciences  
Thursday, October 2, 2014**

Good morning. I'd like to welcome you and thank you for participating in this morning's discussion.

My name is Tom Albright. Along with my colleague Judge Jed Rakoff, I am here today as co-chair of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts. We are here to present findings and recommendations from the committee's report, *Identifying the Culprit*. Afterward we will be happy to take questions.

Accurate eyewitness identifications aid in the apprehension and prosecution of the perpetrators of crimes. As we have seen in recent years, however, inaccurate identifications may lead to the prosecution of innocent people while the guilty remain free. It is therefore crucial to our system of justice that we follow eyewitness identification procedures that achieve maximum accuracy and reliability.

Our committee began work on this topic in the fall of 2013 with support from the Laura and John Arnold Foundation. The National Academy of Sciences appointed a study committee to evaluate the existing body of scientific literature as it relates to eyewitness identification so as to (1) assess the current state of knowledge regarding eyewitness identifications, (2) identify gaps in our understanding of eyewitness identification, and (3) offer recommendations for law enforcement and the judiciary when considering eyewitness evidence.

Our committee was composed of a diverse and highly talented group of individuals, some expert in science, others in law enforcement, and still others in law. It was extremely gratifying for me to work with these individuals. And it has been especially rewarding to collaborate with and share leadership of the committee with my distinguished colleague Judge Rakoff, from whom I have learned a great deal.

In assessing the current state of eyewitness identification research, current policies and procedures for conducting eyewitness identifications, and the evaluation of eyewitness identification evidence by the courts, we reviewed relevant scientific literature and heard from numerous experts, including researchers, law enforcement officials, and members of the judiciary.

We examined two general categories of scientific research: The first of these categories is basic research aimed at understanding the human visual sense and memory. The second category is applied research directed at the specific problem of eyewitness identification.

Basic research on vision and memory has yielded important insights into how these processes operate, as well as their capabilities and their limitations. Research on vision has identified restrictions on what may be seen under specific environmental and behavioral conditions, factors that impede our ability to pay attention to critical features of a visual scene, distortions of perceptual experience that may result from personal expectations, and ways in which emotion and stress may enhance or suppress specific visual perceptions. Research on memory has revealed that the things we remember often are not faithful records of our experiences.

Memories may be forgotten or contaminated, biased by the very practices designed to elicit recall, and heavily influenced by emotional states both at the time an event is experienced and when memories are later retrieved. From basic research, we thus recognize that there are insurmountable limits on vision and memory that are imposed by our biological nature and the

properties of the world we inhabit, and these limitations have implications for eyewitness identification procedures and expectations about eyewitness performance.

Basic research cannot, however, provide a complete picture of conditions in the field, and thus the committee considered research applied to the specific problem of eyewitness identification.

Applied research suggests that accuracy and reliability of eyewitness identifications are influenced by additional factors. These factors fall into two categories. The first is related to protocols followed by law enforcement and legal communities. Referred to as systems variables, these factors can be managed by the criminal justice system. Law enforcement officers might, for example, provide consistent and specific instructions to an eyewitness before an identification procedure is carried out. The second category of factors that influences eyewitness identification is related to characteristics of the crime scene, the perpetrator, or the witness. This second group of factors is referred to as estimator variables. Unlike system variables, estimator variables cannot be controlled by the criminal justice system. Examples include the level of light at a crime scene, the presence of a weapon during the commission of a crime, or the race of the culprit relative to that of the witness.

While this applied research has identified the key variables that determine an individual's ability to make an accurate identification, substantial uncertainty exists with regard to the effect and the interplay of these variables. Consequently, our committee identifies a number of areas where additional research could more clearly illuminate the effects of system and estimator variables on accurate and reliable identifications. We recommend that the scientific and legal communities collaborate to establish a national research initiative on eyewitness identification to pursue these needed studies. .

Additionally, our report identifies areas where scientific research has validated specific practices that positively affect eyewitness identifications. We offer recommendations to incorporate these practices as standard law enforcement procedures. The committee recognizes that the law

enforcement community, while operating under considerable pressure and resource constraints, is working to improve the accuracy of eyewitness identifications. Unfortunately, these efforts have not been uniform and often fall short as a result of insufficient training, the absence of standard operating procedures, and the continued presence of actions and statements at crime scenes and elsewhere that may intentionally or unintentionally influence eyewitness identifications.

As such, the committee recommends several best practices that law enforcement should follow in handling eyewitness identifications:

First, law enforcement agencies should provide their personnel with training (a) about vision and memory and the variables that affect them, (b) on practices for minimizing contamination of eyewitness memory (for example, asking open-ended rather than leading questions), and (c) on protocols that may yield more accurate and reliable eyewitness identifications.

Second, law enforcement should employ blinded procedures for administration of photo array and live lineups. That is, lineup administrators should not be involved in the construction of the photo array or lineup and should not know the placement of the potential suspect; that way, they cannot inadvertently influence the witness. Law enforcement should also adopt clear, written policies and training on photo array and live lineup administration.

Third, law enforcement should develop a standard set of easily understood instructions to use when engaging a witness in an identification procedure. For example, witnesses should be instructed that the perpetrator may or may not be in the photo array or lineup and that the investigation will continue regardless of whether the witness selects a suspect.

Fourth, law enforcement should document a witness' level of confidence verbatim at the time when she or he first identifies a suspect. Expressions of confidence that happen later in the courtroom often deviate substantially from a witness's initial confidence judgment, and

confidence levels reported long after the initial identification can be inflated by factors other than the memory of the witness.

Fifth, law enforcement should video record eyewitness procedures, to obtain and preserve a permanent record of the conditions associated with the initial identification.

I would like to conclude my remarks by observing that much attention has focused recently on the issue of sequential versus simultaneous lineup procedures – that is, whether lineup images should be presented to an eyewitness one at a time (sequentially) or as a group (simultaneously). The question at the center of this focus is whether one or the other of these procedures significantly improves eyewitness performance, and should be adopted by law enforcement. The committee does not endorse one procedure over another at this time. The scientific research on this issue is unsettled. That is, the relative superiority of these competing identification procedures is unresolved. The committee believes, however, that the recommendations we have made with respect to law enforcement practices can improve eyewitness identification accuracy regardless of which procedure is used. Moreover, the committee recommends that caution and care be exercised when considering changes to any existing lineup procedure and that policy decisions regarding changes in procedures be made (1) on the basis of evidence of superiority and (2) in consultation with law enforcement agencies.

Judge Rakoff will now review the committee's findings and recommendations for the judiciary.

Judge Rakoff.

## Opening Statement

**The Honorable Jed Rakoff**

**Co-chair, Committee on Scientific Approaches to Understanding and Maximizing the  
Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts  
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Thank you, Tom. Good morning.

As Dr. Albright indicated, our committee reviewed extensive research, as well as materials submitted to the committee, in order to understand both the scientific underpinnings of eyewitness identification and the current state of law enforcement practices. In addition, the committee considered the legal standards used to evaluate eyewitness identification and reviewed many decisions by state and federal courts.

The evaluation by judges and juries of eyewitness identification testimony is not easy, because judges and juries are not as a rule familiar with the limitations and difficulties that attend the identification process. But scientific research has identified many of these processes and problems. We have therefore concluded that the best guidance for legal regulation of eyewitness identification evidence is provided not so much by past judicial practice and prior court rulings, as by a more careful use and understanding of scientific evidence to guide courts and juries.

For example, the *Manson v. Brathwaite* test that the Supreme Court promulgated in 1977 to regulate the fairness and the reliability of eyewitness identification evidence has, in our view,

become out-of-date, in that it does not incorporate insights gained from research conducted over the past three decades. For example, the *Manston* test considers the confidence that a witness expresses in the accuracy of his or her identification as an independent marker of reliability when, in fact, it is now well established that such confidence level can be powerfully influenced by extraneous factors and tends to vary materially over time. Thus, a witness who says in court that he is certain the defendant was the perpetrator he saw commit the crime will frequently have expressed much less confidence at the time of the original identification.

In light of our increased understanding, the committee offers a number of recommendations to allow courts and juries to better evaluate eyewitness evidence:

First, in order for judges to meet their basic obligation to insure the threshold reliability of evidence presented at trial, judges should make basic inquiries before eyewitness identification evidence is offered. For example, a judge could inquire about prior lineups, about information given to the eyewitness before the lineup, about instructions given to the eyewitness in connection with administering the lineup, about whether the lineup had been administered blindly, and the like. On the basis of these inquiries, the judge can allow such testimony, exclude it, or permit it in modified form.

Second, judges should take all necessary steps to make juries aware of prior identifications, the manner and time in which those identifications were conducted, and the confidence level expressed by the eyewitness at the time of the initial identification.

Third, and contrary to the practice of some courts, the committee recommends that judges have the discretion to allow expert testimony on the basic scientific principles influencing eyewitness

identifications. Because many scientific findings about perception and memory may be unknown to jurors and may be counterintuitive, such testimony will assist jurors in understanding the factors that may affect the accuracy of an eyewitness's identification. The committee views expert testimony as the most effective means of conveying this information.

Fourth, recognizing, nonetheless, that such expert testimony may not always be available, the committee recommends that the courts develop clear and concise jury instructions as an alternative method of conveying information regarding the factors that the jury should evaluate when considering eyewitness identification evidence. Such "model instructions" should be subject to periodic review to reflect new scientific developments.

These recommendations, when added to the committee's recommendations for new law enforcement training protocols, standardized procedures for administering lineups, better data collection, and additional research, will not only improve the accuracy of eyewitness identifications but also allow judges and juries to more effectively evaluate the degree to which such accuracy has been achieved.

Finally, let me say that it has been a privilege to work with such a brilliant scientist as Dr. Albright and with all the distinguished members of the committee.

Dr. Albright and I welcome your questions.