

# THE JUSTICE PROJECT

## **Eyewitness Identification Procedures in Texas**

A Report By

### **The Justice Project**

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# Eyewitness Identification Procedures in Texas

## *Executive Summary*

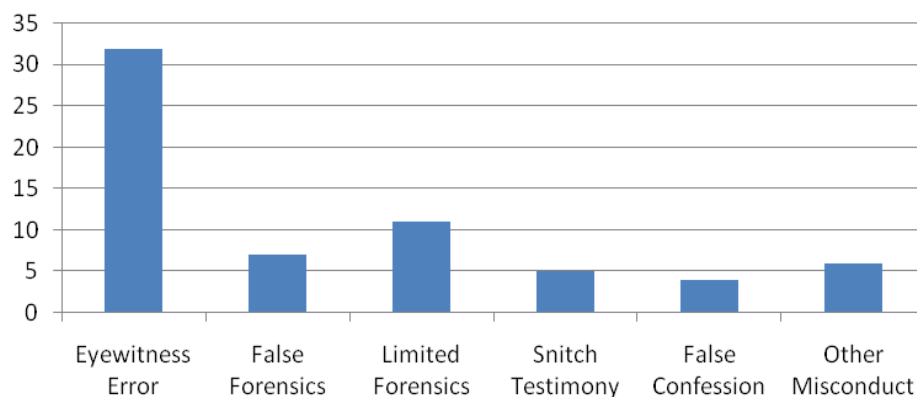
In a survey of the 1034 law enforcement agencies in Texas, The Justice Project (TJP) found that of the 750 departments who responded, only 88, or 12%, have written policies guiding the conduct of photographic and live eyewitness identification procedures that are in line with at least some widely endorsed best practices. This is highly problematic because mistaken eyewitnesses have played a role in 82% of the 38 DNA exonerations in Texas. Overall, the eyewitness identification policies reviewed in this study were incomplete and inconsistent across departments and content areas.

Key findings include that 7% or less of all law enforcement agencies in Texas have strong policies in the areas of cautionary instructions, lineup composition and filler selection, blind administration, and comprehensive documentation of procedures. This overall lack of sound, scientifically-based policy indicates that the State of Texas must pass legislation that requires departments to adopt written policies that implement best practices for the conduct of eyewitness identification procedures.

## *Introduction*

Faulty eyewitness identification has played a role in over 75% of the 223 DNA exonerations cases in our country thus far, making mistaken eyewitness identification the leading cause of wrongful conviction in the United States. The same holds true in Texas where 82% of the state's 38 DNA exonerations involved mistaken eyewitness identifications (see chart below).

### **Wrongful Convictions in Texas**



Both anecdotal evidence and scientific research indicate that eyewitness error is largely a result of faulty eyewitness identification practices carried out during investigations of crimes. Because eyewitness evidence, much like trace physical evidence, is susceptible to contamination if not collected properly, some identification procedures can actually increase the risk of false identification.

Extensive scientific research has concluded that the best eyewitness identification procedures include proper cautionary instructions where the eyewitness is told that the person who committed the crime *may or may not* be present in the photographic or live lineup<sup>1</sup>; the selection of fillers who match the eyewitness's description of the perpetrator and do not allow the suspect to unduly stand out<sup>2</sup>; blind administration wherein the person conducting the lineup has no knowledge of which photograph or person is the police suspect<sup>3</sup>; and complete documentation of the lineup procedure including a statement of the eyewitness's confidence in the identification in his or her own words before any feedback is given to the eyewitness.<sup>4</sup> These practical changes to identification protocols will help increase the likelihood of identifying the true culprit while enhancing protections for innocent people accused of crimes. These procedures have also been endorsed by organizations such as the U.S. Department of Justice, the American Bar Association, and the International Association of Chiefs of Police, but it is very clear that the vast majority of police departments have not actually adopted these practices.

### *Method*

TJP requested a copy of all written policies and procedures regarding photographic and live lineups from 1034 law enforcement agencies in Texas under the Public Information Act. Of the requests mailed to police and sheriffs' departments, TJP received responses from 750 (73%) departments. Of those, only 88 departments (about 12% of respondents) had any written policies or procedures governing the conduct of either photo or live lineups.

In order to determine the quality of the policies and procedures received, TJP analyzed each set of documents and separately rated photo and live lineup policies and procedures on a "Substantially Implements Best Practices" (+) or "Unacceptable" (-) scale in the areas of cautionary instructions, composition fairness, blind administration and comprehensive documentation. Our criteria for evaluating each of the content areas included:

- Cautionary Instructions
  - Substantially Implements Best Practices (+): Instructions are given to the witness prior to the presentation of photographic or live lineups to the effect that the person who committed the crime "may or may not" be among the photos or those presented in a live lineup, and/or that the witness should not guess or feel obligated to identify anyone.
  - Unacceptable (-): Instructions that do not address the fact that the perpetrator may not be included in the photographic or live lineup.

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<sup>1</sup> See, for example, N. M. Steblay. (1997). Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects. *Law and Human Behavior*, 21, 283-297.

<sup>2</sup> See, for example, G. Wells. (1978). Applied Eyewitness-Testimony Research: System Variable and Estimator Variables. *Journal of Personality and Social Psychology*, 36, 1546-1557.

<sup>3</sup> See, for example, G. Wells, A. Memon, and S. D. Penrod. (2006). Eyewitness Evidence: Improving its Probative Value. *Psychological Science in the Public Interest*, 7, 45-75.

<sup>4</sup> See, for example, G. Wells, E. A. Olson, & S. D. Charman. (2002). The Confidence of Eyewitnesses in Their Identifications From Lineups. *Current Directions in Psychological Science*, 11, 151-154.

- Composition Fairness
  - Substantially Implements Best Practices (+): Policies that require a minimum number of fillers, similarity in appearance of people presented in photos or in a live lineup, and uniformity in presentation of people or format and presentation of photographs so that the suspect does not unduly stand out.
  - Unacceptable (-): Policies that do not specifically address fairness in lineup composition as detailed above.
  
- Blind Administration
  - Substantially Implements Best Practices (+): Policies that require the administrator to be unaware of which person in a photographic or live lineup is the actual suspect, or equivalent mechanism to ensure blind administration.
  - Unacceptable (-): Any policy that does not require a blind administrator or equivalent, including those that merely instruct police officers to conduct the lineup in an unbiased manner and/or prohibit personnel from aiding the witnesses in the identification procedure.
  
- Comprehensive Documentation
  - Substantially Implements Best Practices (+): Policies that instruct officers to make a complete record (video or audio/stenographic) of the entire identification procedure and specifically require documentation of the witness's degree of certainty, in his or her own words, prior to any feedback from authorities.
  - Unacceptable (-): Policies that do not require documentation of witness certainty in the witness's own words prior to feedback and complete documentation of the entire procedure (video or audio/stenographic).

### *Findings*

Overall, TJP found that the policies and procedures regulating photographic and live lineups in Texas are largely inadequate and inconsistent across departments. Of the 1,034 departments we contacted and the 750 departments that responded, only 88 had any written protocols regarding either photographic or live lineups. As demonstrated in Appendix A (Page 8), the quality of these policies varied widely among departments across the state. This lack of standardized protocol indicates that Texas is failing to reap the benefits of systematic scientific research on eyewitness error or to follow the best practices recommended by the U.S. Department of Justice, the International Association of Chiefs of Police, the American Bar Association and other organizations.

Not only is there inconsistency across the state, there is also inconsistency across eyewitness policy content areas. As demonstrated by the table below, while 53 of the 88 departments require fairness in composition of photographic lineup procedures, only seven use blind administration procedures (see Appendix A for full results listed by department). In addition, departments are often inconsistent in their treatment of photographic and live lineups. While an

	Cautionary Instructions		Lineup Composition		Documentation of Procedure		Blind Administration	
	N	%	N	%	N	%	N	%
<b>+ Photo</b>	31	4.1%	53	7.0%	4	0.5%	7	0.9%
<b>+ Live</b>	22	2.9%	26	3.5%	2	0.2%	4	0.5%
<b>- Photo</b>	0	0%	16	2.0%	69	9.2%	51	6.8%
<b>- Live</b>	0	0%	21	2.8%	47	6.3%	28	3.7%

**Table 1: Number and Percent of Respondent Departments with Written Policies**

agency may have clearly articulated standards for photo lineups, there may not be an equivalent for the conduct of live lineups. (Some departments only conduct photographic lineups.)

*Cautionary Instructions*

The Texas law enforcement agencies that have some type of cautionary instructions for eyewitnesses generally have strong policies in place, particularly for photo lineups. The problem, however, is that the vast majority of departments do not require any cautionary instructions. TJP received only 31 policies from the 750 respondent departments for photographic lineups and 22 policies for live lineups. While these policies all implement an important best practice, they represent a small number of departments in the State of Texas. These numbers are especially troubling because requiring cautionary instructions is a simple, virtually cost-free way to help reduce the number of bad identifications that can take criminal investigations off course.

*Lineup Composition*

One of the most important aspects of a photographic or live lineup is the selection of “fillers” to be presented with the police suspect in a lineup. These are photos or individuals who the police know did not commit the crime but are included in a lineup as a safeguard against suggestive one-on-one identifications. Lineup composition fairness is particularly important in photo lineup filler selection, as suspects included in photographic lineups do not have the right to an attorney during the procedure. Sixty-nine departments presented TJP with some policy regarding filler selection for photographic lineups, and 53 of those were found to implement relevant best practices. One example of a well-constructed policy in this area is that of the Lewisville Police Department, which requires that officers should “select fillers who generally fit the witness’ description of the perpetrator.” They further address a situation where the suspect may not match the description given by the witness and state,

“When there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.”

The policy cautions, however, that officers should “avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.” In this way, the policy attempts to minimize incorrect identifications while preserving the good identifications.

Most other departments that implement best practices in this area included the following detailed statement regarding the number and types of photos to be used:

“Use at least six photographs of individuals who are reasonably similar in age, height, weight and general appearance and of the same sex and race; whenever possible, avoid mixing color and black and white photos, use photos of the same size and basic composition, and never mix mug shots with other snapshots or include more than one photo of the same suspect; cover any portions of mug shots or other photographs that provide identifying information on the subject, and similarly cover those used in the array.”

These instructions are important because they address the problem of suggestivity that results from inconsistent lineup composition. If all photos in a lineup are of the same form and display identical markings, an identification that results from the lineup will be much stronger and provide valuable evidence to prosecutors and juries.

Although there were fewer exemplary policies for filler selection and composition fairness regarding live lineups, a few departments, such as Benbrook Police Department, noted that fillers for live lineups should have characteristics that match those noticed by the eyewitness. University Park Police Department also stated that officers must “create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature (e.g. scars, tattoos, facial hair) used to describe the perpetrator by artificially adding or concealing that feature.” Again, these precautions help to prevent claims of suggestive, and therefore inadmissible, lineups.

#### *Blind Administration*

One problem that leads to mistaken eyewitness identification is that witnesses may be inadvertently cued toward a photo or individual in a lineup by the officer who conducts the procedure. Because the administrator can unknowingly impact the outcome of the lineup, it is imperative for the person who conducts the lineup procedure to have no knowledge of which photo or individual in the lineup is the suspect. By keeping the administrator “blind” to the identity of the suspect, we preserve the objectivity of the identification and ensure that eyewitness identification choices and confidence are not inadvertently influenced by the administrator.

Despite the scientific research and best practices recommending blind administration that have been available for years, only seven departments in Texas use a blind administrator for photo lineups, and only four require a blind administrator for live lineups. Haltom City Police Department, Lewisville Police Department, Llano County Sheriff’s Department, Lufkin Police Department, Richardson Police Department, University Park Police Department, and Waco Department Police Department all require blind administrators for photographic and/or live lineups. In addition, several of these departments recommend sequential presentation of photographs or individuals rather simultaneous presentation, which many studies indicate can strengthen identifications by reducing the urge for eyewitnesses to “comparison shop” among those presented to them.

The overwhelming majority of departments, however, attempt to address the question of neutrality by simply stating that officers must conduct all eyewitness procedures in a “fair and impartial manner” and that officers may not “assist” a witness in identifying a photograph or individual. While these policies may help stem intentional leading of an eyewitness,

unintentional verbal and nonverbal cues cannot be regulated merely by prohibiting them.<sup>5</sup> The fact that these cues are often inadvertent and unintentional virtually ensures that these policies will fail to safeguard innocent suspects.

### *Documentation of Procedure*

Documentation of lineup procedures is important because it provides juries with an objective record of the lineup at trial and provides a snapshot of the eyewitness's confidence in the identification. In Texas, however, only four departments have written eyewitness policies that require full documentation of lineup procedures and ask for a confidence statement from the witness. They include Lewisville Police Department, Llano County Sheriff's Department, Lufkin Police Department, and Richardson Police Department. Exemplary policies are those like Lufkin Police Department's policy that requires "a statement should be taken from the witness, immediately after the identification, and before any feedback, concerning the level of confidence the witness has in the identification. Make record of the specific words the witness used to describe their level of certainty." These policies provide the best assurance that juries will have the full picture of the procedure in order to be able to judge the quality of the eyewitness evidence in the event the case goes to trial.

Many departments, like Boerne, East Mountain, and Rio Vista Police Department record full lineup procedures and ask witnesses to document any doubts or uncertainties in the pre-viewing cautionary instructions, but their written policies fall just shy of best practices by failing to ask for a confidence statement once an identification has been made. This small change would bring another twelve departments into the "Substantially Implements Best Policies" category.

Unfortunately, many departments have documentation policies that simply meet minimum legal requirements. These departments either require that a photograph is taken of the live lineup composition or that a photocopy is made of a photo lineup to be entered into evidence. Although this is legally necessary and valuable, it does little to provide jurors with the full context of an identification procedure. Other departments hint at a more robust recording practice, but the policies themselves are too broadly worded to make them useful. One common example is that police officers should document the identification procedure in their reports without providing any detail about what should be documented. While this policy may imply that more complete documentation should occur, the lack of specificity does not ensure that all witness and administrator comments or confidence in an identification would actually be documented appropriately.

### *Conclusion*

Based on the great inconsistencies found in the quality of photo and live lineup procedures in Texas law enforcement agencies, combined with the lack of any written policies in the vast majority of jurisdictions, The Justice Project recommends that the State of Texas pass legislation that requires law enforcement agencies to adopt written standards for the conduct of photo and live lineups that implement important safeguards against eyewitness error.

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<sup>5</sup> L. Garrioch, & C. A. E. Brimacombe. (2001). Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence. *Law and Human Behavior*, 25, 299-315.

The benefits of required minimum policies in the areas of cautionary instructions, lineup composition, blind administration and comprehensive documentation make mandatory policies an easy choice to make. Not only can we help to prevent wrongful convictions based on faulty eyewitness identification, we can also make a stronger case against those who are identified using modern procedures that are founded on science. Investigating officers will be able to avoid claims of undue influence in lineup procedures, and fully documented lineups give the jury a way to effectively judge the quality of the evidence that is presented to them. Finally, strong eyewitness identifications reduce the chance that actual perpetrators are free to commit more crimes while innocent citizens serve time for crimes they did not commit.

As we discover more and more men and women across the country who have been wrongfully arrested, tried, and convicted, it is imperative that we learn from the past and stem the flow of faulty eyewitness identifications. By modernizing our policies and making them consistent across the state, we help to ensure that police officers, juries, innocent suspects, victims of crime, and the public are protected and served.

#### *About The Justice Project*

The Justice Project is a non-profit, non-partisan organization that works to improve the fairness and accuracy of the criminal justice system. TJP is based in Washington, D.C. and opened an office in Austin, Texas in 2006.

In 2007 TJP published “Eyewitness Identification, A Policy Review,” one in a series of policy reviews on the prevention of wrongful convictions, available at [www.TheJusticeProject.org](http://www.TheJusticeProject.org).

## Appendix A: Texas Eyewitness Lineup Procedures and Policies

TJP requested written policies on eyewitness identification procedures from 1034 Texas municipal police and sheriff’s departments. 750 departments (73%) responded to our request.

The 88 departments listed below provided TJP with written policies that addressed at least one of the four areas evaluated. Of the remaining 662 responsive departments, 629 indicated that they had no written policies for the conduct of eyewitness identification procedures. 33 departments provided some written material, but it did not address the conduct of photo or live lineup procedures. Those departments are not represented in the table below.

A “+” indicates that the department substantially implements best practices in this area. A “-” indicates that the department has some written policy in this area, but it does not substantially implement best practices.

A blank cell indicates that the department has no written policy to address this area.

<b>Texas Eyewitness Lineup Procedures and Policies</b>				
<b>Department</b>	<b>Cautionary Instruction</b>	<b>Composition Fairness</b>	<b>Documentation of Procedure</b>	<b>Blind Administration</b>
	Photo/Live	Photo/Live	Photo/Live	Photo/Live
Arlington Police Department		+/-	-/-	-/-
Austin Police Department		-/+	-/-	-/-
Baytown Police Department		-/-	-/-	-/-
Benbrook Police Department	+/>+	+/>+	-/-	-/-
Boerne Police Department	/+	+/-	-/-	-/-
Bowie Police Department		+/>+	-/-	-/-
Brenham Police Department	/+	+/-	-/-	-/-
Brownsville Police Department		+/>+	-/-	-/-
Bryan Police Department		-/-	-/-	
Cameron County Sheriff Dept	+/>+			-/-
Cedar Park Police Department	+/>/			
Cibolo Police Department	/+	+/-	-/-	-/-
Cleveland Police Department	+/>/		-/-	
College Station Police Department	+/>/	-/-		
Colleyville Police Department		+/>/	-/-	-/-
Coppell Police Department	+/>/	-/-	-/-	
Corpus Christi Police Department	+/>+	-/-		-/-
Daingerfield Police Department	/+	+/-	-/-	-/-
Dallas County Sheriff Department		+/-	-/-	-/-

Department	Cautionary Instruction	Composition Fairness	Documentation of Procedure	Blind Administration
	Photo/Live	Photo/Live	Photo/Live	Photo/Live
Dallas Police Department	+/	+/	-/	-/
Dickinson Police Department	+/		-/	
Double Oak Police Department	/+	+/-	-/-	-/-
Dublin Police Department		+/-	-/-	-/
Duncanville Police Department		+/-		-/-
East Mountain Police Department	/+	+/+	-/-	-/-
El Campo Police Department				-/-
El Paso Police Department	+/	+/	-/	
Ellis County Sheriff Department		+/-	/-	
Friendswood Police Department	+/		-/	
Friona Police Department		+/+	-/-	-/-
Fritch Police Department		+/+	-/-	-/-
Grapevine Police Department		+/	-/	-/
Groesbeck Police Department	/+	+/-	-/-	-/-
Guadalupe County Sheriff Dept	+/		-/	
Haltom City Police Department	+/+		-/-	+/+
Harker Heights Police Department		+/+	-/-	-/-
Harlingen Police Department		+/+	-/-	-/-
Harris County Sheriff Department		+/+	-/	
Hondo Police Department		+/+	-/-	-/-
Horizon City Police Department		+/	-/	-/
Houston Police Department	+/+	+/+	-/-	-/
Hurst Police Department	+/	+/		-/
Irving Police Department		-/+	-/-	
Jack County Sheriff Department		+/+	-/-	-/-
Jacksboro Police Department		+/+	-/-	-/-
Jersey Village Police Department	+/			
Keller Police Department		+/	-/	
Lamar County Sheriff Department	+/		-/	
Lamesa Police Department		+/	-/	-/
Laredo Police Department		-/+	-/-	
Lewisville Police Department	+/+	+/+	+/+	+/+
Liberty County Sheriff Department	+/			
Llano County Sheriff Department	+/+	+/+	+/+	+/+
Longview Police Department		-/+	-/-	-/-
Lubbock Police Department		-/	-/-	-/-
Lufkin Police Department	+/	-/	+/	+/
Marshall Police Department		+/	-/-	-/

Department	Cautionary Instruction	Composition Fairness	Documentation of Procedure	Blind Administration
	Photo/Live	Photo/Live	Photo/Live	Photo/Live
Mount Pleasant Police Department		+/	-/	-/
Pflugerville Police Department		-/-	-/	
Richardson Police Department	+/	+/	+/	+/
Richland Hills Police Department	+/		-/	
Rio Vista Police Department	/+	+/+	-/-	-/-
Robstown Police Department	+/+	-/-		-/-
Round Rock Police Department	+/		-/	
San Angelo Police Department	+/	+/+	-/	
San Antonio Police Department		+/-	-/-	
Seguin Police Department	/+	+/-	-/-	-/
Selma Police Department	/+	+/-	-/-	-/
Shavano Park Police Department	/+	+/-	-/-	-/
Snyder Police Department		+/-	-/-	-/
Socorro Police Department			/-	/-
Southlake Dept of Public Safety		+/-	-/-	
Sugar Land Police Department			-/	
Tarrant County Sheriff Department		+/-	-/-	-/
Temple Police Department		-/		
Tom Green County Sheriff Dept		+/	-/-	-/-
Trenton Police Department		+/	-/	-/
Trophy Club Police Department	/+	+/-	-/-	-/
Tulia Police Department	+/			
University Park Police Department	+/+	+/+	-/-	+/-
Victoria Police Department		+/	-/	-/
Waco Police Department	+/+		-/-	+/+
Webster Police Department	+/			
Wichita County Sheriff Department		+/+	-/-	-/-
Wichita Falls Police Department	+/		-/	
Williamson County Sheriff Dept		-/+	-/-	-/
Wise County Sheriff Department		+/+	-/-	-/-
Woodway Public Safety Department		-/+	-/-	