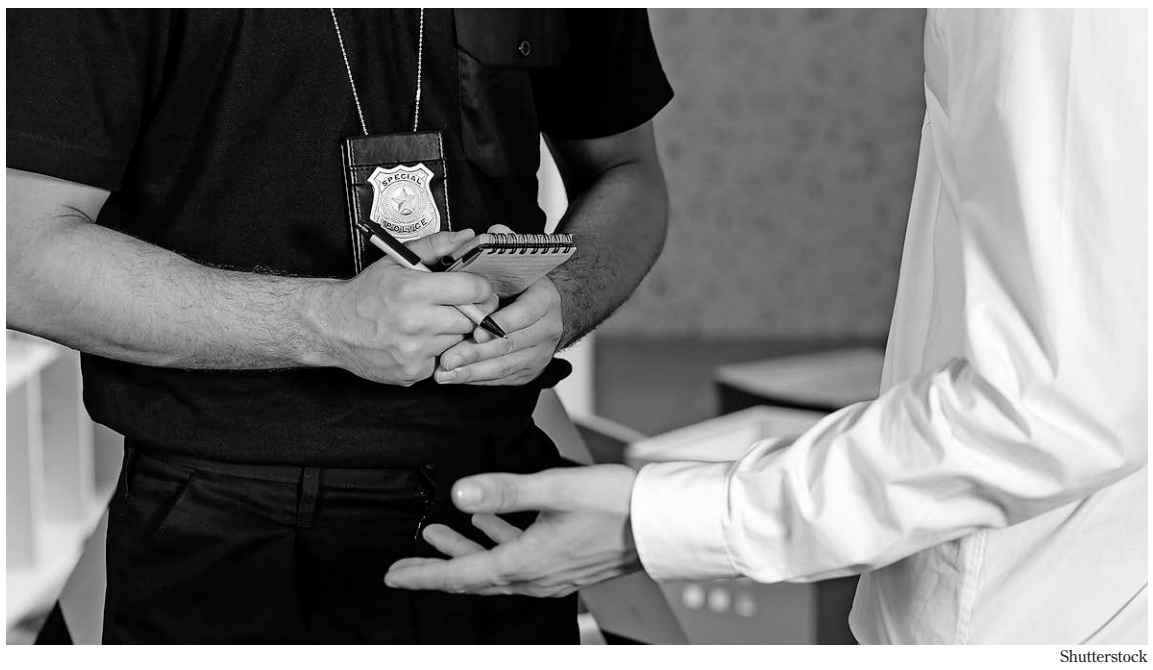
Study casts doubt on use of 'showups'

By Mitchell L. Eisen



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When police are in pursuit of a suspect matching a particular description shortly after a crime has been reported, any citizen can be detained, handcuffed and shown to witnesses without any probable cause whatsoever, simply because that person happened to be in the area at that time and matched some element of the witnesses' description of the culprit. This identification procedure is referred to as a showup. The U.S. Supreme Court recognized problems involved in the use of showups as early as the 1960s, noting that "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned" *Stovall v. Denno*, 388 U.S. 293 (1967). Although the courts, law enforcement and the research community have all agreed that show-ups are inherently suggestive, until recently, we really never knew how dangerous the actual risk of misidentification was when using this procedure.

Field Studies

Recently, researchers at CSU Los Angeles collaborated with local law enforcement to conduct a series of simulated-field experiments in which over 1,000 witnesses were immersed into what they were led to believe was an actual police investigation that culminated in a live show-up conducted by the police. These were the first studies ever to examine show-ups conducted in the field, under real-world conditions where witnesses believed their identification would result in the arrest and prosecution of the suspect.

In each experiment, a minor crime was staged repeatedly for small groups of participants under ideal witnessing conditions: long, clear exposure to the thief in a well-lit area with a 20-minute delay before the crime (theft of a laptop). The suspect who was presented in police custody was either approximately the same height and weight as the thief, or differed by approximately 6 inches and 50 pounds. Otherwise, the thief and the suspect were both Latino males wearing similar clothing. The results of these experiments were truly striking and revealed that the danger of misidentification when using showups appeared to be far more serious than previous laboratory research had indicated. There are several important findings from this work that are important for the courts and law enforcement to take note of.

Error Rates Under Ideal Conditions

We conducted three different experiments, and found that when an innocent suspect who matches the general description of the suspect was presented at a perfectly controlled show-up, the false identification rate was consistently very high (Exp. 1, 38 percent; Exp. 2, 34 percent; Exp. 3, 40 percent). After removing participants who stated they suspected the show-up was being done for research purposes, and only looking at witnesses who reported believing the crime and investigation were real, the false identification rate was even more alarming (Exp. 1, 45.5 percent; Exp. 2, 40 percent; Exp. 3, 50.1 percent).

What Is Driving These High Rates of Misidentification?

It is arguably very difficult for the average citizen to understand that any person could be detained, handcuffed and presented in a showup for no other reason than they happened to be walking in a certain area and matched the general description the suspect. Moreover, the majority of those witnesses who misidentified the innocent suspect reported feeling pressured and/or obligated to choose the person being presented by the police. In essence, these errors are not simply driven by fallible witness memory.

High Confidence

This is the really scary part. Not only was the false identification rate alarmingly high in these experiments, but witnesses who made these identifications tended to be highly confident in their decision. The researchers explained that the elevated confidence was likely related to the pressure and/or obligation witnesses reported experiencing, coupled with the fact that in actual cases, it is likely very difficult for many people to be equivocal about such an important decision that will presumably lead to another person's arrest and prosecution. Thus, when making such an important affirmative decision that can affect another person's life, witnesses are more likely to commit to that selection with high confidence.

Proper Procedures

In actual cases, it is not uncommon for the admonition to be paraphrased or not read at all. When the admonishment was not read, witnesses who believed the show-up was part of an actual investigation misidentified the innocent suspect over 50 percent of the time.

Even when the admonition is read properly, it is often overshadowed by other information the witness may be exposed to that can lead them to believe that the police have caught the culprit. This is referred to as "pre-admonition suggestion." Our study used the same highly realistic field-simulation paradigm described above to examine this issue. In this experiment, after the crime, an officer responded to the scene to take witness statements. Minutes after his arrival, the officer received a radio dispatch that could be heard clearly by the witnesses. The dispatch either stated that the sheriff had "caught the guy" or "detained a suspect who matched the thief's description," and instructed the officer to bring the witnesses to identify the suspect. The witnesses then met with two sheriff's deputies who properly admonished the witnesses and then conducted a live show-up with either an innocent suspect or the actual culprit. Participants who overheard the suggestive radio call misidentified the innocent suspect more than 50 percent of the time when he was the same height and weight and the culprit and 48 percent of the time when he was 6 inches taller and 50 pounds heavier.

Bottom Line

Although showups are often used legitimately in the field when lineups are not a viable option, the overly liberal use of showups by law enforcement surely needs to be reined in, and the only way to do this is to challenge bad showups in court. Many show-ups are clearly unnecessary, and others are just plain unduly suggestive.

- The data from these recent field-simulation studies show that showups conducted without a proper admonishment appear to result in exceedingly high false-identification rates, and should be challenged as being unduly suggestive.
- When witnesses are exposed to information indicating that the police believe that they have the actual culprit, false identifications in our field simulation studies were near chance levels (50/50). These showups should also be challenged as unduly suggestive.
- Moreover, once probable cause has been established there is really no need to use a show-up, as the suspect will surely be taken into custody and there is plenty of time to construct a fair an unbiased photographic lineup. These new data showing the dangerously high rates of misidentification when using showups supports the need to limit showups to exigent circumstances related to time pressures as prescribed in *Stovall*.

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EISEN

Law remains unclear on whether banks can provide info

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Surely, you assume, your bank cannot simply provide your private financial information without your consent, or at least your knowledge. The answer may not be as clear as you suppose.

ing party seeking information about your accounts. Surely, you assume, your bank cannot simply provide your private financial information without your consent, or at least your knowledge. The answer may not be as clear as you suppose.

It is true that California bank customers possess statutory and constitutional financial privacy rights in their bank records. Numerous federal and state statutes identify these rights. For example, the Gramm-Leach-Bliley Act (GLBA) prohibits a financial institution from disclosing any personally identifiable financial information about customers unless it provides the customer with notice that it intends to do so, and the customer receives a chance to object. 15 U.S.C. Section 6802. Regulation P, which governs the treatment of nonpublic personal information about consumers by financial institutions (12 CFR Sections 1016.10 et seq.), contains a similar prohibition.

In California, the Financial Information Privacy Act, which can be found in the Financial Code (Sections 4051.5 et seq.), begins by declaring the Legislature's determination that the "California Constitution protects the privacy of California citizens from unwarranted intrusions into their private and personal lives," and that the GLBA is inadequate to meet such privacy concerns. Accordingly, the Privacy Act declares, banks that want to share customers' information must "seek and acquire the affirmative consent of California consumers prior to sharing the information."

These statutes protect a broad swath of information about customers — even information that would disclose the mere fact that they are customers of a particular bank.

So what, then, is the problem?

The problem is that all three of the statutory schemes contain exceptions — often not well defined — to the disclosure prohibitions. The Privacy Act expressly excepts from its disclosure requirements a situation in which a bank needs "to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." Not exactly a beacon of clarity. The GLBA and Regulation P contain similar exceptions.

You probably already see the issue. The exception in the Privacy Act — and its federal counterparts — arguably swallows the rule, at least in the context of a lawsuit discovery request to a financial institution.

It is true that there exists of body of case law in California that requires notice to a customer before his financial records can be turned over by a financial institution. The California Supreme Court long ago explained, in *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652 (1975), that a then-recently enacted constitutional amendment elevated the right of privacy to an "inalienable right" and included privacy in confidential financial affairs. Before this amendment, the Supreme Court noted, a bank had no obligation to notify a customer that his information was being sought and could freely disclose the customer's information. The Supreme Court discussed a court's need to carefully balance the right of civil litigants to discover relevant facts, on the one hand, and the right of bank customers to keep their financial information private. It held that before a bank could disclose confidential customer information in the course of civil discovery, it needed to take reasonable steps to notify its customer of the pendency and nature of the proceedings.

The question becomes whether and to what extent the Legislature's enactment of the Privacy Act in 2003 supplanted this body of case law. This author has seen the argument made that when the Legislature enacted the Privacy Act — which, as noted above, explicitly references the constitutional right to privacy in financial records discussed in *Valley Bank* — it undertook and codified its own balancing regarding when a bank must notify a customer that his records are being sought. Accordingly, this argument goes, the "to respond to judicial process" exception in the Privacy Act clarifies that a bank need not notify its customers if the bank, as a party to a lawsuit, receives a discovery request seeking customer information, and that a court order to disclose — which may or may not require notice to the customer — would sufficiently "protect" the bank from any customer claims that it should not have produced private information.

While this argument seemingly would stand *Valley Bank* and its progeny on their head, there do not exist any California cases since the Privacy Act's enactment that discuss the interplay between it and pre-Privacy Act case law. Furthermore, at least one district court decision has noted that even the privacy considerations expressed in *Valley Bank* do not extend to situations in which there exists "*compulsion by legal process*" — suggesting that the Privacy Act carve-out in fact is consistent with *Valley Bank*; a bank customer simply has no right to receive notice when his bank must respond to "judicial process." *Stone v. Advance Am.*, 2010 WL 1433540, at *4-5 (S.D. Cal. 2010).

This argument — that the Privacy Act has supplanted the *Valley Bank* notice requirement — may draw support from the fact that, as an outgrowth of the very same constitutional amendment discussed in *Valley Bank* that elevated the right of privacy to an inalienable constitutional right, the Legislature enacted Code of Civil Procedure Section 1985.3. Section 1985.3 establishes a process by which an individual must receive notice — and be afforded an opportunity to object and litigate — when his bank (and other) records are sought via subpoena. *See Foothill Fed. Credit Union v. Superior Court*, 155 Cal. App. 4th 632 (2007). Arguably the same Legislature that passed Section 1985.3 in the context of third-party subpoenas could have — but chose not to — also have written the Privacy Act to ensure similar notice in the face of a bank's release of private information via discovery or a resulting court order. On the other hand, it is unclear why the Legislature would create a dichotomy whereby a nonparty bank customer must receive notice of records sought via subpoena, but not through party discovery or a resulting court order.

The takeaway from all this is that the law remains unclear, potentially providing financial institution litigants with a Hobson's choice when confronted with a discovery request seeking private customer information: insist on giving notice to your customers that you will be providing their information (which, in most cases, financial institutions will do, but may in certain contexts create concern about customer-relationship repercussions), or provide the information without notice in the hope that the court order (that you hopefully forced the requesting party to obtain) will, together with the Privacy Act, insulate you from any subsequent challenges to your having disclosed the information.

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