Csaba Fenyvesi

Problems on personal identification attempt in criminal cases

Abstract: The study shows the most frequent problems of the identity parade (line-up) method and their possible consequences, e.g. the worst of them – judicial miscarriage (miscarriage of justice). The author analyses the sources of major tactical and technical errors on the basis of real international and Hungarian criminal cases and suggests a few preventive methods, tactics for law enforcement bodies as well as criminalists.

Keywords: errors (failures), false identification, identity parade, investigation, line-up, miscarriage of justice, prevention

Introduction

The title of my article was chosen intentionally, not by mistake. I chose it deliberately instead of the term *identity parade* which is known by the Criminal Procedure Code (Nr. 2017. XC. Act). I would like to mention that during seven years of my research I have concluded that the name of this dual institution (used in criminal procedure law and in criminalistics) is inspiring or even manipulating. The Hungarian word for the term identity parade forces a person, who would usually want to meet his expectations and is often a victim of a crime, to choose from lined-up people, objects, sounds…etc. The person is forced to choose regardless of everything. The urge to meet expectations of personal identification can lead to a dangerous scenario which would be the worst-case scenario in a criminal case, the judicial miscarriage – a wrong sentence (miscarriage of justice).

1. The dangers of identity parade (line-up) based on American researches

What is the basis of my version introduced above? Partially my own research and the researches and analyses undertaken in other parts of the world. Multiple investigations of reasons of miscarriage of justice have been conducted in the USA. I would like to mention three of them. The conclusions of these investigations are similar to my conclusion, e.g. negative positions during the identification procedures.

As a result of the first examination they differentiate between direct and indirect reasons.[1]

Indirect reasons include:

a) the pressure of public opinion;

b) being a part of a minority when being charged (e.g. Afro-American, Indian, Irish origin, sometimes religious reasons);

c) the Anglo-Saxon procedure with cross-questions, which does not necessarily clear the facts of the case but aims to confirm a different opinion and to defeat the other party;

d) the bias of the police.

Direct reasons include:

a) incorrect identity parades as the most common cases;

[1] See: Hack, P.: *Az igazságszolgáltatás kudarcai*. (Failure of criminal justice) In: Fenyvesi, Cs. (ed.):A Magyar Büntetőjogi Társaság Jubileumi Tanulmánykötete. MBT, Budapest-Debrecen-Pécs, 2011. 43.; Badó, A.-Bóka, J.: *Ártatlanul halálra ítéltek. (Innocently death penalty)* Nyitott könyv, Budapest, 2003.; http://www.innocenceproject.org. (2023.02. 03.)

b) police investigation failures (e.g. errors in certification, inspection, manipulations, residual contamination, traces, damage to uniqueness points);

c) breach of the rules of police investigation;

d) failures of the prosecutor (e.g. missing exclusion of evidence);

e) erroneous opinions of experts (lack of precision, unprofessional opinions);

f) incorrect statements of witnesses and reports of other criminals, prison agents, informants;

g) incorrect, insufficient working performance of an attorney;

h) false confessions;

i) false indirect evidence.

The second research deals with 205 cases. According to its results, the reasons are as follows:[2]

a) misidentification by a witness	52,3 %
b) false testimony	11 %
c) negligence of officials'	9,9 %
d) compulsion	8,4 %
e) "framing"	4,2 %
f) false testimony by an official-police	2,6 %
g) expert error	1,6 %

Lastly, in the third research 86 cases were examined. The following causative factors of miscarriages of justice were highlighted:[3]

a) misidentification by a witness	71 %
b) errors in forensic science tests	63 %
c) police errors	44 %
d) prosecution errors	28 %
e) false/erroneous expert opinions	27 %
f) dishonest informants	19 %
g) incompetent defence counsels	19 %
h) false witness testimony	17 %
i) false confession	17 %

2. Failures in the investigation, the weaknesses of recognition (identification) procedure in Hungary

[2] Huff, C. R.-Rattner, A.-Sagarin, E.: *Convicted But Innocent. Wrongful Conviction and Public Policy.* Sage Publications, Thousand Oaks, 1966. 62.

[3] Saks, M.J.-Koehler, J. J.*: The Coming Paradigm Shift in Forensic Identification.* Science, 2005/309. 892.

In my opinion, it is possible to differentiate the failures of forensic science from multiple points of view.

A) According to the inner division of criminalistics:

a) criminal tactics (inspection, "first strike", heat trace, securing the scene, blocking the scene, identity parade, attempt to prove, interrogation, failures in using secret devices, perseverant version perception, stating a wrong version, lack of defence control, assessment of the written past, not recognizing the deadlocks, wrongful organization of the investigation);

b) forensic technology (incorrect detection of traces - residues, recording, crossing of traces – traces contamination), breach of the chain of custody, loss of the trace, misuse of a tape…etc.);

c) methodological (inappropriate confiscation of a computer, absence of bank statements collection; and it can be continued indefinitely, because the possibilities are endless, given that with every crime there is a new group of failures).

B) Error (failure) groups according to the pyramid model of criminalistics (hypothetical) (basic questions, mediators, focus):

a) general failures in relation with seven questions of criminalistics (loss of time, delay, absence of the database control);

b) errors (failures) in relation with traces (detection of the traces, failure to record traces, "destruction of traces"- their loss, their contamination by pollutants, incorrect identification, etc.);

c) errors (failures) in relation with residues (e.g. absence of search of micro- or sub-micro sizes, contamination, incorrect identification);

d) errors (failures) in relation with testimonies (false confessions, false testimonies, false recognition, wrong setting of an attempt to prove, etc.);

e) documents (including the incorrect expert opinions, failure to identify false documents, falsely declaration of something to be false, etc.).

C) According to the levels of the "danger scale":

a) the level of "judicial miscarriage" (especially dangerous, the most dangerous category): e.g. an error in an identity parade, statements from wrong witnesses, false confession, manipulation of testimonies, wrong expert opinions, unreasonable crossing of traces and residues);

b) dangerous (often there is not anyone held accountable): errors in an attempt to prove (the negative is rather mentionable, this occurs when someone is incorrectly excluded), error in search (nothing is found or the corpuses are not recorded precisely enough), loss of documents, mistakes of the "first strike", incorrect exclusion during the questioning using a polygraph, incorrect identification of scent by dogs (incorrect tracking of scent);

c) less dangerous (minor relevance): errors in confrontation, unreasonable questioning using a polygraph.

D) From the point of view of a perpetrator or an alleged perpetrator, following errors can occur:

a) in favour of a perpetrator or an alleged perpetrator: incorrect exclusion during the questioning using a polygraph, incorrect exclusion based on expert opinion on traces and residues or handwriting, error of a witness, etc.;

b) detrimental for a perpetrator or an alleged perpetrator: incorrect loading of a polygraph, incorrect loading based on expert opinion on traces and residues or handwriting, error of a witness, false confession, etc.

E) Based on the visibility of an error (failure):

a) open errors (listed in the groups above);

b) secret errors (those that can appear using secret devices, forces, methods, either the legal frames or the tactical-technical groups, e.g.: absence of licensing, overstepping the aim or subject, wrong report from an informant).

F) Errors (failures) based on the "crime scene" can include:

a) errors in the investigation part (it is the most common in this part, especially in those criminal procedure methods, where, even despite the legislative body intention - the emphasis is on this in practice (like the Hungarian one);

b) errors in the intermediate (prosecutor's) part (because before indictment, in some criminal procedures, the prosecutor can conduct investigative or forensic actions, like interrogating, inspecting, attempt to prove /reconstruction/, organizing an identity parade);

c) errors in the judicial stage (where more forensic steps appear, like the tactics of interrogation).

3. Errors (failures) in recognition (identification), errors in the specific cases

It it not useless to see through mistakes that were actually made in some national and international cases (as an "anatomic horse") which can be found in legal bibliography. From these cases we can derive the Achilles heel, including – and I will not keep it a secret anymore – the weaknesses of the recognition method.

Lawsuit of Alfred Dreyfus: At the beginning, the proceedings against him were based on the expert opinion, whom the accused or the court did not know, and then in the open procedure, two others, less famous writing experts incorrectly expressed their incriminating opinions. Furthermore, a writing expert Alfonse Bertillion, also expressed his incorrect opinion. An idea about drafting a document by another official appeared during the proceedings, but the substantive check of this was not conducted. The prosecution perseveringly stuck to charging the 35-year old Dreyfus, and as a result he was stripped of his title and he was incarcerated for the rest of his life. After multiple appeals (and 5-year-imprisonment on Devil's Island), he was pardoned by the president in 1989 and fully rehabilitated, his title was returned to him and he was allowed to re-join the French army in 1906.

Nicola Sacco and Bartolomeo Vanzetti, Italian trade union officials, were suspected and then charged with armed robbery based on four completely mistaken weapons experts opinions (given by incompetent people) and on the identification of a projectile and a weapon. Furthermore, these were also a few incorrectly performed identity parades, errors of the witnesses which were crucial for the proceedings, and revision of alibi supported by other witnesses was ignored. Likewise, the information received from the "underworld" about other perpetrators were neglected. Only in 1977 the governor of Massachusetts state admitted that the previous court proceeding was not correct, and it did not comply with the rules.[4]

János K. made a false confessions regarding the killings at Martfű (city) in 1957 several times. The confessions were often different from each other – using an artificial word which is now incorrect due to the Miranda-rules – and he withdrew them. At one occasion during the on-the-spot questioning he showed the police how he attacked and killed a woman who was on her way home from her workplace riding a bicycle. False witnesses who saw him near the crime scene appeared during the recognition. Between 1962 and 1967 five more similar crimes were committed in the area. The perpetrator of these crimes, Péter K., was identified in 1967, and was found guilty of the murder in 1957, mostly based on his exceptionally detailed, revealing confession.

Dénes P. was sentenced to six years of imprisonment in Heves County because of the attempt of an assault resulting in death and a robbery in 1994, mostly based on his handwritten confession and the statement of a wrong witness. Besides these, a scent identification by dogs also proved that he was at the crime scene, but not at the time of committing the crime but before. He spent two and a half years in prison when it became obvious that this crime was committed by someone else who was later held accountable for it.

Ede K. was convicted by final judgement to incarceration for the rest of his life after several years for committing a crime which caused the death of eight people in 2002 at Mór (city). The decision was made on the basis of wrong identity parades, failures of witnesses, absence of defence of the accused and due to the insistence on the only version. It later came to light, that the real criminals were even checked by the police on the day of the crime, after committing it, when they were blocking the scene as they were leaving the city by cars, with the weapons and the prey in them.

János M.'s murder case in Szolnok County has false witness statements – since their revision has not been carried out; inaccurate and incomplete reports of search warrants, confiscations, criminal records and pictures, there were errors in the selection of witnesses during the investigation, identity parades have been manipulated, alibi check of the accused has been late and the victim's spleen which would have been needed for an analysis of the blood type has not been kept.

The Sz. siblings were in custody for six months for a bank robbery which was committed by Attila A., also known as the "whiskey robber", because there were false witness statements and wrongful identifications of scent by dogs.

In László V.'s murder case in Tolna County in 1991 – with several absent reports – there were reports containing false confessions made after "talking" with an officer, false witness statements from family members occurred, and a videotape served as incriminating evidence, because inculpatory words of the accused were recorded on it. Lastly, I mention the ignorance of the polygraph's excluding result – as a persistent step.

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[4] Wall, P.M.: Eye-*Witness Identification in Criminal Cases.* Charles C. Thomas Publisher, Springfield, Illionois, USA, 1965. 20-21., 93-94.

Krisztián B. from Pécs (city) came into the focus of the police in connection with an indecent exposure offence because he appeared on a footage made in the suburbs wearing a hoodie. According to his statement later, on 17th October at night he was running which was a part of his training and he was stopped by the police. On 21st October (the day after the events of 20th October) his registered photo was shown to a cashier who recognized the offence committed by a person in a hoodie at Tettye (north part of the city), alongside with three other photos. The woman in her twenties recognized the suspect at 70 %. Following this, the people who prepared the identity parade hid the suspect´s forehead in the photograph and after that the woman was 80 % sure that it was him, because of his pointed chin, his eyes, and his glasses. Next, they showed the videotape with the record of the accused in the hoodie (only this tape) to an eyewitness, who identified him at 100 %. The police did not perform the identity parade using people (selection), but they suspected the man on the CCTV footage. They immediately showed the man to the cashier. The accused denied everything and defended himself constantly from the start, on the same day. The lady recognised the accused by his voice, but he kept denying the offence. Later both the attempt to prove and digital data showed that the suspect could not have been at the scene physically at the time of the crime, so the investigation against him was terminated.

4. Identity parade as a potential basis of the most dangerous outcome

As the American and Hungarian cases above show: identity parades based on sight or hearing are sources of danger with the highest priority. The level of danger increases due to the fact that, in my experience, a mistake made at the beginning of the process spirals through the whole proceedings and wipes away other evidence, that could be contradictory or in favour of a suspect. It becomes too strong and indefensible for the defence and the accused if it is done properly, and there are only mistakes made by a witness. Proving otherwise is critical in theory, even rarer in real cases.

From my point of view, there is or there could be a 2-way problem as regards line-ups. First, the overstepping of the police (legal or forensic), errors, manipulations and on the other hand, the errors of witnesses (wrongful observations, photos), and the combinations of these, appearing at the same time (in parallel) (I do not deal with the errors of witnesses in details due to the scope of my study).

5. Specific errors (failures) during the performance of recognition

Based on my researches so far, legal bibliography, my practical experience and based on the false manners described in the cases above, I list the reasons of wrong performance below, which are different from the criminalistics consequences.

a) the precise studying of the data regarding the case is not carried out; also there are no decisions whether there is a need for the recognition process and if they exist, it is not clear which type should be performed (e.g. the type in connection with the situation or the one with no connection to the situation; whether original objects or data carriers should be used);

b) absence of a witness (victim) interrogation or a suspect, specifically absence of examining the circumstances of the detection (like time, season, distance, duration, other movements and actions, emotional effects, etc.);

c) absence of clarifying the features of a target person or object that would make them recognizable ;

d) lack of clarification whether a person interrogated is willing to cooperate during the recognition process, and whether there are any obstacles in connection with using the person as evidence (it should not be excluded evidence);

e) absence of check of the perceptiveness of a witness (sensory or other disabilities), e.g. examination in attempt to prove (In the case of János M., the attempt to prove was only done with the witness stating different things when it was certain, that under the circumstances described by him it was impossible to see the face of the suspect and to define the sex of the person);

f) absence of planning personal and material conditions of the recognition procedure in advance (possible official witnesses, an attorney of a witness, a defence attorney, presence of people involved, the use of target location, options of technical recording options);

g) an identity parade regarding the situation is not performed under the same circumstances;

h) disorderly conduct of the people present is allowed during the performance (they are not stopped);

i) not considering the psychological protection of a witness; the event is organised in such a way that the person being recognised can see the person who tries to recognize (identify) (e.g. not through a French window; one-way mirror);

j) too many people, objects, documents, sounds, data carriers, animals, plants, flavours, smells, etc. to identify (more than five);

k) the corpse, or a part of it is shown in multiple forms, but it is only recommended in a single form;

l) a picture of a person was previously shown to an identifying witness - “the witness has to identify” (e.g. it was the case two witnesses in the cases of János M. and Ede K., the witnesses later selected a person based on the pictures shown to them);

m) the potential of the accused stands out, he is different from others in the line as regards his clothes, hairstyle, hair colour, height, facial hair (beard, moustache, etc.), age, body shape;

n) an identity parade in connection with the situation is not performed under the same circumstances of detection (in the case of János M., the distance between the line and the person was not proper and the lighting was problematic);

o) in case of more than one identifying witnesses, it is a mistake if they are not separated from each other before and during the identification procedure;

p) there are not enough people (or objects, animals, plants, photos) during the identification procedure (in the Dreyfus case he was the only one lined up for the witnesses);

q) only photos of one person are shown if an identity parade is performed using pictures (and photos of anyone else are not shown);

r) either an extremely large picture is shown (overly different from the others);

s) or a photo of the investigation version is shown extremely slowly and for a long time;

sz) people chosen for an identity parade are extremely different from each other as regards their characteristics (the “picture” is too mixed as regards height, body shape, age, etc.);

t) an officer uses suggestions, manipulation, and incorrect instructions when talking to the identifying witness, he suggests which person should be chosen (in a harsher way: he makes a confirmatory, praising comment);

ty) circumstances under which the identifying person noticed the person or object in question;

u) identification is performed in a confronting way;

v) they are unreasonably late with the execution (so the witness' memories would fade);

w) an incorrect, incomplete, wrong protocol and video of the performance and statements of the identifiers;

z) they record an uncertain selection as certain and successful in a protocol;

zs) similarities are determined in percentages (e.g. a witness identified the perpetrator at 80 %). In my opinion, either there is an identification or there is not, it is pointless, and at the same time, it is dangerous to talk about similarity and percentages of similarity.

6. My suggestions to amend the regulations and in criminal tactics

I would like to highlight that in the last thirty years I have never seen a warning ("lecture") from an officer saying: "you do not have to choose among the people (objects, sounds, photos, recordings) in question, it is not certain that the perpetrator is among them and it is not your obligation to make a choice" in a criminal file (which is mandatory in the American practice).[5]

The requirement stipulating that the identification has to be performed under the original detection conditions is also missing.

As my second *"de lege ferenda"* suggestion, I concluded that the fifth section of paragraph 210 in the Hungarian Criminal Procedure Code in force, which is currently becoming broader and broader, should be extended with these important sentences below.

My first amending suggestion reflects my choice of the title. It is rather a recognition attempt, the usage of words in the Criminal Procedure Code should show the attempt of the probable recognition as an institutional name (just like in the case of attempt to prove/reconstruct a case).

Regarding criminal tactics, a new ecological recognition method should be taken into consideration. The difference between this method and the conventional method is that in these procedures the witness is put – accidentally, more or less – in the natural environment of the accused. In these cases the police ask the accused to be in the environment with many people, like in a store or on the street. Then they bring the witnesses there with the intention of trying to recognize (identify) the perpetrator they had seen before. The fact that the people participating in the identification are not chosen purposefully is equalled to the number and colourfulness of the people that are present with them. But it is possible that participants are among the passers. The advantage of this method is that it is much more unstrained (natural) and relaxed than a classic identity parade, and there is a very minimal chance that the targeted person stands out from the group - due to their inner struggles or the unintentional attention of the other "cotton" participants.[6]

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[5] Kollár, B.: *A felismerésre bemutatás elmélete és gyakorlata Amerikában*. (The theory and practice of line-up in the USA) Belügyi Szemle, 2013/10. 113-116.

[6] See more:: Lindsay, R. C. L.-Wells, G. L.*: Improving eyewitness identification from lineups: Simultaneous versus sequential lineup presentation.* Journal Applied Psychology, 1985/70. 3. 556-564;.
Levi, A. M.*: Some Facts Lawyers Need To Know about the Police Lineup.* Criminal Law Quaterly, 2002/46.;

Schäfer, A.: *Sequenzielle Video-Gegenüberstellungen.* Kriminalistik, 2001/12. 797-798.

I have another criminal tactical, manipulation-preventive suggestion which could be used in practice. In this case, instead of the criminalists working on the case "blind" executors who have not worked on the case before are used. I am talking about law enforcement employees (the police, customs, prosecutor) who are not familiar with the potential suspect, so they do not even know in their subconscious who they are targeting with the procedure. The line-up with the suspect is organized by the criminalists familiar with the case. But their role stops here for a while, they step out of the proceeding. A detective without influence, who is obliged to share this information with the identifier, enter. Only he performs the identity parade and he is not familiar with the case nor with the participants. After that he continues with the process – keeping his distance, without influencing it because he does not even have an idea of whom, what or why he should suspect or attempt to recognize, and he does so according to the tactical-technical rules and suggestions. Following this, he hands over the protocol, with the result in it, to the criminalists. Since he does not have any data of the previous events, it is not difficult for him to act according to the suggestion that he is not allowed to tell anything to the identifying person, he cannot reassure, discourage by speaking, movement or metacommunication of any kind.

Lastly, I list a few of my little criminal tactical suggestions and those that increase the chance of getting decent evidence:

a) The recognition of an unknown body can be promoted by a previously conducted "corpse-toilet", which makes the damaged, incomplete bodies, body parts recognizable, it completes them with special stuffing materials. A modern and high-quality version of this is the face reconstruction, which can be combined with the identity parades to identify someone.

b) The person conducting the recognition has to aim for the least communication possible during the line-up. Instructions must be short, understandable, and precise.

c) It could have a tactical importance to precisely mention and correctly record the way of expression the identifying person uses when pointing out the person he saw committing the crime (whether he points with his finger, says it loud, whether he is confident, sure or, on the contrary, insecure, unsure).

d) In case of uncertain or worrisome identification, there is no point in putting the suspect among other participants and doing the whole procedure again, instead the "blind" test is needed. In the case of a blind test, they the suspect is not even included in the first round of the identity parade (only people without any suspicion), and then the witness is asked to identify.

e) The recognition attempt must be concluded in the shortest time possible, because as time passes, the probability of success decreases, the identifying witnesses become uncertain, and the perpetrators change, in many cases they make changes on themselves.

f) An important criterion that requires previous check is that none of the people in the line can be familiar with the identifying person (usually with the victim).

g) When recording a protocol about the result of the line-up, other than the criminal procedure's form and content, it is of the utmost importance that protocol contains the authentic completion of the tactical requirements stated above, and also the questions and comments of the participants. In case of identifying people, the protocol must include whether the person identified chose his place in the line or not.

h) Drawing the crime scene is quite rare in case of identity parades. It is more reasonable with objects in order to make the identifying person draw it during the previous hearing if the witness cannot describe the object's general and special traits with his own words.

i) Especially when the recognition is performed based on (partially) functional features (e.g. walking, running, speaking, making sounds), it is useful to work with more modern devices than just taking a photo (recording a video, using a digital camera).

Closing thought

I can only hope that professionally prepared, conscious people, law enforcement bodies, and criminalists who consider and follow the procedure and rules of forensic science and suggestions stated above will not make a fatal mistake which would lead to incorrect recognitions, and furthermore, to miscarriage of justice in the future.

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Summary

During seven years of the research the author have concluded that the English name of "recognition" as a dual criminalistics institution (used in criminal procedure law and in criminalistics) is inspiring or even manipulating. The Hungarian word for the term identity parade forces a person, who would usually want to meet his expectations and is often a victim of a crime, to choose from lined-up people, objects, sounds…etc. The person is forced to choose regardless of everything. The urge to meet expectations of personal identification can have a dangerous scenario which would be the worst-case scenario in a criminal case, the judicial miscarriage – a wrong sentence (miscarriage of justice). The author evaluates the

danger of incorrect performance of the recognition procedure of a person (also referred to as identity parade or line-up in English texts) on the basis of American research. This is a base for his version of the analysis of problems regarding the performance of recognition procedure. The author´s version is partly based on his own research and on researches and analysis undertaken in other parts of the world - the USA. Several trials (reason of miscarriage of justice) were held in the USA. The author presents three of them. They show a similar conclusion to the author´s own conclusion, such as negative positions in identifying procedures. Based on the long-term research, the author distinguishes between direct and indirect reasons for recognition errors. The study can be a good stimulus for thinking about mistakes in criminal and police practice.

Dr. univ. ec.., Dr. habil.
Csaba Fenyvesi, Ph.D.,
Professor
Criminal and Civil Procedure Law Department
The University of Pécs, Law Faculty,
48-as tér 1, Pécs, Hungary, H 7622
e-mail: fenyvesi.csaba@ajk.pte.hu

Reviewers: prof. JUDr. Jozef Meteňko, PhD., mjr. doc. JUDr., PhDr. Martin Laca, PhD.