

Presumed Guilty A film by Roberto Hernández and Layda Negrete



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Antonio "Toño" Zúñiga belongs to a club no sane person would want to join. He is one of the growing number of wrongfully convicted individuals, many of whom have spent even more time in prison than Toño. One subgroup is comprised of the nearly 300 people in the United States who have been exonerated by DNA evidence. When those cases have been analyzed, the major cause of wrongful conviction has been found to be faulty eyewitness memory, which plays a role in about 75 percent of such cases.

Dubious witness testimony played a role in Antonio's case, too. The key witness, Victor Daniel Reyes, initially accused three gang members of killing his cousin. There was no mention of Antonio. Only in a later interview did Reyes implicate Antonio. So it is natural to wonder what happened in between. What information was fed to Reyes that caused him to change his recollection? In my experience with hundreds of criminal cases, I have found that a common reason for someone's testimony to change is that the witness has been exposed to new information. What did the police tell Reyes? There is some evidence that they fed him Antonio's name, but what else? Also, Reyes had little trouble describing the gang members he initially accused, but he couldn't provide a description of Antonio. In a dramatic moment during Antonio's retrial, Reyes admits that he never saw the person who murdered his cousin. But even that is not enough to earn Antonio an acquittal.

An analysis of Antonio's dubious conviction would undoubtedly reveal causes beyond a mistaken (or lying) witness, such as an incompetent trial lawyer who wasn't even licensed to practice law; oppressive detectives who refused to answer questions at trial (often claiming, "I can't remember"); an inadequate court record that would be completely unhelpful if needed for an appeal; and a justice system that presumes guilt and is totally stacked against the defendant.

So much reform is needed that it is hard to know where to begin: Detectives who are properly trained and held accountable: A court record that is complete so that appellate courts have adequate information. After all, it is not the trial transcript, but the brilliant videotape of the retrial that appears, finally, to succeed in bringing justice for Antonio. However, reform is also needed with regard to law enforcement's

handling of witness testimony.

The United States justice system has been struggling with these issues for many years. About 15 years ago, the Department of Justice released a report on the first 28 cases of DNA exonerations, revealing the large percentage of innocent people who had been convicted because of faulty eyewitness memory. The Justice Department then assembled a committee that came up with a set of guidelines for law enforcement.

Eyewitness Evidence: A Guide for Law Enforcement offers a set of national guidelines for the collection and preservation of eyewitness evidence. The guide includes recommendations such as asking open-ended questions, refraining from interrupting an eyewitness' responses and avoiding leading questions. It also includes guidelines for constructing lineups, such as including only one true suspect per lineup and including the proper number of "fillers." The publication relies on psychological findings and explicitly acknowledges that these findings offer the legal system a valuable body of empirical knowledge.

Wrongful convictions are tragedies that should prompt us to integrate psychological science into law and courtroom practice. Judges, jurors, attorneys and police officers could benefit from better understanding of human memory. At a minimum, it is important to appreciate fully that memory is malleable. Memories can be changed by things that we are told, as apparently happened with the witness against Antonio. False memory reports can appear true, and without independent corroboration it is virtually impossible to tell whether a particular report is the product of true memory or the product of imagination, suggestion or some other process. Judges and juries sometimes think that they can tell the difference, but they are actually responding to the confidence, the detail and the emotion used to deliver a memory report. These characteristics may be associated with true memories, but, unfortunately, also with false ones. I once wrote that memory, like liberty, is a fragile thing. Antonio Zúñiga learned that the hard way. How many others are actually innocent, but still imprisoned? It's hard to get a handle on the true figure. But unless things change in Mexico, many more will join their ranks.

Elizabeth Loftus is a Distinguished Professor in the Department of Psychology and Social Behavior, the Department of Criminology, Law, and Society, and the Department of Cognitive Sciences, and a Fellow of The Center for the Neurobiology of Learning and Memory at the University of California, Irvine. She is also Professor of Law. She studies human memory. Her experiments reveal how memories can be changed by things that we are told. Facts, ideas, suggestions and other post-event information can modify our memories. The legal field, so reliant on memories, has been a significant application of the memory research. Loftus is also interested in psychology and law, more generally.