

FLIPPING A COIN: A SOLUTION FOR THE INHERENT  
UNRELIABILITY OF EYEWITNESS IDENTIFICATION  
TESTIMONY

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INTRODUCTION

By most accounts, mistaken eyewitness identification is the leading cause of wrongful convictions in the U.S.<sup>1</sup> This phenomenon is not new or old, but seems to be a timeless aspect of criminal procedure. “Centuries of experience ... have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable.”<sup>2</sup> Justice Frankfurter once said:

What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent – not due to the brutalities of ancient criminal procedure.<sup>3</sup>

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<sup>1</sup> See, e.g., Innocence Project, *Causes & Remedies: Mistaken I.D.*, at <http://www.innocenceproject.org/causes/mistakenid.php> [hereinafter *Causes*] (mistaken eyewitness identification played a major part in more than 2/3 of first 138 post-conviction DNA exonerations); EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* xiii-xv (1932) (44 out of case study of 65 innocent defendants were convicted primarily on the basis of mistaken identification).

<sup>2</sup> *Jackson v. Fogg*, 589 F.2d 108, 112 (2nd Cir. 1978) (granting *habeas* relief to prisoner convicted solely on the basis of testimony of four eyewitnesses, after finding that the eyewitnesses’ identifications were unreliable).

<sup>3</sup> FELIX FRANKFURTER, *THE CASE OF SACCO & VANZETTI* 30 (1927), quoted in *United States v. Wade*, 388 U.S. 218, 228 (1967).

The Supreme Court has placed the blame squarely on government suggestion,<sup>4</sup> but has allowed even tainted identifications when the court is satisfied that the identification is otherwise “reliable.”<sup>5</sup> All proposals to improve the reliability of eyewitness identifications have focused on removing suggestion; for example, by using double blind sequential lineup procedures where lineup participants are shown one at a time and the officer conducting the lineup does not know who the suspect is.<sup>6</sup> But suggestion is not the problem. Whether suggestion has played a part in the identification or not, eyewitness identification is inherently unreliable.<sup>7</sup> The only solution is to exclude the use of eyewitness identification testimony at trial unless the witness is acquainted with or otherwise familiar with the suspect.

This article examines the unreliability of eyewitness identification testimony and proposes its exclusion. It argues that what at first may seem a radical idea, in fact, would make convictions much more reliable with a minimal negative impact on the criminal justice system. In Part I, the substantial risk of misidentification is discussed, along with actual examples of misidentification. Part II discusses the absence of any features by which courts and juries could judge the reliability of the identification in any particular case. Part III concludes by showing that excluding identification testimony would not overly burden the

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<sup>4</sup> See, e.g., *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (calling suggestion a “major factor contributing to the high incidence of miscarriage of justice from mistaken identification”); *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (holding that identification testimony should not be admitted if it “was so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] was denied due process of law”).

<sup>5</sup> *Manson v. Brathwaite*, 432 U.S. 98, 114 (1976).

<sup>6</sup> Causes, *supra* note 1.

<sup>7</sup> See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY & THE LAW* 10-14 (1995) (summarizing the results of several respected identification studies).

criminal justice system.

## I. THE SUBSTANTIAL RISK OF MISIDENTIFICATION

### A. Witnesses Are Likely to Mistakenly Identify the Wrong Person.

The bulk of the research on eyewitness identification has been carried out since 1980,<sup>8</sup> well after the series of significant Supreme Court identification Due Process cases.<sup>9</sup> The Court has not had an opportunity to review new evidence on eyewitness identification reliability, or to decide whether admitting inherently unreliable testimony as prejudicial as eyewitness testimony comports with Due Process.<sup>10</sup>

The data does not paint a pretty picture. In one early study, “customers” subjected 146 unwitting convenience store clerks to memorably bizarre behavior.<sup>11</sup> Two hours later, only 34.2% of the clerks were able to correctly identify the customer from a non-suggestive photoarray; twenty-four hours later, that number was reduced to 7.8%.<sup>12</sup>

In a similar study, where the identification time period of two or twenty-four hours was chosen at random, and when the customer

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<sup>8</sup> Cutler & Penrod, *supra* note 7 at 68.

<sup>9</sup> The last one being *Manson v. Brathwaite*, 432 U.S. 98 (1977).

<sup>10</sup> There was one study, however, done in 1971 that merely measured subjects’ ability to accurately identify a target face only eight minutes after seeing the target’s picture. After ten seconds of exposure to the picture, there was 47% accuracy, and after 32 seconds of exposure, 75% accuracy. C. RONALD HUFF, ET. AL., CONVICTED BUT INNOCENT 89 (1996) (citing K.R. Laughery et al., *Recognition of Human Faces*, 55 J. APPLIED PSYCHOL. 477 (1971)).

<sup>11</sup> Cutler & Penrod, *supra* note 7 at 11 (citing J.C. Brigham, A. Maass, et. al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673 (1982)).

<sup>12</sup> *Id.*

was in the photoarray, 41% of the clerks correctly identified him.<sup>13</sup> However, when the customer was not in the photoarray, 34% of the clerks mistakenly identified someone else.<sup>14</sup> The false identification rate when the customer was in the photoarray was not recorded.

Later studies where the time periods and situations were changed arrived at similar results.<sup>15</sup> In one remarkable study, 30% of “witnesses” who had not actually witnessed an event, but who had engaged in discussions about it, later testified that they had recalled the incident and identified a person from a lineup as the culprit.<sup>16</sup> In summarizing these studies, Cutler and Penrod reported that the average rate of correct identifications in these simple experiments is 41.8%, while the rate of false identifications is 35.8%.<sup>17</sup>

Nor do those witnesses who have received training for eyewitness situations appear to fare any better.<sup>18</sup> In one recent study

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<sup>13</sup> Cutler & Penrod, *supra* note 7 at 11 (citing C. Krafska & S. Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58 (1985)).

<sup>14</sup> *Id.*

<sup>15</sup> Cutler & Penrod, *supra* note 7 at 11-12 (citing S.J. Platz & H.M. Hosch, 18 *Cross Racial/Ethnic Eyewitness Identification: A Field Study*, J. APPLIED SOC. PSYCHOL. 972 (1988) (44% correct ID 2 hours later) and M.A. Pigott, J.C. Brigham, et. al., *A Field Study of the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy*, 17 J. POLICE SCI. & ADMIN. 84 (1990) (4-5 hours later, 47.8% correct ID, 37.5% false ID when culprit not in array)).

<sup>16</sup> MICHAEL SENG & WILLIAM CARROLL, *EYEWITNESS TESTIMONY: STRATEGIES & TACTICS* §2.43 (2d ed. 2004) (citing Brown, *An Experience In Identification Testimony*, 25 J. AM. INST. CRIM. LAW & CRIMINOLOGY 621 (1935)).

<sup>17</sup> *Id.* at 12.

<sup>18</sup> In the Pigott study, *supra* note 15, 77% of the bank tellers had received training. Cutler & Penrod, *supra* note 7 at 12.

One study involving police trainees found a 51% false identification rate when presented with a “blank” photoarray. ELIZABETH LOFTUS & JAMES DOYLE, *EYEWITNESS TESTIMONY: CIVIL & CRIMINAL* §4-8 (3d ed. 1997 & Supp. 2004) (citing Yuille, *Research and Teaching with Police*, 33 INT’L REV. APLIED PSYCHOL. 5 (1984)).

of 509 Navy and Marine officers in survival training, subjects were interrogated for 40 minutes in high-stress and low-stress simulations and asked to identify their interrogators twenty-four hours later, using various identification procedures.<sup>19</sup> One of the many remarkable aspects of this study is the fact that these trained officers should have had plenty of opportunity to view their interrogators, often in more than close proximity.<sup>20</sup>

Yet, in a live lineup, subjects could correctly identify only 30% of the high-stress interrogators and 62% of the low-stress interrogators.<sup>21</sup> Using a standard police-type photo spread, but without elements of suggestion, only 32% of the high-stress identifications were correct, and 68% of the identifications were mistaken.<sup>22</sup> Using sequential photos, a technique often proposed to increase reliability by decreasing the influence of “relative similarity,”<sup>23</sup> the high-stress group still had only 49% accuracy, while the low-stress group’s accuracy dropped to 76%.<sup>24</sup> Furthermore, as in

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Police training was one of the factors given very heavy weight in *Manson v. Brathwaite* pertaining to the witness’ degree of attention. 432 U.S. at 115.

<sup>19</sup> Abram Katz, *U.S. Navy Study: Eyewitnesses Unreliable*, NEW HAVEN REG., June 21, 2004 [hereinafter *Navy Study*], <http://www.truthinjustice.org/navy-study.htm>; Charles A. Morgan III et al., *Accuracy of Eyewitness Memory For Persons Encountered During Exposure To Highly Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265 (2004). The subjects had spent an average of 4.2 years in the service prior to the training. *Id.*

<sup>20</sup> While many details of the study are classified, there is every indication that subjects were “man-handled” during the high stress interrogations. Katz, *supra* note 19.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 615 (1998).

<sup>24</sup> Katz, *supra* note 19. The report indicated that an identification was made in every case, showing that the high-stress group made more mistaken identifications than correct ones in every case, and even the low-stress group of trained military officers made an unacceptable number of mistaken identifications, ranging from 12-38%. *Id.*

previous studies,<sup>25</sup> there was absolutely no correlation between confidence or certainty and accuracy in either the low-stress or the high-stress group.<sup>26</sup>

*B. The Risk of Misidentification is Not a Theoretical One.*

There is no way to know for certain how many convictions are based on mistaken identification testimony. Estimates range as high as 5%.<sup>27</sup> One conservative study believes that as few (or as many) as 0.5% of convicted felons are actually innocent.<sup>28</sup> Accepting

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The low stress group's relatively low false identification rate should not be considered indicative since these witnesses had an extraordinary opportunity to view the target: 40 minutes in close proximity without physical stress. Rather one should note that even under these circumstances which should lead to very reliable identifications only 24 hours after the event, the subjects made 38% false identifications in a live lineup, and 25% false identifications in a sequential photo test. Morgan III et al., *supra* note 19 at 272.

<sup>25</sup> E.g., Seng & Carroll, *supra* note 16 at §2.4; Loftus & Doyle, *supra* note 18 at §3-12.

<sup>26</sup> Katz, *supra* note 19.

<sup>27</sup> Loftus & Doyle, *supra* note 18 at §4-1.

<sup>28</sup> Huff, *supra* note 10 at 59-62. The authors tried to be reasonably conservative. The authors took the research from an early study by Kalven and Zeisel, H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966), which found that in 4% of criminal cases studied, the jury convicted where the judge would have found the defendant not guilty.

Because the jury could be expected to be more accurate than the judge at least some of the time, perhaps as much as half the time, the authors halved this estimate, and then assumed another half of these cases appealed successfully. The authors combined this figure with their own survey of Ohio prosecutors, judges and public defenders, which sought their *perception* of wrongful conviction rates. Because the majority of respondents believed that the rate was something less than 1%, the authors again halved the 1% back of the envelope estimate based on the Kalven & Zeisel study, and arrived at a 0.5% rate, which they believe is conservative.

This figure does not account for cases where both the judge and the jury incorrectly believed in the defendant's guilt.

the conservative figure would mean that as many as 10,000 people a year are convicted of crimes they did not commit.<sup>29</sup> It is impossible to know how many of these convictions are based on mistaken identification testimony, but one can extrapolate based on how many exonerations involved mistaken eyewitness identification testimony.

Studies of the causes of wrongful convictions show that mistaken eyewitness identification testimony accounts for between one-half to two-thirds of these errors.<sup>30</sup> These studies encompass a wide range of crimes.<sup>31</sup> Notably, these mistakes were not confined to the cases where there is only one eyewitness, and included instances where the witnesses had plenty of time to view the perpetrator.

In one celebrated case of mistaken identification that occurred in 1979, seven store clerks were robbed at gunpoint by a “gentleman bandit” who pointed a chrome-plated handgun at them.<sup>32</sup> These seven clerks identified Father Bernard Pagano — a Roman Catholic priest — as the robber, and few doubted that he would have been

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<sup>29</sup> Id. at 62. Peter Neufeld and Barry Scheck believe that this number is probably much higher, based on the 25% DNA exoneration rate in sexual assault cases. NAT’L INST. OF JUSTICE, DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii-xxxi (1996)

Since there does not seem to be anything inherent in sexual assault cases that would make eyewitnesses more prone to mistakes than in robberies or other serious crimes where the crucial proof is eyewitness identification, it naturally follows that the rate of mistaken identifications and convictions is similar to DNA exoneration cases.

<sup>30</sup> See, e.g., Borchard, *supra* note 1 (44 out of 65 innocent defendants - 67.7%); Causes, *supra* note 1 (more than 2/3 of first 138 exonerated by DNA); Huff, *supra* note 10 at 64 (study of 205 wrongful convictions, including 54 from Borchard, found that 52.3% were due to eyewitness misidentification).

<sup>31</sup> Of the 205 cases in Huff et.al.’s database, 45% involved murder or manslaughter, 30.5% involved robbery, 12.5% involved rape. Huff, *supra* note 10 at 64.

<sup>32</sup> Seng & Carroll, *supra* note 16 at §1.2.

convicted if another man had not confessed before the trial ended.<sup>33</sup>

Another infamous example of misidentification involved the 1984 rape of Jennifer Thompson, a 22-year-old college student with a 4.0 grade point average.<sup>34</sup> According to Thompson, during her ordeal, she “studied every single detail on the rapist's face.”<sup>35</sup> After the rape, she immediately went to the police department and worked on a composite sketch.<sup>36</sup> She then identified Ronald Cotton in a photo array a few days later, and later in a lineup.<sup>37</sup> Cotton was convicted in January 1985.<sup>38</sup>

But Ronald Cotton was not the man who raped her.<sup>39</sup> After an appeals court overturned the conviction because of improper exclusion of exonerating evidence, Cotton was granted a new trial in 1987, this time for two rapes because a “second victim decided Cotton was her assailant.”<sup>40</sup> Although there was evidence that the actual rapist, Bobby Poole, confessed in prison, this evidence was not

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<sup>33</sup> Id.

<sup>34</sup> Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES June 18, 2000, <http://tinyurl.com/4qbea>. Cutler & Penrod’s meta-analysis of studies involving more than 16,000 subjects shows that there is no correlation between intelligence and accuracy. Cutler & Penrod, *supra* note 7 at 81-82.

<sup>35</sup> Thompson, *supra* note 34. Research shows that Thompson’s efforts to study and remember the details of her attacker’s face should lead to more accurate memory retention and identification later. Seng & Carroll, *supra* note 16 at §2.33.

The Supreme Court in *Neil v. Biggers* placed a great deal of emphasis on a similar degree of attention in assessing the reliability of the victim’s identification under due process. 409 U.S. 188, 200 (1972).

<sup>36</sup> Thompson, *supra* note 34.

<sup>37</sup> Id.

<sup>38</sup> Innocence Project, *Case Profiles: Ronald Cotton*, at [http://www.innocenceproject.org/case/display\\_profile.php?id=06](http://www.innocenceproject.org/case/display_profile.php?id=06) [hereinafter Ronald Cotton].

<sup>39</sup> Id.

<sup>40</sup> Id.



admitted into trial.<sup>41</sup> Thompson and the second victim were shown Poole and Cotton, and asked to identify the rapist.<sup>42</sup> Both identified Cotton as the rapist.<sup>43</sup> Thompson said of Bobby Poole, "I have never seen him in my life."<sup>44</sup> But she was mistaken. In 1995, DNA tests proved that Bobby Poole was the rapist. By that time Ronald Cotton had spent more than 10 years in prison.<sup>45</sup>

Not only have people been falsely imprisoned; some have surely been executed based on false eyewitness identification.<sup>46</sup> One hundred and twenty-two death row prisoners have been exonerated since 1973.<sup>47</sup> Mistaken eyewitness identification testimony played a

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<sup>41</sup> Id.

<sup>42</sup> Thompson, *supra* note 34.

<sup>43</sup> Ronald Cotton, *supra* note 38.

<sup>44</sup> Thompson, *supra* note 34.

<sup>45</sup> Ronald Cotton, *supra* note 38.

<sup>46</sup> See generally Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 61 LAW & CONTEMP. PROBS. 105 (1998).

<sup>47</sup> Death Penalty Information Center, *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> [hereinafter Exonerations] (last visited March 16, 2005). DPIC describes the criteria for inclusion on the exoneration list in the following manner:

DPIC uses the traditional objective criteria that have determined innocence since the founding of this country. In order to be included on the list, defendants must have been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dismissed; or b) they were given an absolute pardon by the governor based on new evidence of innocence.

*Id.* Some claim that the list is misleading because exonerees have not been proven innocent. *E.g.*, FLORIDA COMMISSION ON CAPITAL CASES, REPORT 5 (Sep. 10, 2002) ("A defendant is found guilty or not guilty, never innocent."), at <http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf>. These claims ignore the substantial burdens required by appellate courts to set aside convictions, especially when the issue raised is one of innocence, and misplaces the subsequent burden of proof.

major role in 49 of these cases.<sup>48</sup> This number should be compared with 1009 executions in the same time period,<sup>49</sup> resulting in a more than 10% innocence rate, and an extremely high 5% mistaken identification rate, or 40% of those found innocent. While it is almost impossible to definitively prove innocence after a prisoner has been executed because of the lack of judicial review, in thirty-two cases between 1900 and 1985, the purported victim was later found alive.<sup>50</sup> But states do not willingly participate in this inquiry: “some states candidly admit that their policy is never to confess error.”<sup>51</sup>

The role of mistaken identification in the death penalty innocence cases is much smaller than the 2/3 rate seen in all the innocence project cases, however. This may be because eyewitness testimony plays a smaller part in death penalty cases than in other serious crimes. According to a *Houston Chronicle* study, which included a survey of Texas defense lawyers and prosecutors, as well

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<sup>48</sup> Author’s hand-count based on DPIC list of exonerated prisoners. Death Penalty Information Center, *Cases of Innocence 1973 – Present*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=109> (last visited Feb 1, 2006).

The Center on Wrongful Convictions (CWC) performed an earlier, more thorough study of the first 86 legally exonerated death row prisoners since 1973, and found that 46, or 53.5% involved faulty eyewitness testimony. Rob Warden, Center on Wrongful Convictions, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row*, May 2, 2001, <http://www.law.nwu.edu/depts/clinic/wrongful/Causes/eyewitnessstudy01.htm>. The CWC list included some freed prisoners as exonerated who did not appear on the DPIC list: for example, William Jent and Earnest Miller.

<sup>49</sup> Death Penalty Information Center, *Executions by Year*, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last visited Feb 1, 2006).

<sup>50</sup> David Margolick, *25 Wrongfully Executed in U.S., Study Finds*, N.Y. TIMES, November 14, 1985, at A19.

<sup>51</sup> Edward Lazarus, *Why States Don’t Confess Error in Death Penalty Cases*, CNN INTERACTIVE, June 14, 2000, at <http://archives.cnn.com/2000/LAW/06/columns/lazarus.saldano.6.12/index.html>.

as an examination of several capital murder cases tried in Houston, “the vast majority of death penalty trials has no eyewitness testimony.”<sup>52</sup>

One recent execution where the conviction rested mainly on questionable eyewitness identification testimony was the case of Gary Graham.<sup>53</sup> The only witness who claimed to see Graham commit the murder in a supermarket parking lot, “claimed to have seen a total stranger ... 9:30 at night, in the dark, from a distance of 40 feet away for two seconds.”<sup>54</sup> There were many problems with this identification. When presented with a photoarray containing Gary Graham’s picture two weeks after the murder, Bernadine Skillern said that Graham’s photo resembled the murderer, but that the murderer’s complexion was darker, and his face thinner.<sup>55</sup> The next day, she picked Graham out of a lineup; he was the only subject in both the photoarray and the lineup.<sup>56</sup> There were seven other eyewitnesses, none of whom identified Graham as the murderer, who they say was much shorter than Graham.<sup>57</sup> Three witnesses who

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<sup>52</sup> Steve Brewer, *Murder Trial Eyewitnesses ‘a luxury’*, HOUSTON CHRON. June 22, 2000, at A17. Contrary to the findings of researchers, *see infra* notes 124-129 and accompanying text, the experienced capital defense lawyers surveyed stated that eyewitness testimony would actually create an opportunity for them to create reasonable doubt, because eyewitness testimony is so unreliable.

<sup>53</sup> CNN.com, *Execution Looms for Texas Inmate Convicted on Testimony of One Witness*, June 15, 2000, at <http://archives.cnn.com/2000/LAW/06/15/graham.execution/#1>.

<sup>54</sup> *Id.*

<sup>55</sup> Campaign to End the Death Penalty, *CEDP Fact Sheets: Gary Graham*, at <http://www.nodeathpenalty.org/factsheets/garyGraham.html> [hereinafter CEDP] (last visited Dec. 22, 2004).

<sup>56</sup> *Id.* Nathan Sobel contends that the use of photographs before a lineup reduces identification reliability and raises fairness issues. NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL & PRACTICAL PROBLEMS §10.2 (2d ed. rev. 2004)

<sup>57</sup> CEDP. Graham’s problems may have been compounded by poor representation by Ron Mock, who did not call two witnesses listed in the police report. Ron Mock was infamous in Texas for losing more death penalty cases than

saw the killer in the supermarket checkout lane, including one who stood next to him, emphatically declare that Gary Graham was the wrong man.<sup>58</sup> Graham was executed on June 22, 2000.<sup>59</sup>

## II. CURRENT RESPONSES AND PROPOSALS DO NOT MEANINGFULLY LESSEN THE RISK OF MISIDENTIFICATION.

### A. *The Neil v. Biggers Reliability Factors Do Not Sufficiently Ensure That Only Reliable Eyewitness Identifications Are Admitted.*

In determining whether an identification should be excluded as violating Due Process, the Supreme Court has established a threshold question of whether the pre-trial identification procedures contained elements of suggestion.<sup>60</sup> The Court has singled out suggestion because it believes that suggestive procedures “increase the likelihood of misidentification.”<sup>61</sup> The reliability of a particular eyewitness identification is only examined once suggestion is found, but suggestion *per se* does not violate a defendant’s Due Process rights.<sup>62</sup> One Assistant U.S. Attorney has stated that allowing suggestive procedures “is analogous to creating one piece of evidence, the identification that results from the procedure, and

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any other lawyer. See Rick Casey, *Mock Gone, Not Mockery*, HOUSTON CHRON. Dec. 3, 2004, at B1.

<sup>58</sup> *Id.* See also Statement of Richard Burr, *Texas Execution: a NewsHour with Jim Lehrer Transcript*, June 22, 2000, at [http://www.pbs.org/newshour/bb/law/jan-june00/execution\\_6-22a.html](http://www.pbs.org/newshour/bb/law/jan-june00/execution_6-22a.html) (last visited Dec. 22, 2004).

<sup>59</sup> Lou Jones, *Gary Graham*, FINAL EXPOSURE: PORTRAITS FROM DEATH ROW (1996), <http://www.fotojones.com/editorial/deathrow/inmates/graham.html> (last visited Dec. 22, 2004).

<sup>60</sup> *Neil v. Biggers*, 409 U.S. at 198.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 198-99; accord *Manson v. Brathwaite*, 432 U.S. at 113-14 (characterizing the Due Process right to identification procedures free from suggestion as merely an “evidentiary interest”).

destroying another piece of evidence, the identification, or failure of identification, that would have resulted from a correctly conducted process.”<sup>63</sup>

Suggestive identification procedures may well be unfair in and of themselves,<sup>64</sup> but there is some indication that if the actual culprit were actually in the lineup or photoarray, suggestion does not affect the accuracy of the identification.<sup>65</sup> However, if the culprit is not present, even subtle suggestion results in a misidentification rate of up to 90%, as compared to a misidentification rate of 45% if suggestive procedures were not used.<sup>66</sup> Although there is some indication that the effect of suggestive procedures is less in real crimes than in staged ones,<sup>67</sup> even the non-suggestive false identification rates (45%) must be seen as unacceptable.

Once suggestion is found, courts will determine whether the identification is nonetheless reliable, weighing the factors set out in *Neil v. Biggers*<sup>68</sup> against the “corrupting effect of the suggestive identification itself.”<sup>69</sup> These factors include “[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the

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<sup>63</sup> Benjamin Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 292 (1991).

<sup>64</sup> Id.

<sup>65</sup> Cutler & Penrod, *supra* note 7 at 116-17 (citing Brian Cutler et al., *The Reliability of Eyewitness Identifications: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 223 (1987)).

<sup>66</sup> Id. at 117.

<sup>67</sup> Id. at 119 (citing G. Kohnken & A. Maass, *Eyewitness Testimony: False Alarms on Biased Instructions?*, 73 J. APPLIED PSYCHOL. 363 (1981)).

<sup>68</sup> 409 U.S. at 199-200.

<sup>69</sup> Manson, 432 U.S. at 114.

confrontation.”<sup>70</sup> The problem is that this reliability test “is not a satisfactory method of measuring reliability.”<sup>71</sup>

### 1. The Opportunity of the Witness to View the Criminal

The amount of time that a witness views a criminal, the lighting conditions and the proximity of the witness are all relevant to the reliability of an identification. Lighting conditions and the witness’s distance from an event have a particularly great influence on a witness’s ability to perceive objects and people.<sup>72</sup> But even in perfect perception conditions, where accuracy is highest, identifications are unreliable, and mistakes are rampant.<sup>73</sup> The effect of the time period is a bit more complex.

Curiously, the amount of time a witness views an event does not correlate with accuracy. Although “[c]ommon sense tells us that the amount of time available for viewing a perpetrator is positively associated with the witness’s ability to subsequently identify him,”<sup>74</sup> this turns out not to be the case. Instead, Cutler & Penrod’s meta-analysis of research involving more than 16,000 subjects shows that the improvement in recognition decreases slightly as exposure time grows, and this improvement is in any event relatively small.<sup>75</sup> This seems to contradict the 1971 study which showed that eight minutes after an event, the recognition rate ranged from 47% accuracy after ten seconds of exposure to 75% accuracy after 32 seconds of

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<sup>70</sup> Id.

<sup>71</sup> Rosenberg, *supra* note 63 at 276.

<sup>72</sup> Loftus & Doyle, *supra* note 18 at §2-4.

<sup>73</sup> See *supra* Section I.

<sup>74</sup> Cutler & Penrod, *supra* note 7 at 101.

<sup>75</sup> Id. The meta-analysis was an effort to normalize all of the disparate eyewitness studies available before 1995; they account for statistical variations by putting the studies together and arriving at a vast set of data for many different witnessing variables.

exposure.<sup>76</sup> This study was included in Cutler & Penrod's meta-analysis, and can be explained by the fact that most identifications occur more than eight minutes after an event; the difference will be smaller as more time elapses.<sup>77</sup>

The aforementioned Navy study may be particularly instructive in this regard.<sup>78</sup> The officers were subjected to interrogations of 40 minutes, much longer than the short seconds or minutes that most crimes encompass.<sup>79</sup> Yet, the reliability of the identifications made by these highly trained military officers was not significantly greater than in other studies with shorter event durations.<sup>80</sup>

Another problem is that courts will analyze this factor on the basis of the witness's recollection of the circumstances, which is subject to an overestimation bias.<sup>81</sup> In one study, witnesses overestimated the duration of a 34 second event by a factor of 2½ times.<sup>82</sup> And the confidence bolstering effect of suggestion may have even greater effects that insulate this factor from meaningful review.<sup>83</sup> Recent research indicates that as the confidence of mistaken eyewitnesses is inflated, the lighting improves, they are closer to the action, and the event takes longer.<sup>84</sup>

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<sup>76</sup> Huff, *supra* note 10 at 89 (citing K.R. Laughery et al., *Recognition of Human Faces*, 55 J. APPLIED PSYCHOL. 477 (1971)).

<sup>77</sup> Cutler & Penrod, *supra* note 7 at 110.

<sup>78</sup> Katz, *supra* note 19.

<sup>79</sup> Morgan III et al., *supra* note 19 at 268.

<sup>80</sup> Compare *id.* at 272 with Cutler & Penrod, *supra* note 7 at 11-12.

<sup>81</sup> Rosenberg, *supra* note 63 at 278-79.

<sup>82</sup> Loftus & Doyle, *supra* note 18 at §2-5 (citing Buckhout, *Eyewitness Identification and Psychology in the Courtroom*, 4 CRIM. DEF. 5 (1977)).

<sup>83</sup> Loftus & Doyle, *supra* note 18 at §1-3.

<sup>84</sup> *Id.* (citing Wells & Bradfield, "Good, You Identified the Suspect:" Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED

## 2. The Witness' Degree of Attention

Research shows that efforts to study and remember the details of an event or facial features should lead to more accurate memory retention and identification later.<sup>85</sup> Courts have placed emphasis on witnesses' training in order to show that they would pay close attention to the person and event.<sup>86</sup> Courts also tend to believe that a person in danger will pay greater attention to detail than otherwise.<sup>87</sup>

However, studies have shown that police officers and others specially trained in facial recognition are no better than the overall population at either making correct identifications or refraining from making false ones.<sup>88</sup> Furthermore, many studies have shown that violence or other stressful situations greatly decrease the ability of a witness to make accurate identifications.<sup>89</sup> The Navy study is probably the most accurate one to date on the effects of stress on subsequent identifications; most other researchers are reluctant to subject their witnesses to the kinds of stress experienced during violent crimes. And the effect of stress in that study was enormous.<sup>90</sup>

## 3. The Accuracy of a Prior Description

There is no agreement on whether identifications preceded by a detailed description objectively matching the person later

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PSYCHOL. 42 (2003)).

<sup>85</sup> Seng & Carroll, *supra* note 16 at §2.33; Cutler & Penrod, *supra* note 7 at 88.

<sup>86</sup> *See, e.g.*, Manson v. Brathwaite, 432 U.S. at 115 ("as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail").

<sup>87</sup> *See, e.g.*, Neil v. Biggers, 409 U.S. at 200 ("She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.").

<sup>88</sup> Cutler & Penrod, *supra* note 7 at 86.

<sup>89</sup> *See* Loftus & Doyle, *supra* note 18 at §2-7.

<sup>90</sup> *See supra* notes 21-24 and accompanying text (showing false identification rates up to 68%).



identified are more accurate than other identifications.<sup>91</sup> This inconsistency extends to the question of a relationship between the ability to describe faces and accuracy in identifying faces.<sup>92</sup> Furthermore, even where Cutler & Penrod found that subjects who had a high ability to describe faces could make more accurate identifications, there was a very low correlation between *consistent* descriptions and accuracy.<sup>93</sup> Unfortunately, both courts and jurors value description consistency.<sup>94</sup> To a non-psychologist evaluating the conflicting results, the evidence should be considered inconclusive at best.<sup>95</sup>

#### 4. The Certainty of Eyewitness Identification

If there is one thing that the research is virtually unanimous on, it is this: there is no correlation whatsoever between eyewitness

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<sup>91</sup> See Cutler & Penrod, *supra* note 7 at 93 (comparing Pigott et al.'s 1990 study showing no significant correlation between description accuracy, completeness and congruence with Wells' conflicting 1985 study).

<sup>92</sup> Id. at 83 (citing P. Shapiro & S. Penrod, *Meta-analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986); Rosenberg, *supra* note 63 at 277 (citing Wells & Murray, *What Can Psychology Say About the Neil v. Biggers Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347 (1983); Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?*, 1979 BULL. PSYCHONOMIC SOC'Y 13, 15-18).

<sup>93</sup> Cutler & Penrod, *supra* note 7 at 94.

<sup>94</sup> See, e.g., Gregory-Bey v. Hanks, 332 F.3d 1036, 1050 (7th Cir. 2003); State v. Cheeseboro, 552 S.E.2d 300, 308 (S.C. 2001); Cutler & Penrod, *supra* note 7 at 183 (summarizing studies which of jurors' belief in the predictive power of consistent description of peripheral details); Sobel, *supra* note 56 at §6.7 (summarizing many cases where description accuracy and consistency played a major role).

<sup>95</sup> Compare Cutler & Penrod, *supra* note 7 at 83 (finding eyewitnesses with high ability to describe faces made more correct identifications, but it was unknown whether they made fewer false identifications) with Rosenberg, *supra* note 63 at 277 (finding no such relationship between ability to describe faces and accurate identifications).

certainty and accuracy.<sup>96</sup> “Experienced judges understand that the most positive witness is not always the most reliable.”<sup>97</sup> Even if confidence did correlate with accuracy,<sup>98</sup> the fact that confidence is malleable and often bolstered by police and prosecutors should raise doubt in the predictive power of confidence.<sup>99</sup> Consequently, many courts have begun to place very little reliance on witness confidence.<sup>100</sup>

## 5. The Time Between the Crime and the Confrontation

The amount of time passed before a witness or victim identifies the perpetrator is undoubtedly an important factor in determining the reliability of an identification. Memory retention apparently drops off in a sharp “forgetting curve” after an event, eventually stabilizing into an extremely low rate of accurate identification, a rate approaching chance in some studies.<sup>101</sup>

Cutler & Penrod’s survey of studies that manipulated retention intervals showed that fewer correct identifications (51% vs. 61%) and more false identifications (32% vs. 24%) were associated

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<sup>96</sup> See, e.g., Seng & Carroll, *supra* note 16 at §2.4, §2.40; Loftus & Doyle, *supra* note 18 at §3-12; Cutler & Penrod, *supra* note 7 at 94-95.

<sup>97</sup> Sobel, *supra* note 56 at §6.12..

<sup>98</sup> Ebbe Ebbesen & Vladimir Konecni, Eyewitness Memory Research: Probative v. Prejudicial Value 14, at <http://www.psy.ucsd.edu/~eebbesen/prejvprob.html> (last visited Jan. 5, 2005).

<sup>99</sup> See Loftus & Doyle, *supra* note 18 at §3-12; Cutler & Penrod, *supra* note 7 at 186-90.

<sup>100</sup> E.g., Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005) (reversing conviction because jury charge on eyewitness reliability included element of certainty); Commonwealth v. Santoli, 680 N.E.2d 1116, 1121 (Mass. 1997) (disapproving jury instructions on witness certainty); State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (adopting alternative reliability criteria without certainty factor); Krist v. Eli Lilly & Co., 897 F.2d 293, 296-97 (7th Cir. 1990) (questioning probativity of witness certainty in any context); Sobel, *supra* note 56 at §6.12..

<sup>101</sup> Loftus & Doyle, *supra* note 18 at §3-2(a).

with longer delays.<sup>102</sup> Very short intervals may be particularly important when it comes to reducing false identifications. In one study looking at very short intervals (2 hours vs. 24 hours) in low stress situations, false identifications increased from 15% to 52% while correct identifications decreased less dramatically from 43% to 39%.<sup>103</sup>

There is some evidence, however, that this factor is much less relevant than the opportunity to view.<sup>104</sup> This may be because the process of forgetting does not seem to occur in a predictable passive decay mechanism, but rather in a more complex manner where new experiences, and even older ones, interfere with the process of reliable memory.<sup>105</sup> In some cases memories may be affected by unconscious transference, where a person seen in another context is identified as the criminal.<sup>106</sup> Furthermore, in some cases, violent events may make people engage in a process of “motivated forgetting,” where the subconscious mind will block aspects of the event from memory.<sup>107</sup>

The problem is not that the courts rely overmuch on reliability factors that do not accurately predict reliability, such as the degree of attention, but that even if every factor pointed to a more reliable identification, the corresponding degree of reliability is still unacceptable. Nor would inclusion of other, more valid reliability factors, such as whether the testimony involved cross-race identification,<sup>108</sup> make eyewitness identification testimony

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<sup>102</sup> Cutler & Penrod, *supra* note 7 at 106.

<sup>103</sup> *Id.* (citing Krafka & Penrod, *supra* note 13).

<sup>104</sup> Sobel, *supra* note 56 at §6.13.

<sup>105</sup> Seng & Carroll, *supra* note 16 at §2.38.

<sup>106</sup> Loftus & Doyle, *supra* note 18 at §4-10.

<sup>107</sup> *Id.* at §3-3.

<sup>108</sup> *See* Cutler & Penrod, *supra* note 7 at 104 (Penrod & Shapiro’s meta-analysis showed that cross-race identifications were less accurate (57% vs. 63%) and subject

sufficiently reliable. The baseline accuracy rates, assuming that every factor pointed to a “more reliable” identification, range from 50-60% even in non-stressful witnessing situations — not too much more reliable than a coin toss.

Courts acknowledge this, though, and rely on the jury to get it right. The Supreme Court has placed a great deal of confidence in the adversarial jury system as a means of ferreting out mistaken eyewitness identification testimony:

It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness. . . . While identification testimony is significant evidence, such testimony is still only evidence. . . .

Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.<sup>109</sup>

*B. Juries Cannot Meaningfully Determine Whether Eyewitness Identification Is Accurate.*

“Few moments are more dramatic than when a courtroom witness, upon prompting from the prosecutor, outstretches an arm, extends a finger, and declares with rock-solid certainty that the accused is the person she saw fleeing the scene of the crime with bloodied hands.”<sup>110</sup> Studies have shown that jurors overwhelmingly believe eyewitness identification testimony. Rare is the *My Cousin Vinny* moment, where the defense lawyer can show that the

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to more false identifications (22% vs. 18%)); Loftus & Doyle, *supra* note 18 at §4-9 (55% false identification rate for cross-race identification vs. 35% for same-race).

<sup>109</sup> Manson, 432 U.S. at 114 (quoting *Clemons v. United States*, 408 F.2d 1230, 1251 (DC Cir. 1968)).

<sup>110</sup> Loftus & Doyle, *supra* note 18 at §4-1.

eyewitness is blind or viewing the event through filthy windows.<sup>111</sup> In a couple of studies, even this sort of discrediting information (the eyewitness had very poor eyesight and was not wearing glasses at the time) resulted in only a 4% lower conviction rate.<sup>112</sup> Cutler & Penrod state flat-out that “there are more convictions than there are accurate identifications.”<sup>113</sup> Jurors believe in eyewitnesses “despite impeachment, despite aggressive cross-examinations, and despite cautionary instructions.”<sup>114</sup> Jurors have an “implicit faith” in eyewitness identification testimony and “tend to dispose of information that challenges that faith.”<sup>115</sup> Even if jurors were disposed to question the accuracy of an identification, because eyewitness identification testimony is inherently unreliable, jurors are simply unable to distinguish correct identifications from false ones.<sup>116</sup>

In one study involving mock jurors, whether leading or open questions were used, whether the witness was accurate or not, between 73%-86% of “jurors” believed the eyewitness identification.<sup>117</sup> The criteria by which jurors judge the reliability of a witness do not correlate with accuracy. Truth is not at issue — we can assume that the victims and other eyewitnesses making the identification are being truthful, even when mistaken. The eyewitness is usually sincerely convinced of the accuracy of his or

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<sup>111</sup> MY COUSIN VINNY (Twentieth Century Fox 1992).

<sup>112</sup> Cutler & Penrod, *supra* note 7 at 191.

<sup>113</sup> *Id.* at 186.

<sup>114</sup> Loftus & Doyle, *supra* note 18 at §9-1.

<sup>115</sup> *Id.*

<sup>116</sup> See generally Steven Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 170-88 (1990).

<sup>117</sup> Cutler & Penrod, *supra* note 7 at 181-82 (citing Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440 (1979)).

her testimony.<sup>118</sup> Jurors tend to evaluate eyewitnesses by three criteria: witness confidence, consistency, and memory of specific details.<sup>119</sup> None of these criteria correlate with identification accuracy.

For example, in one study, “jurors” predicted a 83% probability that a “completely certain” eyewitness would correctly identify a culprit, compared with a 28% probability that a “somewhat uncertain” witness would do so.<sup>120</sup> However, studies have found that there is very little correlation between witness confidence and accuracy.<sup>121</sup> There is similarly little correlation between witness consistency or memory of specific details and accuracy.<sup>122</sup> In fact, memory of peripheral details will increase the likelihood of a witness making an identification with confidence, but is *inversely* correlated with accuracy.<sup>123</sup>

Even experienced defense attorneys are unable to effectively counter jurors’ propensity to believe eyewitness testimony. Cutler & Penrod found that an attorney’s degree of experience, and presumed skill at cross-examination, did not significantly influence verdicts, even when correlated with known mistaken identifications.<sup>124</sup> “Cross-examination, a marvelous tool for helping jurors discriminate

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<sup>118</sup> Loftus & Doyle, *supra* note 18 at §10-1(a).

<sup>119</sup> Cutler & Penrod, *supra* note 7 at 181-190, 200-203. Some commentators say that the criteria that jurors use to evaluate eyewitness identification is the same as that used for all witness testimony: perception, sincerity, and memory – the difference may in the end be semantic. *See* Friedland, *supra* note 116 at 181.

<sup>120</sup> Cutler & Penrod, *supra* note 7 at 178 (citing Gary Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony?*, in *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* 256 (Gary Wells & Elizabeth Loftus eds. 1984).

<sup>121</sup> Cutler & Penrod, *supra* note 7 at 94-95; Seng & Carroll, *supra* note 16 at §2.4, §2.40; Loftus & Doyle, *supra* note 18 at §3-12.

<sup>122</sup> *See supra* notes 91-95 and accompanying text.

<sup>123</sup> Cutler & Penrod, *supra* note 7 at 94.

<sup>124</sup> Cutler & Penrod, *supra* note 7 at 186.

between witnesses who are intentionally deceptive and those who are truthful, is largely useless for detecting witnesses who are trying to be truthful but are genuinely mistaken.”<sup>125</sup> Normally, cross-examination serves to expose an insincere or dissembling witness.<sup>126</sup> However, with eyewitness identification testimony, an aggressive cross-examination only serves to highlight the witness’s sincerity.<sup>127</sup> The attorney can question the witness about any factors, such as stress or cross-race identification, that would lead to more erroneous identifications,<sup>128</sup> but jurors do not tend to credit these factors in assessing the witness’s credibility.<sup>129</sup>

Nor could expert witnesses help jurors to determine whether a particular witness has made an accurate identification or not. While expert testimony will tend to increase the amount of time that juries spend in deliberation discussing the eyewitness testimony (from 10% of the total deliberation time to 28%) and decrease the conviction rate by up to 20%,<sup>130</sup> expert testimony cannot help the jury determine whether any particular identification is accurate or not.<sup>131</sup>

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<sup>125</sup> Wells et al., *supra* note 23 at 609.

<sup>126</sup> Loftus & Doyle, *supra* note 18 at §10-1(a).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at §10-2.

<sup>129</sup> Cutler & Penrod, *supra* note 7 at 197-209 (“the effectiveness of cross-examination as a safeguard is still questionable in light of the lack of juror sensitivity to factors that are known to be diagnostic of eyewitness reliability”).

<sup>130</sup> *Id.* at 218-21.

<sup>131</sup> Ebbesen & Konecni, *supra* note 98 at 4 (arguing that not only is there no theory which would allow an expert to predict the accuracy of a particular identification, but also that the effect of combining the various reliability factors is unknown).

*But see* Loftus & Doyle, *supra* note 18 at §11-11 (advocating practitioners’ use of trace evidence analogy to convince judges that “expert testimony does not necessarily threaten *only* a rise in the jurors’ general level of skepticism about eyewitnesses, but actually points to specific factors in this specific case that are diagnostic of reliability or error”) (emphasis added).

Expert testimony can inform jurors about the factors which would make an identification particularly unreliable, and also decrease jurors' reliance on witness confidence.<sup>132</sup> However, when not presented with the particular factors which would make the identification more unreliable than the baseline, jurors will place even greater weight on the identification.<sup>133</sup> This reliance is unwarranted considering that most studies place the baseline reliability rate of eyewitness identification at around 50%.<sup>134</sup>

*C. Current Proposals Improve Real-World Reliability But Not Enough*

There have recently been a few proposals to improve the reliability of eyewitness identification evidence<sup>135</sup> by incorporating the recommendations of Gary Wells and his collaborators for improving identification accuracy.<sup>136</sup> These proposals seek not only to eliminate any inadvertent suggestion<sup>137</sup> which may taint the reliability of an identification but also to counteract the tendency for witnesses to choose the person in the lineup or photoarray<sup>138</sup> who merely looks the most similar to the culprit, a tendency known as "relative judgment."<sup>139</sup> These proposals range from improved questioning techniques by investigating officers<sup>140</sup> and simply

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<sup>132</sup> Cutler & Penrod, *supra* note 7 at 227.

<sup>133</sup> *Id.* at 227-30.

<sup>134</sup> *See supra* notes 11-26 and accompanying text.

<sup>135</sup> *See generally* NAT'L INST. OF JUSTICE, DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999) [hereinafter *The Guide*].

<sup>136</sup> Wells et al., *supra* note 23.

<sup>137</sup> *The Guide* assumes that law enforcement is acting in good faith. at 2.

<sup>138</sup> The term "lineup" will be used to refer to both photoarrays and live lineups.

<sup>139</sup> Wells et al., *supra* note 23 at 613-14 ("most of the 54% who identified the culprit in a culprit-present lineup would have identified someone else if the culprit had not been present...eyewitnesses tend to select whomever looks most like the perpetrator regardless of whether the actual perpetrator is in the lineup").

<sup>140</sup> *The Guide*, *supra* note 135 at 13-16, 21-25.



informing the witness that the perpetrator may not be in the lineup<sup>141</sup> to changing lineup procedures themselves by using blank<sup>142</sup> or sequential lineups.<sup>143</sup> However, even the most effective of these procedures, the use of double blind sequential lineups, do not make eyewitness identifications reliable enough.

There is little doubt that double blind sequential lineups can improve reliability under the right circumstances – studies have shown that they can reduce the false identification rate by more than 50%.<sup>144</sup> Such dramatic results have not been achieved in all studies however; in the Navy study, the lowest false identification rate for the high-stress group was 51%.<sup>145</sup> What makes psychologists so enthusiastic about this procedure is that it appears to reduce the false identification rate without adversely affecting the ability to obtain correct identifications when the culprit is in the lineup.<sup>146</sup> However, this technique may not be the most reliable one for all circumstances. In the Navy study, the low stress interrogation group made fewest false identifications with the use of a photoarray, rather than

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<sup>141</sup> Id. at 32. One study found that simply telling a witness that the culprit may not be in the lineup reduced the false identification rate *when the culprit was not in the lineup* from 78% to 33%, while having no adverse effect on a witness's willingness to make a positive identification when the culprit *was* in the lineup. Wells et al., *supra* note 23 at 614.

<sup>142</sup> Wells et al., *supra* note 23 at 614.

<sup>143</sup> The Guide, *supra* note 135 at 34, 36.

<sup>144</sup> Cutler & Penrod, *supra* note 7 at 128. One commentator stresses the importance of making sure that sequential lineups are double blind, if done at all, since the effect of inadvertent suggestive clues may be greater than in simultaneous lineups. Wells et al., *supra* note 23 at 634.

<sup>145</sup> Morgan III et al., *supra* note 19 at 272.

<sup>146</sup> Cutler & Penrod, *supra* note 7 at 128. Cutler & Penrod have found that sequential presentation may eliminate the effects of some types of suggestiveness (subtle clothing clues, for example), reducing false identification rates from 84% to 25%. Id. at 133.

sequential photos (12% vs. 25%).<sup>147</sup> Another problem is that when an identification is not made through the sequential method, witnesses are often given a second chance to identify a suspect through a simultaneous lineup, more than erasing any advantage.<sup>148</sup>

The biggest problem, however, is that sequential lineups and other procedures are not sufficient to make eyewitness identifications reliable. Law enforcement organizations who adopt these positive steps are to be commended,<sup>149</sup> but they are using a band-aid on a gaping wound. The best achievable rates for false identifications is around 20%,<sup>150</sup> and any imperfect witnessing condition can result in false identification rates ranging from 51% to 68%<sup>151</sup> to 90%!<sup>152</sup>

### III. ELIMINATING EYEWITNESS IDENTIFICATION TESTIMONY WOULD NOT UNREASONABLY BURDEN THE CRIMINAL JUSTICE SYSTEM.

Because current proposals do not sufficiently lessen the risk of misidentification, the only rational response to such a high rate of

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<sup>147</sup> Morgan III et al., *supra* note 19 at 272. This counterintuitive result may be anomalous. Multiple repeated tests would be needed to determine whether this result is representative. This needed type of repetition is very rare in the world of eyewitness tests.

<sup>148</sup> Cutler & Penrod, *supra* note 7 at 129.

<sup>149</sup> See, e.g., The Guide, *supra* note 135; DIV. CRIMINAL JUSTICE, N.J. OFFICE OF ATTORNEY GEN., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> (last visited Jan. 7, 2005).

<sup>150</sup> Cutler & Penrod, *supra* note 7 at 128; Gunter Koehnken et al., *Forensic Applications of Line-Up Research*, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 205, 227 (Siegfried Sporer et al., eds. 1996). Even in the low stress group for the Navy study, where the subjects viewed the interrogators for 40 minutes at close proximity, the false identification rates more commonly seen were 25% and 38%. Morgan III et al., *supra* note 19 at 272.

<sup>151</sup> Morgan III et al., *supra* note 19 at 272.

<sup>152</sup> Cutler & Penrod, *supra* note 7 at 116-17.

false identifications is to eliminate these identifications from trial. DNA tests can only exonerate those suspects and defendants for whom there is such physical evidence. The vast majority of cases do not involve DNA evidence. There has been some movement to institute new safeguards for the use of eyewitness testimony in Capital and other murder cases, but these proposals only seek to remove the elements of suggestion and relative similarity by incorporating Gary Wells' recommendations.<sup>153</sup> As discussed in the previous section, these proposals improve identification accuracy, but not enough. Furthermore, there is no reason to believe that false identifications are more of a problem in murders than in other violent crimes; in fact, the opposite may be the case.

Victims make up the vast majority of eyewitnesses, and live victims are rare in most homicides.<sup>154</sup> This helps to account for the lower number of wrongful capital convictions attributed to false identification.<sup>155</sup> Generally, victims making an identification have been subjected to an extreme amount of stress, which greatly increases the false identification rate.<sup>156</sup>

For about half of all violent crimes, however, eyewitness testimony is extremely reliable, because the crime was committed by someone known to the witness, such as a relative.<sup>157</sup> This is why eyewitness identification testimony should only be excluded in those cases where the defendant is a stranger to the witness, or the witness is an accomplice,<sup>158</sup> and only in FBI Crime Index felony cases.<sup>159</sup> The

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<sup>153</sup> See, e.g., REPORT OF THE COMMI'N ON CAPITAL PUNISHMENT 31-40 (Ill., 2002), [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/chapter\\_02.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_02.pdf).

<sup>154</sup> Samuel L. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 137 (1998).

<sup>155</sup> See *supra* notes 46 - 52 and accompanying text.

<sup>156</sup> See *supra* notes 19- 24 and accompanying text.

<sup>157</sup> Gross, *supra* note 154 at 137.

<sup>158</sup> Perjured eyewitness testimony from accomplices accounted for 15, or 32.6%, of the 46 erroneous identifications discussed by the Center on Wrongful

Crime Index is simply chosen as a proxy for serious crimes for which the cost of further investigation is outweighed by the benefit of fewer wrongful convictions.

The burden on the criminal justice system would not be all that great. A survey of prosecutors in 30 states resulted in an estimate that only 3% of felony cases are based on eyewitness identifications,<sup>160</sup> and another estimate pegged the number at 5%.<sup>161</sup> If this number is halved to account for those crimes in which the witness previously knew the defendant, only 1.5-2.5% of these cases are based on suspect identifications. Police and other investigators should, of course, be allowed to continue to use identifications as an investigative tool. Surely investigators can find other evidence in those 1.5-2.5% of cases, so that these cases can be prosecuted with more reliable evidence.

Murder cases are the least dependent on eyewitness identification testimony, yet they have the highest “clearance” (or arrest and charge) rate of all Crime Index crimes at 62.4%.<sup>162</sup> Police were able to find the evidence needed even without witnesses. The next highest clearance rates were for aggravated assault and rape, both crimes where in many cases, the victim was acquainted with

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Convictions report. Warden, *supra* note 48.

Professor Gross claims that witness perjury is a “far more common cause of errors in murders and other capital cases than in lesser crimes.” Gross, *supra* note 154 at 139. He attributes this factor to absence of a live victim to contradict the perjurer. *Id.*

<sup>159</sup> FBI, CRIME IN THE U.S. 2003 3 (2004) [hereinafter CRIME].

<sup>160</sup> Cutler & Penrod, *supra* note 7 at 8 (citing Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71 (1989)).

<sup>161</sup> *Id.* (citing Wallace Loh, *Psycholegal Research: Past & Present*, 79 MICH. L. REV. 659, 686 (1981)).

<sup>162</sup> Crime, *supra* note 159 at 255.

the culprit.<sup>163</sup> And where the crime was committed by a stranger, the police should continue to use the victims' and other witnesses' accounts for investigations. With new investigative techniques, such as the use of DNA testing, police may be able to solve many of these crimes more easily than ever before.

Certainly, there are many cases, including homicides, where there is no other evidence but eyewitness identification. And sometimes, there is not even that. When the crime is especially serious, the pressure to find and convict a culprit is especially high.<sup>164</sup> But where there is no other evidence, the added pressure to get justice for the community may lead to mistakes. And these mistakes can be fatal.

#### CONCLUSION

Eyewitness identification testimony is known to the courts and to psychologists to be extremely unreliable. However, there is great resistance to excluding this type of evidence at trial. The commonsense belief that "seeing is believing" is hard to overcome. The problem is not just that people are being convicted for crimes they did not commit, but that for every wrongful conviction there is a guilty party left to wreak havoc on the public.<sup>165</sup> The only effective way to fix this problem is to exclude eyewitness identification testimony from trials.

After all, the goal is not just to convict someone, but to convict the actual perpetrator of the crime. Current proposals would greatly reduce the number of false identifications, but not by enough. When even under the best of circumstances, victims or witnesses who

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<sup>163</sup> SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-2002 Table 3.17 (2004), <http://www.albany.edu/sourcebook/pdf/t317.pdf>.

<sup>164</sup> See Gross, *supra* note 154 at 135.

<sup>165</sup> Huff, *supra* note 10 at 150.

experienced stress will make a mistaken identification around 50% of the time, and juries cannot discern the accurate from the false, there is something inherently wrong with using this unreliable identification to convict someone. Identifications are fine as an investigative tool, but if eyewitness identification is all that these cases hang on, we can't be sure that the real culprits pay for these crimes. The very possibility that such dangerously unreliable evidence is causing innocent people to be executed or imprisoned should counsel against allowing its use in court.