

Expert Eyewitness Testimony

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Introduction

Mistaken eyewitness identification is the single largest source of wrongful convictions in documented exoneration cases.¹ To combat the risk of wrongful conviction, defendants in New York have begun to request that an expert on eyewitness identification be permitted to testify. However, this is unnecessary because a significant number of wrongful convictions based on mistaken eyewitness identifications could be prevented by proper investigative procedures and more effective trial representation.²

This paper will illustrate how the problem of wrongful convictions based on mistaken identifications in New York can be overcome by altering the investigative procedures implemented by police departments and making better use of effective trial techniques presently made available to defendants rather than by allowing expert eyewitness identification testimony at trial. Part I discusses the research that has been done concerning factors that an expert eyewitness identification witness might testify about at trial. Part II discusses the New York test that expert testimony must meet in order to be admitted at trial. Part III lists negative affects of expert eyewitness testimony. Part IV summarizes what New York courts have said on the issue of expert eyewitness identification testimony. Part V considers the alternatives to expert eyewitness identification. Part VI concludes by suggesting that the problem of mistaken identifications could be overcome by altering the investigative procedures and employing

¹ Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000).

² GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK, ix, The Carswell Co. Ltd., (1988).

effective trial techniques rather than allowing expert eyewitness identification testimony at trial.

Part I: Topics for Expert Eyewitness Testimony

The substance of an expert witness's testimony concerning eyewitness identification differs depending on the specific case, but there are certain factors that are common to most cases that involve such testimony. These factors include the race of the witness and defendant, the use of violence in the criminal incident, a confidence-accuracy correlation, and weapon focus.³

A. Cross-Racial Identifications

If the case involves an eyewitness who identified someone of a different race, an expert may testify as to the fallibility of cross-racial identifications. Research shows that people have difficulty recognizing individual members of a race different from one's own.⁴ Many explanations for the cross-racial effect have been offered, but none have been conclusively accepted.⁵ One seemingly accurate explanation is that we use specific features to distinguish between members of our own race, and those features do not assist us when distinguishing between members of another race.⁶ Another explanation that has been advanced is that we are more able to distinguish between members of a different race when we spend a significant amount of time with people of that race. One study

³ *People v. Legrand*, 196 Misc.2d 179 at 202 (New York County 2002).

⁴ Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identification in New York*, 48 N.Y.L.SCH.L.REV. 323, (2004).

⁵ ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 86-88, Lexis Law Publishing (1997).

⁶ Deborah Davis et al., *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. AIR. L. & COM. 1421, at 1443 citing D. Dunning et al., *Basketball Fandom and Cross-Race Identification Among European-Americans: Another Look at the Contact Hypothesis*, presented at the American Psychology-Law Society (Mar. 1998).

reinforcing this explanation shows that Caucasians who are avid basketball fans have less difficulty with cross-racial identification because of their repeated exposure to African-American faces.⁷ This can be likened to analogous studies done on individuals who have repeated exposure to different models and years of cars.⁸ In these studies, the witnesses who have learned to distinguish the different models and years of most cars can name and describe any particular type of a car quite accurately.⁹ If this explanation is accepted and taken one step further a prosecutor whose witness's identification is questioned due to its cross-racial nature could show evidence that the witness had repeated exposure to people of the same race as the defendant, and possibility overcome the supposed fallibility of the witness's cross-racial identification.

B. Violence/Weapon Focus

Studies conducted within classroom environments show that a witness who observed a violent event may be unable to recall the event accurately.¹⁰ Yet, victims in real life situations involving violence, such as the Holocaust, wars, kidnapping or sexual abuse have memories from these traumatic incidents that are more likely to persist over time, and the victim is often unable to forget the incident.¹¹ Likewise, studies have

⁷ Deborah Davis et al., *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. AIR. L. & COM. 1421, at 1443 (2001) citing D. Dunning et al., *Basketball Fandom and Cross-Race Identification Among European-Americans: Another Look at the Contact Hypothesis*, presented at the American Psychology-Law Society (Mar. 1998).

⁸ Ralph Norman Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057 at 1061 (2000).

⁹ *Id.*

¹⁰ Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identification in New York*, 48 N.Y.L.SCH.L.REV. 323, (2004).

¹¹ Deborah Davis et al., *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. AIR. L. & COM. 1421 (2001).

shown that memories from actual incidents, where the threat and trauma are real, actually demonstrate a highly accurate, detailed and persistent account of the incident.¹²

Some psychologists claim that witnesses frequently focus on a weapon and this reduces their memory of other details of the crime.¹³ Yet, studies show that there is no difference in accuracy, irrespective of the presence or absence of a weapon.¹⁴ Further, “...eyewitnesses in crimes involving a weapon provided more detailed descriptions than those in weaponless crimes and victims offered more detailed descriptions than witnesses.”¹⁵

C. Confidence-Accuracy Correlation

Many proponents of expert eyewitness testimony posit that a witness’s confidence in their identification is not an indicator of their accuracy, and since jurors are reminded that they are to judge the witness’s credibility and reliability, perhaps they should be made aware that an eyewitness’s confidence in their identification is not necessarily linked to the accuracy of their identification.¹⁶ However, a recent study conducted by Drs. Venter and Louw found that there is a positive correlation between confidence and accuracy.¹⁷ Also, according to Dr. Ebbe B. Ebbesen, a recognized expert in the field, the determination of whether the correlation between accuracy and confidence is positive or

¹² A. Venter et al., *The Effect of Violent Versus Non-Violent Incidents on Eyewitness Memory*, 23 MED. & L. 833 at 834, 849 (2004).

¹³ Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identification in New York*, 48 N.Y.L.SCH.L.REV. 323 at 341, (2004).

¹⁴ *People v. Legrand*, 196 Misc.2d 179 at 197 (New York County 2002).

¹⁵ *Id.*

¹⁶ Heather Sonnenberg, *The Admissibility of Expert Identification Testimony in New York Courts According to People v. Lee*, 12 TEMP. POL. & CIV. RTS. L. REV. 231 at 241 (2002).

¹⁷ A Venter, *The Effect of Confidence and Method of Questioning on Eyewitness Testimony*, 24 MED. & L. 369 at 381 (2005).

negative varies widely over studies.¹⁸ This means that it cannot be definitively stated that a witness's confidence indicates either a correct identification or an incorrect identification. Additionally, Dr. Ebbesen notes that there are certain factors that affect accuracy, such as length of exposure and retention interval.¹⁹ Little research has examined what the relationship between confidence and accuracy might be when these other factors are considered.²⁰ As a result, it is generally accepted within the relevant community that there is no specific correlation between confidence and accuracy.

D. Field Studies

“Experimental results ‘cannot be generalized to real cases due to a lack of realism of experiment procedures.’”²¹ To date, memory research has mostly been conducted in the laboratory.²² Since many of the studies previously conducted concerning eyewitness identification are done in a controlled environment, all of the possible variables are already known.²³ This is unlike an actual criminal incident where the variables are unknown and the degree to which these variables interact is also unknown.²⁴ For this reason, psychologists are unable to definitively predict the effect of certain variables on an eyewitness in an actual criminal incident versus a staged criminal incident.²⁵ It should also be noted that the majority of studies concerning eyewitness accuracy take place in a

¹⁸ Ebbe B. Ebbesen, A Signal Detection Analysis of the Relationship Between Confidence and Accuracy in Face Recognition Memory: Implications for Eyewitness Identifications, Ebbe B. Ebbesen, p. 1 (working draft).

¹⁹ Retention interval refers to the amount of time between observing the criminal and being asked to identify him. Ebbe B. Ebbesen, A Signal Detection Analysis of the Relationship Between Confidence and Accuracy in Face Recognition Memory: Implications for Eyewitness Identifications, p. 1 (working draft).

²⁰ *People v. Legrand*, 196 Misc.2d 179 at 197 (New York County 2002).

²¹ *Id.* at 199 quoting Dr. Ebbesen, an expert who testified in the trial.

²² A. Venter et al., *Memory Accuracy of a Real-Life Simulated Incident*, 23 MED. & L 403 at 404 (2004).

²³ *People v. Legrand*, 196 Misc.2d 179 at 202 (New York County 2002)

²⁴ *Id.*

²⁵ *Id.*

classroom using middle class students from suburban areas, thus it is difficult to say how people growing up in a tough inner city may react to other races, weapons, and violence.²⁶ A crime victim will be focused on the crime being committed against them, while a student in a classroom may be daydreaming, or even sleeping while the staged crime is taking place.²⁷ As stated by Dr. Louw et. al., “To make an impact in the area of eyewitness testimony in coming up with results which are less affected by confounding variables, it would...be important for researchers in this field to reconstruct events which have the qualities of real-life incidents...”.²⁸

Part II. Admissibility of Novel Scientific Evidence

Before novel scientific evidence can be admitted through the testimony of an expert, the methods and principles underlying the evidence must be generally accepted within the relevant discipline.²⁹ In 1994, the New York Court of Appeals case of *People v. Wesley* held that the Frye test was the proper standard for the admissibility of expert scientific evidence.³⁰ In *Frye v. United States* the court held that a systolic blood pressure deception test had not “yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony adduced from the discovery, development, and experiment thus far made.”³¹ This holding developed into the four-fold Frye test.³² Under this test, an expert must be competent to testify about the subject matter; the testimony must

²⁶ Joseph N. Sorrentino, *Defanging the Defense Eyewitness Expert*, 28 –AUG PROSECUTOR 22 at 24 (1994).

²⁷ *Id.*

²⁸ A. Venter et al., *Memory Accuracy of a Real-Life Simulated Incident*, 23 MED. & L 403 at 423 (2004).

²⁹ John S. DeWitt, *Novel Scientific Evidence and Controversial Cases: A Social Psychological Examination*, 21 LAW & PSYCHOL. REV. 1 (1997).

³⁰ *People v. Wesley*, 83 N.Y. 2d 417 (1994).

³¹ *Frye v. United States*, 54 App. D.C. 46, Court of Appeals of District of Columbia (1923).

³² *People v. Legrand*, 196 Misc.2d 179 (New York County 2002).

conform to a generally accepted explanatory theory; the testimony must be beyond the ken of the jury; and the probative value of the testimony must outweigh its prejudicial effect.³³ Usually if a judge does not allow expert eyewitness testimony it is because the testimony fails on the second, third or fourth prong.

A. General Acceptance

The second prong: that the testimony must conform to a generally accepted explanatory theory, means that the particular procedure need not be unanimously accepted by the relevant community but must be generally acceptable as reliable.³⁴ Not all expert eyewitness testimony is generally accepted by the social psychological community.³⁵ As detailed above, there is much controversy surrounding the areas of cross-racial identification, violence, weapon focus and the confidence-accuracy correlation. In addition, the New York Court of Appeals has held that it is within the trial judge's discretion whether to admit this testimony.³⁶ One reason provided for this holding is, "in recognition that expert testimony of this nature may involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community."³⁷

³³ *People v. Legrand*, 196 Misc.2d 179 (New York County 2002).

³⁴ *People v. Middleton* 54 N.Y.2d 42 (1981)

³⁵ *People v. Legrand*, 196 Misc.2d 179 (New York County 2002).

³⁶ *People v. Lee*, 96 N.Y.2d 157 at 162 (2001).

³⁷ *People v. Lee*, 96 N.Y.2d 157 at 162 (2001) citing *People v. Wesley* 83 N.Y.2d 417 (1994).

B. Ken of Jury

The trial court must determine whether the evidence to be offered is within the ken of the average juror, or if it will assist the jurors in reaching a verdict.³⁸ Generally, jurors use all of the evidence presented to them to determine whether the eyewitness's identification is reliable. Thus, it is likely that the average juror already takes into consideration the confidence-accuracy correlation, the effect of race on an identification, and the presence of a weapon when determining the accuracy of the witness's identification.³⁹ Thus, offering expert testimony concerning these topics seems to invade the province of the jury as it presents them with information that is either already known to them, or has already been considered by them.

C. Probative v. Prejudicial Effect

The idea that eyewitness expert testimony may prejudice jurors against the eyewitness rather than compel them to carefully apply new knowledge in their own evaluation of the eyewitness may be the strongest objection to such testimony.⁴⁰ Studies have shown that testimony from an expert about research on eyewitness reliability generated reductions in jurors' beliefs about the accuracy of the eyewitness.⁴¹

Alternatively, defendants should be wary of presenting expert testimony because undoubtedly the prosecution will respond with an expert of their own and studies show

³⁸ *People v. Lee*, 96 N.Y.2d 157 at 162 (2001).

³⁹ Joseph N. Sorrentino, *Defanging the Defense Eyewitness Expert*, 28 –AUG PROSECUTOR 22 at 24 (1994)

⁴⁰ Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909 at 921 (1995).

⁴¹ Neil Vidmar et al., *Juries and Expert Evidence*, 66 BROOKLYN L. REV. 1121 (2001) citing Harmon N. Hosch, *A Comparison of Three Studies of the Influence of Expert Testimony on Jurors*, 4 LAW & HUMAN BEHAV. 297 (1980).

that biased jurors may be motivated to use less valid scientific testimony (which could come from either expert) to bolster their own previously held notions.⁴²

Part III. Negative Affects of Expert Eyewitness Testimony

Expert eyewitness testimony can negatively affect the jury and the court. This testimony may cause jurors to become confused⁴³ in that several experts may testify in a given trial and each expert may present a different study with a different outcome, which results from the lack of a general acceptance within the relevant scientific community. Along the same line, allowing this testimony to be presented at trial will result in a “battle of the experts.” This will result in longer trials on dockets that are already behind schedule. A further negative affect of expert eyewitness testimony is that it invades the essential reliability assessing function of the jury.⁴⁴

Part IV. New York Courts and Expert Eyewitness Testimony

The New York Court of Appeals has considered the admissibility of expert eyewitness testimony in two cases: *People v. Mooney* and *People v. Lee*.⁴⁵ In *People v. Mooney*, in 1990, the majority affirmed the lower court’s decision to deny the defendant’s motion for an expert identification witness in a hasty two paragraph opinion, and Judge Kaye wrote a lengthy dissent.⁴⁶ In 2001, when the Court of Appeals revisited the topic in *People v. Lee*, Judge Kaye was Chief Judge and concurred in the majority

⁴² John S. Dewitt, *Novel Scientific Evidence and Controversial Cases: A Social Psychological Examination*, 21 LAW & PSYCHOL. REV. 1 at 22 (1997).

⁴³ Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 LAW, PROBABILITY & RISK 295 at 298 (2003).

⁴⁴ *United States v. Hall*, 165 F.3d 1095 at 1106 (7th Cir. 1998), *United States v. Lumpkin*, 192 F.3d 280 at 289 (2nd Cir. 1999), *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996).

⁴⁵ *People v. Mooney*, 76 N.Y.2d 827 (1990), *People v. Lee*, 96 N.Y.2d 157 (2001).

⁴⁶ *People v. Mooney*, 76 N.Y.2d 827 (1990).

opinion which held that expert testimony is not inadmissible per se, and that the decision whether to admit it rests in the sound discretion of the trial court.⁴⁷ The Court of Appeals also went on to say that a trial court should only admit expert eyewitness identification testimony when jurors are unable “...to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.”⁴⁸ The trial courts of New York have since grappled with the issue of whether to admit expert eyewitness testimony.

In both *People v. Lopez* and *People v. Miller*, the Appellate Division of the First Department held that the lower courts did not abuse their discretion in denying the defendant’s motion to present expert testimony concerning eyewitness identification.⁴⁹ Further, the court held that even without the expert testimony the defendant was able to attack the eyewitness testimony through cross-examination and summation arguments.⁵⁰

In *People v. Paccione*, the Appellate Division of the Second Department held that the lower court did not abuse its discretion in denying the defendant’s motion to call an expert witness on the matter of eyewitness identification because he failed to make a showing that his case was one where the jurors would have benefited from the specialized knowledge of an expert witness.⁵¹

In *People v. Johnson*, the Appellate Division of the Fourth Department held that the lower court did not abuse its discretion in determining that the proposed expert eyewitness identification testimony was not beyond the ken of the ordinary juror and was

⁴⁷ *People v. Lee*, 96 N.Y.2d 157 at 160 (2001).

⁴⁸ *People v. Lee*, 96 N.Y.2d 157 at 162 (2001).

⁴⁹ *People v. Lopez*, 1 A.D.3d 168 (1st Dep’t 2003), *People v. Miller* 8 A.D.3d 176 (1st Dep’t 2004).

⁵⁰ *People v. Lopez*, 1 A.D.3d 168 (1st Dep’t 2003), *People v. Miller* 8 A.D.3d 176 (1st Dep’t 2004).

⁵¹ *People v. Paccione*, 295 A.D.2d 451 (2nd Dep’t 2002).

therefore inadmissible.⁵² The New York Court of Appeals later denied leave to appeal.⁵³ Similarly, in *People v. Young*, the Fourth Department again held that the trial court did not abuse its discretion in denying the defendant's motion to permit expert testimony on the subject of eyewitness identification.⁵⁴

In *People v. Carrieri*, the defendant sought to have an expert witness testify with regard to the accuracy of cross-racial identification.⁵⁵ The court determined that, "unsettled debate over the relationship between 'own-race' bias and cross-racial identification would render such expert testimony inadmissible until there is a general agreement about its effects in the scientific community."⁵⁶ The court stated further that, "...jurors are generally aware of the vagaries involved in witness identification through their own life experiences."⁵⁷ The court also pointed out that the Supreme Court urged in *Wade* that it is common knowledge that identification testimony generally is suspect because witnesses may make mistakes or forget what they have seen.⁵⁸ Finally, the court held that the testimony was inadmissible "...on the grounds that it falls within the ambit of jurors' general knowledge and life experience as well as due to its questionable scientific validity."⁵⁹

In *People v. Radcliffe*, the court stated that expert identification testimony should present specialized knowledge about identification that would help the finder of fact determine the accuracy of the identification.⁶⁰ Interestingly, this court noted that the

⁵² *People v. Johnson*, 303 A.D.2d 967 (4th Dep't 2003).

⁵³ *People v. Johnson*, 100 N.Y.2d 583 (2003).

⁵⁴ *People v. Young*, 20 A.D.3d 893 (4th Dep't 2005).

⁵⁵ *People v. Carrieri*, 4 Misc.3d 307 (Queens County 2004).

⁵⁶ *Id.* at 308.

⁵⁷ *Id.* at 309.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *People v. Radcliffe*, 191 Misc.2d 545 (Bronx County 2002).

Court of Appeals decision in *Lee* suggested that if a contested identification is corroborated by other evidence, there may be no need for expert testimony.⁶¹ The defendant requested expert eyewitness identification testimony concerning exposure time.⁶² The court responded to this request by stating that this testimony would not be beyond the ken of the typical juror.⁶³ Finally, the court held that the defendant's pretrial application for permission to call an expert on identification would not be denied but held in abeyance until a more clear and precise application was put forth by the defendant.⁶⁴

In *People v. Santiago*, the court determined that expert identification testimony was not appropriate.⁶⁵ However, the court did instruct the jury that certainty and accuracy are different concepts, and that one does not guarantee the other.⁶⁶ In this way, the court conveyed to the jury a concept that an expert might have testified about. The court also stated that the parties may suggest ways to address, during jury selection and in the final instructions, the topic of a witness's confidence.⁶⁷

In *People v. Smith*, the court held that expert eyewitness identification testimony was permissible,⁶⁸ but never provided the rationale for allowing this testimony.⁶⁹ This makes it difficult to cite this case as propounding any specific rule of law.⁷⁰

In *People v. Legrand*, the defendant sought to introduce expert identification testimony regarding the confidence-accuracy correlation, post-event information and

⁶¹ *Id.* at 547.

⁶² *People v. Radcliffe*, 191 Misc.2d 545 at 549 (Bronx County 2002).

⁶³ *Id.*

⁶⁴ *Id.* at 552.

⁶⁵ *People v. Santiago*, 2 Misc.3d 652 (New York County 2003).

⁶⁶ *Id.* at 653.

⁶⁷ *Id.* at 653.

⁶⁸ *People v. Smith*, 191 Misc.2d 765 (New York County 2002).

⁶⁹ *Id.*

⁷⁰ *Id.*

confidence malleability, and weapon focus.⁷¹ The court first found that the search for a general consensus on confidence-accuracy is undermined by the lack of an accepted standard of measurement among psychologists.⁷² The court went on to conclude that the confidence-accuracy correlation has not yet achieved general acceptability within the relevant scientific community and thus it could not be admitted.⁷³ The court also held that the proposed testimony on post event information and confidence malleability has not been generally accepted.⁷⁴ In regard to weapon focus, the court found that there have been experiments that have demonstrated that the presence of a weapon did not hinder the ability of eyewitnesses to offer a detailed description. In addition, victims of crime that involved a weapon provided more detailed descriptions than those in weaponless crimes.⁷⁵ Thus, the court held that the testimony on weapon focus could not be admitted because it was not generally accepted.⁷⁶ The court also discussed laboratory versus reality, and considered whether it is generally accepted for experts to apply what they have learned from laboratory studies to the testimonies of actual eyewitnesses in real life criminal events.⁷⁷ The court in dicta stated, "...Dr. Ebbesen and Dr. Malpass have both agreed that the experts do not exactly understand why various research results have been reached. This is not a debate among experts about a generally accepted principle. Rather, it is a real controversy among the relevant experts concerning whether these principles are generally accepted."⁷⁸

⁷¹ *People v. Legrand*, 196 Misc.2d 179 (New York County 2002).

⁷² *Id.*

⁷³ *People v. Legrand*, 196 Misc.2d 179 at 192 (New York County 2002).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 209.

In 2004 in the case of *People v. Champagne Smith*, the court denied the defendant's request for expert testimony concerning eyewitness testimony and identification.⁷⁹ The request was denied because the proffered expert testimony (concerning the confidence-accuracy correlation, confidence malleability and post event information, unconscious transference, and weapon focus) was not generally accepted within the relevant field.⁸⁰

The court of *People v. Trinidad* is yet another court that considered whether to allow expert testimony concerning eyewitness identification, and denied the defendant's request.⁸¹ The court decided that the defendant had failed to demonstrate what contribution a scientific study of perception and memory could add "...to the common experience of the average person or juror who witnesses all the time and could apply commonsense analysis to the evaluation of the eyewitnesses' testimony."⁸²

Part IV. Alternatives To Expert Eyewitness Testimony

There are several alternatives to permitting experts to testify concerning eyewitness identification. These alternatives can be implemented both at the investigative stage and at the trial stage.

⁷⁹ *People v. Smith*, 2004 Slip Op 50172U (New York County 2004).

⁸⁰ *People v. Smith*, 2004 Slip Op 50172U (New York County 2004).

⁸¹ *People v. Trinidad*, 188 Misc.2d 324 (Kings County 2001).

⁸² *People v. Trinidad*, 188 Misc.2d 324 (Kings County 2001).

A. Investigative Stage

1. Crime Scene

When police officers first arrive at a crime scene they should obtain descriptions from all potential eyewitnesses.⁸³ The police should immediately separate these witnesses so that they are not swayed by each others' descriptions.⁸⁴ By receiving numerous descriptions, the police officers will be able to determine which witnesses' descriptions are the most reliable and which witnesses may have had a poor vantage point while observing the incident.⁸⁵ It is best to obtain descriptions as soon as possible.⁸⁶ This is because memory retrieval success declines with the passage of time.⁸⁷ The witnesses should be asked open ended questions rather than leading questions.⁸⁸ Finally, police officers should document information obtained from a witness, while being careful not to paraphrase what the witness said, as this may lead to problems later.⁸⁹

2. Mug Books and Composites

The next step in the identification process is preparing mug books and/or composites.⁹⁰ Usually, an eyewitness is shown a large number of mug shots to ensure that the perpetrator's picture will be among those viewed if it is within the possession of

⁸³ GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK, 28, The Carswell Co. Ltd., (1988).

⁸⁴ *Id.*

⁸⁵ GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK, 28, The Carswell Co. Ltd., (1988).

⁸⁶ *Id.* at 31.

⁸⁷ *Id.*

⁸⁸ Eyewitness Evidence: A Guide for Law Enforcement, (Dep't Justice October 1999) at 15.

⁸⁹ *Id.* at 39.

⁹⁰ *Id.* at 17.

the police department.⁹¹ Showing a large number of mug shots decreases the likelihood of an accurate identification.⁹² Dr. Gary L. Wells, a known expert in the field of eyewitness identification, suggests “pruning” the mug book periodically to eliminate photos of people who could not have committed any recent crime.⁹³ This would be accomplished by removing people who are presently incarcerated, or are deceased.⁹⁴ Mug shot photos should be grouped by format to ensure that no photo unduly stands out, and the photos should be uniform with regard to general physical characteristics.⁹⁵ It is also important to be sure that only one photo of each individual is in the mug book.⁹⁶ The witness should be advised that the person who committed the crime may not be in the mug book.⁹⁷ When or if, the witness chooses a picture, the police officer should document the procedure and the outcome.⁹⁸ Composite images may be useful, but they should be reserved for special cases where the police officers are reasonably sure that the eyewitness can perform well at the task.⁹⁹

3. Photo Arrays and Line-ups

In the investigative stage police departments often utilize photo-arrays (or photo line-ups). A photo-array should be used only when there is a definite suspect or suspects

⁹¹ GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK, 52, The Carswell Co. Ltd., (1988)

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Eyewitness Evidence: A Guide for Law Enforcement, (Dep’t Justice October 1999) at 17.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 20.

⁹⁹ GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK, 42, The Carswell Co. Ltd., (1988).

and when a live line-up cannot be performed.¹⁰⁰ Only one suspect should be included in each photo-array and five fillers (foils or distractors) should be included.¹⁰¹ The fillers should generally fit the witness's description of the perpetrator, but the fillers should not so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.¹⁰² The fillers in a line-up should all be wearing clothing that is similar to that of the suspect.¹⁰³ Generally, the picture of the suspect, or the suspect himself (in the case of a live line-up) should not be placed in the middle of the line-up.¹⁰⁴ When showing a new suspect to the same witness, officers should refrain from reusing fillers.¹⁰⁵ The witness should be instructed that the perpetrator may not be in the photo-array.¹⁰⁶ Police officers should follow these same guidelines when composing live line-ups.¹⁰⁷ It should also be noted that "experiments have generally failed to demonstrate superior performance by an eyewitnesses when they identify from a live line-up versus a color photo-array."¹⁰⁸

¹⁰⁰ Live lineups cannot be performed when there is a lack of people available that resemble the suspect, or when the suspect has not yet been found. GARY L. WELLS, *EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK*, 57, The Carswell Co. Ltd., (1988).

¹⁰¹ GARY L. WELLS, *EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK*, 28, The Carswell Co. Ltd., (1988), interview with Police Officer Herbert, New York Police Department, Queens County, Precinct 104 (October 30, 2005).

¹⁰² *Eyewitness Evidence: A Guide for Law Enforcement* at p. 29.

¹⁰³ "If the suspect is wearing a hat, we will all wear hats", Interview with Police Officer Herbert, New York Police Department, Queens County, Precinct 104 (October 30, 2005).

¹⁰⁴ Interview with Police Officer Herbert, New York Police Department, Queens County, Precinct 104 (October 30, 2005).

¹⁰⁵ *Eyewitness Evidence: A Guide for Law Enforcement*, (Dep't Justice October 1999) at 30.

¹⁰⁶ *Eyewitness Evidence: A Guide for Law Enforcement*, (Dep't Justice October 1999) at 32., GARY L. WELLS, *EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK*, 74, The Carswell Co. Ltd., (1988).

¹⁰⁷ *Eyewitness Evidence: A Guide for Law Enforcement*, (Dep't Justice October 1999) at 32, GARY L. WELLS, *EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK*, 72, The Carswell Co. Ltd., (1988).

¹⁰⁸ GARY L. WELLS, *EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK*, 72, The Carswell Co. Ltd., (1988).

4. Double Blind Line-ups

When conducting photo arrays or live line-ups, a double blind method should be employed.¹⁰⁹ A double blind method is implemented by having an officer who is not involved in the case conduct the photo array or line-up.¹¹⁰ This method should be utilized because officers that are involved in the case often show a bias to the witness through inadvertent or sometimes advertent behavior.¹¹¹

Several New York courts have considered whether to require the use of a double blind method.¹¹² Four lower courts in New York have concluded that it would violate the separation of powers to direct law enforcement how to conduct a line-up.¹¹³ Three lower courts in New York have granted defendant's motion for a double blind line-up,¹¹⁴ while two lower courts in New York have denied the defendant's motion because the research did not conclusively show superiority of double blind line-ups when compared to regular line-ups.¹¹⁵ Overall, the majority of New York courts that have considered the issue have

¹⁰⁹ Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507 (2002), *People v. Kirby*, 6 Misc.3d 1012A (Kings County 2002).

¹¹⁰ GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK, 75, The Carswell Co. Ltd., (1988).

¹¹¹ Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507 AT 519 (2002).

¹¹² *People v. Kirby*, 6 Misc.3d 1012A (Kings County 2002), *People v. Alcime*, 2002 NY Slip Op 40021U (Kings County 2002), *People v. Thomas*, 189 Misc.2d 487 (Kings County 2001), *People v. Martinez*, 2001 NY Slip Op 050130U (New York County 2001), *People v. Santiago*, 2004 NY Slip Op 50015U (New York County 2004), *People v. M.A.*, 194 Misc.2d 449, (New York County 2002), *People v. Gonzalez*, 2004 NY Slip Op 51007U (Bronx County 2004), *People v. Hammonds*, 1 Misc.3d 880 (Westchester County 2003), *People v. Aspinall*, 194 Misc.2d 630 (Richmond County 2003) *People v. Wilson*, 191 Misc.2d 224 (Kings County 2002).

¹¹³ *People v. Santiago*, 2004 NY Slip Op 50015U (New York County 2004), *People v. Alcime*, 2002 NY Slip Op 40021U (Kings County 2002), *People v. Aspinall*, 194 Misc.2d 630 (Richmond County 2003) and *People v. M.A.*, 194 Misc.2d 449, (New York County 2002).

¹¹⁴ *People v. Thomas*, 189 Misc.2d 487 (Kings County 2001), *People v. Kirby*, 2002 NY Slip Op 50730U (Kings County 2002) and *People v. Wilson*, 191 Misc.2d 224 (Kings County 2002).

¹¹⁵ *People v. Martinez*, 2001 NY Slip Op 50130U (New York County 2001) and *People v. Gonzalez*, 2004 NY Slip Op 51007U (Bronx County 2004).

either held or made recommendations that New York State's district attorneys' offices and police departments begin employing the double blind method.¹¹⁶

Although not all of the methods explained above would be feasible in every situation, every jurisdiction should consider them to avoid mistaken identifications.

B. Trial Stage

At trial there are several ways to reduce or eliminate the potential for a wrongful conviction based on a mistaken identification.¹¹⁷ There are a number of safeguards already built into the system to protect the rights of the defendant and allow her to challenge the veracity or accuracy of identifications.¹¹⁸ Defense counsel should attempt to use pretrial hearings, voir dire, cross-examination, opening and closing statements, and jury instructions to overcome the possibility of a conviction based on a mistaken identification.¹¹⁹

¹¹⁶ *People v. Kirby*, 6 Misc.3d 1012A (Kings County 2002), *People v. Alcime*, 2002 NY Slip Op 40021U (Kings County 2002), *People v. Thomas*, 189 Misc.2d 487 (Kings County 2001), *People v. M.A.*, 194 Misc.2d 449, (New York County 2002), *People v. Hammonds*, 1 Misc.3d 880 (Westchester County 2003), *People v. Wilson*, 191 Misc.2d 224 (Kings County 2002).

¹¹⁷ Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28-NOV CHAMPION 8 (2004).

¹¹⁸ Thomas Dillickrath, *Section IV: Evidence of Innocence Offered by the Criminal Defendant, Not So Fast: Expert Testimony on Eyewitness Identification: Admissibility and Alternative*, 55 U. MIAMI L. REV. 1059 at 1099 (2001).

¹¹⁹ Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28-NOV CHAMPION 8 (2004), ELIZABETH F. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL*, Lexis Law Publishing (1997).

1. Motion to Suppress

Defense counsel should always make a motion to suppress the identification testimony.¹²⁰ Identification testimony can be suppressed if the identification is the result of an illegal seizure of the defendant, if the identification violated the defendant's right to counsel, or if it was obtained under circumstances that are so unduly suggestive as to give rise to a substantial likelihood of irreparable misidentification.¹²¹

2. Voir Dire

The next point at which a defense attorney may alert the jury or judge to the possibility of a mistaken identification is at voir dire.¹²² Usually a lawyer choosing a jury panel is attempting not only to elicit sufficient information to exercise peremptory challenges intelligently, but also to convey something of his or her theory of the case to the jurors.¹²³ Generally, counsel should attempt to discover at this point whether the potential jurors believe that a witness could honestly be mistaken about an identification, or that a witness could be confident about their identification without being accurate as to that identification.¹²⁴ Counsel should also look for experiences that may cause the jury to relate to the eyewitness, or experiences that may cause the jury to have doubts about the

¹²⁰ Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28-NOV CHAMPION 8 (2004). ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 117, Lexis Law Publishing (1997).

¹²¹ ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 117, Lexis Law Publishing (1997).

¹²² Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28-NOV CHAMPION 8 (2004), ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 165, Lexis Law Publishing (1997).

¹²³ ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 165, Lexis Law Publishing (1997).

¹²⁴ Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28-NOV CHAMPION 8 (2004).

eyewitness's testimony.¹²⁵ If a juror is able to relate to a witness they will be more likely to evaluate the witness's reliability and credibility favorably.

3. Opening Statement and Closing Argument

Other points at which defense counsel can alert the judge or jury to the possibility of mistaken identification are the opening statement and closing argument. Since the majority of trial attorneys use opening statements and closing arguments to familiarize the jury or judge with the legal and factual theories of their case, and to dilute the impact of their opponent's strong points and their own weak points, there is no reason why defense counsel could not use his opening statement and closing argument to alert the jury or judge to the unreliable nature of eyewitness identification (but counsel must be careful to comment only on evidence brought out during the trial).¹²⁶

4. Cross-Examination

Defense counsel will have the opportunity to cross-examine the eyewitness. For cross-examination to be effective in this context defense counsel must ask questions to highlight the potential for error in the identification process.¹²⁷ These include suggestiveness of the police-orchestrated identification procedure, the stress levels of the eyewitness, the lighting conditions, the duration of the incident, the race of the defendant (if different from that of the witness), and, if there was a weapon involved, counsel may

¹²⁵ ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 168-169, Lexis Law Publishing (1997).

¹²⁶ ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 181, Lexis Law Publishing (1997).

¹²⁷ Jessica Lee, *Note: No Exigency, No Consent, Protecting Innocent Suspects from the Consequences of Non-Exigent Show-ups*, 36 COLUM. HUMAN RIGHTS L. REV. 755 at 775 (2005).

focus his questioning on whether the eyewitness was looking at the weapon or the perpetrator's face.¹²⁸

5. Jury Instructions

Lastly, defense counsel should request a jury instruction concerning the eyewitness testimony.¹²⁹ Since the power of jury instructions is well-recognized in the judicial system, defense counsel should request that the judge instruct the jury concerning the unreliability of eyewitness testimony, and defense counsel should provide special instructions tailored to their case.¹³⁰ These instructions could include factors such as whether the witness had an adequate opportunity for observation, the strength and circumstances of the witness's recollection of the incident, the amount of time between incident and identification, and any occasions where the witness failed to identify or misidentified the defendant.¹³¹

Part VI. Conclusion

Attorneys, judges, police officers and legislators agree that the repeated convictions of innocent individuals is something that continues to plague the entire New York State criminal justice system. No end is served by convicting an innocent person. However, this problem is one that can and should be overcome by more effective use of

¹²⁸ Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28-NOV CHAMPION 8 (2004).

¹²⁹ *Id.*

¹³⁰ ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 323-330, Lexis Law Publishing (1997).

¹³¹ Thomas Dillickrath, *Section IV: Evidence of Innocence Offered by the Criminal Defendant, Not So Fast: Expert Testimony on Eyewitness Identification: Admissibility and Alternative*, 55 U. MIAMI L. REV. 1059 at 1093 (2001).

tried and proven tactics and techniques, and not by presenting controversial psychological research, experiments, and results to the juries of New York State.