

U N I V E R S I T Y *of* **H O U S T O N**

Public Law and Legal Theory Series 2009-A-35



**JUDICIAL BLINDNESS TO
EYEWITNESS MISIDENTIFICATION**

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Sandra Guerra Thompson*

Introduction

As of this writing, 244 people have been exonerated by means of DNA evidence,¹ most leaving prison cells after many years in prison. These exonerations represent only the “tip of an iceberg”²—the actual numbers of wrongly convicted are undoubtedly much higher.³ The leading cause of wrongful convictions has been shown to be erroneous eyewitness identifications.⁴

Many studies of exonerations find that erroneous eyewitness identifications play a part in over

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¹ See Innocence Project, <http://innocenceproject.org> (last visited Oct. 15, 2009) (citing 244 exonerations by means of DNA evidence as of Oct. 15, 2009). This does not include the hundreds of others exonerated by other means. See Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523-24 (2005) (reporting on study that examined 340 exonerations from 1989-2003, a little less than half cleared by DNA evidence and the rest by other means).

² Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 62 (2008); see also Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1491 (arguing that “untold numbers of additional innocent people have been punished for crimes they did not commit”).

³ See generally Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. OF L. & SOC. SCI. 173, 174-76 (2008) (addressing the rate of false convictions and some types of wrongful conviction cases).

⁴ Thompson, *supra* note 2, at 1490 (citing studies of eyewitness testimony and wrongful convictions).

75% of all wrongful convictions.⁵ These studies have led to numerous proposals for reform of police procedures,⁶ yet we see surprisingly little progress toward minimizing eyewitness-identification error, a major cause of failure in the criminal justice systems of this country.

In 1999, the Department of Justice's National Institute of Justice published its influential study of eyewitness identification procedures that included detailed recommended guidelines.⁷ Following that effort, several other government and private task forces have followed suit and conducted additional independent studies, yielding similar proposals for reform.⁸ Over the past decade, it is fair to say that a growing consensus on state-of-the-art procedures for obtaining eyewitness identifications has emerged among reformers.⁹ Such procedures include techniques for reducing suggestion, such as having live lineups and photo arrays conducted by investigators who do not know the identity of the suspect, thus eliminating the possibility that the investigator might unconsciously influence the witness's selection or give the witness confirmatory feedback (e.g., "Good, you picked the right guy.") that has been found to bolster a witness's confidence in the selection.¹⁰ Other recommendations pertain to the manner of viewing a suspect, how witnesses are instructed, and the proper documentation of identification procedures.¹¹

⁵ *Id.* at 1490-91; *see also* Innocence Project, Understanding the Causes: Eyewitness Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited on Oct. 12, 2009).

⁶ In an earlier essay, I compare the recommendations of the leading organizations that have conducted studies of eyewitness identifications. *See* Sandra Guerra Thompson, *What Price Justice? The Importance of Costs to Eyewitness Identification Reform*, 41 TEX. TECH L. REV. 33, 33 (2008). *See also infra* note 39 and accompanying text (listing reports that include proposed procedures for eyewitness identification).

⁷ *See infra* note 39 and accompanying text.

⁸ *Id.*

⁹ *See* Thompson, *supra* note 6, at 42-54.

¹⁰ *See* Thompson, *supra* note 2 at 1504-06; *see also infra* Part I.B.

Reform groups have urged law enforcement to implement the recommended procedures voluntarily.¹² Ten years after the Department of Justice issued its report only a handful of states have adopted any reforms, whether as a matter of state constitutional law, evidence rules, or by statute.¹³ A handful of police departments have voluntarily implemented some of the critical reforms.¹⁴ Overall, the vast majority of the thousands of independent law enforcement agencies across the country have made few, if any, changes to the status quo.¹⁵

This Article presents the findings of an empirical study of recent case law in which defendants challenge the legality of the eyewitness identification procedures. The study involved

¹¹*See infra* Part I.B.

¹² *Id.*

¹³ Only a few states have adopted more protective state constitutional or evidentiary rules. *See, e.g.,* Wisconsin v. Dubose, 699 N.W.2d 582, 591, 593-95 (2005) (relying on “extensive studies on the issue of identification” and citing Department of Justice guidelines, as well as social science findings, in rejecting federal due process reliability assessment for show-ups and requiring that show-ups must be necessary to comply with state due process); State v. Long, 721 P.2d 483, 487, 492-93 (Utah 1986) (finding that trial courts should give cautionary instruction regarding eyewitness identification in case involving no corroborating evidence). *See also infra* note 39 and accompanying text (citing reforms in North Carolina, New Jersey, and recommended procedures established in Wisconsin).

¹⁴ *See infra* note 39 and accompanying text.

¹⁵ I have previously argued that police departments are unlikely to adopt the reform procedures of their own initiative. *See* Thompson, *supra* note 2, at 1519-20. At present, police departments apparently have not felt sufficient political pressure, or seen any other reason, to implement the changes of their own accord. Indeed, in some cases, the suggested reforms have been met with intense resistance by law enforcement. *See* SHERI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES, at iv (2006), *available at* <http://www.chicagopolice.org/ILPilotonEyewitnessID.pdf>; *see also* Thompson, *supra* note 6, at 47 (discussing Illinois legislature’s resistance to sequential lineups).

a review of all cases within the calendar year ending in April 8, 2009 in which state appellate courts issued opinions and in which the suggestiveness of eyewitness identification procedures were challenged. In the cases surveyed, only a small percentage of the police investigations followed any of the recommended procedures and usually not the most critical procedures. The overwhelming majority of departments in the cases surveyed followed the same suggestive procedures that have contributed to misidentifications and wrongful convictions in the past.¹⁶

The study reported here only examines cases which met the following conditions: (1) eyewitness identification was an important issue; (2) defendants asserted their right to trial and challenged the identification at trial; and (3) defendants continued to challenge the identification evidence on appeal. In a sense the cases examined here represent the most worrisome cases, those in which defendants have called upon the courts to correct perceived errors in the process. However, this survey does not tell us much about the remaining universe of cases in which eyewitness identification plays a role. It tells us nothing, for example, about the procedures actually followed in departments throughout the country.¹⁷ Thus, we cannot draw any sweeping conclusions about overall police practices from what effectively is just a small sample. To obtain such information, one would have to conduct a massive survey of the tens of thousands of independent police agencies throughout the country. What this survey does provide, however, is a glimpse at a relatively small number of cases in which defense lawyers have asserted mistaken eyewitness identification both at trial and on appeal. Even this limited view is not encouraging.

¹⁶ See *infra* notes 89-97 and accompanying text.

¹⁷ We can look to sources such as the Innocence Project which compile data on the states that have implemented reforms. See *infra* note 57 and accompanying text. But even that information tells us little about the procedures actually followed by police departments in most states.

As this Article will demonstrate, many of the same problems and practices that have contributed to erroneous identifications in the past continue to present themselves in cases decided within the past year. The reported appellate decisions often do not indicate whether other corroborating evidence of identification is present. However, some courts make clear that eyewitness's identification testimony was the sole basis for the conviction.¹⁸ Given the lessons drawn from countless social science studies about the particular factors that reduce eyewitness accuracy and the police practices that inject suggestiveness, it is a safe bet that at least some of the defendants, among the dozens of cases reviewed, were wrongly convicted.

How did the appellate courts respond to the challenges to the eyewitness identification evidence in these cases? In this study, none of the courts invoked state constitutional law or evidentiary rules to reject the suggestive practices decried by reformers.¹⁹ The courts do not exclude eyewitness identification testimony, even when it is obtained under circumstances that have been shown scientifically to be prone to error, nor do they find such testimony insufficient to support a verdict without additional corroborating evidence.²⁰ Indeed, many of the appellate opinions continue to view the eyewitness's degree of certainty as an indicator of reliability,

¹⁸ *See, e.g.,* *Shabazz v. State*, 667 S.E. 2d 414, 416 (Ga. Ct. App. 2008). I have previously called for a requirement that eyewitness identification testimony be corroborated in all cases to prevent erroneous convictions. *See* Thompson, *supra* note 2, at 1523-43. Since no state has yet to implement such a corroborating evidence requirement, there are no challenges to the lack of such corroborating evidence. I reiterate here that a rule that had the effect of requiring that investigators gather more evidence than eyewitness identification testimony would go a long way to eliminate erroneous convictions based on misidentification. *Id.* at 1523-28, 1540-43 (discussing trade-offs and feasibility of a corroboration rule).

¹⁹ *See infra* notes 109-12 and accompanying text.

²⁰ *Id.*

despite the fact that social science research proves otherwise.²¹ Meanwhile, the courts often overlook other indicia of unreliability. Just as in the days before the reform was proposed, the study shows that dubious eyewitness identification evidence continues to be admitted, and appellate courts continue to turn a blind eye to defense challenges based on suggestiveness and unreliability of such evidence. If one read only the recent case law challenging suggestive identification procedures, one might get the impression that the innocence reform movement—and the exoneration of hundreds of innocent persons—never happened.²²

Part I of this article provides a brief review of social science findings on eyewitness identifications, especially as they pertain to violent crimes perpetrated against strangers, and the reform procedures proposed by influential groups as a means of improving the accuracy of eyewitness identifications. These proposed reforms take into account social science research regarding both the weaknesses of eyewitness identification evidence as well as the effects of various police practices. Part II presents the findings of an empirical study of state appellate case law and provides data regarding the types of crimes in which mistaken identification (and, thus, innocence) poses the main defense. The study examines the extent to which various factors are at play in these cases such as the use of weapons, lighting conditions, the use of hats and disguises, and cross-racial identification. It also provides data on the types of identification procedures used and the extent to which suggestive procedures are followed. Part III surveys the

²¹ See *infra* notes 134-35 and accompanying text.

²² A study of cases involving exonerations showed that constitutional challenges to eyewitness identifications had been rejected in 100% of the cases, again indicating that such challenges have proved utterly useless in ferreting out erroneous identifications. See Garrett, *supra* note 2, at 77. Apparently, even a heightened awareness of wrongful convictions and the perils of eyewitness identifications have not caused most appellate courts to review identification claims more generously. *But see supra* note 13 and accompanying text.

state appellate decisions in the study, which demonstrates that state appellate courts typically ignore the well-established scientific literature and the calls for procedural improvements.

I. The Factors that Produce Unreliable Eyewitness Identification Testimony and the Reform Proposals Designed to Remedy the Problem

After many decades of research, social scientists have amassed a wealth of literature proving definitively that certain variables reduce an eyewitness's ability to make an accurate identification of a stranger.²³ Unfortunately, many of these variables, known as "estimator variables," are inherent in the fallibility of human beings as eyewitnesses and cannot be corrected by police procedure.²⁴ For example, there is nothing the police can do to change the fact that robbery victims often view their culprits in the dark, for only a brief period of time, and while the robber is aiming a gun or knife at the victim, which induces great stress in victims and causes them to focus on the weapon. Each of these estimator variables has been shown to decrease the accuracy of an identification.²⁵ Also, the police cannot correct the increased risk of

²³For a general overview of the scientific literature pertinent to eyewitness identifications in violent crimes, *see* Thompson, *supra* note 2, at 1497-1506.

²⁴ *See* Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 766 (1995). *See also* Thompson, *supra* note 2, at 1501-04 (addressing estimator variables).

²⁵ The effects of poor lighting and limited time for viewing on the ability to identify a stranger are obvious. *See* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 280-82 (2003) (noting that accuracy of eyewitness's identification can be affected by many factors including lighting conditions, amount of time subject is viewed, whether the subject wears a disguise, lessened ability to recognize a person of a different race, and presence of a weapon, among others); ELIZABETH LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 16-36 (4th ed. 2007) (addressing lighting, violence, stress and fear,

misidentification created by the fact that a culprit and a victim are not of the same race or by the fact that robbers often wear hats, disguises, or have facial hair.²⁶ Likewise, when witnesses are either very young or elderly or have used alcohol or controlled substances, studies have shown an increased risk of erroneous identification.²⁷ It bears repeating that no police procedure can improve the inherent failings of a witness's ability to recall the face of a stranger observed under difficult circumstances.

On the other hand, the police can greatly exacerbate the problem of inherently weak identifications by suggesting to the witness that a selection should be made or that the witness should choose a particular person. Factors that contribute to an increased risk of error are known as “system variables,”²⁸ which refers to the variables that can be controlled by the system. The following sections address the system variables that can contribute to identification error and the reform protocols designed to reduce those risks.

A. The Social Science of Eyewitness Identification—The System Variables

and weapon focus). Scientific studies confirm the effects of “weapon focus” and stress, both of which have been shown to reduce the accuracy of eyewitness identifications. See Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 476 (2001); ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 35-36 (Harvard University Press 1996).

²⁶ See Thompson *supra* note 2, at 1501 (on cross-racial identification); see also Wells & Olson, *supra* note 25, at 281.

²⁷ LOFTUS ET AL., *supra* note 25, at 38 (studies show that children are “relatively inaccurate” and also “highly suggestible”); Wells & Olson, *supra* note 25, at 280 (“very young children and the elderly perform[] significantly worse than younger adults” in studies of eyewitness identification); LOFTUS ET AL., *supra* note 25, at 46-50 (addressing effects of alcohol and other drugs).

²⁸ See Wells & Seelau, *supra* note 24, at 766.

With so many estimator variables present in violent crimes, it stands to reason that identification evidence in these kinds of cases will be particularly unreliable. Thus, it is critical that the police follow procedures shown to produce the most accurate identifications possible.

Experts consider as highly suggestive the single-suspect live viewings conducted near the time of the crime, so-called “show-ups,” because witnesses are likely to believe that the police have arrested the correct person.²⁹ An eyewitness may wrongly assume that the police “know” the displayed person is guilty, when, in fact, the police may not have any idea whether or not the person is the culprit. If the suspect is shown in the back of a police car or wearing handcuffs, the situation further suggests to the witness that the police have caught the “right guy.” On the other hand, show-ups have some advantages. The scientific literature confirms that delay in conducting an identification procedure will reduce reliability of the identification.³⁰ Show-ups also allow the police to quickly clear individuals who may in fact be innocent. Therefore, most courts adopt the position that, on balance, the benefits of a show-up outweigh the concerns about suggestiveness.³¹ However, researchers have found that show-ups “result in more false identifications than line-ups.”³² In addition, show-ups, as well as single-photo identifications, also create a secondary problem in that they taint later pre-trial or in-court identifications by producing a higher level of confidence in the later identification.³³

Photo arrays or live lineups can also be conducted in a suggestive manner. For example, when asked to identify a culprit from a photo array or live lineup, eyewitnesses can be led to

²⁹ Behrman & Davey, *supra* note 25, at 477 (citing studies).

³⁰ *Id.* at 476.

³¹ *See infra* notes 127-32 and accompanying text.

³² Behrman & Davey, *supra* note 25, at 477.

³³ *Id.* at 488.

believe, or can erroneously assume, that the culprit is definitely among the persons presented. In such cases, eyewitnesses are prone to employ a psychological process known as “relative judgment” that causes them to choose the person who most closely resembles the culprit.³⁴ Identifications under these circumstances tend to be reliable if the true culprit is actually in the lineup or photo array, but such identifications are highly inaccurate if the true culprit is not present.³⁵ Thus, simultaneous presentation of individuals, together with statements indicating that the police believe they have arrested the right person, are two types of system variables that reduce the accuracy of eyewitness identifications.³⁶ If the identification procedure is conducted by the investigating officer who knows the identity of the suspect, there is also a concern that the officer may consciously or unconsciously give an eyewitness clues about which person is the suspect.³⁷ Likewise, if the investigating officer gives an eyewitness confirmatory feedback (e.g., “Good, you’ve picked the right guy.”), this feedback tends to inflate the witness’s confidence in the accuracy of the identification and has other distorting effects on a witness’s memory.³⁸

B. The Reform Recommendations

In the wake of numerous high-profile exonerations in the 1990’s, various groups began to study scientific literature to determine what changes might be made to police procedure that would promote reliability in eyewitness identifications. In 1999, the Department of Justice published a highly influential report on eyewitness identifications with proposed protocols and procedures recommended for further study, and since then several other respected groups such as

³⁴ See Thompson *supra* note 2, at 1505-06.

³⁵ *Id.* at 1506.

³⁶ *Id.* at 1504-06.

³⁷ *Id.* at 1504.

³⁸ *Id.* at 1505 (citing studies).

the American Bar Association, private organizations, and several state agencies also have issued reports advocating improved procedures.³⁹ These recommendations are based on findings in the social science literature regarding witness memory as well as considerations of effective police practice.⁴⁰ The proposals focus mostly on two eyewitness identification procedures: live lineups

³⁹See NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), *available at* <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf> (last visited on Oct. 8, 2009); ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (Paul Giannelli & Myrna Raeder eds., 2006) [hereinafter ABA INNOCENCE COMM. REPORT]; N.C. Actual Innocence Comm'n, Recommendations for Eyewitness Identification, <http://www.aoc.state.nc.us/www/ids/News%20&%20Updates/Eyewitness%20ID.pdf> (last visited on Oct. 18, 2009); Letter from Office of Att'y Gen., State of N.J., to All County Prosecutors, Col. Carson J. Dunbar, Jr., Superintendent, NJSP, All Police Chiefs, All Law Enforcement Chief Executives, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001), *available at* <http://www.psychology.iastate.edu/FACULTY/gwells/njguidelines.pdf> (last visited on Oct. 8, 2009) [hereinafter N.J. Att'y Gen. Identification Guidelines]; THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW (2007), *available at* <http://www.thejusticeproject.org>; Innocence Project, Fix the System: Eyewitness Identification, <http://www.innocenceproject.org/fix/Eyewitness-Identification.php> (last visited on Oct. 15, 2009) [hereinafter Innocence Project, Fix Eyewitness Identification]; Innocence Project, Mistaken Eyewitness Identifications, http://www.innocenceproject.org/docs/Mistaken_ID_FactSheet.pdf (last visited on Oct. 15, 2009). In the State of Wisconsin, the Attorney General adopted a "Model Policy and Procedure for Eyewitness Identification." WISCONSIN DEPARTMENT OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION, *available at* <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf> (recommending "double-blind, sequential photo arrays and lineups . . . , non-biased instructions to eyewitnesses, and assessments of confidence immediately after identifications").

⁴⁰ See Thompson, *supra* note 6, at 60-61 (addressing the extent to which reports take into account practical considerations in recommending changes in police procedures).

and photo arrays. The reports give much less attention to show-ups, which is unfortunate since show-ups constitute one of the most common forms of identification procedure used.⁴¹

The principle recommendations concern the procedures used to conduct the identification process as well as the proper documentation of the identification process. For lineups and photo arrays, most of the proposals recommend what is known as “blind,” or “double-blind,” administration.⁴² In a blind identification procedure, the investigator conducting the lineup or photo array does not know the identity of the suspect.⁴³ If the witness is also instructed that the investigator is unaware of the suspect’s identity, that is called “double-blind.”⁴⁴ Using a double-blind procedure reduces suggestion in two ways: (1) it ensures that the investigator conducting the identification procedure cannot, either consciously or unconsciously, suggest which person the witness should select; and (2) it deters witnesses, again consciously or

⁴¹ *Id.* at 53-54.

⁴² The ABA, Innocence Project, North Carolina Actual Innocence Commission, the New Jersey guidelines, and the Justice Project have all called for blind procedures. *See* Thompson, *supra* note 6, at 41. Only the DOJ report is somewhat different; it tends to be more conservative in its conclusions and does not actually recommend the implementation of blind procedures. *See* NAT’L INST. OF JUSTICE *supra* note 39, at 9. Even so, it notes that “blind procedures . . . are used in science to prevent inadvertent contamination of research results, [but] may be impractical for some jurisdictions to implement.” *Id.* It does recommend, however, that blind procedures should be an area of “future exploration and field testing.” *Id.*

⁴³ *See* Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 381, 389-90 (2006).

⁴⁴ *Id.* at 389.

otherwise, from looking to investigators for clues about whom to select. It also eliminates the opportunity for the officer to give the witness confirmatory feedback after the identification.⁴⁵

To combat the problem of relative judgment, whereby eyewitnesses tend to select the person who most closely resembles the culprit,⁴⁶ researchers recommend that photos or live individuals be displayed in sequential fashion, rather than the traditional simultaneous fashion.⁴⁷ The benefit of sequential presentation is that witnesses are in fact less prone to select the wrong person. The disadvantage, from the perspective of investigating officers, is that witnesses are also less prone to make any selection at all.⁴⁸ As a result, the published reports yield a less enthusiastic verdict on the adoption of sequential lineups and photo arrays. Private organizations, such as the Innocence Project and the Justice Project, have endorsed sequential presentation, while the American Bar Association, Department of Justice, and the State of Illinois have endorsed field testing.⁴⁹ Only two states, New Jersey and North Carolina, along with a few localities, now mandate sequential presentation.⁵⁰ Overall, the published reports agree that sequential procedures should be adopted, at least for purposes of field testing.

Show-ups, one of the most common methods used to obtain eyewitness identifications, have received scant attention, even from the reform proposals. The Department of Justice report provides a number of important guidelines, such as separating witnesses during a show-up.⁵¹

⁴⁵ See *supra* note 38 and accompanying text.

⁴⁶ See Thompson, *supra* note 2, at 1505-06.

⁴⁷ *Id.* at 1519.

⁴⁸ *Id.* at 1520.

⁴⁹ See Thompson *supra* note 6, at 45-48.

⁵⁰ *Id.* at 46-47.

⁵¹ *Id.* at 53.

The Innocence Project further recommends that show-ups occur in a neutral location and manner, and that the suspect be displayed without handcuffs (when practicable) and removed from the squad car.⁵²

For all identification methods, the proposals advocate proper documentation and the use of non-suggestive questioning from the beginning of an investigation through the identification process and thereafter.⁵³ Also important is the use of cautionary instructions prior to the display of a suspect in a show-up, a photo array, or a lineup.⁵⁴ In show-ups, witnesses should be told that the person displayed may not be the culprit. In photo arrays or lineups, witnesses should be told that the suspect may or may not be present and, ideally, that the investigation will continue even if the witness makes no identification at that time.⁵⁵ Finally, all of the proposals would require investigators to obtain and properly document a statement of the witness's confidence in selecting a suspect immediately after the identification is made.⁵⁶ The proposed changes to police protocol would go a long way in reducing the negative effects that may occur through the police-witness interaction.

⁵² *Id.*

⁵³ *Id.* at 48-49, 52-53.

⁵⁴ *Id.* at 52.

⁵⁵ *See, e.g.,* N.C. GEN. STAT. § 15A-284.52(b)(3) (2007) (requiring instructions to witness that the investigation will continue even if the witness does not make an identification).

⁵⁶ Thompson, *supra* note 6, at 53. Asking for a witness's confidence level at the time an identification is made reduces the common tendency for witnesses' confidence levels to rise as they progress through the investigative and trial process. *See* John S. Shaw, III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 631, 647-48 (1996); *see also infra* notes 132-35 & 142-44 and accompanying text (on effects of confirmatory feedback on witness confidence and jury instructions on witness confidence).

Unfortunately, there appears to be little actual improvement in police practices. Organizations like the Innocence Project of the Cardozo School of Law keep track of jurisdictions that adopt improved eyewitness identification procedures. The Innocence Project cites only two states and eight localities that have mandated sequential double-blind procedures,⁵⁷ which means that tens of thousands of police departments have yet to change their practices. For example, in Texas, a state that has not adopted new procedures on a statewide basis, a recent news report found that, of the roughly two dozen police departments in the Dallas area, only two even had written policies for show-ups.⁵⁸ This is especially alarming since Dallas has also uncovered twenty wrongful convictions in the past few years.⁵⁹ Even in the face of intense media scrutiny over the large number of exonerations in the Dallas area, the police departments in the region have not responded by implementing any new procedures for show-ups, a commonly used means of obtaining identifications.⁶⁰ The use of show-ups in Dallas is just

⁵⁷ See Innocence Project, *Eyewitness Identification Reform*, available at <http://www.innocenceproject.org/Content/165.php> (last visited Oct. 15, 2009). In addition, the State of Maryland, by statute passed in 2007, requires police agencies to develop written policies on eyewitness identifications and that these must comply with the Department of Justice standards. MD. CODE ANN. § 3-505 (2008). The Department of Justice standards do not *require* blind and sequential lineups and photo arrays; however, they do recommend them for further study. NAT'L INST. OF JUSTICE *supra* note 39, at 44, 49.

⁵⁸ Steve McGonigle & Jennifer Emily, *DNA Exonerates Fell Victim to "Drive-By" Identification*, DALLAS MORNING NEWS, Oct. 13, 2008, available at <http://www.dallasnews.com/sharedcontent/dws/dn/dnacases/stories/101308dnproDNAshowups.264c41d.html> (last visited Oct. 23, 2009).

⁵⁹ *Id.*

⁶⁰ *Id.* (citing review of more than 20 years of appellate case law for the Dallas County area, finding more than 100 felony convictions following trials that were based on show-ups). On the other hand, the Dallas Police

one example; but there is every reason to believe that the same practices exist for police departments across the vast majority of the country.⁶¹

II. An Empirical Study of State Appellate Decisions in Eyewitness Identification Cases

One hypothesis to be drawn from the research on eyewitness identifications is that identifications made under the typical circumstances of a violent crime are likely to be less reliable. Although many violent crimes are perpetrated between individuals who know each other,⁶² a substantial number of violent crimes are perpetrated between strangers.⁶³ The typical scenario of these crimes displays factors that are known to reduce eyewitness identification reliability, such as use of a weapon, use of hats or disguises, poor lighting due to nighttime, and little time to view the suspect. In addition, the element of cross-race identification can be present as well. The findings of the study presented here answer two questions: (1) what types of crimes and circumstances are present among state appellate cases that raise eyewitness identification as a principle issue; and (2) what procedures were followed by the police in obtaining the

Department has at long last implemented some improved techniques for photo lineups. After a two-year delay, Dallas police will begin a study on blind, sequential photo lineups, apparently using a computer to obtain the fillers for the lineups. *See Dallas Police Study into Sequential Blind Photo Lineups Will Begin Soon*, Crime Blog, DALLAS MORNING NEWS, Oct. 16, 2008 *available at* <http://crimeblog.dallasnews.com/archives/2008/10/dallas-police-study-into-seque.html> (last visited Oct. 23, 2009).

⁶¹ *See supra* note 58 and accompanying text.

⁶² *See* National Institute of Justice, Bureau of Justice Statistics, Crime Characteristics, http://www.ojp.usdoj.gov/bjs/cvict_c.htm#relate (last visited Oct. 15, 2009) (addressing relationships between offenders and victims by gender, age, and types of crimes).

⁶³ For example, in 2002, 43% of murder victims were related to or acquainted with their assailants, but 57% of victims were either murdered by strangers or the victims had an unknown relationship to their murderers. *Id.*

identification evidence. Of critical importance is whether the police procedures comport with the reform procedures as specified by the Department of Justice and other groups.

In order to study appellate responses to identification evidence, I conducted a survey of all state appellate decisions handed down during the twelve-month period ending April 8, 2009 in which the introduction of eyewitness identification testimony was challenged.⁶⁴ The research produced 128 cases, of which 31 were excluded,⁶⁵ leaving a total of 96 cases studied, representing twenty-two states.

The survey demonstrates a couple of important points about the types of crimes in which eyewitness identifications play a critical role today. For instance, DNA evidence has essentially eliminated sexual assault cases from the mix of cases in which eyewitness identification testimony is critical. Of the 96 cases under review, only 4 cases (4%) involved a sexual assault.

⁶⁴ The survey was done via the Lexis search engine, searching all state court cases with the date restrictors of April 8, 2008 and April 8, 2009. LexisNexis, <http://www.lexisnexis.com> (last visited Oct. 15, 2009). The search terms were “‘eyewitness identification’ & suggestive.” These terms were considered sufficiently broad to capture all cases involving constitutional challenges to eyewitness identification testimony.

⁶⁵ Cases were excluded for any of several reasons. First, cases were excluded if the eyewitness and the suspect knew each other from a prior relationship, or if an eyewitness identification was not actually challenged on appeal. When the witness has a prior relationship with the suspect, the “identification” is simply a formality, and there is no real doubt that the witness would mistakenly identify an innocent person. Second, cases were excluded if the identifications were made prior to 1999, the year when the Department of Justice issued its influential report on eyewitness identification testimony. Since one aspect of the study examined the extent of compliance with Department of Justice standards, the study could not include identifications made prior to 1999. *See* NAT’L INST. OF JUSTICE, *supra* note 39 (DOJ guideline on eyewitness evidence published in 1999). Cases in which the identification was made without any police involvement were also excluded from the study. In a few cases, the appeals presented no genuine issue relating to the eyewitness identification, so those cases were excluded as well.

A recent study has shown that 100% of the cases in which individuals had been exonerated by means of DNA evidence involved sexual assault.⁶⁶ Sexual assault cases in bygone days often relied solely on identification testimony to establish the identity of the perpetrator, and history has shown us that those eyewitnesses sometimes got it wrong. Since DNA evidence is generally available in sexual assault cases, the police nowadays routinely use DNA evidence to exclude wrongly identified suspects and prevent miscarriages of justice in almost all of those cases.

On the other hand, because DNA evidence is usually unavailable for most other crimes, the identification of culprits must still be made the old-fashioned way—through inherently unreliable eyewitness identification testimony. Of the 96 cases in the survey, 51% involved facts that constitute robbery.⁶⁷ Another 32% involved murder, attempted murder, or assault. Of the

⁶⁶ See Thompson, *supra* note 2, at 1491 n. 12.

⁶⁷ For purposes of the study, I have based the categorization of a case as involving “robbery” or “attempted robbery” if the facts involve a use of force or threat of force as a means of taking a person’s property against their will, or the attempt to do so. I did not base the category determination on the conviction charges which can sometimes obscure the real gist of the crime involved. For example, a “carjacking” involves a use of force as a means of stealing a car and possibly other property. A prosecutor could charge this as a “burglary” in some states in which unlawfully entering a vehicle with intent to commit a felony can be considered burglary. The use of a weapon in such a case could lead to an unlawful weapon possession charge. It better serves our purposes to recognize that the facts fit the classic definition of robbery—a taking of property by means of force—better than they correspond with our traditional understanding of burglary as an unlawful entry into a habitation or as they fit a weapon possession charge which tells us nothing about the violent nature of the crime. It is important to call the set of facts “robbery” because they belong to the category of cases that I argue is most likely to involve erroneous eyewitness identification testimony today. The robbery cases also include one conviction for conspiracy to commit robbery. In addition, in several cases individuals were charged both with robbery and an assaultive offense such as kidnapping (n = 3), murder (n = 4), assault or attempted manslaughter (n = 4), and burglary (n = 3). All of these cases are included only in the category designated “Robbery/Attempted Robbery.”

remaining cases, burglaries of homes made up 9.3%, thefts made up 2%, and false imprisonment accounted for 1% of the total. In short, almost all the cases (88.5%) involved murders, robberies, sexual assaults, or false imprisonment—serious violent crimes.⁶⁸ Interestingly, of the burglary/home-invasion cases in the study, none involved the use of a weapon,⁶⁹ even though burglaries are serious felonies with the potential for violence. If we add burglaries to the calculus, then 97.9% of the cases in the study involved a serious violent crime. All of the cases in the study included only stranger-on-stranger crimes.⁷⁰ In approximately 43% of the cases, lighting conditions were not optimal due to the crimes being committed during nighttime hours.⁷¹ In addition, 65.6% percent of the cases involved the use of weapons (50 firearms, 11 knives, and 2 blunt objects (a pipe and a golf club)).⁷² In 11% of the cases, all of which were robberies, the culprits wore hats, had bandanas covering their noses and mouths, or had facial hair that obscured the features of their faces.

⁶⁸ See *infra* Table 1.

⁶⁹ One case in the study yielded convictions for both robbery and burglary. See *State v. Smith*, Nos. 21463, 22334, slip op. 2008-Ohio-6330 (Ohio Ct. App. Dec. 5, 2008). In this case, the culprits forcibly entered a home specifically looking for one of the residents. *Id.* at 2. Since the case can be viewed as one in which the culprits intended to confront the victims, it was grouped with the robbery cases and excluded from the burglary cases. *Id.*

⁷⁰ Again, I eliminated all cases in which the witnesses had a prior relationship or otherwise knew the identity of the culprit. See *supra* note 63 and accompanying text.

⁷¹ For purposes of this study, “night” is defined as an offense committed between the hours of 9:00 p.m. and 5:00 a.m. or designated as having been committed at “night,” “after dark,” or “during nighttime.” Offenses committed indoors, regardless of time of day, were excluded, as were offenses committed during “evening.” In addition, in 21 cases neither the time of day nor the lighting conditions were mentioned, so these were excluded for purposes of calculating the percentage of cases occurring at night.

⁷² See *infra* Table 2.

Offense	Number	Percentage
Robbery/Attempted Robbery	49	51%
Murder/Attempted Murder/Assault	31	32%
Burglary/Home-Invasion	9	9.3%
Sexual Assault	4	4%
Theft	2	2%
False Imprisonment	1	1%

Table 1. Offenses Represented in Case Study

Weapon	Number	Percentage
Firearm	50	52%
Knife	11	11.4%
Physical Assault, no weapon	6	6.2%
Blunt Object	2	2%
Threat of weapon, no weapon	2	2%
No Weapon	23	23.9%
No mention of weapon	2	2%

Table 2. Use of Weapons

From this data, we can determine that numerous estimator variables, which decrease eyewitness identification accuracy, are at play in a substantial majority of the cases studied. The well-documented effect of weapon-focus plays a role in a majority (70.8%) of this group of cases. Poor lighting occurred in a substantial percentage (43%) of the cases. The use of hats, bandanas across the nose and mouth, facial hair, and other disguises applies in a smaller percentage of the cases (11%), but these are all robberies, which also generally involve use of

weapons and other estimator variables. Finally, at least 88% of the cases involve serious violent crimes, which will generally involve high levels of stress, another known factor for decreasing the accuracy of identifications.⁷³

Cross-racial identification is also an accuracy-decreasing factor.⁷⁴ With few exceptions,⁷⁵ it was not possible to determine from the appellate decisions whether the witnesses and culprits were of different races because the races of the individuals often was not mentioned.⁷⁶

Finally, witnesses often view criminal culprits when the witnesses are not in a good physical condition to form an accurate memory of a culprit's face. For example, in the cases studied, there was an 11-year old witness to a murder,⁷⁷ an elderly victim of a knife-point robbery,⁷⁸ a witness who was drinking beer at the time of the crime and on pain killers when he

⁷³ LOFTUS ET AL., *supra* note 25, at 29.

⁷⁴ Cross-race identifications are less reliable than same-race identifications. *See supra* note 26 and accompanying text.

⁷⁵ *See, e.g.*, Howell v. State, 989 So. 2d 372, 381 (Miss. 2008); People v. Figueroa, No. B199625, 2008 Cal. App. Unpub. LEXIS 3529, at *5 (Cal. Ct. App. April 29, 2008).

⁷⁶ The issue is sometimes incidentally mentioned on appeal in challenges to lower courts' refusals to admit expert testimony explaining that cross-race identifications are less reliable. *See, e.g.*, People v. Nazario, No. 3415, 2008 WL 4182513, at *5 (N.Y. Sup. July 30, 2008).

⁷⁷ People v. Romero, 892 N.E.2d 1122, 1124-25 (Ill. App. Ct. 2008). For a discussion of the effects of age on the accuracy of eyewitness identification, *see supra* note 27 and accompanying text.

⁷⁸ State v. Ayo, 7 So. 3d 85, 90 (La. Ct. App. 2009) (88-year old victim); People v. Johnson, No. A118080, 2008 Cal. App. Unpub. LEXIS 5376, at *1 (Cal. Ct. App. July 1, 2008) (victim was 86 years old); *see also supra* note 27 and accompanying text.

identified the defendant,⁷⁹ and another who may have been smoking marijuana.⁸⁰ One witness of a knife-point robbery viewed a robber who wore a plastic nose and fake glasses,⁸¹ while the victim of another robbery had been brutally beaten and left unconscious during the robbery.⁸² One victim had been shot multiple times,⁸³ and another had a gun pressed to his head when he saw the culprit for a few seconds.⁸⁴ One sexual assault victim saw her attacker, while being sodomized, as the tape on her eyes came off and she peered through a gap in the pillowcase the attacker had put over her head.⁸⁵

While any one of these “estimator” variables makes the identification less likely to be accurate, this study demonstrates that, in violent crime cases, such as the vast majority of cases in this study, numerous estimator variables often are present. To provide one of many possible examples, in *Howell v. State*, the witness viewed a murder committed with a firearm, a highly stressful event to observe.⁸⁶ The witness saw the killing in low light in the early morning from about seventy-one feet away.⁸⁷ It was a cross-race identification, and the witness may have been smoking marijuana at the time.⁸⁸

⁷⁹ *People v. Martinez*, No. H03185, 2008 Cal. App. Unpub. LEXIS 7997, at *2, *5-6 (Cal. Ct. App. Sept. 26, 2008).

⁸⁰ *Howell*, 989 So. 2d at 380-81.

⁸¹ *People v. Sanchez*, No. C057286, 2008 Cal. App. Unpub. LEXIS 10334, at *1 (Cal. Ct. App. Dec. 22, 2008).

⁸² *State v. Williams*, 960 A.2d 805, 808 (N.J. Super. Ct. App. Div. 2008).

⁸³ *State v. Battle*, No. 2007AP1059-CR, 2008 Wisc. App. LEXIS 301, at *2 (Wis. Ct. App. Apr. 22, 2008).

⁸⁴ *Hudson v. State*, No. 14-07-00888-CR, 2009 Tex. App. LEXIS 499, at *1-2 (Tex Ct. App. Jan. 29, 2009).

⁸⁵ *State v. Scarborough*, No. E-2007-01856-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 191, at *4-6 (Tenn. Crim. App. Mar. 17, 2009).

⁸⁶ *Howell v. State*, 989 So. 2d 372, 380-81 (Miss. 2008).

⁸⁷ *Id.*

The study sheds light on the mix of identification procedures used by police departments in cases decided in the past year challenging identification evidence. As mentioned earlier, we cannot extrapolate from these figures and determine the mix of procedures followed throughout the country, but the study does provide insights into the procedures followed in cases where innocence was claimed based on a misidentification.

Scientific research shows that a witness's first viewing of a suspect is critical because it affects the witness's memory of the event.⁸⁹ In the case study reported here, photo arrays, also known as photo lineups or "6 Packs," were the first procedure followed in obtaining the identifications in 58 cases (60.4%). Show-ups were the first procedure in 22 (22.9%) of the cases. In two of the cases, the witnesses were shown single photos of the suspects (followed by photo lineups).⁹⁰ In another three cases, live lineups were used first.⁹¹ In two cases, the witnesses viewed mug shots at the police station first.⁹²

In three cases, the witnesses identified the suspects not by recollection of their facial features, but by things like their ears or their shirts.⁹³ In two cases, witnesses identified suspects

⁸⁸ *Id.*

⁸⁹ LOFTUS, *supra* note 25, at 106-108.

⁹⁰ *See* State v. Allen, 274 S.W.3d 514, 519 (Mo. App. 2008); People v. Noriega, Crim. No. B188098, 2008 Cal. App. Unpub. LEXIS 10061, at *38 (Cal. Ct. App. Dec. 15, 2008).

⁹¹ *See infra* Table 3.

⁹² *Id.*

⁹³ In one of the photo lineup cases, the witness identified the defendant from a photo lineup based mostly on his ears. She also had provided a description of the suspect, including height and race, that varied considerably from the defendant's characteristics and she did not mention that the defendant had a missing tooth. *See* People v. Rucker, No. 280082, 2008 Mich. App. LEXIS 2236, at *1-2 (Mich. Ct. App. Oct. 23, 2008). In yet another photo lineup case, the victim did not see the defendant's face during the assault but identified him based on his build and on his

by their tattoos.⁹⁴ In other cases, the witnesses identified the defendants in whole or in part by hearing their voices.⁹⁵ Surveillance video was available in several cases, but in only one case did witnesses first identify the suspect from the video.⁹⁶ In another case, the witness spotted the suspect in public, without police intervention, and this identification was followed by a show-up.⁹⁷

Identification Procedure	Number	Percentage
Photo Lineup	58	60.4%
Show-ups	22	22.9%
Identified Physical Attribute Other than Face (tattoo, voice)	3	3.1%
Live Lineup	3	3.1%
Single Photo	2	2%
Viewed Mug Shots	2	2%

statement that the victims had “told on him,” which the victims believed referred to an earlier incident involving the defendant in a grocery store. *See People v. Bryant*, No. A114925, 2008 Cal. App. Unpub. LEXIS 3154, at *2-6 (Cal. Ct. App. Apr. 16, 2008). In one of the show-up cases, the witness could not see the culprit’s face but identified a man police caught in the area by his shirt, build, race, and age. *See People v. Evans*, No. H029616, 2008 Cal. App. Unpub. LEXIS 8541, at *4-5 (Cal. Ct. App. Oct. 17, 2008).

⁹⁴ In *Scarborough*, a rape victim worked with a police sketch artist to develop a composite sketch of a tattoo, followed by her out-of-court viewing of photos of the suspect’s tattoos. *State v. Scarborough*, No. E-2007-01856-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 191, at *7 (Tenn. Crim. App. Mar. 17, 2009). In *Commonwealth v. Crork*, the witness was shown a single photo of the suspect’s tattoo. 966 A.2d 585, 587 (Pa. Super. 2009).

⁹⁵ *State v. Williams*, 960 A.2d 805, 809-12 (N.J. Super. Ct. App. Div. 2008); *People v. Nelson*, Nos. B195996, B205753, 2008 Cal. App. Unpub. LEXIS 4472, *4-5 (Cal. Ct. App. June 2, 2008).

⁹⁶ *See Tucker v. State*, 965 A.2d 900, 902 (Md. Ct. App. 2009).

⁹⁷ *See People v. Romero*, 892 N.E.2d 1122, 1125 (Ill. App. Ct. 2008).

No Police Involvement or No Information on Procedure	2	2%
In-Court Identification	1	1.1%
Viewed Surveillance Video	1	1.1%

Table 3. Types of Identification Procedures.

This group of cases present a large number of estimator variables that decrease identification accuracy; the next question is how often police investigators followed the protocols recommended for reducing suggestiveness. The study did not include cases in which photo arrays or live lineups were conducted via the double-blind or sequential method, which is advanced in the reform proposals. In a few of the cases (6.2%), police officers read admonitions (usually that the culprit may or may not be in the show-up or photo array) to witnesses before they viewed a suspect in a show-up or photo array. This suggests that in some jurisdictions admonitions have been introduced as standard procedure. In none of the cases, however, did the admonition include an assurance that the investigation would continue even if the witness failed to identify anyone at that time, as suggested in some reform proposals.⁹⁸

In a larger number of cases, police officers used practices that can decrease identification accuracy. For example, in 13 cases (13.5 %) police officers told witnesses that a suspect had been arrested or taken into custody, which suggests to a witness that the police have other evidence to prove that the person is guilty.⁹⁹ A key procedure recommended for cases involving multiple witnesses is that they should be kept apart during an identification procedure and should be instructed not to discuss their identification with other witnesses;¹⁰⁰ however, witnesses were

⁹⁸ See *supra* note 55 and accompanying text.

⁹⁹ See NAT'L INST. OF JUSTICE, *supra* note 39, at 31-33.

¹⁰⁰ See *supra* note 51 and accompanying text.

kept together during identification procedures in 10 (10.4 %) cases.¹⁰¹ In four cases (4.1%), the police gave confirmatory feedback after the identification was made, which has been shown to boost a witness’s confidence level and taint the later in-court identification process.¹⁰²

Suggestive Procedure	Number	Percentage
Witness told Suspect in Custody	13	13.5%
Witnesses View Suspect Together	10	10.4%
Police Give Confirmatory Feedback	4	4.1%

Table 4. Use of Suggestive Procedures

Social science also warns that showing the photo of a suspect in more than one photo array may cause “unconscious transference.”¹⁰³ There are several cases in this study in which the police showed a witness the defendant’s photo in more than one photo array and the witness was unable to select the defendant’s photo, but the witness was nonetheless able to identify the defendant at a preliminary hearing or at trial.¹⁰⁴ In these cases the witnesses did not identify the

¹⁰¹ In an additional case, one witness told a second witness that she had identified the defendant in the show-up, despite being told by police not to talk to the other witness. The second witness then confidently identified the defendant, although she said that the culprit wore a different outfit. *People v. Nelson*, Nos. B195996, B205753, 2008 Cal. App. Unpub. LEXIS 4472, *5 (Cal. Ct. App. June 2, 2008).

¹⁰² *See supra* note 38 and accompanying text. In one of the cases, the witness stated that the confirmatory feedback made her “feel better.” *See Shabazz v. State*, 667 S.E. 2d 414, 417 (Ga. Ct. App. 2008).

¹⁰³ *See LOFTUS, supra* note 25, at 142-44; *LOFTUS ET AL., supra* note 25, at 106-108.

¹⁰⁴ *People v. Ybarra*, No. F047855, 2008 Cal. App. LEXIS 1421, at *21-22 (Cal. Ct. App. Sept. 12, 2008) (witness views two photo arrays, identical with the exception that they featured two different photographs of defendant in the same place on the array); *State v. Zabala*, No. 97875, 2008 Kan. App. Unpub. LEXIS 534 at *2-3 (Kan. Ct. App. Aug. 8, 2008) (two show-ups of the defendant given to same witnesses within minutes of each other, with the second show-up after the officer’s discovery of clothing matching description in defendant’s backpack);

defendants on the first try but were able to do so on a second attempt. The concern is that a witness may have unconsciously transferred the image of the defendant's face from the photo array and then erroneously believed that the image was part of the memory of the crime. Sometimes this unconscious transference can occur through no fault of the police,¹⁰⁵ but in other cases police practices can create the potential for the problem to occur.

III. Judicial Tolerance of Suggestive Identification Practices

It is nearly impossible to determine whether there are any wrongful convictions among the dozens of cases in this study. A few cases raise serious concerns due to the presence of multiple estimator variables that reduce accuracy, the use of suggestive police procedures, and the absence of corroborating evidence. Due to the nature of the encounters in so many of the cases involving robbery or assaults with firearms, there is generally no possibility of obtaining DNA evidence from the crime scenes.¹⁰⁶ Thus, these prosecutions hinge on eyewitness identification of culprits observed under conditions most likely to lead to misidentification. Are

State v. Lee, No. 2007AP1636-CR, 2008 Wisc. App. LEXIS 546, at *7 (Wis. Ct. App. July 16, 2008) (witness unable to identify defendant from photo lineup but later identified him at trial); People v. Richardson, No. B197177, 2008 Cal. App. Unpub. LEXIS 5741, at *4-5 (Cal. Ct. App. July 16, 2008) (witnesses shown two photo arrays and twice gave equivocal responses but reports being 100% sure after seeing defendant at preliminary hearing); People v. Hart, No. 272910, 2008 Mich. App. LEXIS 850, at *1-2 (Mich. Ct. App. Apr. 29, 2008) (witness views surveillance tape, unable to select defendant from photo array, identifies defendant in court after court denies defendant's request to sit in spectator section to force witness to choose among group of spectators).

¹⁰⁵ In one case, the defendant claimed that he had been in the store as an innocent bystander during the armed robbery and that the witnesses erroneously remembered him as the robber instead. People v. Robinson, No. 276889, 2008 Mich. App. LEXIS 743, at *2 (Mich. Ct. App. Apr. 10, 2008). If true, this would be a classic form of unconscious transference.

¹⁰⁶ See Gross et al., *supra* note 1, at 530-531.

all of the individuals in the study actually guilty? Juries were willing to find that they were.¹⁰⁷ The fact that some of these cases could have resulted in convictions “beyond a reasonable doubt” is highly troubling. Without some strong corroborating identification evidence, the law should not permit convictions.¹⁰⁸ At a minimum, the law should not continue to allow the introduction of eyewitness identifications obtained by the police using procedures that, as indicated by scientific research, create an increased risk of error.

The study presented here examined appellate court reaction in cases involving serious challenges to eyewitness identification testimony. The findings are quite sobering. Of the 96 cases studied, only two resulted in reversals, and in both cases the error was based on something other than the eyewitness identification evidence.¹⁰⁹ In *State v. Washington*, for example, a North Carolina court of appeals reversed a conviction based on an unnecessary and unreasonable delay of nearly five years and its effects on witness memory.¹¹⁰ In one other case, the court

¹⁰⁷ See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 207-09 (1995) (summarizing survey studies, prediction studies, and mock juror studies, and concluding that “jurors are generally insensitive to factors that influence eyewitness identification accuracy, often rely on factors (such as recall of peripheral details) that are not diagnostic of witness accuracy, and rely heavily on one factor, eyewitness confidence, that possesses only modest value as an indicator of witness accuracy”).

¹⁰⁸ See generally Thompson *supra* note 2 (arguing in favor of a corroborating evidence requirement for admission of eyewitness identification testimony); see also Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271, 272, 290 (2007) (proposing blanket exclusion of eyewitness identification testimony in criminal cases).

¹⁰⁹ A third case was remanded for an evidentiary hearing on the identification testimony. See *State v. Chipi*, No. A-6156-05T4, 2008 N.J. Super. Unpub. LEXIS 304, at *1 (N.J. Super. App. Div. Sept. 22, 2008).

¹¹⁰ 665 S.E.2d 799, 812 (N.C. App. 2008). The defendant’s primary claim was that the avoidable delay by the prosecution caused the eyewitnesses’ memories to fade, creating a serious risk of misidentification. *Id.* at 811-12.

upheld the exclusion of a pre-trial identification (on Fourth Amendment grounds) but then affirmed the admission of in-court identifications by the same witnesses.¹¹¹ Thus, in only one case was there a total preclusion of identification testimony, and that was based on a violation of the defendant's speedy trial right.¹¹² In every other case, the eyewitnesses were permitted to provide eyewitness identification testimony in some form.

A. Claims of Unduly Suggestive Procedures and Unreliability

The United States Supreme Court has fashioned a due process exclusionary remedy for unduly suggestive identification procedures; however, even an unduly suggestive identification need not be excluded if it is determined to be sufficiently reliable.¹¹³ The federal standard for

See also People v. Earle, 91 Cal. Rptr. 3d 261, 266-67 (Cal. Ct. App. 2009). In *Earle*, the trial court refused to sever an indecent exposure case for which there was strong evidence from a sexual assault case in which the eyewitness's description of the attacker differed greatly from the defendant's actual appearance. The descriptions of the vehicle also differed. Additionally, the victim had managed to break loose from her attacker, but the defendant was a world class competitor in the sport of "submission grappling." *Id.* at 378-79. For these reasons, the appeals court found that there was "fertile ground for a reasonable doubt in juror's minds that the victim had correctly identified defendant as her assailant." The joinder of the less serious indecent exposure case, for which there was strong evidence, thus "played a central role, and quite possibly a decisive one, in securing a conviction on the assault charge." *Id.* at 379.

¹¹¹ *See* People v. Leonard, No. 270638, 2008 Mich. App. LEXIS 1110, at *1, *41-43 (Mich. Ct. App. May 27, 2008). The Supreme Court has permitted the admission of in-court identification testimony, even if the pre-trial identification testimony is excluded, if there is a finding that the in-court identification is based on an independent recollection of the events and is not the product of the tainted identification procedure. *See* United States v. Wade, 388 U.S. 218, 241 (1967).

¹¹² *Washington*, 665 S.E. 2d at 812.

¹¹³ *See* Manson v. Brathwaite, 432 U.S. 98, 104 (1977); Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons v. United States, 390 U.S. 377, 385-86 (1968); Stovall v. Denno, 388 U.S. 293, 294-95, 299 (1967).

determining reliability calls on courts to take into account five factors in evaluating the totality of the circumstances:

[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.¹¹⁴

This five-factor test, fashioned in 1972, has been roundly criticized for including witness certainty as a factor when the social science research shows that witness confidence in an identification does not necessarily correlate with accuracy, and that a witness's confidence level has a tendency to rise as the witness moves through the criminal justice process.¹¹⁵ Nonetheless, state appellate courts, with few exceptions, continue to apply this test (including the witness confidence prong) in assessing federal and state due process claims.¹¹⁶ Courts seem unfamiliar with, or unpersuaded by, the scientific research on witness confidence, and they erroneously rely on witness certainty in evaluating the reliability of the identification.¹¹⁷

In addition, the Supreme Court's decisions focus solely on police conduct in determining whether the identification process was "unduly suggestive," which is the

¹¹⁴ *Biggers*, 409 U.S. at 199-200.

¹¹⁵ See Shaw & McClure *supra* note 56, at 629; see generally Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 120-22 (2006) (calling for an updated rule in part because witness confidence levels are not necessarily strongly correlated with accuracy and can be infected by suggestion).

¹¹⁶ See *infra* notes 136-37 and accompanying text.

¹¹⁷ See, e.g., *People v. Gandara*, 2008 Cal. App. Unpub. LEXIS 4780, at *17-18 n.3 (Cal. Ct. App. 2008) (identification reliable, in part, because witness "did not have any doubts when she picked out Gandara's photograph" over a year after the crime).

basis for a due process claim.¹¹⁸ Thus, cases in which suggestion is introduced by a private citizen or in which identifications are simply unreliable due to the presence of multiple estimator variables—through no fault of the police—do not raise a due process issue.¹¹⁹

These cases raise a variety of claims relating to eyewitness identification. Many cases challenge the identification testimony on due process grounds, claiming that the procedures used to obtain the identification were unduly suggestive and that the resulting identification is unreliable.¹²⁰ Sometimes misidentification claims are incorporated into claims of ineffectiveness of counsel when purported counsel errors relate to eyewitness identification evidence.¹²¹

¹¹⁸ The United States Supreme Court has only decided cases in which identification procedures were conducted by the police and has not considered suggestive procedures employed by private parties. In *Manson v. Brathwaite*, for example, the Court framed the question as follows: “[W]hether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence *obtained by a police procedure* that was both suggestive and unnecessary.” 432 U.S. at 99 (emphasis added); *but see* State v. Chen, 952 A.2d 1094, 1105-1106 (holding that New Jersey evidence rules require that courts grant “a preliminary hearing when the reliability of State’s identification evidence is called into question by evidence of highly suggestive words or conduct by private actors that pose a significant risk of misidentification”).

¹¹⁹ See, e.g., People v. Richards, No. F054916, 2008 Cal. App. Unpub. LEXIS 9262, at *15-16 (Cal. Ct. App. Oct. 24, 2008) (noting that no authority exists for proposition that conduct by private citizens can be the basis for a motion to exclude identification testimony).

¹²⁰ See *infra* notes 122, 127 and accompanying text.

¹²¹ See, e.g., State v. Lyons, No. 90604, 2008-Ohio-5099, ¶11 (Ohio Ct. App. Oct. 2, 2008); State v. Taylor, No. 90001, 2008-Ohio-3455, ¶89 (Ohio Ct. App. July 10, 2008); *Richards*, 2008 Cal. App. Unpub. LEXIS 9262, *3-4.

One type of due process claim centers on the make-up of a photographic lineup or live lineup. Defendants argue that these lineups are unduly suggestive either because the defendant is the only person in the group who fits the witness's description, or because the defendant's photo is said to "stand out."¹²² Courts generally reject these claims and find that the other persons in the lineup are sufficiently similar to the defendant in appearance, and, thus, the lineup is not unduly suggestive.¹²³ This is the case even if the defendant's photo is the only one with a different color background or different size than the rest,¹²⁴ because courts focus instead only on the similarity of features of the individuals in the photos; sometimes even the dissimilarity of the individuals' features is not considered important. In *People v. Lloyd*, for example, the court rejected such a claim despite the fact that both witnesses stated that people in most of the photos either did not match the description or were too old to be the culprit.¹²⁵ The *Lloyd* court concluded that despite the fact that up to four of the six photos "may have looked too old,

¹²² See, e.g., *People v. Rutledge*, No. A117967, 2008 Cal. App. Unpub. LEXIS 5995 (Cal. Ct. App. July 24, 2008) (defendant being the only person in lineup with braids); *People v. Romero*, 892 N.E.2d 1122, 1125 (Ill. App. Ct. 2008) (defendant being the only person in photo array with teardrop tattoo).

¹²³ See, e.g., *State v. Blackburn*, No. W2007-00061-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 439, at *13 (Tenn. Crim. App. June 10, 2008); *People v. Acosta*, No. E042057, 2008 Cal. App. Unpub. LEXIS 3929, at *13-15 (Cal. Ct. App. May 14, 2008); *People v. Bolden*, No. G038374, 2008 Cal. App. Unpub. LEXIS 10253, at *9-20 (Cal. Ct. App. Dec. 18, 2008); *People v. Richardson*, No. B197177, 2008 Cal. App. Unpub. LEXIS 5741, at *20 (Cal. Ct. App. July 16, 2008); *People v. Styles*, No. F054133, 2009 Cal. App. Unpub. LEXIS 195 (Cal. Ct. App. Jan. 12, 2009); *Rutledge*, 2008 Cal. App. Unpub. LEXIS 5995, at *11-12; *Romero*, 892 N.E. 2d at 1128-30.

¹²⁴ See, e.g., *Richardson*, 2008 Cal. App. Unpub. LEXIS 5741, at *19-20.

¹²⁵ No. 277172, 2008 Mich. App. LEXIS 2196, at *7-8 (Mich. Ct. App. Nov. 13, 2008).

thereby eliminating them from consideration by the eyewitnesses, [that] does not mean that the witnesses were thereby forced to misidentify defendant.”¹²⁶

Several other cases challenged the suggestiveness of show-ups. In *People v. Acosta*, the appellate court rejected the defendant’s challenge to the use of a show-up.¹²⁷ He cited the U.S. Department of Justice Guide and a California Department of Justice District Attorney’s Association Field Guide for the proposition that field show-ups are “automatically suggestive.”¹²⁸ The court relied on precedent in rejecting the contention that a show-up should be considered “automatically suggestive” and instead applied the same five factors of the federal due process test.¹²⁹ Interestingly, the court rejected the contention that the show-up was even suggestive despite two facts suggesting otherwise: (1) it was a single-person field show-up; and (2) the police told the witness that the defendant was the person they had arrested.¹³⁰ The court stated that telling the witness that the police had arrested the suspect “was not particularly suggestive, as most people asked to make an identification at a show-up would probably assume that a person detained by police as a suspect is probably under arrest.”¹³¹ This conclusion flies in the face of social science literature and common sense. It is precisely *because* people will assume that the police believe that a person displayed in a one-person show-up is guilty that the

¹²⁶ *Id.* at *8-9.

¹²⁷ *See Acosta*, 2009 Cal. App. Unpub. LEXIS 906, at *1, *6-8.

¹²⁸ *Id.* at *7.

¹²⁹ *Id.* at *6-7. The court cited the California Supreme Court decision that adopted the federal test. *Id.* (reiterating the test from *People v. Cunningham*, 25 P.3d 519 (2001)).

¹³⁰ *People v. Acosta*, No. E042057, 2008 Cal. App. Unpub. LEXIS 3929, at *7-8 (Cal. Ct. App. May 14, 2008).

¹³¹ *Id.* at *8.

use of show-ups is suggestive.¹³² If an officer confirms a person's belief that the police have enough evidence to arrest the person, the problem of suggestiveness is only exacerbated.

Appellate courts also seem to misunderstand the dangers of confirmatory feedback, leading them to reject claims on the grounds that the feedback, given *after* the identification is made, does not render the selection process suggestive.¹³³ Contrary to courts' position, scientific studies indicate that the danger of such feedback is that it can vastly elevate the confidence level that a witness will later report from the level that the witness actually experienced at the time of the selection.¹³⁴ Thus, the problem with confirmatory feedback is not that it renders the identification process "suggestive," but that it creates a tendency to bolster a witness's perception of his or her true level of confidence. Thus the witness later will overstate his or her certainty in the identification, when the true level of confidence might have been much lower without the confirmatory feedback. Of course, there is still the problem that witness confidence statements, with or without confirmatory feedback, are notoriously unreliable anyway.¹³⁵

Even when defendants ask courts to require the police to follow less suggestive procedures and cite to reform proposals, the courts decline to impose such requirements on the

¹³² See *supra* notes 29-33 and accompanying text.

¹³³ See, e.g., *People v. Gandara*, 2008 Cal. App. Unpub. LEXIS 4780, at *15-16 (Cal. Ct. App. 2008) (confirmatory feedback given *after* witness's unaided identification of defendant, therefore, did not taint pre-trial identification and, thus, does not render in-court identification invalid); *State v. Allen*, 274 S.W.3d 514, 525 (Mo. App. 2008) (same); *State v. Smith*, 946 A.2d 319, 325 (Conn. App. Ct. 2008) (same).

¹³⁴ See, e.g., *supra* note 10 and accompanying text.

¹³⁵ See *supra* note 117 and accompanying text.

police as a matter of either evidentiary or constitutional law.¹³⁶ Instead, the courts simply follow the five-factor test in *Manson v. Brathwaite*,¹³⁷ including the scientifically invalid witness confidence prong.¹³⁸

¹³⁶ See, e.g., *Taylor v. Commonwealth*, 663 S.E.2d 536, 539 (Va. Ct. App. 2008) (rejecting need for sequential, double blind photo lineup); *Allen*, 274 S.W.3d at 525 (rejecting claim that police should use blind administration of lineups and make a written record of witness's responses at the moment of identification because not required by state law); *Gibson v. State*, 661 S.E.2d 850, 854 (Ga. Ct. App. 2008) (failure to read admonition form did not render line-up procedure to be impermissibly suggestive); *Smith*, 946 A.2d at 327 (concluding without explanation that "[d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure"); but see *People v. Bryant*, No. A114925, 2008 Cal. App. Unpub. LEXIS 3154, at *13-14 (Cal. Ct. App. Apr. 16, 2008) (defense attorney not prevented from asking expert witness about DOJ's position on double-blind, sequential photo line-ups).

¹³⁷ See, e.g., *State v. Lyons*, No. 90604, 2008-Ohio-5099, ¶17 (Ohio Ct. App. Oct. 2, 2008); *Howell v. State*, 989 So. 2d 372, 381 (Miss. 2008); *State v. Gwennap*, Nos. 98,254, 98,255, 2008 WL 3916001, at *6 (Kan. Ct. App. Aug. 22, 2008); *State v. Zabala*, No. 97875, 2008 Kan. App. Unpub. LEXIS 534 at *11-12 (Kan. Ct. App. Aug. 8, 2008); *State v. Lee*, No. 2007AP1636-CR, 2008 Wisc. App. LEXIS 546, at *9 (Wis. Ct. App. July 16, 2008); *People v. Richardson*, No. B197177, 2008 Cal. App. Unpub. LEXIS 5741, at *16-17 (Cal. Ct. App. July 16, 2008); *State v. Taylor*, No. 90001, 2008-Ohio-3455, ¶94 (Ohio Ct. App. July 10, 2008); ***State v. Gwennap***, Nos. 98,254, 98,255, 2008 Kan. App. Unpub. LEXIS 622 at *11-14 (Kan. Ct. App. Aug. 22, 2008) (adding additional factor); *Gandara*, 2008 Cal. App. Unpub. LEXIS 4780, at *14; *People v. Thomas*, No. 272731, 2008 Mich. App. LEXIS 1221 (Mich. Ct. App. June 12, 2008); *State v. Hall*, 986 So. 2d 863, at *10-11 (La. Ct. App. 2008); *People v. McGuire*, No. F051892, 2008 Cal. App. Unpub. LEXIS 4108, at *7-8 (Cal. Ct. App. May 20, 2008); *State v. Segines*, No. 89915, 2008-Ohio-2041 (Ohio Ct. App. May 1, 2008); *People v. Robinson*, No. 276889, 2008 Mich. App. LEXIS 743, at *6 (Mich. Ct. App. Apr. 10, 2008); *People v. Juarez*, No. B197785, 2008 Cal. App. Unpub. LEXIS 5273, at *7 (Cal. Ct. App. June 30, 2008).

¹³⁸ See *supra* note 115 and accompanying text.

B. Claims Challenging Jury Instructions on Eyewitness Identification or Decisions to Exclude Expert Testimony

Two areas left within the discretion of the trial court are the issuance of jury instructions and the admission of expert testimony. Appellate courts usually reject challenges to the exclusion of expert witness testimony on eyewitness identifications. Sometimes the claims are rejected on the basis that there was sufficient corroborating identification evidence.¹³⁹ Other times the appellate courts find that the decision is a matter within the trial court's discretion, that jury instructions and the argument of counsel suffice to alert the jury about the issues with eyewitness identification testimony, or that the jury is sufficiently able to evaluate the testimony without the assistance of an expert (and presumably without any assistance at all).¹⁴⁰ Indeed, in some cases the courts even have shown hostility toward the idea of admitting expert testimony on the science of eyewitness identification.¹⁴¹

¹³⁹ See, e.g., *People v. Smith*, N.Y.S. 2d 88, 89 (N.Y. App. Div. 2008); *People v. Bolden*, No. G038374, 2008 Cal. App. Unpub. LEXIS 10253, at *22 (Cal. Ct. App. Dec. 18, 2008); *People v. Olague*, No. C053372, 2009 Cal. App. Unpub. LEXIS 2754, at *97 (Cal. Ct. App. Apr. 7, 2009); *People v. Lloyd*, No. 277172, 2008 Mich. App. LEXIS 2196, at *7-8 (Mich. Ct. App. Nov. 13, 2008).

¹⁴⁰ See, e.g., *State v. Allen*, 274 S.W.3d 514, 526 (Mo. Ct. App. 2008) (exclusion may be based on theory that jurors can “rely on their own experience to reach a judgment on what weight to give eyewitness evidence”) (internal citation omitted); *People v. Fowlkes*, No. B198406, 2008 Cal. App. Unpub. LEXIS 6971, at *22 (Cal. Ct. App. Aug. 26, 2008) (permitting the expert to offer his opinion would improperly allow the judge and jury to shift responsibility for the decision to the witness).

¹⁴¹ In *Bolden*, for example, the trial court rejected the admission of expert testimony, according to the Court of Appeal, on the ground that “Shomer [the expert witness] ‘seemed like an advocate’ and had overstated the importance of certain factors.” 2008 Cal. App. Unpub. LEXIS 10253, at *14-15; *People v. Ruiz*, No. E044016, 2008 Cal. App. Unpub. LEXIS 8960, at *18 (Cal. Ct. App. Nov. 18, 2008) (referring to scientific findings on

Not only is witness confidence erroneously considered in the due process reliability test, courts in some jurisdictions compound the error by also instructing juries to consider it in evaluating the reliability of identification testimony. Many cases in the study challenge the use of this jury instruction. In *People v. Nelson*, for example, a California Court of Appeals upheld the use of this standard jury instruction that instructs jurors to consider “the extent to which the witness is either certain or uncertain of the identification.”¹⁴² Further, a due process challenge to the use of this instruction was rejected in *People v. Ruiz*, despite the fact that the court agreed that “there may be little correlation between a witness’s certainty and reliability of the identification.”¹⁴³ Defendants sometimes also seek reversal because trial courts have refused to give cautionary jury instructions on police suggestion in the eyewitness identification process.¹⁴⁴

witness certainty as “certain experts’ opinions that have not yet achieved widespread acceptance in California jurisprudence”).

¹⁴² 2008 Cal. App. Unpub. LEXIS 4472, at *9-10; *see also Gwennap*, 2008 WL 3916001, at *16-17 (no error to instruct on witness certainty as factor lending reliability to identification); *Juarez*, 2008 Cal. App. Unpub. LEXIS 5273, at *6; *People v. Canfield*, No. A118126, 2008 Cal. App. Unpub. LEXIS 9289, at *1 (Cal. Ct. App. Nov. 17, 2008); *People v. Luna*, No. G039202, 2008 Cal. App. Unpub. LEXIS 9001, at *1 (Cal. Ct. App. Oct. 27, 2008); *People v. Rodriguez*, 387 Ill. App. 3d 812, 820 (Ill. App. 2008).

¹⁴³ 2008 Cal. App. Unpub. LEXIS 8960, at *15-16. In *Ruiz*, the court rejected the due process challenge to the instruction despite the fact that experts have stated that witness confidence does not correlate with accuracy. *Id.* The court concluded that to find a due process violation “would essentially be binding the jury to accept certain experts’ opinions that have not yet achieved widespread acceptance in California jurisprudence.” *Id.* at *18. The court also found no error in the “alleged ‘contradiction’ between defendant’s expert testimony and the trial court’s jury instruction.” *Id.* at *19.

¹⁴⁴ *People v. Wells*, No. B200441, 2008 Cal. App. Unpub. LEXIS 7859, at *10-11, *15-16 (Cal. Ct. App. Sept. 18, 2008) (affirming trial court’s refusal to instruct jury to consider whether “police exercised coercion or deception or suggestion in the identification process” and, if so, “whether or not it was of such a nature as to be reasonably

Even if identification evidence was erroneously admitted or expert testimony erroneously excluded, the conviction will not be reversed when there is sufficient corroborating evidence of identification (and, thus, less risk of misidentification).¹⁴⁵ Thus, corroborating evidence of identification does play a role at the back end of the process, but it is not a requirement for admission of identification testimony.¹⁴⁶

The *Nelson* case raises so many troubling issues that it justifies a closer look. First, it is a prime candidate for scientifically sound jury instructions on the limited relevance of witness confidence in evaluating identification reliability. In *Nelson*, the defendant was convicted of committing two similar robberies of the same fast-food restaurant.¹⁴⁷ There was no corroborating evidence of identification¹⁴⁸ and, other than the eyewitness's identification testimony, other critical facts indeed tended to exonerate the suspect. For example, the robber had worn a black sweatshirt with a white shirttail hanging out from underneath, but the defendant

likely to produce a misidentification"); *People v. Deo*, Nos. C047126, C046880, 2008 Cal. App. Unpub. LEXIS 4822, at *112-13 (Cal. Ct. App. June 13, 2008) (affirming trial court refusal to instruct jury to be cautious in considering eyewitness identifications).

¹⁴⁵ *People v. Bolden*, No. G038374, 2008 Cal. App. Unpub. LEXIS 10253, at *18-19 (Cal. Ct. App. Dec. 18, 2008); *People v. Olague*, No. C053372, 2009 Cal. App. Unpub. LEXIS 2754, at *97 (Cal. Ct. App. Apr. 7, 2009).

¹⁴⁶ *See generally* Thompson, *supra* note 2 (arguing in favor of a corroboration requirement for admission of eyewitness identification testimony).

¹⁴⁷ *People v. Nelson*, Nos. B195996, B205753, 2008 Cal. App. Unpub. LEXIS 4472, *1 (Cal. Ct. App. June 2, 2008).

¹⁴⁸ The robber's face was not clear on surveillance videos of the two robberies, and no fingerprints were found on the knife found on the ground near an alley. *Id.* at *6 and n. 2.

was arrested in a nearby park soon after the robbery wearing a “blue or purple shirt.”¹⁴⁹

According to the court, “[o]ne of the deputies testified that criminals commonly wear multiple layers of clothing during crimes, so that they can avoid detection afterwards by shedding a layer of clothing.”¹⁵⁰ There are at least three problems with this theory: (1) the robber had worn the same black sweatshirt in the two robberies for which Nelson was tried, which is not consistent with the “shedding a layer” idea; (2) the robber wore the same clothes to the *same restaurant* on two occasions, suggesting that this was not a particularly calculating robber; and (3) the layer of clothing under the black sweatshirt was white, but defendant was found wearing a blue or purple shirt.¹⁵¹ In addition, the police officers found a small amount of currency on the ground near the knife that was recovered, but they did not recover the black sweatshirt or the white shirt worn underneath.¹⁵²

Moreover, the police could not account for the other money stolen in the second robbery, moments before Nelson’s arrest.¹⁵³ He was found with only a small amount of money on him

¹⁴⁹ *Id.* at *4. It is not uncommon for suspects not to match witness descriptions. *See, e.g.*, *People v. Earle*, 91 Cal. Rptr. 3d 261, 266 (Cal. Ct. App. 2009) (victim characterized assailant as looking Mexican and skinny, but defendant was clearly looked northern European and had an athletic build with a bull neck; defendant also had a deeply furrowed brow and protruding, possibly damaged ears, which the victim did not mention); *Fowlkes*, *People v. Fowlkes*, No. B198406, 2008 Cal. App. Unpub. LEXIS 6971, at *4-5, *7 (appellant had shaved head but shooter had “hair on his head” and appellant appeared to have lighter skin than he did on the day of the shooting; victim also described car as a white two-door Dodge Neon with a green emblem on the back but co-defendant drove a white, four-door Honda Civic with no green sign or emblem on the back).

¹⁵⁰ *Nelson*, 2008 Cal. App. Unpub. LEXIS 4472, at *6.

¹⁵¹ *Id.* at *3-6.

¹⁵² *Id.* at *4.

¹⁵³ *Id.*

when arrested.¹⁵⁴ A deputy testified that criminals commonly attempt to avoid detection by disposing of loot after a robbery.¹⁵⁵ However the defendant would not have had time to spend the money, and it makes little sense to think he would throw the stolen money away on the off chance that he might be arrested.

In addition, even the identification testimony was not particularly solid. First, all the identifications were cross-racial, which are scientifically shown to be less reliable.¹⁵⁶ Scientific findings indicate that such identifications are less accurate even if the witness harbors no significant biases and has had frequent interactions with persons of that race.¹⁵⁷ Yet at trial, one witness was allowed to testify that she had “friends and coworkers who were African-American, and could distinguish between different people of that race.”¹⁵⁸ The second witness also testified to a professed ability to distinguish people of different races.¹⁵⁹

The witnesses also did not inspire confidence in their true ability to recognize the culprit. At trial, the victim of the first robbery, Mr. Hernandez, said he did not get a good look at the robber’s face.¹⁶⁰ He could not give a positive identification of Mr. Nelson, but he was nonetheless allowed to testify that the defendant looked ““familiar”” to him.¹⁶¹ After the second robbery, Ms. Martinez, who had viewed both robberies, testified that she was “positive” that the

¹⁵⁴ *Id.* at *6.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *3-6.

¹⁵⁷ *See supra* note 26 and accompanying text.

¹⁵⁸ *Nelson*, 2008 Cal. App. Unpub. LEXIS 4472, at *3.

¹⁵⁹ *Id.* at *6 (Cal. Ct. App. June 2, 2008).

¹⁶⁰ *Id.* at *3.

¹⁶¹ *Id.*

defendant was the robber; however, she had shown less confidence when she identified him just after the second robbery.¹⁶² Ms. Martinez viewed the defendant in a show-up at which he was illuminated with bright lights, without handcuffs, and not wearing a black sweatshirt as the robber had worn.¹⁶³ She said that she recognized his face (because his clothes were different) but wanted to be sure, so she asked to hear his voice.¹⁶⁴ Only after he spoke the words, “Open the register,” did she identify him.¹⁶⁵ She said she then was “a hundred percent sure that it was him.”¹⁶⁶ Unfortunately, social science research on voice identification shows that attempts to recognize an unfamiliar voice, based on minimal interaction under stressful circumstances, are highly unreliable, and yet witnesses will exhibit high confidence in their abilities to make such identifications.¹⁶⁷

Ms. Martinez then told the second witness, Ms. Diaz, that she had identified the defendant, despite being told not to do so by the police.¹⁶⁸ In this way, she tainted Ms. Diaz’s identification. Ms. Diaz then stated that she could identify defendant by his face even though he was wearing ““a whole different . . . outfit.””¹⁶⁹ When this witness viewed Mr. Nelson, he was

¹⁶² *Id.*

¹⁶³ *Id.* at *4.

¹⁶⁴ *Id.* at *4-5

¹⁶⁵ *Id.* at *4-5.

¹⁶⁶ *Id.* Another case from the study that relied in part on voice identification is *People v. Bryant*, No. A114925, 2008 Cal. App. Unpub. LEXIS 3154, at *24 (Cal. Ct. App. Apr. 16, 2008).

¹⁶⁷ See Lawrence M. Solan & Peter M. Tiersma, *Hearing Voices: Speaker Identification in Court*, 54 HASTINGS L.J. 373, 393-413 (2002-03) (reviewing the social science of voice identification).

¹⁶⁸ *Nelson*, 2008 Cal. App. Unpub. LEXIS 4472, at *5.

¹⁶⁹ *Id.*

wearing handcuffs.¹⁷⁰ She also stated that she was positive that he was the robber, relying on her recollection of his face.¹⁷¹ This identification is tainted by several suggestive facts: (1) the defendant was the only person shown to the witness by the police; (2) the previous witness told the second witness that she had identified the defendant; and (3) the defendant was shown while wearing handcuffs and having bright lights shined on him.¹⁷² Given that the first witness had already identified Mr. Nelson as the robber, there was no need for a second show-up. Presumably, the police could have organized a live lineup for the second witness instead.

Again, it is impossible to know from reading the appellate case law whether someone like Mr. Nelson is actually guilty or not. The jury found him guilty beyond a reasonable doubt on the sole basis of eyewitness testimony, which rested in large part on voice identification by the principal witness.¹⁷³ Mr. Nelson is serving a 14-year prison sentence.¹⁷⁴ His appeal challenged the admission of the eyewitness testimony on several grounds, including the use of a jury instruction that told jurors to *take into account* witness confidence in determining the reliability of the testimony.¹⁷⁵ Ideally, the instruction would instead warn jurors *not* to give weight to witness confidence. In reviewing Mr. Nelson's challenge to the use of the jury instruction on witness confidence, the lower appellate court simply deferred to the California Supreme Court's

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *6.

¹⁷² *Id.* at *4-6.

¹⁷³ *Id.* at *4-5.

¹⁷⁴ *Id.* at *1.

¹⁷⁵ *Id.* at *6, *9-10.

approval of the instruction and found “no impropriety” in the use of the witness confidence factor listed in the standard jury instruction.¹⁷⁶

Conclusion

The innocence movement, armed with DNA evidence, has led to the release of hundreds who had been wrongly convicted.¹⁷⁷ Influential groups have reacted by devoting a great deal of study to arrive at scientifically-supported recommendations for preventing future miscarriages of justice.¹⁷⁸ As we approach the ten-year anniversary of the Department of Justice’s *Guidelines for Eyewitness Identifications* and the similar reports that followed, it behooves us to evaluate the implementation stage of the innocence reform movement. Unfortunately, the improved procedures have not been widely mandated through the political process.¹⁷⁹ A paltry number of jurisdictions have adopted the recommended procedures—only two states and a handful of local law enforcement agencies have adopted the key procedures recommended for eyewitness identifications, such as sequential, double-blind administration of line-ups and photo arrays.¹⁸⁰ Can we rely on the police departments themselves to adopt the changes? In this country, there are almost 19,000 independent police departments,¹⁸¹ and there are no widely followed professional accreditation standards that might impose the recommended procedures as a

¹⁷⁶ *Id.* at *11.

¹⁷⁷ *See supra* note 1 and accompanying text.

¹⁷⁸ *See supra* note 39 and accompanying text.

¹⁷⁹ *See supra* note 13 and accompanying text.

¹⁸⁰ *See supra* note 13 and 51 and accompanying text.

¹⁸¹ *See* International Association of Chiefs of Police, FAQs, <http://www.theiacp.org/faq.htm> (last visited on Oct. 6, 2009).

condition for accreditation.¹⁸² The failure of the political process to mandate such changes has left virtually all law enforcement agencies in forty-seven states free to ignore the scientific findings and recommendations for change, and that would appear to be precisely what they have done. The same, faulty eyewitness identification practices of the past that produced hundreds of erroneous convictions continue to be used today.

The study presented in this Article has shown that in a large number of robbery, murder, and assault cases there continue to be grave concerns about eyewitness misidentification of innocent defendants. Unfortunately, DNA evidence is not available in most robbery or murder cases, so any innocent persons who are wrongly identified are not likely to be exonerated in the fashion of those wrongly convicted of sexual assaults in the past. Is there any reason to believe that eyewitness-victims in sexual assault cases are more prone to err in identification than eyewitness-victims in robbery or homicide cases? In a word: No, there is no reason to think robbery victims make for better eyewitnesses than sexual assault victims.¹⁸³ Indeed, misidentifications in robberies most likely occur at a greater rate than in rapes because “robberies are frequently quick, and may involve less immediate physical contact,”¹⁸⁴ making an accurate identification less likely. Thus, the numbers of wrongly convicted undoubtedly are many times greater than the numbers of exonerated.¹⁸⁵

¹⁸² See Thompson, *supra* note 2, at 1520 (stating that “only a fraction of police departments have applied for national accreditation status,” so it is not considered an effective way to regulate police practices).

¹⁸³ See Gross et al., *supra* note 1, at 530.

¹⁸⁴ *Id.*

¹⁸⁵ See Thompson *supra* note 2, at 1493 (noting that in 2004 there were over four times as many robberies committed as there were rapes, 401,470 to 95,089); Gross et al., *supra* note 1, at 531 (rape exonerations are “tip of

We may never have the means to detect the scores of innocent people who have been wrongly arrested for robberies, murders, and other violent crimes due to erroneous eyewitness identification; however, at a minimum, courts can refuse to apply scientifically unsound due process tests and jury instructions, and they can admit expert testimony to educate the jurors of the pitfalls of the identification process. Courts can also cite the failure to follow state-of-the-art practices and the estimator variables at play in a particular case (like use of a weapon or disguise) as part of the “totality of the circumstances” in deciding state due process claims.¹⁸⁶ Instead, the study reported here shows a disappointing failure of state appellate courts to show leadership in ensuring greater accuracy in the criminal justice system.

the iceberg” that do not include a much larger group of undetected false convictions for robberies and other serious crimes of violence for which DNA is unavailable).

¹⁸⁶ See Thompson, *supra* note 2, at 42-59; see also *Manson v. Brathwaite*, 432 U.S. 98, 164 (1977).