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A TRIPARTITE SOLUTION TO EYEWITNESS ERROR

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Based on over thirty years of extensive scientific research on eyewitness testimony, we have developed a comprehensive, practical solution to eyewitness error, which we present in this article. Our tripartite solution to eyewitness error consists of the following components: (1) Permitting expert testimony when the primary or sole evidence against the defendant is eyewitness testimony; (2) Improving procedures for collecting eyewitness evidence by conducting eyewitness interviews and identification procedures in a manner consistent with best practices identified by scientific research in the field; and (3) Educating the principal participants in the criminal justice system about eyewitness testimony to sensitize them to the effects of eyewitness factors. The tripartite solution provides judges, attorneys, law officers, and jurors with a conceptual framework for understanding and evaluating eyewitness testimony and gives practical suggestions in the form of ten guidelines for attorneys to use when either supporting or attacking the reliability of eyewitness testimony. The article also serves as a blueprint for the reforms that the criminal justice system must institute to significantly reduce eyewitness error. Finally, the article explains why procedural due process requires the adoption of the tripartite solution.

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I. INTRODUCTION

“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”¹

“[W]e regularly sentence innocent people to death. So the underlying question remains: Considering all the attention we devote to death penalty cases, why do we make so many mistakes?”²

It was just turning dark one October night when a young woman hitchhiker was picked up on Pacific Highway South 10 miles outside of Seattle by a man with a beard and a three-piece suit. Instead of driving her to Tacoma, the man turned into an isolated dirt road, raped her and left her by the side of the road.

Just 24 hours later, the rape victim, shown an array of photographs by detectives, identified Steven Titus as her rapist. Largely on the basis of her testimony, Mr. Titus was found guilty.

But a few months after Mr. Titus’s conviction, new evidence suggested a different suspect was responsible for a series of rapes, including this one. When the rape victim saw the photograph of the new suspect, she realized he was her rapist and broke down in tears, saying, ‘Oh my God, what have I done to Mr. Titus?’

Though Mr. Titus was released, his life was in shambles: he had used all his money for his defense, had lost his job and good reputation and had been left by his fiancée.

Mr. Titus spent the next four years in a struggle to sue the authorities. Eleven days before the case was to come to trial, Mr. Titus died of a heart attack. Ten months later his estate was awarded a settlement of \$2.8 million.

The circumstances of this case are not unusual.³

The purpose of this article is to delineate a tripartite solution to eyewitness error that is based on over thirty years of extensive scientific research on eyewitness testimony. The criminal justice system depends on eyewitness evidence. It is often the only evidence available in a criminal case and, where properly handled, can be very reliable. The solution proposed here maintains the availability of eyewitness evidence, while instituting safeguards to promote its reliability and accuracy.

Part II of this article describes the extent of the problem of wrongful convictions, reviewing empirical studies that estimate the contribution of eyewitness errors to wrongful convictions, the difficulties eyewitnesses

¹ *United States v. Wade*, 388 U.S. 218, 228 (1967) (footnote omitted).

² Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 *LAW & CONTEMP. PROBS.* 125, 133 (1998).

³ Daniel Goleman, *Studies Point to Flaws in Lineups of Suspects*, *N.Y. TIMES*, Jan. 17, 1995, at C1.

have in accurately identifying the perpetrator of a crime, and the powerful impact that eyewitness testimony has on the trier of fact. Part III depicts how American courts have responded to the problem of eyewitness error and analyzes whether those responses have been adequate.

Part IV introduces the tripartite solution. Its first component is permitting expert testimony when the primary or sole evidence against the defendant is eyewitness testimony. The second component is improving law enforcement's procedures for collecting eyewitness evidence. The article describes a scientifically validated method for interviewing eyewitnesses that significantly increases the amount of accurate information obtained from eyewitnesses and decreases the probability of contaminating their memory of the crime. The article then discusses how to further improve investigatory procedures for eyewitness evidence by proposing changes in identification procedures that scientific research has shown can significantly reduce erroneous eyewitness identifications. Finally, the article introduces the third component of the tripartite solution, delineating how and by what means educating the principal participants of the criminal justice system about eyewitness testimony could reduce eyewitness error. This article concludes with an additional imperative for implementing the tripartite solution: the constitutional demands of procedural due process.

II. EYEWITNESS ERROR'S ROLE IN WRONGFUL CONVICTIONS

A. THE NUMBER OF WRONGFUL CONVICTIONS

To understand the impact of eyewitness error on the criminal justice system, it is first necessary to consider the scope of the problem of wrongful convictions. In 2002, over one million adults were convicted of felonies in the United States.⁴ One survey of Ohio criminal justice officials estimates that wrongful convictions occur in about 1 of every 200 felony criminal cases (.5%).⁵ This translates to more than 5000 innocent persons being convicted of serious crimes in 2002. However, DNA testing of criminal suspects suggests that the percentage of wrongful convictions may be much higher.⁶ For example, a 1995 survey of public and private forensic

⁴ U.S. Dep't of Justice, Criminal Sentencing Statistics, <http://www.ojp.usdoj.gov/bjs/sent.htm> (May 24, 2007).

⁵ John C. Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 CT. REV. 12, 13 (1999).

⁶ EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 20 (1996).

laboratories in the United States indicated that DNA tests had been conducted in 21,621 criminal cases.⁷ Of these:

DNA testing exonerated the suspect in 23% of the cases. In another 16% of the cases, DNA tests produced inconclusive results [often due to deteriorated or insufficiently large samples]. In other words, in those cases in which there was a conclusive DNA test result (a sample of many thousands of cases), 27% of the suspects were exonerated by the test.⁸

One-half of all persons arrested for serious crimes are ultimately convicted.⁹ In 1999, Dripps noted that many of the suspects now exonerated by DNA testing would have been indicted prior to its use.¹⁰ This implies that there may have been “a false conviction rate in the past of greater than 10% for criminal cases where DNA testing is now possible.”¹¹ More importantly, Dripps asserts that factors such as eyewitness error, which were likely to cause wrongful indictments in DNA cases, continue to produce wrongful indictments in criminal cases where there is no testable biological evidence.¹² “A false conviction rate of 10% would imply almost 100,000 wrongful felony convictions every year.”¹³

A 1987 study determined that in approximately 80,000 criminal trials every year in the United States the sole or primary evidence against the

⁷ *Id.*

⁸ Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 638-39 (1999) (citing CONNORS ET AL., *supra* note 6, at xxx, 20). Since DNA evidence was first introduced into the criminal justice system, it has exonerated more than 340 people who were wrongfully convicted of crimes. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005). Sixty-four percent of the exonerations involved at least one eyewitness misidentification. *Id.* at 542. Eighty-eight percent of the rape exonerations involved eyewitness misidentification. *Id.* at 530; *see also* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. OF PSYCHOL. 277, 278 (2003) (stating that more than 100 prisoners have been exonerated by DNA evidence).

⁹ C. Ronald Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RES. SOC. PROBS. & PUB. POL'Y 99, 102 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE (1983)).

¹⁰ *See* Dripps, *supra* note 8, at 639 (“In short, the sample of persons tested is pretty close to a sample of persons who would, in the absence of DNA evidence, have gone to trial.”).

¹¹ Richard A. Wise & Martin A. Safer, *A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony*, 40 CT. REV. 6 (2003); *see also* Dripps, *supra* note 8, at 638-39 (“None of these explanations seems very powerful.”). In other words, the DNA cases are representative of criminal cases where DNA testing is not possible.

¹² *See* Dripps, *supra* note 8, at 639:

¹³ Wise & Safer, *supra* note 11, at 6; *see also* Dripps, *supra* note 8, at 638-39 (“None of these explanations seems very powerful.”). In other words, the DNA cases are representative of criminal cases where DNA testing is not possible.

defendant was eyewitness testimony.¹⁴ However, science is increasingly revealing that a significant percentage of eyewitness testimony is wrong. “Erroneous eyewitness testimony . . . no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system.”¹⁵ In one study of 340 convictions, eyewitness error played a role in 64% of wrongful convictions.¹⁶ In the first 180 DNA exoneration cases, eyewitness error was a cause of the wrongful conviction in 75% or more of the cases.¹⁷

The United States judiciary has been aware for some time of the problem posed by eyewitness error.¹⁸ For example, the United States Court of Appeals for the Second Circuit stated:

There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he

¹⁴ Goleman, *supra* note 3, at C1; *see also* Edith Greene, *Judge's Instructions on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252, 273 (1988) (reporting that judges estimated that 26% of the trials over which they presided involved eyewitness identification as a major issue).

¹⁵ Rob Warden, Northwestern Univ. Sch. of Law, Ctr. on Wrongful Convictions, How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row, <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Research/eyewitnessstudy1.htm> (last visited July 24, 2006); *see also* Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 2 J. APPLIED PSYCHOL. 170, 170 (1996) (stating that “[f]alse eyewitness identifications . . . appear to be one of the leading causes of erroneous conviction”) (internal citations omitted); Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 112 (2002) (“[M]istaken identifications are the largest single cause of wrongful convictions.”); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1275 (2005) (quoting *United States v. Wade*, 388 U.S. 218, 229 (1967) (“[M]istaken identification ‘probably accounts for more miscarriages of justice than any other single factor.’”). Indeed, Borchard identified erroneous eyewitness identification as a leading cause of false conviction over seventy years ago. EDWARD M. BORCHARD, *CONVICTING THE INNOCENT XII* (1932).

¹⁶ Gross et al., *supra* note 8, at 542; *see also* Huff, *supra* note 9, at 101, 103 (finding eyewitness error in nearly 60% of approximately 500 wrongful convictions).

¹⁷ *See* Gary Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INT. 45, 48 (2006) (“As of this writing, there have been more than 180 definitive DNA exonerations: the proportion that involves eyewitness identifications continues to run about 75% or more.”); *see also* The Innocence Project, <http://www.innocenceproject.org/> (last visited Aug. 7, 2006).

¹⁸ Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605 (1998).

points to the defendant and exclaims with conviction that veils all doubt, "[T]hat's the man!"¹⁹

Similarly, Brigham and Bothwell wrote, "[J]urors appear to regard eyewitness evidence as one of the most persuasive kinds of evidence that can be presented."²⁰ Jurors place such great faith in eyewitness testimony because they seemingly believe that perceptual memory is like a videotape that can be replayed with near perfect fidelity.²¹ Accordingly, when an eyewitness testifies, he or she "can simply play back the appropriate tape."²² However, scientific research has revealed that eyewitness memory is much more malleable and susceptible to error than is generally realized.²³

III. THE LEGAL SYSTEM'S RESPONSE TO THE PROBLEM OF EYEWITNESS ERROR

A. THE UNITED STATES SUPREME COURT'S RESPONSE

The eyewitness problem has not escaped the attention of our highest court. In 1967, the Supreme Court first addressed the issue of eyewitness identification in a trilogy of cases: *United States v. Wade*,²⁴ *Gilbert v. California*,²⁵ and *Stovall v. Denno*.²⁶ In *Wade*, the Court held that because a post-indictment pre-trial lineup is a critical stage of a criminal proceeding, a defendant has a right under the Sixth Amendment to have an attorney present at a post-indictment lineup.²⁷ The Court further stated that if an attorney is not present at a post-indictment pre-trial lineup, the eyewitness's identification of the defendant is inadmissible.²⁸ However, in the event that the post-indictment pre-trial lineup is inadmissible, the State can still use the eyewitness's courtroom identification of the defendant as evidence of the defendant's guilt.²⁹

¹⁹ *Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir. 1982) (citing *United States v. Wade*, 388 U.S. 218, 235-36 (1967)).

²⁰ John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 19 (1983).

²¹ *Id.* at 20.

²² *Id.*

²³ See Brigham et al., *supra* note 5, at 14; Wells et al., *supra* note 18, at 624.

²⁴ 388 U.S. 218 (1967).

²⁵ 388 U.S. 263 (1967).

²⁶ 388 U.S. 293 (1967).

²⁷ 388 U.S. at 237-38.

²⁸ *Id.* at 240.

²⁹ *Id.* ("The State may then rest upon the witnesses' unequivocal courtroom identifications, and not mention the [post-indictment] pretrial identification as part of the State's case at trial.").

In *Gilbert*, the Supreme Court held that the State is not entitled to show that eyewitness testimony which was the direct result of an illegal post-indictment lineup could be substantiated by an independent source.³⁰ Instead, the trial court must grant the defendant a new trial if such testimony was presented at the guilt stage, or grant appropriate relief if the testimony was presented at the penalty stage, unless it is determined that the admission of the eyewitness's identification was harmless error beyond a reasonable doubt.³¹

In *Stovall*,³² the Court addressed whether a suggestive identification procedure necessitated by exigent circumstances that was conducive to an erroneous identification constituted a denial of due process.³³ The Court held that the totality of the circumstances must be examined when there is an alleged violation of due process in conducting an identification procedure.³⁴ Thus, in *Stovall*, the Court found that, though the eyewitness's identification of the defendant was suggestive, it was imperative because the only eyewitness was in a hospital with life-threatening injuries.³⁵ "Under [the] circumstances, the usual police station lineup . . . was out of the question."³⁶

One year later, in *Simmons v. United States*,³⁷ the Supreme Court confronted the issue of whether an in-court identification of a defendant is admissible if it has been tainted by suggestive pre-trial identification photographs necessitated by exigent circumstances.³⁸ Applying the same standard it previously enunciated in *Stovall*, the Court ruled that in-court

³⁰ 388 U.S. at 272-73.

³¹ *Id.* at 274.

³² *Stovall v. Denno*, 388 U.S. 293 (1967).

³³ *Id.* at 302. The defendant in *Stovall* was convicted of murder and sentenced to death. *Id.* at 295. One day after the murder, the police brought the defendant in handcuffs to a hospital room so the victim's wife, who had been seriously injured during the murder, could identify him. *Id.* After observing the defendant and hearing him speak, the victim's wife identified the defendant as her husband's murderer. *Id.* The defendant asserted on appeal that his showup in the hospital was unconstitutional because, among other reasons, its suggestiveness violated due process. *Id.* at 295-96.

³⁴ *Id.* at 302.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 390 U.S. 377 (1968).

³⁸ *Id.* 381. In *Simmons*, the defendant was convicted of robbing a bank. *Id.* The day after the bank robbery, FBI agents showed five bank employees some photos consisting mostly of group pictures of the defendant and others. *Id.* After viewing the photos, the bank employees all identified the defendant as one of the bank robbers. *Id.* At a later date, the FBI interviewed the bank employees for a second time and showed them other photos that included the defendant's photo. *Id.* They once again identified the defendant as a perpetrator of the crime. *Id.*

identifications would be permissible, notwithstanding the use of suggestive photographs, as long as their use was necessary and the in-court identifications were reliable.³⁹

Five years later, in *Kirby v. Illinois*,⁴⁰ the Supreme Court clarified its holdings in *Wade* and *Gilbert* by ruling that an individual has a right to counsel in a pre-trial identification procedure only if it took place after criminal proceedings had been initiated against the defendant.⁴¹ Furthermore, in *United States v. Ash*,⁴² the Supreme Court held that a defendant does not have a right to an attorney at a photo array, even if the defendant has been indicted, ruling that a photo array is not a “trial-like adversary confrontation”⁴³ meriting Sixth Amendment protection.⁴⁴ As a consequence of the Supreme Court’s rulings in *Kirby* and *Ash*, law enforcement agencies generally conduct lineups prior to indictments or use photo arrays to identify suspects so they are not required to have the defendant’s attorney present at an identification.⁴⁵ Thus, the Supreme Court’s decisions in *Kirby* and *Ash* largely negate the effect of its earlier rulings in *Wade* and *Gilbert*.⁴⁶

In *Neil v. Biggers*⁴⁷ and *Manson v. Brathwaite*,⁴⁸ the Supreme Court rendered its final major decisions on suggestive identification procedures. The Court ruled that such identification procedures, even those from unnecessarily suggestive procedures, were admissible provided they were

³⁹ *Id.* at 385-86.

⁴⁰ 406 U.S. 682 (1972).

⁴¹ *Id.* at 689.

⁴² 413 U.S. 300 (1973).

⁴³ *Id.* at 317.

⁴⁴ *Id.*

⁴⁵ See Dripps, *supra* note 8, at 656-57.

⁴⁶ See *id.*

[T]he Court’s focus on the Bill of Rights . . . undermined even the modest protection supplied by the *Wade* rule. Given the Fifth Amendment privilege, suspects can be questioned only before the right to counsel attaches. Therefore it was imperative that the right to counsel attach late enough in the process for the police to get a crack at the suspect under the *Miranda* rules. Fairly supported by the language of the Sixth Amendment, the Court held that the ‘prosecution’ does not commence until formal charges are filed. Thus by delaying accusation until after the lineup, the police can entirely circumvent the *Wade* rule.

Id.; see also Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1109 (2003) (“The application of the Sixth Amendment to certain identifications has thus proved to be a somewhat hollow victory for defendants.”).

⁴⁷ 409 U.S. 188 (1972).

⁴⁸ 432 U.S. 98 (1977).

reliable.⁴⁹ The Court further held that this reliability is to be determined by the “totality of the circumstances,”⁵⁰ a standard first mentioned in *Stovall*, and delineated five eyewitness factors that the trier of fact must consider when making this determination: (1) the eyewitness’s opportunity to view the perpetrator during the crime; (2) the length of time between the crime and the subsequent identification; (3) the level of certainty demonstrated by the witness at the identification; (4) the accuracy of the eyewitness’s prior description of the criminal; and (5) the eyewitness’s degree of attention during the crime [hereinafter “the Supreme Court eyewitness factors”].⁵¹ In summary, Supreme Court decisions, taken together, are supportive of the admissibility of eyewitness testimony, even where highly suggestive identification techniques are used, provided the identification is deemed reliable.⁵²

B. THE SUPREME COURT DECISIONS ON EYEWITNESS TESTIMONY ARE CONTRARY TO SCIENTIFIC FINDINGS

The Supreme Court decisions on eyewitness testimony predate the vast majority of the scientific research on the causes of eyewitness errors and thus constitute “educated guesses” by the Court on how various eyewitness factors and identification procedures affect identification accuracy.⁵³ Unfortunately, scientific research has shown that many of the Supreme Court’s assumptions about eyewitness testimony are erroneous.⁵⁴ The Court’s decisions in *Neil* and *Manson* are good illustrations of this difficulty. Empirical studies indicate that many of the eyewitness factors that the Supreme Court mandated the trier of fact to consider when evaluating eyewitness testimony do not affect eyewitness accuracy the way the Supreme Court assumed they do.⁵⁵

⁴⁹ *Neil*, 409 U.S. at 199-200. In *Neil*, the rape victim viewed the defendant in a showup rather than in a lineup even though the showup occurred seven months after the rape. *Id.* at 196. In *Manson*, an undercover police officer made a drug purchase and was shown a single photo of the defendant shortly thereafter. *Manson*, 432 U.S. at 98.

⁵⁰ *Manson*, 432 U.S. at 113 (citing *Stovall v. Denno*, 388 U.S. 293, 302 (1967)); *Neil*, 409 U.S. at 199.

⁵¹ *Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199-200.

⁵² *But see* *United States v. Wade*, 388 U.S. 218, 237 (1967) (finding a violation of the Sixth Amendment where counsel is not present at a post-indictment lineup). *See also* *Gilbert v. California*, 388 U.S. 263, 272 (1967).

⁵³ *Brigham et al.*, *supra* note 5, at 17.

⁵⁴ *Id.* at 17-19.

⁵⁵ *Id.* at 17-18. Witnesses with a better opportunity to observe the criminal, such as under better lighting, with a closer view, or a longer viewing time, are more likely to make accurate identifications. *Id.* Second, the length of the retention interval, which is the time between the crime and the identification, is generally related to accuracy. *Id.*

For example, the first Supreme Court eyewitness factor is the eyewitness's opportunity to view the perpetrator of the crime.⁵⁶ While the Court was correct in stating that eyewitnesses who have a better opportunity to observe the perpetrator of a crime⁵⁷ are more likely to make accurate identifications than eyewitnesses who view crimes under poor conditions,⁵⁸ scientific study has revealed that post-event information, such as a lineup administrator's comment that the eyewitness has identified the suspect, can distort the eyewitness's memory of how good his or her view of the crime was.⁵⁹

With regard to the second factor, the Supreme Court is right that the retention interval, or the length of the time between the crime and the identification,⁶⁰ is generally related to accuracy, with shorter intervals generally producing more accurate eyewitness identifications than longer intervals.⁶¹ Scientific studies show, however, that other factors, such as stress and race of the witness and suspect, may interact with the retention interval to affect the accuracy of an eyewitness's identification.⁶²

Scientific research has also called factor three into question.⁶³ By the time of trial, an eyewitness's confidence in his or her identification has little relationship to identification accuracy because of the many post-event factors that affect confidence but not accuracy.⁶⁴ Moreover, the Supreme

⁵⁶ *Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199.

⁵⁷ Eyewitnesses may have a better opportunity to observe the perpetrator of the crime due to such factors as better lighting, close proximity to the crime, and duration of the crime. BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 161 (1995).

⁵⁸ Bradfield et al., *supra* note 15, at 112.

⁵⁹ *Id.* at 113.

⁶⁰ Brigham et al., *supra* note 5, at 17.

⁶¹ *Id.*

⁶² John C. Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673, 679-80 (1982).

⁶³ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

⁶⁴ D. Stephen Lindsay et al., *Witnessing-Condition Heterogeneity and Witnesses' Versus Investigators' Confidences in the Accuracy of Witnesses' Identification Decisions*, 24 LAW & HUM. BEHAV. 685, 695 (2000). The results of studies on eyewitness confidence generally indicate that highly confident eyewitnesses are only somewhat more likely to make accurate identifications than less confident eyewitnesses. Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, in *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* 155, 155-70 (Gary L. Wells & Elizabeth F. Loftus eds., 1984). Although some recent studies show that eyewitness confidence may have significantly greater probative value in predicting eyewitness accuracy in certain circumstances than earlier studies indicated, as one researcher cautioned:

Court's reliance on this factor is particularly troubling because scientific research has shown that it is the single most important factor that determines whether jurors believe that an eyewitness has made an accurate identification.⁶⁵

Regarding the fourth factor, empirical studies have demonstrated that eyewitness accuracy in describing a perpetrator is not related to eyewitness accuracy in identifying a perpetrator.⁶⁶ Thus, the Court erred in holding that the trier of fact should consider the accuracy of an eyewitness's prior description of the perpetrator in evaluating the accuracy of his or her identification.⁶⁷

The final eyewitness factor is the quality of an eyewitness's attention.⁶⁸ Although research has established that eyewitnesses who pay greater attention to a crime generally make more accurate identifications than those who pay less attention, fear, stress, and the presence of a weapon may have a significant negative impact on the witness's ability to attend to a crime.⁶⁹ Furthermore, post-event information, such as police confirmation that the eyewitness has identified the suspect in a lineup, can distort the

[S]ubstantial CA [confidence accuracy] obtained in this study and in some others . . . should not be construed as evidence that the confidence witnesses display in court predicts the accuracy of their eyewitness testimony. Myriad social, cognitive, and statistical factors likely greatly attenuate the CA relationship over the months between when a crime was witnessed and when the witness testifies. It is not to courtroom testimony to which the current findings may generalize, but rather to initial identification decisions made in nonbiased testing situations shortly after a witnessed event.

Lindsay et al., *supra* note 64, at 695 (citations omitted).

⁶⁵ Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 361 (1998).

⁶⁶ Kenneth A. Deffenbacher, *A Maturing of Research on the Behaviour of Eyewitnesses*, 5 APPLIED COGNITIVE PSYCHOL. 377, 393 (1991).

⁶⁷ *Id.*

The common-sense assumption accepted by the U.S. Supreme Court [in *Neil*] is that there should be a strong relation between a witness's accuracy of prior verbal description of a suspect and subsequent identification accuracy. At least five studies have involved explicit testing of this notion. . . . [A]ll found no relationship between prior verbal description accuracy and subsequent face identification accuracy.

Id. (citing Brigham et al., *supra* note 5, at 18). "Wells . . . found a statistically significant, yet very modest, correlation of .27. He noted, however, that this correlation was not due to better describers being better identifiers. Rather, it was due to the fact that faces that are better described are better identified." *Id.*

⁶⁸ *Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199.

⁶⁹ Deffenbacher, *supra* note 66, at 386-87.

eyewitness's memory of the crime and cause him or her to overestimate the amount of attention he or she paid to the perpetrator.⁷⁰

The Supreme Court eyewitness factors are also deficient because they are incomplete. Scientific study shows the importance of considering such factors as the wording of questions,⁷¹ lineup instructions,⁷² confidence malleability,⁷³ mugshot-induced bias,⁷⁴ post-event information,⁷⁵ child suggestibility,⁷⁶ attitudes and expectations,⁷⁷ alcoholic intoxication,⁷⁸ cross-race bias,⁷⁹ weapons focus,⁸⁰ forgetting curve,⁸¹ exposure time,⁸² presentation format,⁸³ unconscious transference,⁸⁴ stress,⁸⁵ age,⁸⁶ and disguise.⁸⁷

⁷⁰ Wells & Bradfield, *supra* note 65, at 374.

A confirming-feedback remark not only inflates eyewitnesses' recollections of how confident they were at the time, it also leads them to report that they had a better view of a culprit, that they could make out details of the face, that they were able to easily and quickly pick him out of a lineup, that his face just "popped out" to them, that their memorial image is particularly clear, and that they are adept at recognizing faces of strangers.

Id.

⁷¹ Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 405 (2001).

⁷² "Police instructions can affect an eyewitness's willingness to make identification." *Id.* at 408.

⁷³ "An eyewitness's confidence can be influenced by factors that are unrelated to identification accuracy." *Id.*

⁷⁴ "Exposure to mug shots of a suspect increases the likelihood that the witness will later choose that suspect in a lineup." *Id.*

⁷⁵ "Eyewitness testimony about an event reflects not only what they actually saw but information they obtained later on." *Id.*

⁷⁶ "Young children are more vulnerable than adults to interviewer suggestion, peer pressures, and other social influences." *Id.*

⁷⁷ "An eyewitness's perception and memory for an event may be affected by his or her attitudes and expectations." *Id.*

⁷⁸ "Alcoholic intoxication impairs an eyewitness's later ability to recall persons and events." *Id.*

⁷⁹ "Eyewitnesses are more accurate when identifying members of their own race than members of other races." *Id.*; see also Deffenbacher, *supra* note 66, at 390.

⁸⁰ "The presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face." Kassin et al., *supra* note 71, at 408. *But see* Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 485 (2001) (reporting that weapon focus was not found in their study and suggesting that the weapon focus effect "is simply not a real-life phenomenon").

⁸¹ "The rate of memory loss for an event is greatest right after the event and then levels off over time." Kassin et al., *supra* note 71, at 408.

⁸² "The less time an eyewitness has to observe an event, the less well he or she will remember it." *Id.*

⁸³ "Witnesses are more likely to misidentify someone by making a relative judgment when presented with a simultaneous (as opposed to sequential) lineup." *Id.*

In summary, the Supreme Court's decisions on eyewitness identifications fail to incorporate scientific research on eyewitness testimony and therefore permit many preventable eyewitness errors.

C. THE RELUCTANCE OF AMERICAN COURTS TO INSTITUTE NEW SAFEGUARDS

Both the Supreme Court and other United States courts have failed to demonstrate adequate flexibility and innovation in dealing with the eyewitness problem, instead restricting their response to the use of traditional safeguards, such as motions to suppress identifications, voir dire, cross-examination, closing argument, and juror instructions to deal with the problem of eyewitness error.⁸⁸ Unfortunately, these safeguards are not effective in preventing eyewitness error.⁸⁹ Ironically, courts have been reluctant to permit expert eyewitness testimony even though it is the only traditional legal safeguard that has shown any efficacy in mitigating eyewitness error.⁹⁰ The ability of American courts to cope with the problem of eyewitness error has, in the past, also been hampered by the traditional standard employed to rule on the admissibility of scientific evidence.⁹¹ A brief review of the landmark cases on the admissibility of scientific evidence in the United States is revealing.

⁸⁴ "Eyewitnesses sometimes identify as a culprit someone they have seen in another situation or context." *Id.*

⁸⁵ "Very high levels of stress impair the accuracy of eyewitness testimony." *Id.*; see also Deffenbacher, *supra* note 66, at 388.

⁸⁶ Deffenbacher, *supra* note 66, at 391.

⁸⁷ *Id.* at 390. For an excellent discussion of eyewitness factors that affect identification accuracy, see Douglas J. Narby et al., *The Effects of Witness, Target, and Situational Factors on Eyewitness Identifications*, in *PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATIONS* 23, 23-52 (Siegfried Ludwig Sporer et al. eds., 1996).

⁸⁸ Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 *PSYCHOL. PUB. POL'Y & L.* 909, 911, 923 (1995).

⁸⁹ Berman & Cutler, *supra* note 15, at 170.

⁹⁰ See CUTLER & PENROD, *supra* note 57, at 139-68, 241 ("These results are consistent with the findings from a growing body of research on expert psychological testimony which indicate that expert testimony has a salutary effect on juror decision processes. In this respect, we are optimistic about its value as a safeguard, especially in light of the more dismal findings for cross-examination."); Steven D. Penrod & Brian Cutler, *Preventing Mistaken Conviction in Eyewitness Identification Trials: The Case Against Traditional Safeguards*, in *PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE* 89, 115 (Ronald Roesch et al. eds., 1999); Brigham et al., *supra* note 5, at 23-25; Leippe, *supra* note 88, at 923-24; see also Wise & Safer, *supra* note 11, at 15 ("The only legal safeguard that has been empirically shown to be effective in educating jurors about eyewitness testimony is expert testimony.").

⁹¹ See Leippe, *supra* note 88, at 912-13.

In *Frye v. United States*,⁹² the United States Court of Appeals for the District of Columbia ruled that “novel” scientific evidence is admissible in a case only if the principles and methodology through which the scientific evidence is collected have received the “general acceptance” of the experts in the field.⁹³ This strict standard excluded much necessary, valid scientific evidence merely because it had not yet achieved general acceptance in the scientific community.⁹⁴

A competing standard was enunciated in the 1993 landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁹⁵ In that decision, the United States Supreme Court overruled the “general acceptance” standard of *Frye* and replaced it with a new standard for determining the admissibility of scientific evidence in the federal courts.⁹⁶ Although the *Daubert* ruling only applies to federal courts, many states have adopted it.⁹⁷ In *Daubert*, the Supreme Court held that a “rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules [of Evidence] and their ‘general approach of relaxing the traditional barriers’ to ‘opinion testimony.’”⁹⁸ In so holding, the Court found that the primary criteria for determining whether scientific evidence is admissible should be its “scientific validity,” rather than its general acceptance within the scientific community.⁹⁹ This decision placed the primary burden for determining the validity of scientific evidence on trial judges, ruling that a court must evaluate the scientific method employed and the application of that scientific method to facts of the case.¹⁰⁰ The Court delineated some guidelines for determining the validity of purported scientific evidence:

⁹² 293 F. 1013 (D.C. Cir. 1923).

⁹³ *Id.* at 1014; *see also* Kassin et al., *supra* note 71, at 406 (examining *Frye*).

⁹⁴ Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681, 689 (2002) (“This stringent standard excluded a great deal of testimony based on methodologies whose value was subject to debate in the relevant scientific field.”).

⁹⁵ 509 U.S. 579 (1993).

⁹⁶ *Id.* at 589.

⁹⁷ But, as of 2001, seventeen states continued to use the *Frye* test. *See* Kassin et al., *supra* note 71, at 406.

⁹⁸ 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

⁹⁹ *Id.* at 594-95; Brigham et al., *supra* note 5, at 19.

¹⁰⁰ *Daubert*, 509 U.S. at 592. The Supreme Court’s decision in *Daubert* requiring trial judges to determine the validity of scientific evidence creates difficulties because, as empirical data indicates, judges frequently possess insufficient knowledge of the scientific method to accurately assess the validity of expert testimony. *See, e.g.*, Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1167-73 (2001) (discussing this dilemma).

- (1) Can it be empirically tested, and if so, has it been empirically tested?
- (2) Has it been published in scientific journals that are subject to peer review?
- (3) What are its known or potential error rates?
- (4) Is it generally accepted in the scientific community?¹⁰¹

The voluminous research on eyewitness testimony satisfies this balancing test.¹⁰²

In *Kumho Tire Co. v. Carmichael*,¹⁰³ the Supreme Court extended the *Daubert* “scientific validity” standard to all expert testimony, including testimony that is “technical”¹⁰⁴ as well as testimony based on “other specialized knowledge.”¹⁰⁵ The Court also found that a trial court need not apply all of the *Daubert* factors in every case, and that indeed a court may consider factors not enumerated in *Daubert* when determining the validity of expert testimony.¹⁰⁶ The *Kumho* opinion suggests that scientific validity is the most important criterion in determining the admissibility of scientific evidence.¹⁰⁷

In *General Electric Co. v. Joiner*,¹⁰⁸ the Supreme Court, building on its opinion in *Kumho*, held that a trial court’s ruling on the admission of expert testimony must be reviewed under an “abuse of discretion” standard.¹⁰⁹ Consequently, federal appellate courts and most state appellate courts now rarely reverse a trial court’s decision to admit or exclude expert testimony “unless manifestly erroneous.”¹¹⁰ In summary, in jurisdictions that follow *Daubert*, courts must generally make three determinations in ruling on the admissibility of eyewitness expert testimony. First, is the expert testimony reliable in both the sense that the methodology and reasoning employed by the eyewitness expert have scientific validity, and that the expert’s

¹⁰¹ *Daubert*, 509 U.S. at 593-94.

¹⁰² Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1065 (2001).

¹⁰³ 526 U.S. 137 (1999).

¹⁰⁴ *Id.* at 141.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 141-42. In fact, the *Kumho* opinion led to an amendment of Federal Rule of Evidence 702 that buttressed a trial court’s ability to exclude eyewitness expert testimony with impunity, as they could now offer a “rules-oriented basis for the exclusion.” Dillickrath, *supra* note 102, at 1066.

¹⁰⁷ Dillickrath, *supra* note 102, at 1065. However, Dillickrath suggests that this fact can be a “sufficient rationale” for the exclusion of expert testimony. *Id.* at 1066.

¹⁰⁸ 522 U.S. 136 (1997).

¹⁰⁹ *Id.* at 143.

¹¹⁰ *Id.* at 142.

conclusion is supported by the facts of the case?¹¹¹ Second, is the eyewitness expert's testimony relevant to the case? In other words, will the testimony "assist the trier of fact to understand the evidence or determine a fact in issue"?¹¹² Third, is the probative value of the eyewitness expert's testimony substantially outweighed by its prejudicial value?¹¹³ Finally, in jurisdictions that still follow *Frye*, courts ascertain whether the principles and methods employed by the eyewitness expert have gained "general acceptance" in the scientific community.¹¹⁴

In general, the applicable legal standards usually result in the judge ruling that expert psychological testimony on eyewitness testimony is inadmissible.¹¹⁵ Moreover, in the federal courts and in most state courts, an appellate court will generally not overrule a trial court's decision to admit or exclude eyewitness expert testimony unless the trial court judge abused his or her discretion in making that determination.¹¹⁶ Nevertheless, scientific studies have demonstrated that eyewitness testimony is frequently flawed and that the present preventative measures taken by courts are generally inadequate. Indeed, as one expert has explained, "[there is] a vacuum in legal standards that ignores the last decade of research" on eyewitness testimony.¹¹⁷ As such, new measures are called for. We therefore propose the tripartite solution.

IV. THE TRIPARTITE SOLUTION

As previously stated, the tripartite solution involves:

- (1) Permitting expert testimony when the primary or sole evidence against the defendant is eyewitness testimony;
- (2) Improving procedures for collecting eyewitness evidence by conducting eyewitness interviews and identification procedures in a manner consistent with best practices identified by scientific research in the field; and
- (3) Educating the principal participants in the criminal justice system about eyewitness testimony to sensitize them to the effects of eyewitness factors.

¹¹¹ See CLIFFORD S. FISHMAN, *JONES ON EVIDENCE* § 14:77 (6th ed. 2002).

¹¹² *Id.* (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993)).

¹¹³ FED. R. EVID. 403.

¹¹⁴ FISHMAN, *supra* note 111, at § 14:77 n.83.

¹¹⁵ See Berman & Cutler, *supra* note 15, at 170; see also Dillickrath, *supra* note 102, at 1060.

¹¹⁶ See Dillickrath, *supra* note 102, at 1060.

¹¹⁷ Daniel Goleman, *supra* note 3, at C7 (quoting interview with Stephen Penrod).

A. FIRST COMPONENT OF THE TRIPARTITE SOLUTION: PERMITTING
EXPERT TESTIMONY WHEN THE PRIMARY OR SOLE EVIDENCE
AGAINST THE DEFENDANT IS EYEWITNESS TESTIMONY

The first component of the tripartite solution consists of permitting expert testimony when the primary or sole evidence against the defendant is eyewitness testimony. Eyewitness expert testimony “refers to the delivery to a jury by a qualified research psychologist of information about research and theory on eyewitness behavior.”¹¹⁸ During this testimony the eyewitness expert explains to jurors how memory works, the relevant eyewitness research, and what eyewitness factors may have affected the accuracy of eyewitness testimony. The eyewitness expert does not express an opinion on the ultimate issue (i.e., the accuracy of the eyewitness).¹¹⁹

1. Are Courts Justified in Their Exclusion of Eyewitness Expert Testimony?

Although some courts admit eyewitness expert testimony, the vast majority of courts are skeptical of its value, if not outright hostile to its admission.¹²⁰ In excluding eyewitness expert testimony, courts have generally given one or more of the following reasons¹²¹: (a) the testimony of the eyewitness expert would concern matters already within the jury’s knowledge;¹²² (b) traditional legal safeguards, such as voir dire, cross-examination, closing argument, jury instructions, and motions to suppress

¹¹⁸ Leippe, *supra* note 88, at 910.

¹¹⁹ Brian L. Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 LAW & HUM. BEHAV. 311, 312 (1989) (internal citation omitted).

¹²⁰ Headley, *supra* note 94, at 692; *see also* James M. Doyle, *No Confidence: A Step Toward Accuracy in Eyewitness Testimony*, THE CHAMPION, Jan.-Feb. 1998, at 12 (noting that “hostility to expert testimony on eyewitness identification remains strong . . .”).

¹²¹ For a discussion of the reasons courts generally give for excluding eyewitness expert testimony, *see* FISHMAN, *supra* note 111, at § 14:78; Leippe, *supra* note 88, at 912; and Gregory G. Sarno, Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R. 4th 1047, § 3(a) (1986). Judges appear to be hostile to the admission of eyewitness expert testimony for several reasons. First, they are not knowledgeable about eyewitness testimony, and therefore do not realize that the effect of many eyewitness factors on identification accuracy is not a matter of common sense. They also appear to be concerned about the time and expense that would result from permitting expert testimony. Finally, they seem to believe that jurors will perfunctorily follow the opinion of the expert resulting in guilty defendants going free. *See* Brigham et al., *supra* note 5, at 25; Wells et al., *supra* note 17, at 48; Wise & Safer, *supra* note 11, at 13.

¹²² *See, e.g.*, United States v. Daniels, 64 F.3d 311, 315 (7th Cir. 1995) (quoting United States v. Larkin, 978 F.2d 964, 971 (7th Cir. 1992)) (“[B]ecause it addresses an issue of which the jury already generally is aware . . . it will not contribute to their understanding of the particular factual issue posed.”).

are sufficient to guard against eyewitness error;¹²³ (c) the eyewitness expert's testimony would prejudice the jury or usurp its discretion;¹²⁴ (d) eyewitness expert testimony is unnecessary when the eyewitness is a law enforcement officer or someone else trained to make accurate identifications in stressful situations;¹²⁵ (e) pursuant to Federal Rule of Evidence 704 and other authorities, the prejudicial value of eyewitness expert testimony substantially outweighs its probative value because it will cause jurors to become unduly skeptical of eyewitness testimony.¹²⁶ The validity of each of these reasons for excluding eyewitness expert testimony is discussed below.

a. The Testimony of the Eyewitness Expert Would Concern Matters
Already Within the Jury's Knowledge

Federal Rule of Evidence 702 requires that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."¹²⁷ Using a variety of methods to test jurors' knowledge of eyewitnesses, researchers have found that: (1) jurors have limited knowledge of the factors that influence eyewitness accuracy,¹²⁸ such as the effects of the perpetrator wearing a hat¹²⁹ or using a weapon¹³⁰ on identification accuracy;

¹²³ Dillickrath, *supra* note 102, at 1061. *See, e.g.*, Commonwealth v. Simmons, 662 A.2d 621, 631 (Pa. 1995) ("Moreover, appellant was free to and did attack the witnesses' credibility and point out inconsistencies of all the eyewitnesses at trial through cross-examination and in his closing argument.").

¹²⁴ *See, e.g.*, United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) ("[P]roposed testimony intrudes too much on the traditional province of the jury to assess witness credibility.").

¹²⁵ *See, e.g.*, Webster v. United States, 623 A.2d 1198, 1204 & n.15 (D.C. 1993) (suggesting that typical concerns about eyewitness identification are almost wholly absent in situations where the eyewitness is trained in the art and comes expecting to have to identify an individual, as in undercover drug buys).

¹²⁶ *See, e.g.*, State v. Hill, 463 N.W.2d 674, 678 (S.D. 1990) ("[A]ny small aid the expert testimony might have provided would be outweighed by the unfair prejudice which might have resulted because of the aura of reliability and trustworthiness surrounding scientific evidence.").

¹²⁷ Dillickrath, *supra* note 102, at 1063 (citing FED. R. EVID. 702).

¹²⁸ *Id.* at 1062-63 ("[G]iven the low level of knowledge the general public has regarding the reliability of eyewitness identification, proponents would argue that under Federal Rule of Evidence 702, expert testimony would help the trier of fact to understand an area outside the scope of his or her general knowledge."); Wise & Safer, *supra* note 11, at 12.

¹²⁹ *See generally* K. E. Patterson & A. D. Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406-17 (1977); Peter N. Shapiro & Steven D. Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139-56 (1986).

¹³⁰ Elizabeth Loftus et al., *Some Facts About "Weapons Focus,"* 11 LAW & HUM. BEHAV. 55, 55-62 (1987); *see also* Kassin et al., *supra* note 71, at 412; Nancy Mehrkens

(2) jurors rely on factors which are not good indicators of eyewitness accuracy, such as eyewitness confidence,¹³¹ memory for minor or trivial details,¹³² and inconsistencies in eyewitness testimony;¹³³ (3) jurors overestimate the ability of eyewitnesses to make accurate identifications;¹³⁴ and (4) jurors in mock trials cannot distinguish accurate from inaccurate eyewitnesses.¹³⁵ In short, scientific research shows that jurors have limited knowledge of eyewitness factors and cannot determine whether an eyewitness has made an accurate identification.¹³⁶

Moreover, a recent study suggests that judges are not well situated to ascertain the level of juror knowledge regarding eyewitness factors, as they too are limited in their understanding of eyewitness testimony.¹³⁷ Where the judges were assessed with the same instrument given to eyewitness experts,¹³⁸ judges' answers diverged significantly from those of the experts.¹³⁹ Areas in which the judges showed little consensus included knowledge of the relationship between eyewitness confidence and accuracy

Stebly, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 413-24 (1992).

¹³¹ Gary L. Wells, *How Adequate Is Human Intuition for Judging Eyewitness Testimony?*, in EYEWITNESS TESTIMONY 256-72 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

¹³² Brad E. Bell & Elizabeth F. Loftus, *Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details*, 56 J. PERSONALITY & SOC. PSYCHOL. 669, 669 (1989).

¹³³ Berman & Cutler, *supra* note 15, at 170.

¹³⁴ Brigham & Bothwell, *supra* note 20, at 28.

¹³⁵ R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 79 (1981); R.C.L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 LAW & HUM. BEHAV. 333, 333 (1989).

¹³⁶ Leippe, *supra* note 88, at 921, warns that even though research reveals that the effects of many eyewitness factors are not a matter of common sense, people nonetheless tend to come to this conclusion once an expert explains the factors' effects. Because of this hindsight bias, Leippe predicts that many courts will continue to exclude expert testimony, despite the strong empirical evidence indicating it is not a matter of common sense. *Id.* In other words, once a judge learns the nature of the eyewitness expert's testimony and the basis of it, the judge is likely to conclude that the testimony will just concern matters of common sense because of the hindsight bias. *Id.*

¹³⁷ Wise & Safer, *supra* note 11, at 13; *see also* Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 345 (1997).

¹³⁸ This instrument was developed by Saul Kassin and his colleagues to survey sixty-four eyewitness experts about eyewitness factors that affect identification accuracy. Saul M. Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AM. PSYCHOLOGIST 1089 (1989).

¹³⁹ Wise & Safer, *supra* note 11, at 13.

at trial¹⁴⁰ and whether jurors can distinguish accurate from inaccurate eyewitnesses.¹⁴¹ Many judges appeared to be unfamiliar with simultaneous lineups,¹⁴² the forgetting curve,¹⁴³ and with studies indicating that half or more of all wrongful felony convictions are due at least in part to eyewitness error.¹⁴⁴ The judges were both less knowledgeable¹⁴⁵ and more likely than eyewitness experts to believe the average juror would know the correct answer to the items on the survey.¹⁴⁶ For the judges, experience, both legal and judicial, had no bearing on their knowledge of eyewitness factors.¹⁴⁷

In a follow-up study, undergraduates and law students answered the same eyewitness questionnaire as the judges.¹⁴⁸ This study found that the judges were no more knowledgeable about eyewitness factors than undergraduates and slightly less knowledgeable than the law students,¹⁴⁹ despite the judges' average of fourteen years of law practice¹⁵⁰ and twelve years on the bench,¹⁵¹ and the experience of 76% of them as a prosecutor, defense attorney, or both prior to becoming a judge.¹⁵² In sum, when judges exclude eyewitness experts due to their belief that jurors are knowledgeable about eyewitness testimony, their rulings do not have a sound basis in scientific fact.¹⁵³

¹⁴⁰ *Id.*; see also discussion *supra* note 64 (explaining the role of eyewitness confidence).

¹⁴¹ Wise & Safer, *supra* note 11, at 13.

¹⁴² See discussion *infra* Part IV.B.2.b.vi (providing that all the members of a lineup are all presented at the same time in simultaneous lineup).

¹⁴³ Wise & Safer, *supra* note 11, at 11; see also *supra* note 81.

¹⁴⁴ Wise & Safer, *supra* note 11, at 14.

¹⁴⁵ See, e.g., *id.* at 9-11.

¹⁴⁶ *Id.* at 12. But see Kassin et al., *supra* note 138, at 1097.

¹⁴⁷ Of the 160 judges surveyed, 142 were state judges, 10 were federal, 7 were retired, and 1 was an Indian tribal judge. Wise & Safer, *supra* note 11, at 7. There were 146 trial judges, 6 appellate, and 8 (presumably including the retired judges) who did not indicate their current position. *Id.* On average, the judges had practiced law for 13.96 years and had been on the bench for 12.48 years. *Id.*

¹⁴⁸ Richard A. Wise & Martin A. Safer, A Comparison of What U.S. Judges and Students Know and Believe About Eyewitness Testimony 2 (Sept. 21, 2004) (unpublished manuscript, on file with authors).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 7.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See also Brigham & Bothwell, *supra* note 20, at 29 ("In conclusion, the . . . data refute the claim that expert psychological testimony on eyewitness identifications would not tell the jury members anything they do not already know. Not only do jury members overestimate the accuracy of eyewitness identifications in target-present lineups, they also appear unaware, to some extent, of the sources of error associated with this type of evidence.

b. Traditional Legal Safeguards Are Sufficient to Guard Against Eyewitness Error

As the statistical evidence in the introduction to this article demonstrates, it is manifest that eyewitness error frequently occurs despite the use of traditional legal safeguards. Modern psychological studies illustrate the shortcomings of each safeguard.

i. Voir Dire

In criminal trials, the jurors must critically examine eyewitness testimony for accuracy if they are to return a fair and impartial verdict.¹⁵⁴ Voir dire provides attorneys with the opportunity to eliminate jurors who are unwilling to examine eyewitness testimony critically.¹⁵⁵ For voir dire to be an effective safeguard, it must satisfy two requirements: attorneys must employ a jury selection strategy that enables them to accurately determine which jurors are unwilling to examine eyewitness testimony critically,¹⁵⁶ and judges must permit attorneys to use such a strategy.¹⁵⁷ Unfortunately, empirical studies of attorneys' voir dire strategies reveal they are ineffective in determining jurors' willingness to examine eyewitness testimony critically, as the lawyers tend to employ simplistic profiles of jurors that have little or no predictive validity in making this determination.¹⁵⁸

The scientific literature has demonstrated that the most effective means to determine potential jurors' willingness to examine eyewitness testimony critically is to ascertain their attitudes towards eyewitnesses.¹⁵⁹ However, even this method has proved insufficient.¹⁶⁰ Moreover, even if attorneys could develop an effective voir dire strategy, their attempts at obtaining information regarding jurors' attitudes are often impeded by the constraints courts place on attorneys' use of voir dire strategies and the limited role

Therefore, the . . . data indicate that the testimony of an expert on these matters would not invade the province of the jury. Rather, such testimony would aid the jury in its evaluation of evidence and would thereby further the cause of justice.”).

¹⁵⁴ Douglas J. Narby & Brian L. Cutler, *Effectiveness of Voir Dire as a Safeguard in Eyewitness Cases*, 79 J. APPLIED PSYCHOL. 724 (1994) (“The fairness of the defendant’s trial is therefore partially dependent on the ability and willingness of the jury to scrutinize the eyewitness testimony.”).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 724-25.

¹⁵⁹ *Id.* at 725.

¹⁶⁰ *Id.* at 727 (“No evidence was found for a significant relation between attitudes toward eyewitnesses and juror perception of culpability.”).

attorneys play in the process.¹⁶¹ In sum, voir dire does not prevent eyewitness error.¹⁶²

ii. Cross-Examination

Although cross-examination is the most frequently used legal safeguard and widely assumed to be effective, it is, in fact, an ineffectual remedy for eyewitness error.¹⁶³ Three conditions would have to be met for cross-examination to be an effective safeguard against erroneous eyewitness testimony.¹⁶⁴ First, attorneys must have sufficient opportunity to identify the many factors that may affect eyewitness accuracy.¹⁶⁵ Next, attorneys must understand the effects of such factors.¹⁶⁶ Finally, jurors must know how eyewitness factors affect identification accuracy, so they can understand the implications of an attorney's cross-examination of an eyewitness.¹⁶⁷

Defense attorneys typically do not have adequate opportunity in criminal cases to become aware of the many factors that affect eyewitness accuracy.¹⁶⁸ Because defense attorneys are generally not present when a crime occurs, they must obtain identification information from eyewitnesses or law officers.¹⁶⁹ A defense attorney's ability to obtain this information depends on the quality of the eyewitness's memory and his or her willingness to cooperate with the defense attorney.¹⁷⁰ Most prosecution

¹⁶¹ *Id.* at 728.

¹⁶² *Id.*

¹⁶³ Berman & Cutler, *supra* note 15, at 170. Dillickrath asserts that there are identifiable weaknesses to cross-examination as a safeguard:

First, the typical eyewitness is sincerely convinced of her own sincerity. This is one reason why expert testimony is frequently proffered: to ameliorate the impossibility of shaking the unassailable confidence of a witness who believed in herself. In fact, Dr. Loftus [a prominent eyewitness researcher] posits that traditional cross-examination may reinforce the jury's faith in the eyewitness.

Moreover, eyewitnesses are frequently the victims of crimes and therefore subject to the sympathies of the jury. Even where the witness is a bystander, the jury is generally more likely to sympathize with her than with a hard-pressing lawyer using all the tricks in his repertoire to damage the eyewitness's credibility.

Dillickrath, *supra* note 102, at 1094.

¹⁶⁴ CUTLER & PENROD, *supra* note 57, at 144.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 157.

¹⁶⁹ *Id.* at 145.

¹⁷⁰ *Id.*

eyewitnesses are unwilling to speak to a defense attorney about a crime.¹⁷¹ Moreover, though defense attorneys can obtain copies of police reports, they will often be useless since officers who prepare the reports are not typically knowledgeable about eyewitness factors.¹⁷² Furthermore, officers are generally reluctant to put damaging information about the eyewitness in a police report.¹⁷³ Finally, defense attorneys are usually not present at identification procedures,¹⁷⁴ making it difficult to determine if a procedure was suggestive.¹⁷⁵ Because defense attorneys do not have a sufficient opportunity in criminal cases to gather information about problems that may have affected eyewitness accuracy, cross-examination is not an effective safeguard against eyewitness error.

Moreover, even if defense attorneys had adequate access to information regarding eyewitness accuracy, they have limited knowledge of eyewitness factors.¹⁷⁶ Thus, they are unlikely to ask appropriate questions during the examination, choosing instead to focus on discrediting the eyewitness rather than helping the jury to assess the eyewitness's accuracy.¹⁷⁷ Cross-examination tactics are also ineffective because they generally involve showing a jury the peripheral inconsistencies in an eyewitness's testimony,¹⁷⁸ decreasing the eyewitness's level of confidence,¹⁷⁹ and demonstrating the eyewitness's poor memory for minor details.¹⁸⁰ These factors are not related to eyewitness accuracy, though judges, attorneys, and jurors often believe they are.¹⁸¹

¹⁷¹ This assertion is based on Richard Wise's six years of experience as a criminal prosecutor.

¹⁷² Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges, and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 115 (2006) (noting that there is a "large deficiency in knowledge of eyewitness memory amongst . . . law enforcement personnel").

¹⁷³ See generally Penrod & Cutler, *supra* note 90, at 89-118.

¹⁷⁴ CUTLER & PENROD, *supra* note 57, at 156; see also Veronica Stinson et al., *How Effective Is the Presence-of-Counsel Safeguard? Attorney Perceptions of Suggestiveness, Fairness, and Correctability of Biased Lineup Procedures*, 81 J. APPLIED PSYCHOL. 64, 73 (1996) ("Attorneys reported that they were present at only 5% of their clients' identifications, and we believe that these responses were based on both photoarray and lineup identifications.").

¹⁷⁵ CUTLER & PENROD, *supra* note 57, at 156.

¹⁷⁶ *Id.* at 167; see also Devenport et al., *supra* note 137, at 340-43.

¹⁷⁷ Leippe, *supra* note 88, at 923 (stating that attorneys concentrate on "destroy[ing] belief in the eyewitness, [rather than] illuminat[ing] his or her likely level of accuracy").

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Wise & Safer, *supra* note 11, at 8 ("Memory for minor or peripheral details is inversely related to eyewitness accuracy, because an eyewitness who attends to peripheral

Finally, even if defense attorneys were able to muster a cross-examination that addressed the relevant psychological eyewitness factors, as previously discussed, it is still unlikely that an effective examination would alert juries and judges to the threat of eyewitness error. This is likely to occur because most judges and jurors have limited knowledge of eyewitness factors and thus are unlikely to give the risk of error proper consideration during instructions and deliberations.¹⁸² In sum, “[f]or even the most skilled lawyer, cross-examination by itself is probably insufficient to attack the problems of eyewitness identification.”¹⁸³

iii. Closing Argument

For similar reasons, closing argument is also an ineffective legal safeguard against erroneous eyewitness testimony.¹⁸⁴ Even if attorneys manage to plant a few seeds of doubt about an eyewitness’s accuracy during cross-examination, few of these attorneys are capable of reaping a harvest of positive inferences at closing.¹⁸⁵ In sum, during closing argument most attorneys cannot argue cogently why an eyewitness’s testimony is erroneous, nor would most jurors be able to comprehend such arguments even if attorneys were capable of making them.¹⁸⁶

iv. Jury Instructions

In the past thirty years, both state and federal appellate courts have encouraged trial court judges to use special instructions cautioning jurors about the fallibility of eyewitness testimony.¹⁸⁷ The most widely used jury instructions in the United States concerning eyewitness testimony are the *Telfaire* instructions.¹⁸⁸ In *United States v. Telfaire*,¹⁸⁹ the defendant was convicted of robbery on the basis of the testimony of a single eyewitness without any corroborating evidence. On appeal, the conviction was

details has fewer resources available to process the perpetrator’s face.”). In addition, because memory is not like a video recording but is instead a reconstructive process, minor inconsistencies in memory will occur even in accurate eyewitnesses. *Id.* at 15.

¹⁸² See CUTLER & PENROD, *supra* note 57, at 168.

¹⁸³ Dillickrath, *supra* note 102, at 1096.

¹⁸⁴ Leippe, *supra* note 88, at 923.

¹⁸⁵ See Dillickrath, *supra* note 102, at 1096.

¹⁸⁶ See CUTLER & PENROD, *supra* note 57, at 186.

¹⁸⁷ Gabriella Ramirez et al., *Judges’ Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 33 (1996).

¹⁸⁸ CUTLER & PENROD, *supra* note 57, at 255 (citing *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)); see also Ramirez et al., *supra* note 187, at 35.

¹⁸⁹ 469 F.2d 552.

affirmed.¹⁹⁰ Nonetheless, the United States Court of Appeals for the District of Columbia ruled that a trial court must give a jury special instructions on eyewitness testimony when the only evidence against the defendant is a single eyewitness, even if the defense attorney has not requested such an instruction.¹⁹¹ The appellate court then took the opportunity to inform the trial court what instructions should be used in the future for eyewitness testimony.¹⁹²

Several studies have tested the efficacy of jury instructions in educating jurors about the effect of eyewitness factors on identification accuracy.¹⁹³ For example, Ramirez and her associates conducted two experiments on jury instructions.¹⁹⁴ In their first experiment, they tested the effectiveness of the *Telfaire* instructions.¹⁹⁵ They showed participants a brief but realistic simulation of a robbery trial.¹⁹⁶ The primary evidence against the defendant in the simulated trial was the testimony of the robbery victim.¹⁹⁷ Participants viewed the victim's testimony under both poor and good eyewitness conditions.¹⁹⁸ Also, the participants received the *Telfaire* instructions at different stages of the trial.¹⁹⁹

¹⁹⁰ *Id.* at 558.

¹⁹¹ *Id.* at 555.

¹⁹² The *Telfaire* instructions primarily discuss the eyewitness factors that the United States Supreme Court enumerated in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), for assessing eyewitness accuracy. *Telfaire*, 469 F.2d at 558-59.

¹⁹³ See Ramirez et al., *supra* note 187, at 34.

¹⁹⁴ *Id.* at 31.

¹⁹⁵ *Id.* at 36.

¹⁹⁶ *Id.* at 38.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 39.

In the poor eyewitnessing and identification condition, the eyewitness testified that: a) the robber was wearing a hat that covered his hairline; b) the robber was waving a handgun throughout the robbery; c) she had identified the robber in a lineup two weeks after the robbery had occurred; and d) when viewing the lineup of suspects, the police led her to believe that the robber was in the lineup. In contrast, in the good witnessing and identification condition, the eyewitness testified that: a) the robber's face and hair were not concealed; b) the robber had a gun but kept it hidden most of the time; c) she identified the robber just two days after the robbery; and d) when viewing the lineup of suspects, she was told that the robber may or may not be in the lineup. In each condition, the police officer corroborated the eyewitness testimony concerning the lineup procedure.

Id.

¹⁹⁹ *Id.* There were four groups. One received the instructions at the beginning and end of the trial, another only at the beginning, another only at the end, and a last control group received no instructions at all. *Id.* at 37-38.

The results of the first experiment showed that the *Telfaire* instructions either did not affect or even decreased the participant's sensitivity to the witnessing and identification conditions in the simulated trials, no matter when they were given to the participants.²⁰⁰ Furthermore, the participants recalled on average only 31% of the elements of the *Telfaire* instructions, even when they heard them twice.²⁰¹ Ramirez concluded: "[I]t appears that *Telfaire* is not a reliable alternative to eyewitness expert testimony."²⁰²

The experiment was then repeated using three groups that received, respectively, no instructions, the traditional *Telfaire* instructions, and revised *Telfaire* instructions that simplified and improved their language and organization.²⁰³ The new instructions also included explicit discussion of thirteen eyewitness factors thought by most experts to affect identification accuracy.²⁰⁴

The results of the experiment revealed that, though the participants were able to recall more of the revised instructions, they did not improve their sensitivity to the eyewitness and identification conditions, nor did they substantially increase their knowledge of eyewitness factors.²⁰⁵ The finding of only a modest increase in knowledge, even for the revised instructions, was consistent with other research that showed that jurors have difficulty understanding jury instructions that conflict with their prior knowledge and beliefs.²⁰⁶ For example, Smith found that jury instructions on the legal definition of a crime were effective only when judges included a supplementary instruction that attacked point-by-point jurors' mistaken prior beliefs about that definition.²⁰⁷ Ramirez and her colleagues believed that a similar refutation would be necessary to effect any improvement in jurors' grasp of jury instructions about eyewitness testimony.²⁰⁸ However, they determined that such a change would be unlikely because of disagreements on the part of judges as to the nature of laypersons'

²⁰⁰ *Id.* at 45.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 48. In the original experiment, the participants found the instructions to be "too long, boring, repetitious, confusing, and hard to remember." *Id.* at 44.

²⁰⁴ *Id.* at 46-47.

²⁰⁵ *Id.* at 56.

²⁰⁶ *Id.* at 57.

²⁰⁷ Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 *LAW & HUM. BEHAV.* 507, 533 (1993).

²⁰⁸ Ramirez et al., *supra* note 187, at 58.

misconceptions.²⁰⁹ Accordingly, they concluded that “[g]iven this state, the cross-examination of expert witnesses may be the best thing going.”²¹⁰

Additionally, jury instructions lack the flexibility and specificity of expert testimony.²¹¹ It may be difficult to adapt them to the varying factual patterns of individual criminal cases and to the continuously growing body of scientific knowledge on eyewitness testimony.²¹² Moreover, judges tend to be very cautious in changing jury instructions, as verdicts are frequently reversed on appeal due to improper jury instructions.²¹³ In conclusion, “judges’ instructions do not serve as an effective safeguard against mistaken identifications and convictions and . . . expert testimony is therefore more effective than judges’ instructions as a safeguard.”²¹⁴

v. Motions to Suppress Eyewitness Identifications

Research has shown that motions to suppress eyewitness identifications, like the previously discussed legal safeguards, are also an inadequate safeguard against eyewitness error.²¹⁵ For example, Stinson and her colleagues conducted a study to assess attorneys’ knowledge of eyewitness factors that affect the suggestibility and fairness of identification procedures and their willingness to file motions to suppress identifications when the procedures are unfair.²¹⁶ The participants in the study were ninety-seven public defenders who were shown one of eight videotaped lineups that a female eyewitness had viewed.²¹⁷ The videotaped lineups varied as to whether they contained instruction bias, foil bias, presentation bias, or some combination of these biases.²¹⁸ A lineup contained biased instructions if the eyewitness was not informed that the perpetrator might not be in the lineup.²¹⁹ In the foil-biased lineups, the foils matched the

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Richard A. Wise, *A Survey of Judges’ Knowledge of Eyewitness Testimony* 116 (2002) (Ph.D. dissertation, The Catholic University of America).

²¹² *Id.*

²¹³ Greene, *supra* note 14, at 261 (internal citations omitted).

²¹⁴ CUTLER & PENROD, *supra* note 57, at 264.

²¹⁵ Veronica Stinson et al., *How Effective Is the Motion-to-Suppress Safeguard? Judges’ Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 82 J. APPLIED PSYCHOL. 211 (1997); Stinson et al., *supra* note 174, at 64.

²¹⁶ Stinson et al., *supra* note 174, at 64.

²¹⁷ *Id.* at 66-67. Originally 161 assistant public defenders were contacted to participate in the study. A total of 109 public defenders agreed to participate in the study, but because of various difficulties only 97 public defenders actually completed the study.

²¹⁸ *Id.* at 67.

²¹⁹ *Id.* at 65-67.

eyewitness's descriptions of the perpetrator of the crime on no more than two of five characteristics.²²⁰ In the lineups that had presentation bias, the lineup members were presented simultaneously rather than sequentially.²²¹ After watching a videotaped lineup, the attorneys rated the suggestiveness of the foils, instructions, presentation, and the overall fairness of the lineup.²²²

The results of the study showed that the attorneys were sensitive to foil bias, as they correctly concluded that the foil-biased lineups were both more suggestive and less fair than the unbiased foil lineups.²²³ They were only partially sensitive to instruction biases, perceiving them to be more suggestive, but not less fair, than the instruction unbiased lineups.²²⁴ They were completely insensitive to presentation bias, as they rated the sequential lineups as significantly more suggestive and less fair than the simultaneous lineups.²²⁵ The attorneys' ratings on presentation bias are contrary to research that has demonstrated that sequential lineups significantly decrease the number of erroneous eyewitness identifications compared to simultaneous lineups.²²⁶

Building on this data, the Stinson study further established the lack of reliability of motions to suppress as a means to address eyewitness error.²²⁷ The researchers had the attorneys rate the suggestiveness and fairness of the lineup, the probability that they would submit a motion to suppress the identification, and the probability a judge would grant their motion.²²⁸ The attorneys also rated the likelihood that they could convince a jury that the identification presented at trial was inaccurate and that the given lineup was suggestive.²²⁹ Only the attorneys who viewed the foil-biased lineups were likely to submit a motion to suppress the identification.²³⁰

By contrast, when instruction and presentation bias were present in the lineups, the attorneys were unlikely to submit a motion to suppress because they did not believe a judge would grant such a motion, or that a jury could

²²⁰ *Id.*

²²¹ *Id.* at 66-67. In a simultaneous lineup, the members are all presented to an eyewitness at the same time. *Id.* at 66. In a sequential lineup, the members are presented individually. *Id.* See also discussion *infra* Part IV.B.2.b.vi.

²²² Stinson et al., *supra* note 174, at 67-68.

²²³ *Id.* at 72.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See discussion *infra* Part IV.B.2.b.vi.

²²⁷ See Stinson et al., *supra* note 174, at 71.

²²⁸ *Id.* at 67.

²²⁹ *Id.* at 68.

²³⁰ *Id.* at 71.

be convinced of the inaccuracy of eyewitness identification or the suggestiveness of the lineup.²³¹ The results of the study showed that not only do attorneys have a limited knowledge of the biases that affect the suggestibility and fairness of lineups, but that they also frequently believe judges will disregard their concerns of bias.²³²

Stinson also determined if judges were sensitive to foil, instruction, and presentation bias in lineups.²³³ Ninety-nine Florida judges read a short summary of a hypothetical robbery case that included an eyewitness's identification of a suspect.²³⁴ The case summary also contained the eyewitness's description of the robbery and the perpetrator of the robbery, a description of the identification procedure, a color photocopy of the lineup members, and a motion to suppress the identification.²³⁵ The identification procedures varied as to whether they contained foil, instruction, and presentation bias.²³⁶ After reading the case summary and viewing the photograph, the judges rated the suggestiveness of the foils, instruction, and lineup presentation, and the overall fairness of the lineup.²³⁷ They also stated whether they would grant a motion to suppress.²³⁸ The result of the study showed that the judges were sensitive to foil and instruction bias, but were not sensitive to presentation bias.²³⁹

Taken together, these two studies of attorneys' and judges' sensitivity to lineup biases indicate that motions to suppress identifications are an inadequate safeguard against biased lineups.²⁴⁰ Most attorneys and judges have limited knowledge of the biases that indicate lineup suggestibility.²⁴¹ As a result, attorneys do not always submit motions to suppress identifications when they are warranted, and judges do not always grant motions to suppress when they should.²⁴² Furthermore, the most common

²³¹ *Id.* at 72.

²³² *Id.* at 71-72.

²³³ Stinson et al., *supra* note 215, at 216.

²³⁴ *Id.* at 214.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 215. Although judges and attorneys demonstrated awareness of the foil bias in the Stinson studies, it should not be assumed that they would demonstrate this awareness in all circumstances. Foil bias is a complex phenomenon. See Wells et al., *supra* note 18, at 626-27. A small number of judges also indicated that they routinely deny motions to suppress identifications and leave it to the jury to determine whether the identification procedure was suggestive. Stinson et al., *supra* note 215, at 219.

²⁴⁰ Stinson et al., *supra* note 215, at 219.

²⁴¹ *Id.* at 218.

²⁴² *Id.* at 213-19.

identification procedures are photo arrays and pre-indictment lineups.²⁴³ As was stated previously, defendants do not have a right to have an attorney present during these identification procedures.²⁴⁴ Consequently, even if most attorneys were knowledgeable about the factors that create biased lineups, their ability to remedy them would still be significantly impaired because they are generally not present during most identification procedures.²⁴⁵

c. The Eyewitness Expert's Testimony Would Prejudice the Jury and Usurp Its Discretion

For over twenty-five years scientists have studied the influence of expert testimony on jurors.²⁴⁶ After reviewing scientific studies on jurors' ability to evaluate and make use of expert testimony, Vidmar and Diamond arrived at the following conclusions:

It seems clear from this review that claims about jury incompetence and irresponsibility in assessing and considering the testimony of scientific experts are not supported by research findings. There is a consistent convergence in juror interview studies and experimental studies involving both civil and criminal juries. Jurors appear motivated to critically assess the content of the expert's testimony and weigh it in the context of the other trial evidence, as they are instructed to do. . . . Rather than simply deferring automatically to experts, as critics have claimed, the trial process appears to make them aware of the fallibility of expert testimony. This is not to say that every juror is motivated and grasps the expert testimony, because the data seldom shed light on the thought processes of individual jurors, but the deliberation process appears to result in closer examination of diverging views and understandings—just as the legal system assumes it does.²⁴⁷

Furthermore, the probability that eyewitness expert testimony will usurp the function of the jury is reduced because eyewitness experts do not state whether a particular eyewitness has made an accurate identification.²⁴⁸ Instead, experts inform the trier of fact which eyewitness factors may have affected the witness's accuracy, and what the effect of those factors may

²⁴³ See *id.* at 218 (“The presence-of-counsel safeguard only applies to postindictment live lineups, so defendants do not have the right to an attorney at photo lineups or showups, which we found are the most common identification methods.”).

²⁴⁴ *Id.* at 218-19.

²⁴⁵ *Id.* at 211.

²⁴⁶ Wells et al., *supra* note 18, at 604.

²⁴⁷ Vidmar & Diamond, *supra* note 100, at 1174.

²⁴⁸ See *id.*

have been.²⁴⁹ They generally leave it to the jury to apply the relevant eyewitness factors in evaluating the accuracy of a specific eyewitness.²⁵⁰

d. Eyewitness Expert Testimony Is Unnecessary When the Eyewitness Is a Law Enforcement Officer or Someone Else Trained to Make Accurate Identifications in Stressful Situations

Several courts have excluded eyewitness expert testimony when the eyewitness is a law enforcement officer because they believe officers are trained to make accurate identifications in stressful situations.²⁵¹ Empirical research, however, has shown that law officers are no better at identifying faces than lay eyewitnesses.²⁵² Studies indicate that people can be trained to provide more detailed accounts of crimes and be less susceptible to the effects of post-event misinformation.²⁵³ This is indeed true of law enforcement officers.²⁵⁴ However, the same studies reveal that people's abilities to identify faces cannot be improved.²⁵⁵ In sum, courts should not exclude eyewitness expert testimony because a law officer is the eyewitness since the officer, in spite of his or her training, is no better at making accurate identifications in stressful situations than is the lay eyewitness.

e. The Prejudicial Value of Eyewitness Expert Testimony Substantially Outweighs Its Probative Value

With regard to jury prejudice, researchers primarily confront the issue of whether expert testimony merely increases jurors' skepticism of eyewitness testimony²⁵⁶ or increases their sensitivity to eyewitness

²⁴⁹ See *id.*

²⁵⁰ Courts are divided about whether it is permissible to ask eyewitness experts hypothetical questions. Compare *Johnson v. State*, 526 S.E.2d 549, 553 n.3 (Ga. 2000), and *United States v. Mathis*, 264 F.3d 321, 339-40 (3d Cir. 2001) (apparently approving hypothetical questions), with *State v. Fontaine*, 382 N.W.2d 374, 378 (N.D. 1986) (not permitting hypothetical questions). All courts prohibit eyewitness experts from giving an opinion on the accuracy of a particular eyewitness's testimony. *Johnson*, 526 S.E.2d at 553 n.3; *State v. Buell*, 489 N.E.2d 795, 804 (Ohio 1986). Courts prohibit expert opinions on eyewitness accuracy because they consider them an invasion of the jury's province to determine the credibility of eyewitnesses. FISHMAN, *supra* note 111, at § 14:79.

²⁵¹ See *supra* note 85.

²⁵² Brigham et al., *supra* note 5, at 16.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See Fredric D. Woocher, *Legal Principles Governing Expert Testimony by Experimental Psychologists*, 10 LAW & HUM. BEHAV. 47 (1986) (noting "experimental psychologist's impressive credentials might lead the jury to rely too heavily on her opinion and therefore undervalue the weight of the eyewitness evidence").

evidence.²⁵⁷ Sensitivity consists of two elements: knowledge and integration.²⁵⁸ Knowledge is defined as “awareness of the manner in which a factor influences eyewitness memory, including the direction and magnitude of the effect for a given factor.”²⁵⁹ Integration “refers to the ability to render decisions that affect knowledge.”²⁶⁰ In other words, even though jurors may know how an eyewitness factor affects eyewitness accuracy, they may not incorporate that knowledge into their evaluation of eyewitness accuracy.

In a series of studies, Cutler, Penrod, and their colleagues investigated whether expert testimony increases jurors’ sensitivity to eyewitness testimony.²⁶¹ In their first study, they showed 538 undergraduate mock jurors²⁶² videotapes of a realistic trial simulation of a liquor store robbery,²⁶³ where the primary evidence was the robbery victims’ identification of the defendant.²⁶⁴ In one version of the mock trial, an eyewitness expert who had testified over fifty times in court played the role of the expert in the simulated trial, and practicing attorneys played the role of the prosecutor and defense attorney.²⁶⁵ In another version, no expert was presented.²⁶⁶ Instead, the attorneys reviewed the eyewitness factors relevant to the case during closing arguments.²⁶⁷

Other variations on the videotaped trial were created.²⁶⁸ The mock jurors heard from the eyewitness that the crime occurred under either poor or good eyewitness and identification conditions.²⁶⁹ In the trials, the victim testified that she was either 80% or 100% confident that she had made an accurate identification.²⁷⁰

The results of the experiment showed that expert testimony improved mock juror sensitivity to the witness identification conditions when rendering a verdict²⁷¹ and in evaluating the probability that the victim had

²⁵⁷ Cutler et al., *supra* note 119, at 312.

²⁵⁸ *Id.* at 313.

²⁵⁹ CUTLER & PENROD, *supra* note 57, at 217.

²⁶⁰ *Id.*

²⁶¹ Cutler et al., *supra* note 119, at 311.

²⁶² *Id.* at 318.

²⁶³ *Id.* at 316.

²⁶⁴ *Id.* at 317.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 316-17.

²⁶⁸ *Id.* at 317.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 325.

made an accurate identification.²⁷² It also caused the mock jurors to place less reliance on eyewitness's confidence when making inferences about eyewitness credibility and the strength of the prosecution and defense cases.²⁷³

Cutler, Dexter, and Penrod, using the same paradigm that they used in their prior experiment, determined what effects expert testimony would have on experienced jurors.²⁷⁴ All of the experienced jurors in their study had been called for or served on jury duty within a year of their participation in the study.²⁷⁵ In addition, the responses of the experienced jurors were both compared and combined with the responses of the 538 undergraduates who had acted as mock jurors in their prior study.²⁷⁶

The results revealed that, without expert testimony, both the experienced jurors and the undergraduates were insensitive to witnessing and identification conditions and unaware of the impact of eyewitness confidence.²⁷⁷ Expert testimony sensitized both groups of participants to witnessing and identification conditions.²⁷⁸ It also caused both groups of participants to give less weight to eyewitness confidence when evaluating the credibility of the eyewitness and the strength of the defendant's case.²⁷⁹ Furthermore, expert testimony did not increase the skepticism of either the experienced jurors or the undergraduates.²⁸⁰

Penrod and Cutler concluded in their most recent article:

In contrast to the poor effectiveness of attorney and juror, expert testimony appears to be a promising adjunct to traditional safeguards. There is little evidence that jurors are confused by the testimony, while research indicates that it has the salutary effect of educating jurors about factors that influence eyewitness performance and enhances their reliance on those factors when rendering decision. Furthermore, although attorneys have presumably devoted many (fruitless) years to the task of honing skills such as cross-examination of eyewitnesses, relatively little effort has been devoted to finding forms of expert testimony that maximize the educational effects of this testimony. Hence, it is likely that the full benefits of expert testimony about the problem of eyewitness reliability have not yet been realized.²⁸¹

²⁷² *Id.*

²⁷³ *Id.* at 323-24.

²⁷⁴ Brian L. Cutler et al., *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 7 BEHAV. SCI. & L. 215, 217 (1989).

²⁷⁵ *Id.* at 220.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 223.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* The experienced jurors and undergraduates did not differ significantly in their responses to expert testimony or to the absence of expert testimony. *Id.*

²⁸¹ Penrod & Cutler, *supra* note 90, at 115.

The results of several other studies on the effect of expert testimony, however, indicate that, in some circumstances, expert testimony fails to sensitize jurors to the effects of eyewitness factors and only produces increased juror skepticism about eyewitness testimony.²⁸² For example, Leippe and his colleagues conducted two experiments on the effects of expert testimony.²⁸³ In their first experiment, college students read a trial transcript of a robbery/murder case.²⁸⁴ The trial transcript included opening and closing arguments, judges' instructions, and direct and cross-examination of the witnesses, including the only eyewitness to the crime.²⁸⁵ In the different versions of the trial, the strength of the prosecution's case was manipulated to make the prosecution's case either moderately strong or moderately weak.²⁸⁶

Some of the trial transcripts included the testimony of an eyewitness expert, who was called as the court's witness.²⁸⁷ The expert's testimony was introduced either before or after the prosecution presented its case.²⁸⁸ In the jury instructions in the transcripts, the judge either did or did not present a summary of the expert's testimony in those versions of the transcript that included the expert's testimony.²⁸⁹

The results of the first experiment showed that the only condition in which expert testimony had an effect on jurors was when the testimony was presented at the conclusion of the trial and the judge in jury instructions summarized what the expert had said.²⁹⁰ In this condition, the expert's testimony significantly lowered the mock jurors' perceptions of the guilt of the defendant and the credibility of the eyewitness.²⁹¹

Furthermore, these lowered perceptions were present whether the prosecution had a moderately strong or weak case.²⁹² The researchers stated that "[t]aken together, these aspects are somewhat disconcerting in that they suggest that general, educational testimony about eyewitness psychology may work in the defense's favor (i.e., a pro-defense

²⁸² Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. APPLIED PSYCHOL. 524, 525 (2004).

²⁸³ *Id.* at 529, 535.

²⁸⁴ *Id.* at 529.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 534.

²⁹¹ *Id.*

²⁹² *Id.* at 535.

asymmetry), even when it perhaps should not (i.e., an otherwise strong prosecution case)."²⁹³

In a second experiment, Leippe and his colleagues strengthened the prosecution's case with stronger physical and circumstantial evidence and used only two conditions: the strengthened prosecution case without expert testimony, and the strengthened case with expert testimony, together with a jury instruction from the judge that summarized the expert's testimony.²⁹⁴

The expert was again called as the court's witness in the trial transcripts.²⁹⁵ The expert testimony in the second experiment decreased the credibility of the eyewitness and the likelihood of a guilty verdict, despite the relatively strong prosecution evidence.²⁹⁶ The researchers concluded:

This result gives some credence to the concern that eyewitness expert testimony can have the unwanted effect of creating sufficient juror skepticism about the entire case that leads to an acquittal in the face of strong circumstantial evidence. To be sure, we have yet to test for this impact of expert testimony in an extremely strong prosecution case, and it can be argued that an increase in overall skepticism in a moderately strong case is not so inappropriate. Yet, if our results do reflect a tendency that extends to strong extra-eyewitness cases in general, it puts the onus on judges to decide whether to admit eyewitness expert testimony in light of how much other incriminating evidence besides the eyewitness(es) that the prosecution is prepared to offer.²⁹⁷

In addition to those concerns previously discussed, there are other limitations to eyewitness expert testimony. Considering the large number of cases in which eyewitness expert testimony is needed, it is doubtful that judges will be willing to authorize payment for expert testimony for all the indigent defendants who could benefit from it.²⁹⁸ Finally, even if cost was not a concern, there are an insufficient number of eyewitness experts available to testify in all criminal cases where eyewitness identification accuracy is an issue.²⁹⁹

Although it is likely that in the future scientists will be able to significantly increase both the effectiveness of expert testimony and more accurately predict the circumstances when it is or is not effective, more research is needed to accomplish these goals. In light of the current limitations, courts should be required to admit expert testimony only when

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 535-36.

²⁹⁷ *Id.* at 538.

²⁹⁸ The Supreme Court requires the State to pay for expert testimony for indigent defendants where the denial of such assistance would otherwise violate his or her due process rights. *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985).

²⁹⁹ Wells et al., *supra* note 18, at 609.

eyewitness testimony is the sole or primary evidence against a defendant. In other cases, admission of expert testimony should be left to the discretion of the trial judge. When eyewitness testimony is the sole or primary evidence against the defendant, the admission of expert testimony is necessary because it is in these cases that the risk of wrongful conviction is highest, and it makes jurors aware of the many factors that affect eyewitness accuracy. It is also needed because the effect of many eyewitness factors on identification accuracy is not a matter of common sense.

Expert testimony is a flawed but necessary component of the solution to the problems of eyewitness testimony. In light of its shortcomings, the tripartite solution recognizes the need for additional measures to effect a comprehensive solution.

B. SECOND COMPONENT OF THE TRIPARTITE SOLUTION: IMPROVING PROCEDURES FOR COLLECTING EYEWITNESS EVIDENCE BY CONDUCTING EYEWITNESS INTERVIEWS AND IDENTIFICATION PROCEDURES IN A MANNER CONSISTENT WITH BEST PRACTICES IDENTIFIED BY SCIENTIFIC RESEARCH IN THE FIELD

“It is incredible that we know with scientific certainty that some common methods the police use run unnecessary risks of false identifications,” said Dr. Gary Wells, a psychologist at Iowa State University in Ames. “Yet there are no prohibitions against using such methods.”³⁰⁰

1. Interviewing Techniques

Up to this point, this article has addressed the deficiencies in courts’ responses to the problem of eyewitness error. The genesis of eyewitness error, however, occurs long before litigation commences. It begins with the collection of eyewitness evidence by law enforcement officials. Research has shown that one of the key components to reducing eyewitness error is to conduct interviews of eyewitnesses in a manner that maximizes the amount of information obtained from them and that avoids contaminating their memory of the crime.³⁰¹ The second component of the tripartite solution—improving the collection of eyewitness evidence through the use of sound

³⁰⁰ Goleman, *supra* note 3, at C1, C7. It is important to address the problems with these methods because “[i]nformation obtained from witnesses is typically assigned great importance in criminal investigations.” Ivar A. Fahsing et al., *The Man Behind the Mask: Accuracy and Predictors of Eyewitness Offender Descriptions*, 89 J. APPLIED PSYCHOL. 722, 722 (2004).

³⁰¹ Ronald P. Fisher, *Interviewing Victims and Witnesses of Crime*. 1 PSYCH. PUB. POL’Y & L. 732, 752 (1995).

psychological techniques, such as the cognitive interview—endeavors to address this pressing problem.

In interviewing eyewitnesses, law enforcement officers generally make three types of errors: (1) they fail to obtain much of the information that an eyewitness knows about a crime; (2) they contaminate the eyewitness's memory of the crime; and (3) they succumb to systemic pressures which either motivate law officers to gather evidence with a pro-prosecution bias or charge the least experienced officers with gathering the most important evidence.³⁰² The reasons for each of these errors are discussed below.

a. Techniques Which Promote Incomplete Recollection

Law officers make many mistakes that impede their ability to obtain the maximum amount of information from eyewitnesses.³⁰³ First, they frequently interrupt eyewitnesses' narratives of the crime, which disrupts memory and inhibits them from volunteering information.³⁰⁴ This renders the accuracy and completeness of the interview dependent on the law officer asking the right questions, which is difficult because each crime contains unique features that cannot be anticipated.³⁰⁵

Furthermore, most law officers ask closed-ended questions, that is, questions that ask for specific information,³⁰⁶ and provide the eyewitnesses with insufficient time to complete their responses.³⁰⁷ Open-ended questions are superior in facilitating communication and giving the eyewitness control. They also furnish the eyewitness with the best opportunity to fully disclose relevant details of the crime.³⁰⁸ In addition, law officers should allow for pauses when an eyewitness stops talking before asking the next question, thus ensuring that an eyewitness has completed his or her response.³⁰⁹ Moreover, law enforcement officers all too frequently fail to provide assistance to witnesses traumatized by recalling the circumstances

³⁰² *Id.* at 753-56; Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 247, 250, 252-53 (2000).

³⁰³ Fisher, *supra* note 301, at 732.

³⁰⁴ *Id.* at 735.

³⁰⁵ *See id.*

³⁰⁶ For example, "What color was the car?" *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT 8, 11, 19 (2003).

³⁰⁷ *Id.*

³⁰⁸ *See id.*

³⁰⁹ *Id.* at 17.

of a crime.³¹⁰ As will be discussed, such assistance could take the form of employing mnemonic devices from the cognitive interview that enhance recall,³¹¹ or could simply involve the officer lending sympathy and support to a distraught witness.³¹² Numerous studies show that the “aroused” eyewitness, or the eyewitness who feels personally threatened by the crime, has reduced accuracy.³¹³

Another major error made by most law officers is that their questions are often incompatible with the “witness’s mental representation of the crime.”³¹⁴ Because each eyewitness’s mental representation of a crime is unique, law officers need to ask questions that are compatible with the eyewitness’s memory of the crime rather than asking the eyewitness a standard set of questions.³¹⁵

Interviews of eyewitnesses also fail to elicit as much information as possible because law officers are rarely clear in their expectations for witnesses.³¹⁶ For example, they fail to communicate to eyewitnesses the type and degree of detail of information they require.³¹⁷ Finally, as previously stated, law officers lack knowledge of eyewitness factors, and in particular, tend to overestimate the accuracy of eyewitnesses and are unaware of how memory works.³¹⁸ For all these reasons, law officers tend to obtain incomplete accounts of crimes from eyewitnesses.

b. Techniques Which Tend to Contaminate Eyewitnesses’ Memories of Crimes

Perhaps a more pernicious error made by law officers is the use of interrogation techniques which contaminate eyewitnesses’ memories of crimes. The primary vehicle for this error is giving a witness post-event information; in other words, conveying to the witness information culled not from his or her memory of the incident, but from other sources.³¹⁹ Post-event information can come from many different sources such as other eyewitnesses, law officers, or the media and can pertain either to the details

³¹⁰ Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST, 581, 583 (2000).

³¹¹ *See id.* at 745-47; *see also* discussion *infra* Part IV.B.1.d.

³¹² Deffenbacher, *supra* note 66, at 388.

³¹³ *Id.*

³¹⁴ Fisher, *supra* note 301, at 735.

³¹⁵ *Id.*; Wells et al., *supra* note 310, at 583.

³¹⁶ Fisher, *supra* note 301, at 747.

³¹⁷ *Id.*

³¹⁸ *See id.* at 736.

³¹⁹ *See id.* at 740.

of the crime or to the perpetrator's appearance.³²⁰ Post-event information will often seem credible to eyewitnesses,³²¹ and can alter their subsequent responses to questions about an event they witnessed.³²² When this occurs, eyewitnesses' later responses to questions are likely to incorporate the false presuppositions of the earlier questions.³²³ For instance, eyewitnesses tend to incorporate another eyewitness's erroneous description of a person's face into their own description, even when reconstructing the suspect's face with an Identi-kit.³²⁴ Moreover, post-event information not only affects eyewitnesses' memory of the crime but also their ability to recognize the perpetrator of the crime.³²⁵

Christiaansen, Sweeney, and Ochalek found that information introduced after an eyewitness has observed a person could have a significant effect on the eyewitness's estimate of the person's height and weight.³²⁶ "The results of this, and the other studies, emphasize the extent to which remembering is a complex reconstructive process and not a literal record of an actual event."³²⁷ In sum, memory does not permanently store

³²⁰ Brigham et al., *supra* note 5, at 14 ("Such 'post-event suggestions' may come from overhearing the recall of other witnesses or from questioning by field officers investigating the crime, and may involve aspects of the situation or facial characteristics of the suspect.").

³²¹ See Fisher, *supra* note 301, at 740.

³²² Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOLOGIST 867, 867 (2003).

³²³ See *id.* at 867-68. In other words, when law officers, prosecutors, and others ask an eyewitness a question that contains incorrect information, the incorrect information in the question can alter the eyewitness's memory of the crime and ability to correctly identify the perpetrator of the crime.

³²⁴ Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 LAW & HUM. BEHAV. 323 (1980).

The Identi-kit contains transparent line drawings of numerous alternatives of different facial features (forehead and hairline, eyes, nose, chin, mouth, facial hair, glasses, etc.). Subjects examined the features and selected those that seemed most like the ones of the face they were attempting to put together. When they were satisfied that a good likeness had been achieved, the composite was mounted on a white board and photographed.

Id. at 325-26. Deffenbacher has opined that Identi-kit identifications might be especially prone to difficulty because "they require the witness to retrieve from memory isolated facial features, a particularly difficult task, given that faces are quite likely stored as integrated wholes." Deffenbacher, *supra* note 66, at 385.

³²⁵ Loftus & Greene, *supra* note 324, at 333 ("The verbal expressions and other postevent information to which a witness is exposed will not only appear in the verbal reports of witnesses but will also influence future recognition of persons who have been seen before.").

³²⁶ Robert E. Christiaansen et al., *Influencing Eyewitness Descriptions*, 7 LAW & HUM. BEHAV. 59, 64 (1983).

³²⁷ *Id.* at 64-65.

precise records of all our experiences, but rather it is a highly malleable and reconstructive process.³²⁸

Contamination from post-event information is most likely to occur when the source of the post-event information is highly credible, uncertainty surrounds the event, and the post-event information concerns peripheral details.³²⁹ There are many reasons why interviews of eyewitnesses by law officers meet these criteria. For instance, eyewitnesses frequently view law officers as trustworthy authority figures.³³⁰ "The social demand characteristics of the situation provide some motivation for the witness to accept information provided by the interviewer and to proffer responses the witness believes will please the interviewer."³³¹ There is often uncertainty surrounding the commission of a crime.³³² Much of the post-event information provided to an eyewitness may concern peripheral details, such as a description of the perpetrator of the crime, and how the crime occurred.³³³ Law officers can convey post-event information to eyewitnesses in a variety of ways, from overtly volunteering information to the eyewitness,³³⁴ to asking leading questions,³³⁵ to encouraging guessing by the eyewitness,³³⁶ to offering confirming feedback.³³⁷

Post-event information distorts an eyewitness's memory of the crime³³⁸ and also increases his or her confidence in the accuracy of that

³²⁸ Brigham & Bothwell, *supra* note 20, at 20 ("[R]esearch has demonstrated that prior knowledge affects the ways by which information is encoded and retrieved, often resulting in distortions in recall arising from constructive processes at time of acquisition and/or from reconstructive processes at the time of recall.").

³²⁹ Judges, *supra* note 302, at 247. Judges cites a law enforcement officer as an example of a highly credible source. *Id.*

³³⁰ *Id.*

³³¹ *Id.*; see also Lynn Garrioch & C. A. Elizabeth Brimacombe, *Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence*, 25 LAW & HUM. BEHAV. 299, 306 (2001) ("We suggest that informational social influence can explain our results. To reduce the uncertainty surrounding the choosing of a lineup member, witnesses may have looked to their interviewer to help them decide if they were correct and then used the interviewer's reaction to their lineup choice to gauge their identification confidence.").

³³² Judges, *supra* note 302, at 247.

³³³ *Id.*

³³⁴ *Id.* at 248.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ Bradfield et al., *supra* note 15, at 119. Such feedback could be verbal or as simple as a smile. Garrioch & Brimacombe, *supra* note 331, at 300.

³³⁸ Judges, *supra* note 302, at 266; see also Bradfield et al., *supra* note 15, at 119 (finding that confirming feedback "distorted participants' recollection of events that occurred before feedback was given").

memory.³³⁹ Scientific studies show that post-event information has its greatest impact on an eyewitness's confidence for inaccurate information.³⁴⁰ Post-event information also significantly compromises the trier of fact's ability to ascertain the truth in a criminal trial.

c. Systemic Pressures That Either Motivate Law Officers to Gather

Evidence with a Pro-Prosecution Bias or Charge the Least Experienced Officers with Gathering the Most Important Evidence

Moreover, law enforcement bodies not only permit, but may encourage their officers, either overtly or covertly, to take the opportunity to manipulate eyewitnesses' recollections.³⁴¹ Law officers work for the prosecution in criminal cases and therefore are primarily motivated to convict defendants rather than to exonerate them.³⁴² Moreover, once officers have identified a suspect they believe committed the crime, they tend to conduct interviews of eyewitnesses with the goal of obtaining further corroborating evidence of the suspect's guilt, ignoring exonerating evidence.³⁴³ Law officers often interview eyewitnesses in the same manner they interview suspects.³⁴⁴ This aggressive style can convert an eyewitness into a hostile witness who is unlikely to volunteer information.³⁴⁵

The final systemic factor that interferes with law officers' effective interviewing of eyewitnesses is that novice patrol officers responding to

³³⁹ Judges, *supra* note 302, at 249-50.

³⁴⁰ *Id.*

³⁴¹ *See id.* at 253 (describing an "adversarial, politically influenced system that provides strong external incentives to obtain convictions").

³⁴² Fisher, *supra* note 301, at 754; *see also* Dripps, *supra* note 8, at 639 ("[T]he pressure to obtain a conviction in a high-profile rape or homicide case might tempt police and prosecutors to look hard for ways to pin the offense on some luckless innocent.").

³⁴³ Fisher, *supra* note 301, at 754.

³⁴⁴ *Id.* at 755 ("[Law officers] sometimes generalize the interrogation skills to interviews with cooperative witnesses.").

³⁴⁵ *Id.* at 755. Fisher further states that:

[An] institutional factor that militates against effective interviewing is a general ambience within the police world of the police officer as a macho individual. Police are described as markedly self-assertive and concerned with maintaining a virile self-image. One is easily convinced of this by a casual observation of the number of ex-athletes in the police department and by the excessive concern with body building specifically directed with muscularity and not general fitness. To the degree that the macho ideal promotes an aggressive attitude, it detracts from conducting effective interviews with cooperative witnesses.

Id. at 756 (internal citations and quotations omitted). Fisher continues: "Relatedly, I have found in the various interviewing workshops I have conducted that women were generally more effective interviewers than men." *Id.*

emergencies conduct the initial interview of most eyewitnesses.³⁴⁶ Not only do these officers lack training and experience in interviewing eyewitnesses, but they also conduct the interviews under poor conditions.³⁴⁷

Furthermore, though detectives have more time to interview eyewitnesses, and do so under less stressful circumstances, their follow-up interviews are also ineffective because they employ the same techniques they learned when they were patrol officers.³⁴⁸ The systemic problems that interfere with law officers conducting effective interviews can only be solved by better training and by limiting the interviewing of eyewitnesses to officers who have the necessary interpersonal skills and personality traits to be good interviewers.³⁴⁹

d. Improving the Collection of Eyewitness Evidence Through the Use of Sound Psychological Techniques, Such as the Cognitive Interview

Psychologists have proposed a number of measures to improve eyewitness interviews. For instance, Fisher proposed two solutions to increase law officers' ability to conduct effective eyewitness interviews.³⁵⁰ First, law officers who interview eyewitnesses should not know the identity of the suspect to prevent them from biasing eyewitnesses' responses to incriminate the suspect.³⁵¹ Second, law officers should permit defense attorneys to be present during interviews or videotape interviews of eyewitnesses, so that defense attorneys, judges, and juries can be informed of improprieties that occur during interviews.³⁵²

However, perhaps chief among these psychological measures to improve evidence gathering is the cognitive interview.³⁵³ In the 1980s, Ronald Fisher and Ed Geiselman began developing an interviewing technique which greatly enhances the recollection and reporting of eyewitnesses without contaminating their memory of the crime.³⁵⁴ This

³⁴⁶ *Id.* at 756.

³⁴⁷ *Id.* (“[T]heir interviews are conducted under the worst conditions imaginable: general confusion and background noise, high witness arousal, severe time pressure, etc. They are pressed by their superiors to file their reports quickly, even if at the cost of diminished information.”).

³⁴⁸ *See id.* at 757 (discussing difficulty in changing interview habits of experienced but improperly trained police). Fisher further comments that he finds it easier to teach cognitive interviewing skills to his research assistants than experienced police detectives. *Id.*

³⁴⁹ *See id.* at 757-58.

³⁵⁰ *Id.* at 754-55.

³⁵¹ *Id.* at 754.

³⁵² *Id.* at 755.

³⁵³ *See Wells et al., supra* note 310, at 583.

³⁵⁴ *Id.* at 582-83.

“cognitive interview” was based on principles of cognitive and related fields of psychology.³⁵⁵ The purpose of the cognitive interview is to improve the standard law enforcement interview in three ways.³⁵⁶ First, the cognitive interview takes into consideration the social dynamics of the interviewing process by encouraging the law officer to establish rapport with and show empathy for the eyewitness.³⁵⁷ Further, it enhances the eyewitness’s memory of the crime and the interviewer’s recall of the contents of the interview by applying basic principles of memory, using mnemonic devices,³⁵⁸ and by recording the interview.³⁵⁹ Finally, it improves communications between the eyewitness and the interviewer by such means as asking open-ended questions and not interrupting the eyewitness in his or her account of the crime.³⁶⁰

To maximize the amount of information they obtain, law officers need to develop rapport and show empathy for eyewitnesses because eyewitnesses are frequently traumatized by the crimes they observe.³⁶¹ Rapport and empathy also facilitate eyewitness cooperation, comfort, and ease in disclosing information.³⁶² The cognitive interview accomplishes these tasks by requiring the interviewer to express sympathy and concern for the eyewitness, personalize the interview to the witness’s unique needs, use frequent open-ended questions, and not interrupt the eyewitness.³⁶³ The cognitive interview emphasizes the importance of maintaining rapport with an eyewitness throughout the entire criminal process and not just at the initial interview.³⁶⁴

Next, the cognitive interview enhances an eyewitness’s recollection of a crime through promoting basic principles of memory: First, that “the effectiveness of a retrieval cue is related to the amount of feature overlap

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ See Fisher, *supra* note 301, at 745.

³⁶⁰ See Wells et al., *supra* note 310, at 582-83.

³⁶¹ See *id.*

³⁶² See *id.* (advocating the establishment of rapport with witnesses to allow them to talk freely about their experiences). See also Fisher, *supra* note 301, at 756 (“As a means of combating the stereotype of the aggressive person as the ideal, police should attempt to promote values of the compassionate person or the good companion as the ideal police officer, at least for those whose primary role is to conduct interviews with cooperative witnesses.”).

³⁶³ See *id.* (discussing common errors in a normal police interview).

³⁶⁴ See also NAT’L INST. OF JUSTICE, *supra* note 306, at 15, 18, which is based in large part on the cognitive interview where it emphasizes rapport building at every stage of the interviewing process.

with the encoded event.”³⁶⁵ Second, “[t]hat information not accessible with one retrieval cue may be accessible with a different cue.”³⁶⁶

The cognitive interview provides several mnemonic devices to improve an eyewitness’s memory of the crime. These devices include asking the eyewitness to recreate the context of the crime with specificity and requesting that the eyewitness recall everything he or she can remember about the crime, even if the eyewitness believes it is unimportant.³⁶⁷ Additional devices include requesting that the interviewee remember the crime in different orders, describe the events from a variety of perspectives, and communicate through nonverbal means, such as drawings or gestures, if that promotes memory.³⁶⁸ The cognitive interview also enhances an eyewitness’s concentration while remembering the crime through minimizing distractions and following a slower pace with a greater proportion of open-ended questions.³⁶⁹ The interview concludes by encouraging the eyewitness to contact the interviewer with any additional information recalled later.³⁷⁰ The memory of the law officer is also improved by recording the interview.³⁷¹

Numerous laboratory studies of the cognitive interview demonstrated that it increases the amount of information elicited from eyewitnesses by 35% to 75% over standard police interviews.³⁷² Two field studies of the cognitive interview in the United States and England, with victims and

³⁶⁵ Ronald P. Fisher et al., *Improving Eyewitness Testimony with the Cognitive Interview*, in ADULT EYEWITNESS TESTIMONY 245, 246 (David Frank Ross et al. eds., 1994) (citations omitted). A retrieval cue is a stimulus that helps an individual to remember an event. The best retrieval cues are those cues that were present when the event occurred. Psychologists refer to this empirical finding as the encoding specificity principle. This is why law officers sometimes take an eyewitness back to the scene of the crime or show them an object that was present during the crime such as the perpetrator’s clothing. The encoded event refers to the stored memory of the event that the person is attempting to retrieve (i.e., the crime). See WAYNE WEITEN, PSYCHOLOGY: THEMES AND VARIATIONS 279 (7th ed. 2007).

³⁶⁶ Fisher et al., *supra* note 365, at 245-46.

³⁶⁷ Judges, *supra* note 302, at 251 (citations omitted).

³⁶⁸ *Id.*

³⁶⁹ Fisher, *supra* note 301, at 752. “[E]rror rates in recall can be reduced if leading questions are avoided.” Deffenbacher, *supra* note 66, at 385 (citation omitted). The cognitive interview further aids the interviewer in obtaining the maximum amount of information possible from an eyewitness by giving the interviewer a planned sequence for conducting the interview. The planned sequence consists of a rapport building stage, an open narration stage, a probing stage, a review stage, and a closing stage. Judges, *supra* note 302, at 251. Deffenbacher also supports the use of an open narration phase. Deffenbacher, *supra* note 66, at 384-85.

³⁷⁰ See also NAT’L INST. OF JUSTICE, *supra* note 306, at 20.

³⁷¹ Fisher, *supra* note 301, at 745.

³⁷² Wells et al., *supra* note 310, at 584 (citation omitted).

eyewitnesses of real crimes, also demonstrated that the cognitive interview produces significantly more information than the standard law enforcement interview.³⁷³ The cognitive interview, unlike the standard law enforcement interview, has the added benefit of not artificially increasing eyewitness confidence.³⁷⁴

In sum, law enforcement officers' use of psychologically sound interviewing techniques, such as the cognitive interview, are essential to reducing eyewitness error. Such techniques maximize the amount of information obtained from eyewitnesses, do not contaminate their memory of the crime, and prevent the artificial increase of their confidence.

2. Identification Procedures

Legal scholars and agencies have wrangled for decades with the challenge of developing effective guidelines for identification procedures.³⁷⁵ Despite these attempts, procedures continue to be flawed.³⁷⁶ Prior efforts have been ineffective because they failed to sufficiently base their recommendations on scientific research, which has established several scientific principles relevant to fair identification procedures.³⁷⁷

³⁷³ *Id.* (by 55% in the United States and 35% in England).

³⁷⁴ Fisher, *supra* note 301, at 752.

³⁷⁵ For an excellent discussion of the history of these efforts, see Wells et al., *supra* note 310, at 581-82. The efforts culminated, to some extent, in 1999 with the Department of Justice's publication of the "Guide," the first national guidelines. In testimony to the importance of using scientific research in formulating guidelines for the collection of eyewitnesses, the Guide stated:

This *Guide* is supported by social science research. During the past 20 years, research psychologists have produced a substantial body of findings regarding eyewitness evidence. These findings offer the legal system a valuable body of empirical knowledge in the area of eyewitness evidence. This *Guide* makes use of psychological findings, either by including them in the procedures themselves or by using them to point the way to the design and development of further improvements in procedures and practices for possible inclusion in future amendments or revisions to this document.

NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 1-2 (1999).

³⁷⁶ See Wells et al., *supra* note 310, at 582.

³⁷⁷ See, e.g., Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 940 (1999) ("Legal psychologists have long recognized the potential for bias in such a procedure, which has made eyewitness identification one of the most-studied and best-understood areas in all of applied psychology.").

a. The Scientific Principles Relevant to Fair Identification Procedures

i. Once a Mistake Is Made in an Identification Procedure, It Cannot Be Corrected

Koehnken, Malpass, and Wolgater emphasized that:

Valid implementation of eyewitness identification using lineups and photo spreads demands especially careful preparation. An identification of a suspect under suggestive conditions early in an investigation cannot simply be rectified by later conducting a fair lineup. Various psychological mechanisms result in the witness retaining the effects of errors made in previous recognition tests. There are no procedures that can reliably rule out the possibility that earlier mistakes will be maintained at a later identification.³⁷⁸

ii. Eyewitnesses Tend to Use a Relative Judgment Process in Making an Identification

There is strong empirical evidence that most eyewitnesses employ a relative judgment process in selecting a suspect from a photo array or a lineup.³⁷⁹ In other words, eyewitnesses tend to select the lineup member who most closely resembles the perpetrator of the crime.³⁸⁰ When an eyewitness employs an absolute judgment process, the eyewitness identifies a lineup member because her appearance matches the eyewitness's memory of the perpetrator of the crime and not because she most closely resembles the perpetrator.³⁸¹ Studies indicate that promoting absolute judgments rather than relative judgments in eyewitnesses would lead to more accurate identification.³⁸²

There are several reasons why eyewitnesses tend to make a relative rather than an absolute judgment when selecting a suspect in an identification procedure. First, eyewitnesses logically assume that law enforcement officials would not conduct an identification procedure if they did not have a suspect.³⁸³ Many eyewitnesses feel under great pressure from law officers, friends, family, or themselves to make an identification.³⁸⁴ If an eyewitness cannot make an identification, he might

³⁷⁸ Gunter Koehnken et al., *Forensic Applications of Line-Up Research*, in *PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATIONS* 205, 208 (Siegfried Ludwig Sporer et al. eds., 1996).

³⁷⁹ Wells et al., *supra* note 310, at 585-86.

³⁸⁰ *Id.* at 585.

³⁸¹ *Id.* at 586.

³⁸² See Koch, *supra* note 46, at 1104-05.

³⁸³ See Wells et al., *supra* note 18, at 630.

³⁸⁴ Brigham et al., *supra* note 5, at 15.

feel like a failure.³⁸⁵ Thus, the witness will be looking to make an affirmative identification and will select the lineup member who is closest to her recollection of the perpetrator.³⁸⁶ “Those who reported using a relative judgment process were more likely to have made a false identification than were those who reported using an absolute judgment process.”³⁸⁷

iii. The Lineup-as-Experiment Analogy

Garrioch and Brimacombe clarify why it is important for law officers to conduct fair and impartial identification procedures:

Like a researcher with a specific hypothesis (i.e., that a particular lineup member is the suspect), the detective is now in a position to exert tremendous influence in administering the lineup. . . . A lineup administrator’s knowledge of the suspect’s identity can increase the likelihood that the witness will identify the suspect.³⁸⁸

To understand what safeguards are necessary to minimize erroneous eyewitness identifications, it is useful to view identification procedures as experiments.³⁸⁹ Wells and his colleagues explain how identification procedures resemble experiments:

[T]he police have a hypothesis (that the suspect is the culprit); they collect materials that could be used to test the hypothesis (e.g., picture of the suspect and filler pictures), they create a design (e.g., placing suspect’s picture in a particular position in an array), instruct the subject(s) (eyewitness or eyewitnesses); run the procedure (show the lineup to the eyewitness), record the data (identification of the suspect or not); and interpret the hypothesis in light of the data (decide whether the identification decision changes their assessment of whether the suspect is the culprit).³⁹⁰

The lineup-as-experiment analogy allows us to identify procedural errors that are likely to cause erroneous identifications.³⁹¹ They include:

³⁸⁵ Koehnken et al., *supra* note 378, at 208-09.

Under these circumstances, an “ideal” witness would realize that he or she cannot remember any more and therefore, cannot recognize any of the individuals present in the line-up. Unfortunately, we are not always dealing with ideal witnesses. A witness may want to present him or herself as a “good,” constructive person, who can help the police catch the offender and thereby solve the crime. Sometimes witnesses feel themselves to be “failures” when they cannot recall what the offender looked like.

Id.

³⁸⁶ Wells et al., *supra* note 310, at 586.

³⁸⁷ Wells et al., *supra* note 18, at 617.

³⁸⁸ Garrioch & Brimacombe, *supra* note 331, at 300 (internal citations omitted).

³⁸⁹ See Wells et al., *supra* note 18, at 617-18.

³⁹⁰ *Id.* at 618.

³⁹¹ *Id.*

[T]he presence of demand characteristic (e.g., pressuring the eyewitness to make a choice), the influence of confirmation biases (e.g., asking the eyewitness specifically about the suspect while not asking those same questions about the distractors), the facilitation of response biases (e.g., encouraging a loose recognition criterion threshold in the eyewitness), making inferences from small sample sizes (e.g., making strong judgments of validity based on only one eyewitness), not using control groups (e.g., failing to see if people who did *not* witness the crime [but who have the eyewitness's description of the perpetrator] can identify the suspect), selective recording and interpretation of data (e.g., finding significance in an identification of the suspect, but ignoring the outcome if the eyewitness makes a non-identification), leaking of the hypothesis (e.g., making it obvious to the eyewitness which person in the lineup is the suspect), and a host of other possible confounds.³⁹²

In summary, the lineup-as-experiment analogy makes clear that it is essential to conduct identification procedures in a manner that ensures that the eyewitness identification of the suspect is a result of her memory of the crime and not the manner in which the identification procedure was conducted.³⁹³

Moreover, eyewitness evidence should be viewed as a type of physical trace evidence, such as fingerprints, DNA, and firearm patterns.³⁹⁴ Like other trace evidence, it has a physiological basis and its validity depends on the proper use of scientific procedures in collecting the evidence.³⁹⁵ Accordingly, eyewitness evidence, like other types of trace evidence, should be admitted at trial only if proper scientific procedures are followed in producing it.³⁹⁶

³⁹² *Id.* Among other concerns, Wells and his colleagues highlight in this passage the use of “mock witnesses” as a solution to the problem of biased lineups: “Mock witnesses are people who have never seen the culprit but are given the eyewitness’s verbal description of the culprit, shown a picture of the lineup or photospread, and asked to select the person they think is the suspect in the case.” *Id.* at 631.

³⁹³ See Koehnken et al., *supra* note 378, at 211.

Assume, for example, that the suspect was the only person in the line-up wearing handcuffs. Under such circumstances the possibility exists that an eyewitness identifies the suspect even if he or she were completely innocent, simply because the fact that a person is wearing handcuffs strongly implies that this is the suspect. Thus, the identification response may not be determined by the similarity between the eyewitness’s image of the criminal in memory and the appearance of the suspect presented in the line-up but instead by inferences drawn from the line-up procedure.

Id.

³⁹⁴ See Wells et al., *supra* note 18, at 618.

³⁹⁵ See *id.* at 618-19.

³⁹⁶ See *id.* at 619.

Some forms of forensic evidence, such as fingerprints, DNA, and firearms patterns, are subject to criticism for not following scientific principles in the collection and analysis of the evidence. We see no reason why eyewitness identification evidence should not be treated in a similar fashion. In fact, the analogy between eyewitness evidence and physical trace evidence is itself

iv. Eyewitness Confidence

Of all the factors that predict eyewitness accuracy, researchers have devoted the most attention to the effects of eyewitness confidence.³⁹⁷ There are several reasons for the large number of studies on eyewitness confidence. First, it is one of the five factors that the United States Supreme Court enumerated in *Neil and Manson* that jurors must consider in evaluating the accuracy of eyewitness testimony.³⁹⁸ Next, scientific studies have shown that it is the single most important factor to jurors in judging whether an eyewitness has made an accurate identification.³⁹⁹ It also seems intuitively logical that if an eyewitness is confident of his identification, the eyewitness is more likely to be accurate at trial. Unfortunately, empirical research does not support this conclusion.⁴⁰⁰ Several studies have identified post-event factors that significantly increase the confidence, but not the accuracy, of eyewitness testimony.⁴⁰¹ These factors include post-event questioning, confirming feedback,⁴⁰² and repeating questions of witnesses.⁴⁰³ Thus, by the time of trial, eyewitness confidence has little probative value in assessing eyewitness accuracy because of the many factors that affect eyewitness confidence but not accuracy.⁴⁰⁴

useful. Eyewitness evidence can be construed as a type of trace evidence except that, unlike blood or fingerprints, the trace is in the brain of a human observer in a form of a memory. This memory trace even has some physical properties in the sense of being located as a neurological trace in the brain. Like physical evidence, the critical issue is how to extract the evidence in a way that is maximally diagnostic of identity.

Id. at 618-19.

³⁹⁷ *Id.* at 619.

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 620.

⁴⁰⁰ *Id.* at 625-26.

However, the studies of the confidence-accuracy relation and the studies of confidence malleability show that high confidence does not necessarily denote high accuracy and that high levels of confidence can come from external sources, such as giving a witness feedback about their choices or information about the behavior of other eyewitnesses.

Id. at 626.

⁴⁰¹ John S. Shaw, III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629, 630 (1996).

⁴⁰² See discussion *infra* Part IV.B.2.b.x.

⁴⁰³ *Id.*

⁴⁰⁴ See discussion *supra* Part III.B.

b. Guidelines for Conducting Identification Procedures

Based on the foregoing principles, law officers should apply the following ten guidelines when conducting identification procedures.⁴⁰⁵

i. Law Enforcement Should Use Identification Procedures Only When There Is Probable Cause to Believe the Suspect Committed the Crime

Many mistaken eyewitness identifications occur in culprit-absent identification procedures.⁴⁰⁶ Some law enforcement agencies place all suspects in photoarrays or lineups when they have little or no evidence of the suspect's guilt.⁴⁰⁷ In such circumstances, there is a substantial likelihood that the suspect is innocent and that the law enforcement agency is conducting a culprit-absent identification procedure.⁴⁰⁸ Requiring law enforcement agencies to have probable cause before placing a suspect in an identification procedure will significantly reduce the number of culprit-absent identification procedures.⁴⁰⁹

There are times, however, when law enforcement agencies use identification procedures as an investigatory tool rather than to establish a suspect's guilt.⁴¹⁰ In such circumstances, law enforcement agencies should distinguish between those eyewitnesses used to produce investigatory leads and those used to establish a defendant's guilt.⁴¹¹ An eyewitness used to

⁴⁰⁵ It should be noted that Gary L. Wells has recently reviewed the literature in the field and provided six recommendations for conducting identification procedures. See Gary L. Wells, *Eyewitness Identifications: Systemic Reviews*, 2006 WISC. L. REV. 615, 623-31 (2006). His recommendations coincide with six of the ten recommendations in this article. Wells's six recommendations are: "(1) Only one suspect per lineup; (2) The suspect should not 'stand out'; (3) Caution that the offender might not be in the lineup; (4) The sequential procedure; (5) Double-blind testing; and (6) Collect a confidence statement at the time of the identification." *Id.* at 623-31. However, we independently arrived at these six recommendations through our own review of the eyewitness literature, as reflected in earlier drafts of this article completed before we had access to Wells's findings. We are gratified that our recommendations coincide with those of the leading expert on identification procedures.

⁴⁰⁶ Wells & Olson, *supra* note 8, at 286 ("Research repeatedly shows that culprit-absent lineups present great problems for eyewitnesses.").

⁴⁰⁷ *Id.* "Investigators will place a suspect in a lineup for the slightest of reasons (e.g., a mere hunch)." *Id.* at 290.

⁴⁰⁸ *Id.* at 289-90.

⁴⁰⁹ See *id.*

⁴¹⁰ Steven Penrod, *How Well Are Witnesses and Police Performing?*, CRIMINAL JUSTICE, Spring 2003, available at <http://www.abanet.org/crimjust/spring2003/eyewitness.html>.

⁴¹¹ *Id.*

generate leads in a case should not also be used to establish a defendant's guilt at trial.⁴¹²

ii. Before Conducting an Identification Procedure, It Should Be Determined Whether the Eyewitness Has Previously Seen the Suspect

Prior to conducting an identification procedure, it is important to ascertain if an eyewitness has seen the suspect before or after the crime.⁴¹³ If this has occurred, the nature of the prior viewing of the eyewitness should be determined,⁴¹⁴ as well as the outcome of any earlier identification procedure.⁴¹⁵ These determinations are vital because prior exposure of an eyewitness to a suspect, such as in a mug book, substantially increases the likelihood that an eyewitness will later identify that suspect in a subsequent identification procedure, even if the suspect did not commit the crime.⁴¹⁶

iii. Only One Suspect Should Be Included in Every Identification Procedure

Many lineups in the United States contain more than one suspect, even when there is only one perpetrator who committed the crime.⁴¹⁷ Research has shown that the use of multiple suspects in identification procedures significantly increases the risk of erroneous identifications.⁴¹⁸ This increased risk occurs because multiple suspects decrease the proportion of

⁴¹² *See id.*

⁴¹³ Koehnken et al., *supra* note 378, at 217.

⁴¹⁴ *Id.* at 218.

⁴¹⁵ *Id.*

⁴¹⁶ Evan Brown et al., *Memory for Faces and the Circumstances of Encounter*, 62 J. APPLIED PSYCHOL. 311, 311-18 (1977); *see also* Koehnken et al., *supra* note 378, at 217.

The witness might have (a) seen pictures in the media; (b) been shown one, several, or a whole battery of photographs (mug shots) from police files in order to locate the identity of a still unknown suspect; or (c) been present at an earlier line-up containing the suspect. What are the consequences of having seen the suspect in earlier presented photographs on identification accuracy in subsequently presented line-ups? . . . Research shows that identification errors may increase from previous exposure to a photograph of the suspect. . . . Once a witness comes to a decision and expresses it, he or she may feel committed and may be less willing to change the decision later.

Koehnken et al., *supra* note 378, at 217.

⁴¹⁷ Wells et al., *supra* note 310, at 593. "Although some lineups may be composed entirely of suspects, the opinions of legal experts and psychologists clearly argue against such practices. The advantages of having known-innocent foils in lineups are numerous, and single-suspect lineups are therefore the state-of-the-art model . . ." R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 557 (1985) (citations and internal quotations omitted).

⁴¹⁸ Wells et al., *supra* note 310, at 593.

fillers⁴¹⁹ in the lineup and increase the number of correct responses.⁴²⁰ Putting more than one suspect in a lineup significantly increases the probability that an eyewitness will choose an innocent suspect.⁴²¹

iv. The Number of Lineup Members Should be Increased

Although it would be arbitrary to pick a specific number of lineup members for each identification procedure, there is substantial evidence that increasing the lineup size in the United States from the traditional five or six members is necessary to decrease the number of erroneous eyewitness identifications.⁴²² If an innocent suspect is included in an unbiased identification procedure, the probability that an eyewitness will identify an innocent suspect is $1/N$, where N represents the number of lineup members.⁴²³ Thus, the probability that an eyewitness will identify the innocent suspect due to chance is $1/5$ in an unbiased, five-person lineup and $1/6$ in an unbiased six-person lineup.⁴²⁴ Levi and Lindsay have persuasively argued that, in culprit-absent identification procedures, eyewitnesses identify innocent lineup members approximately 60% of the time.⁴²⁵ Accordingly, in unbiased five- or six-person culprit-absent identification procedures, innocent suspects are still, on average, respectively identified 10% and 12% of the time. These high rates of potential error indicate that the traditional five- or six-identification

⁴¹⁹ A lineup or photoarray contains a suspect and several known innocent individuals. *Id.* at 584. The innocent members of an identification procedure are referred to either as distractors, foils, or fillers. *Id.* at 584-85. The term "fillers" is used in this article to describe known innocent lineup members in this section because it is the term that is most commonly used by law enforcement.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² Avraham M. Levi & R.C.L. Lindsay, *Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations*, 7 *PSYCHOL. PUB. POL'Y & L.* 776, 787 (1990).

Considering the fact that any lineup size is arbitrary, should this limit researchers from making further recommendations? Given the situation, it seems more reasonable to point out the relationship between lineup size and false identification rate and recommend using larger lineups. At the very least, comparisons to other countries could be used to demonstrate that the American, 6-person lineup is not the largest (e.g., 9 or 10 persons are used in England and 12 in Canada). There is no evidence that Canadian and English police are unable to obtain identification evidence despite using larger lineups. Available research evidence shows no decline in correct identification from simultaneous lineups of at least 20 persons. Mug shot research suggests that even larger lineups may not compromise correct identification rates.

Id.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

procedures used in the United States have too few members to prevent erroneous identifications, even when they are otherwise fair.⁴²⁶

v. The Suspect in an Identification Procedure Should Not Stand Out from the Foils

As previously stated, sound scientific principle informs us that, when conducting an experiment, it is important not to convey the experimenter's hypothesis to the participants.⁴²⁷ If the participants know the experimenter's hypothesis, it could cause them to respond in a manner that confirms the hypothesis, rather than in the manner they would normally respond to the experimental stimuli.⁴²⁸

Likewise, in an identification procedure where the suspect stands out, it cannot be determined if the eyewitness selected the suspect because he or she recognized the suspect as the perpetrator of the crime, or because of the biasing effect of the fillers in the identification procedure.⁴²⁹ In such circumstances, an eyewitness's identification of the suspect does not constitute forensically valid evidence of the suspect's guilt.⁴³⁰

Research indicates that the best way to achieve this goal is generally by having the fillers match the eyewitness's description of the perpetrator of the crime.⁴³¹ At the same time, the fillers should not be so similar to the suspect that an eyewitness cannot recognize the suspect if he or she is the perpetrator of the crime.⁴³² This increased similarity does not generally provide any greater protection to innocent suspects and decreases the number of accurate identifications.⁴³³

Showups,⁴³⁴ in particular, are unduly suggestive identification procedures, resulting in more false identifications than lineups.⁴³⁵

⁴²⁶ Levi and Lindsay state that increasing lineup size from six to twelve members could potentially reduce false identification rates by 50% in the United States. *Id.* at 780.

⁴²⁷ Wells et al., *supra* note 18, at 627.

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 630.

⁴³⁰ *See id.*

⁴³¹ Wells et al., *supra* note 310, at 585. See Wells et al., *supra* note 18, at 632-34, for procedures in selecting fillers when the suspect does not match the eyewitness's description, the suspect has unique non-described features, the suspect has common non-described features, the eyewitness description of the perpetrator is unique, or there is more than one eyewitness.

⁴³² See Wells et al., *supra* note 18, at 639.

⁴³³ *Id.*

⁴³⁴ "A showup refers to the observation of a single suspect by a witness in the field, typically at the crime scene." Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 477 (2001).

Accordingly, the use of showups is only appropriate in circumstances where less suggestive identification procedures cannot be used.⁴³⁶

vi. Law Officers Should Use Sequential Identification Procedures

In simultaneous lineups, the witness views all lineup members at once and then makes an identification decision. In sequential lineups, the witness views the lineup members one at a time and is asked to make an identification decision after viewing each one. The witness is instructed that each lineup member will be presented only once and is not told how many lineup members will be presented. The lineup stops when the witness identifies someone or has seen all the lineup members without identifying anyone. Reliably fewer false identifications are obtained with sequential than with simultaneous presentation. Furthermore, Lindsay, Lea, Nosworthy, et al. (1991) found that sequential presentation reduced the effects of foil, instruction, and clothing biases as compared to simultaneous presentation. Thus, simultaneous lineups are considered to be presentation-biased and sequential lineups to be presentation-unbiased.⁴³⁷

Moreover, Leippe opines that sequential lineups reduce inaccurate identifications because they “encourage witnesses to make absolute judgments . . . instead of comparative or relative judgments.”⁴³⁸ Even the Department of Justice’s Guide for the collection of eyewitness evidence notes the use of sequential lineups, stating that they “produce more reliable evidence.”⁴³⁹ The superiority of sequential identifications procedures in

⁴³⁵ *Id.* Behrman and Davey found the suspect identification rate to be highest for showups, but conclude that this high rate of identification is due to the biasing nature of showups. *Id.* at 486-87.

⁴³⁶ An example of a case in which exigent circumstances justified the use of a showup is *Stovall v. Denno*, 388 U.S. 293 (1967). In *Stovall*, the police held a showup in a hospital because of concerns that the eyewitness would not live long enough to participate in other less suggestive identification procedures. *Id.* at 295.

⁴³⁷ Stinson et al., *supra* note 215, at 212.

⁴³⁸ Leippe, *supra* note 88, at 918 (citations omitted).

⁴³⁹ NAT’L INST. OF JUSTICE, *supra* note 375, at 9. The State of New Jersey requires sequential lineups, and a New York court ordered a double-blind sequential lineup in at least one case. Headley, *supra* note 94, at 699-700. Furthermore:

New Jersey’s reforms have influenced other states to examine the possibility of adopting similar lineup protocols. In 2002, Illinois Governor George H. Ryan’s Commission on Capital Punishment, charged with ensuring the accuracy and justness of capital punishment in Illinois, recommended the implementation of eyewitness identification reforms. The North Carolina Actual Innocence Commission created a series of recommendations in 2003 for state law enforcement officers, including a comprehensive lineup protocol. In early 2005, the Avery Task Force made similar recommendations for the Wisconsin criminal justice system. The Virginia General Assembly also instructed the Virginia State Crime Commission to create guidelines for improving lineup procedures in the commonwealth.

Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L., POL’Y & ETHICS 381, 386-87 (2006).

It should be noted that a recent study by Sherry L. Mecklenberg conducted on behalf of the State of Illinois criticized the use of sequential lineups. SHERRY L. MECKLENBERG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 6 (2006), available at http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Report.pdf (“Surprisingly, the Illinois data did not bear out the research experiments that sequential, double-blind lineups produce a lower rate of known false identifications. Instead, the sequential, double-blind procedures resulted in an overall *higher* rate of known false identifications than did the simultaneous lineups.”).

However, the experimental design of the Illinois study has been strongly criticized by Gary L. Wells, the leading eyewitness researcher:

My main reaction is disappointment and concern that the design of the study does not permit any clear conclusions. The reason it does not permit clear conclusions is because the simultaneous lineups never used the double-blind procedure whereas the sequential lineups always used the double-blind procedure. This is extremely problematic because the failure to use double-blind procedures with the simultaneous lineups leaves open several “lineup-administrator influenced” means by which filler identifications could be suppressed and identifications of the suspect enhanced. These lineup-administrator influences were not available for the sequential because the sequential was conducted using double-blind procedures.

Gary L. Wells, Gary L. Wells’ Comments on the Mecklenberg Report 1 (2006), http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Project_Wells_comments.pdf.

Wells continues:

There is one claim in the Mecklenberg Report that I can state unequivocally to be false, or at least terribly misleading. Specifically, it is stated on page 32 that “The protocols and forms, like the surveys, were viewed and approved by Professors Malpass, Ebbesen, Wells, and Steblay.” Although I did examine the survey, I had no input to or knowledge of the design of the study. In fact, I was shocked when I learned of the failure of the study to include a double-blind control for the simultaneous lineups, a fact I learned only when I read the final report. Nancy Steblay clearly states that she too had no idea that this study would have this design flaw. I have asked Sherri [*sic*] Mecklenberg to correct this misperception, but no corrections have yet been made as far as I am aware.

Id. at 4.

Nancy Steblay, another leading expert, states, “My primary concern with the Illinois report is that its conclusion appears to [have] minimal appreciation of the underlying reasons for these outcomes or the broader context of what is known about eyewitness fallibility.” Nancy Steblay, Observations on the Illinois Lineup Data 6 (May 3, 2006), available at http://www.psychology.iastate.edu/FACULTY/gwells/Steblay_Observations_on_the_Illinois_Data.pdf. She also reports that “[Hennepin County]’s [the county of Minnesota where Minneapolis is located] conclusion is that the blind-sequential procedure is working well in Minnesota. Acceptable suspect ID rates and lower filler rates suggest a protocol that will help to convict the guilty and protect the innocent.” *Id.* at 7. “The experience of the pilot project [in Hennepin County] indicates that the double-blind sequential protocol is workable for police in both large and small departments without undercutting the ability to solve cases. At the same time, the protocol elicits valuable new information for the effective investigations and prosecution of criminal cases.” Klobuchar et al., *supra* note 439, at 413.

The State of Wisconsin also recently declined to alter its new eyewitness procedures in response to the Illinois report, stating that “the design of the program does not seem to support [the] inference or conclusion [that the higher rate of filler identification is due to the sequential procedure].” Bureau of Training and Standards for Criminal Justice, Wis. Dep’t

preventing erroneous identifications has been demonstrated in experiments in the United States, Canada, the United Kingdom, South Africa, Germany, and Australia, making it one of the most highly verified findings in all of the scientific literature on eyewitness testimony.⁴⁴⁰

vii. The Lineup Administrator Should Not Know the Identity of the Suspect

It is common practice for the lineup administrator to know the identity of the suspect when conducting an identification procedure.⁴⁴¹ Referring back to the lineup-as-experiment analogy, scientists have long known that double blind procedures, where the experimenter does not know which participants are in the experimental and control groups, are necessary to prevent improper influencing of participants through verbal and nonverbal cues.⁴⁴² In other words, double-blind procedures are used in experiments because people have a natural tendency to test their hypotheses in a manner that confirms them.⁴⁴³ Furthermore, research reveals that a lineup administrator's knowledge of the identity of the suspect does indeed increase the probability that the eyewitness will identify the suspect as the perpetrator of the crime.⁴⁴⁴ Thus, the lineup administrator should not know the identity of the suspect.⁴⁴⁵

of Justice, Response to Chicago Report on Eyewitness Identification Procedures 4 (July 21, 2006), available at <http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf>. It further states that "the extensive prior laboratory research revealing that the double-blind and sequential procedures are superior remains the best scientific information available." *Id.*

⁴⁴⁰ Wells et al., *supra* note 310 at 586.

⁴⁴¹ Wells et al., *supra* note 18, at 627.

⁴⁴² Bradfield et al., *supra* note 15, at 118 ("A lineup administrator who is invested in the outcome of a witness's identification cannot be expected to have the same reaction (verbally or nonverbally) to a filler identification that he or she has to an identification of the suspect. Even if investigators are cautioned against giving feedback to eyewitnesses, involuntary reactions to a witness's selection are difficult to conceal."). "Despite research findings showing its benefits, police are resistant to using double-blind testing because they perceive it as a loss of control and as a suggestion that they cannot conduct fair lineups." Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. APPLIED PSYCHOL. 1106, 1106 (2004).

⁴⁴³ Wells et al., *supra* note 18, at 627-29.

⁴⁴⁴ Bradfield et al., *supra* note 15, at 112.

⁴⁴⁵ Garrioch & Brimacombe, *supra* note 331, at 306. The Illinois study also criticized the use of the double-blind method. However, it has been refuted by such scholars as Wells and Steblay and rejected by the State of Wisconsin. See discussion *supra* note 439.

viii. Eyewitnesses Should Be Given Cautionary Instructions

The lineup administrator should inform the eyewitness that the perpetrator of the crime may not be in the lineup.⁴⁴⁶ By giving this instruction, the lineup administrator alerts the eyewitness to the possibility that the perpetrator of the crime is not in the lineup, thereby legitimizing the decision of an eyewitness who makes this determination and discouraging relative judgments by the eyewitness.⁴⁴⁷ The lineup administrator should also inform the eyewitness he or she does not know the suspect's identity.⁴⁴⁸ This prevents the eyewitness from looking to the administrator for clues to the identity of the suspect or to validate their choice of a lineup member.⁴⁴⁹

Research has shown that these instructions significantly decrease the number of erroneous eyewitness identifications without significantly decreasing the number of accurate identifications.⁴⁵⁰ In fact, a study by Steblay, which combined the results of 22 prior tests on this topic using 2588 participants, found that a cautionary instruction warning that the perpetrator may not be in the lineup reduced the rate of erroneous identifications by 42% in culprit-absent identification procedures. It also only reduced the rate of accurate identifications in culprit-present identification procedures by 2%.⁴⁵¹

ix. All Identification Procedures Should Be Videotaped

Videotaping of identification procedures serves several purposes. First, due to memory error, confirmation bias, or intentional distortions, the manner in which identification procedures are conducted is not always accurately reported in law enforcement reports or in eyewitness testimony.⁴⁵² Second, videotaping of identification procedures would help to protect law officers from false accusations that an identification procedure was improperly conducted or biased.⁴⁵³ Last, videotaping is necessary to ensure that there is a complete record of how the identification

⁴⁴⁶ Wells et al., *supra* note 18, at 629.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instructions Effects*, 21 LAW & HUM. BEHAV. 283, 294 (1997) (meta-analysis concerning a cautionary instruction warning the eyewitness that the perpetrator may not be in the lineup).

⁴⁵¹ Wells et al., *supra* note 310, at 585.

⁴⁵² Saul M. Kassir, *Eyewitness Identification Procedures: The Fifth Rule*, 22 LAW & HUM. BEHAV., 649, 649 (1998).

⁴⁵³ *Id.* at 650.

procedure was conducted so that juries, judges, and attorneys can evaluate the procedure's fairness.⁴⁵⁴ Without such a record, all the other safeguards for conducting fair identification procedures would be meaningless.⁴⁵⁵

x. An Eyewitness Should Make a Clear Statement of His or Her Confidence at the Time of the Identification and Prior to Receiving Any Feedback

As we have seen, eyewitness confidence is the single most important factor that triers of fact use in evaluating the accuracy of eyewitness identifications.⁴⁵⁶ However, we also know eyewitness confidence is malleable.⁴⁵⁷ By the time of trial, it has little diagnostic value in determining the accuracy of an eyewitness's identification.⁴⁵⁸ Research also shows that, when eyewitnesses are asked at trial how confident they were when they made the identifications, they do not have accurate memories of their level of confidence at the time of the identifications, reporting instead their present level of confidence.⁴⁵⁹ Accordingly, taking a statement of confidence from an eyewitness after an identification ensures that the most accurate possible estimate of the eyewitness's true level of confidence is obtained.⁴⁶⁰

Because of the importance of identification procedures to accurate identification and because most of the factors that affect identification

⁴⁵⁴ *Id.*

⁴⁵⁵ *See id.* at 652.

⁴⁵⁶ Wells & Bradfield, *supra* note 65, at 361.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 362.

⁴⁵⁹ *Id.*

⁴⁶⁰ *See id.* at 375 ("Even if the confidence-prophylactic effect is short-lived, at the very least the confidence statement taken at the time of the identification can then be a matter of record and subject to usual discovery procedures so that any later inflation in confidence can be noted for the trier of fact and perhaps discounted accordingly.").

A recent review of existing research underscored the need for lineup administrators to assess eyewitness confidence before providing any feedback. Analysis of twenty laboratory tests demonstrated that confirmatory feedback immediately after the identification (i.e., "Good, you identified the actual suspect.") significantly inflated the participant-witness's retrospective confidence reports when compared with a control group that was told nothing about identification accuracy. In other words, those witnesses whose choice was praised indicated that they had been more certain of the identification from the outset. Confirmatory feedback similarly influenced eyewitnesses' reports of the quality of their view of the perpetrator, their degree of attention, their ease of identification, and of the basis for their identification. Participant-witnesses who received immediate confirmatory feedback were also more willing to testify about the identification and reported a greater ability to remember strangers. These outcomes support the desirability of double-blind lineup administration and prompt, full recording of eyewitness certainty comments.

Klobuchar et al., *supra* note 439, at 390.

accuracy can be controlled, implementation of the guidelines enumerated above is one of the most potent means available to the criminal justice system to reduce eyewitness error. However, improvements in eyewitness evidence gathering and identification procedures can only be effective if the principal participants in the criminal justice system are educated about their importance and use.

C. THIRD COMPONENT OF THE TRIPARTITE SOLUTION: EDUCATING THE PRINCIPAL PARTICIPANTS IN THE CRIMINAL JUSTICE SYSTEM ABOUT EYEWITNESS TESTIMONY

"I had," said he, "come to an entirely erroneous conclusion, which shows, my dear Watson, how dangerous it always is to reason from insufficient data."⁴⁶¹

1. Introduction

As previously discussed, psychological studies have indicated that education about eyewitness testimony is both clearly necessary and sorely needed. For example, Wise and Safer surveyed 160 judges about their knowledge of eyewitness factors, their beliefs about jurors' knowledge of eyewitness factors, and what legal safeguards they would permit attorneys to use to educate juries about eyewitness factors.⁴⁶² They found that the judges in their survey had limited knowledge of eyewitness factors.⁴⁶³

Judges who were more knowledgeable about eyewitness factors had many of the beliefs that may be necessary to reduce eyewitness error.⁴⁶⁴ Thus, greater knowledge of eyewitness factors for the judges was associated with: (1) permitting the greater use of legal safeguards, including expert testimony, to educate jurors about eyewitness factors; (2) believing jurors have limited knowledge of eyewitness factors; (3) agreeing defendants should be convicted solely on the basis of eyewitness testimony only in exceptional circumstances; (4) knowing the important role that eyewitness error plays in wrongful convictions; (5) realizing judges need more training on eyewitness factors; and (6) reporting marginally greater exposure to educational materials about eyewitness testimony.⁴⁶⁵

⁴⁶¹ ARTHUR CONAN DOYLE, *The Adventure of the Speckled Band*, in GREAT CASES OF SHERLOCK HOLMES 152, 178 (Franklin Library 1987).

⁴⁶² Wise & Safer, *supra* note 11, at 7.

⁴⁶³ *Id.* at 13.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

These beliefs were not associated with the number of years a judge had practiced law or been on the bench.⁴⁶⁶ They were also not associated with judicial position or whether a judge had practiced criminal law.⁴⁶⁷ The study suggests that legal and judicial experience do not ensure that judges will have the beliefs necessary to reduce eyewitness error significantly.⁴⁶⁸ Well-designed education programs about eyewitness testimony may be beneficial in helping judges develop those beliefs.⁴⁶⁹

In a follow-up study, Wise and Safer administered the same questionnaire on eyewitness testimony to 57 law students and 121 undergraduates to compare their responses to the judges.⁴⁷⁰ The result of this study showed that all three groups had limited knowledge about eyewitness factors.⁴⁷¹ The judges were no more knowledgeable about eyewitness testimony than the undergraduates.⁴⁷² The law students were slightly more knowledgeable than the other two groups.⁴⁷³

The study indicated that, like the more knowledgeable judges, more knowledgeable undergraduates and law students had many of the beliefs that may be necessary to reduce eyewitness errors, such as being less willing to convict defendants solely on the basis of eyewitness testimony,⁴⁷⁴ giving more accurate estimates of the number of wrongful convictions due to eyewitness testimony,⁴⁷⁵ and reporting greater skepticism about jurors' knowledge of eyewitness factors.⁴⁷⁶ Increased knowledge for the students was also associated with greater willingness to permit the use of legal safeguards, including expert testimony.⁴⁷⁷ This study suggests that educating jurors, attorneys, police officers, and judges about eyewitness testimony may be useful in decreasing eyewitness error.⁴⁷⁸

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ See Wise & Safer, *supra* note 148, at 12-13, 15.

⁴⁷⁰ *Id.* at 2.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 13.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.* at 4.

2. Benefits of Educating the Principal Participants About Eyewitness Testimony

Educating the principal participants in criminal trials about eyewitness testimony could have many important benefits. For example, judges who are more knowledgeable about eyewitness testimony may be more likely to grant motions to suppress eyewitness identifications for suggestive identification procedures, to admit eyewitness expert testimony when it is needed, and to draft better jury instructions about eyewitness testimony. In some cases, knowledgeable judges may be able to draft jury instructions and conduct trials in such a manner that eyewitness expert testimony would be unnecessary.

Attorneys who are more knowledgeable about eyewitness testimony may be better able to determine when identification procedures are suggestive, when law officers' interviews of eyewitnesses have contaminated their memory of the crime, and when eyewitness testimony is likely to be inaccurate. They may be more likely to file motions to suppress identifications and present eyewitness expert testimony when it is needed. In addition, more knowledgeable attorneys could more effectively cross-examine eyewitnesses and present more cogent arguments to the trier of fact about the accuracy of eyewitness testimony.

Law officers who are more knowledgeable about eyewitness testimony would obtain more information from eyewitnesses, would be less likely to contaminate eyewitnesses' memory of crimes, and would be more likely to conduct unbiased identification procedures.

Finally, more knowledgeable jurors would be better able to assess the accuracy of eyewitness testimony; to understand cross-examinations, attorney arguments, and jury instructions about eyewitnesses; and to comprehend eyewitness expert testimony.

As was stated previously, many legal safeguards, such as cross-examination and closing arguments, are ineffective in part because of attorneys', judges', and jurors' lack of knowledge about eyewitness factors.⁴⁷⁹ Increasing these groups' knowledge of eyewitness factors would enhance the effectiveness of legal safeguards and decrease the need for eyewitness experts.

3. Means to Educate Principal Participants About Eyewitness Testimony

There are several means that could be used to educate the principal participants in the criminal justice system about eyewitness testimony. Law schools, police academies, judicial education programs, and continuing

⁴⁷⁹ See discussion *supra* Part IV.A.1.b.i-v.

legal education programs could educate law students, law officers, judges, and attorneys about eyewitness testimony. Jurors could be educated about eyewitness testimony when they are called for jury duty. Psychology and criminal justice courses in high schools and colleges could also be used to educate the general public about eyewitness testimony. Given the high social cost of wrongful convictions, the time and money invested in education would be well spent.

V. PROCEDURAL DUE PROCESS CONCERNS AND CONCLUSION

Headley explains why it is necessary to incorporate scientific research into constitutional jurisprudence:

To banish scientific advancements from the realm of constitutional law is to ground the narrative of constitutional jurisprudence in myth and to shroud the people's fate in mystery. Moreover, a lack of willingness to base its decisions in well-supported scientific research supports the perception that the Court's opinions are nothing more than just that: the opinions of a group of nine people assembled under the guise of law. . . . [We should take] a normative view of the Due Process Clause that would require the Court to rely upon widely accepted research in finding inadequate "process of law" in current approaches to eyewitness identification procedures. In the end, it is ironic that social scientific research seems designed to be relegated to a mere footnote in the annals of constitutional jurisprudence.⁴⁸⁰

Dripps posits that procedural due process analysis asks us if the state's procedure subjects the accused to an "unacceptably high risk of an erroneous decision."⁴⁸¹ Headley states that "scholars readily agree that the Due Process Clause guarantees a minimum level of procedural fairness."⁴⁸² Applying this analysis to eyewitness testimony leads to the conclusion that due process requires the elimination of unreasonable risks that defendants will be wrongfully convicted from eyewitness errors. Therefore, it is

⁴⁸⁰ Headley, *supra* note 94, at 702. Dripps states:

[T]he conservative Court practically has banned due process analysis from police practice cases, leaving the field regulated solely by the Fourth, Fifth, and Sixth Amendments. This is a grave disservice to innocent suspects. Pretrial procedure can leave the criminal defendant facing erroneous but now entrenched identification testimony, without the benefit of exculpatory physical evidence the police neglected to collect or preserve, defended by an overworked lawyer with no time to conduct a new investigation. This can (and does) happen, without any unreasonable searches, without any compelled testimony, and without any denial of counsel. The distinction between investigation and adjudication is far less palpable than current doctrine admits.

Dripps, *supra* note 8, at 649-50.

⁴⁸¹ Dripps, *supra* note 8, at 653.

⁴⁸² Headley, *supra* note 94, at 696. Indeed, the Supreme Court has found due process violations in some suggestive lineup procedures, such as in *Foster v. California*, 394 U.S. 440, 442 (1969). In most cases, however, the Court has held that suggestive identification procedures do not violate due process. Headley, *supra* note 94, at 697-98.

necessary to determine what procedural safeguards are required to achieve this constitutionally mandated level of eyewitness accuracy.

This article's review of scientific research on eyewitness error has revealed the following. Eyewitness testimony plays a role in over half of all wrongful convictions.⁴⁸³ Many eyewitnesses have great difficulty making accurate identifications of perpetrators of crimes.⁴⁸⁴ The standard law enforcement interview of an eyewitness significantly contributes to wrongful convictions because it fails to obtain much of the information that an eyewitness knows about a crime and contaminates an eyewitness's memory of the crime.⁴⁸⁵ Once a suggestive identification procedure is conducted, generally it cannot be determined whether an eyewitness's identification of a suspect is due to the eyewitness's memory of the perpetrator of the crime or to the suggestive identification procedure.⁴⁸⁶

Because an eyewitness's memory is highly malleable, at trial most eyewitnesses cannot accurately recall the quality of their view of the perpetrator of the crime, how well they remembered the details of his or her face, the amount of attention they paid to the perpetrator, the basis for their selection of a lineup member, the ease or speed of their identification, and their degree of confidence in the accuracy of their identification when they made it.⁴⁸⁷ Generally, eyewitnesses cannot determine if a lineup administrator has intentionally or unintentionally influenced their choice of the suspect of a crime.⁴⁸⁸ When assessing eyewitness testimony, jurors tend to rely on factors that are not good indicators of eyewitness accuracy and ignore factors that are good indicators of eyewitness accuracy.⁴⁸⁹ Jurors cannot distinguish between accurate and inaccurate eyewitnesses.⁴⁹⁰

Scientific research also leads to the conclusion that current procedural safeguards are inadequate to prevent wrongful convictions from eyewitness error. The factors enumerated by the Supreme Court in *Neil* and *Manson* are grossly deficient, including factors that are irrelevant to assessing eyewitness accuracy and omitting others that are necessary to make this determination.⁴⁹¹ These factors further contribute to eyewitness error because they are premised on fallacious assumptions about eyewitness

⁴⁸³ See discussion *supra* Part II.A.

⁴⁸⁴ *Id.*

⁴⁸⁵ See discussion *supra* Part IV.A-B.

⁴⁸⁶ See discussion *supra* Part IV.B.1.

⁴⁸⁷ Wells & Bradfield, *supra* note 65, at 366-67.

⁴⁸⁸ Haw & Fisher, *supra* note 442, at 1110.

⁴⁸⁹ See discussion *supra* Part IV.A.1.a.

⁴⁹⁰ *Id.*

⁴⁹¹ See discussion *supra* Part III.A.

testimony.⁴⁹² They assume that at trial eyewitnesses can accurately recall the eyewitness factors that the Supreme Court has enumerated for assessing eyewitness accuracy and that it can be determined whether an eyewitness identification from a suggestive procedure is accurate.⁴⁹³

Current procedural safeguards fail to mandate that eyewitness expert testimony be admitted when the sole or primary evidence against the defendant is eyewitness testimony, though these cases present the greatest risk that eyewitness error will result in an erroneous verdict. They also do not require that interviews and identification procedures be conducted in a manner that would significantly reduce eyewitness error.

In short, current procedural safeguards for preventing eyewitness error violate due process because they create an unreasonable risk that a defendant will be wrongfully convicted because of eyewitness error. They also violate procedural due process because they fail to incorporate scientific procedures for reducing eyewitness error, which could be implemented without imposing an unreasonable financial or administrative burden on the legal system.⁴⁹⁴

Dripps opines that, to truly honor procedural due process, protocols designed to avert eyewitness error like the tripartite solution should be converted into “*Miranda*-like rules of constitutional law.”⁴⁹⁵ Thus, we could effectively reduce erroneous eyewitness testimony to levels that comport with procedural due process by instituting the tripartite solution to eyewitness error proposed in this article. By admitting eyewitness expert testimony in appropriate circumstances and by educating the principal participants in the criminal justice system about eyewitness testimony, the legal system will insure that triers of fact can competently assess the accuracy of eyewitness testimony. Requiring law enforcement agencies to use the cognitive interview will significantly increase the amount of accurate information that is obtained from eyewitnesses and prevent them from contaminating eyewitnesses’ memories of crimes. Implementing the guidelines for conducting identification procedures delineated in this article

⁴⁹² See Koehnken et al., *supra* note 378, at 208.

⁴⁹³ See *id.*; see also Klobuchar et al., *supra* note 439, at 390.

⁴⁹⁴ See, e.g., Headley, *supra* note 94, at 700. Klobuchar states:

Overall, police chiefs and investigators alike found the pilot project [for implementing double-blind sequential lineup procedures] to be easier to implement and less work than anticipated. Implementation was extremely efficient. . . . The pilot project also involved minimal cost. From an administrative perspective, the police chiefs initially wondered whether the need for blind administrators would significantly increase work-hours. As Minnetonka police chief Joy Rikala noted, however, “There [are] no cost implications of this. It’s negligible.”

Klobuchar, *supra* note 439, at 409 (internal citations omitted).

⁴⁹⁵ Dripps, *supra* note 8, at 658-59.

will significantly reduce the number of erroneous identifications and give triers of fact an objective standard for determining if an identification procedure is fair.

Finally, implementing the tripartite solution is essential because the continual discovery of eyewitness error undermines the credibility of the legal system.⁴⁹⁶ Adapting the tripartite solution is also vital because, as Dr. Wells states, “False identifications are a double injustice. . . . It is a nightmare for the innocent person, while the actual culprit remains at large.”⁴⁹⁷ Thanks to scientific research, it is a nightmare from which we can at long last awake.

⁴⁹⁶ Wise & Safer, *supra* note 11, at 16.

⁴⁹⁷ Goleman, *supra* note 3, at C7 (quoting interview with Gary Wells).

