

2012 – MARCH TEAM PROGRAM MATERIALS

1. *Perry v. New Hampshire*, United States Supreme Court (1-11-12)
2. *Perry v. New Hampshire* Oral Argument Transcript (11-2-11)
3. *United States v. Andres De Leon-Quinones*, United States Court of Appeals for the First Circuit (12-7-09)
4. *State of New Jersey v. Larry R. Henderson*, New Jersey Supreme Court (8-24-11)
5. *Commonwealth of Pennsylvania v. Benjamin Walker*, Pennsylvania Superior Court (8-23-10)
6. Report of the Pennsylvania Advisory Committee on Wrongful Convictions (September 2011)
7. Eyewitness Evidence in 2012: The State of the Law, by Jules Epstein, *The Legal Intelligencer* (2-13-12)
8. A Test of the Simultaneous vs. Sequential Lineup Methods: An Initial Report of the AJS National Eyewitness Identification Field Studies (2011)
9. *Commonwealth of Pennsylvania v. Benjamin Walker* – Brief for Amicus Curiae American Psychological Association in Support of Appellant (8-1-11)
10. Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (June 1996)
11. Convicting the Innocent: Where Criminal Prosecutions Go Wrong, by Brandon Garrett
12. Independent Report of Law Enforcement and Victim Representative Members of the Advisory Committee on Wrongful Convictions (September 2011)
13. *Perry v. New Hampshire*: Reflections on the Oral Arguments of Nov. 2, 2011, by Gary L. Wells (11-3-11)
14. Innocence Project Page on Eyewitness Identification
15. Picking Cotton Website
16. Report of The Special Master (*State of New Jersey v. Larry Henderson*) (6-18-10)
17. True Witness: Cops, Courts, Science and the Battle against Misidentification, by James Doyle
18. Eyewitness: How Accurate is Visual Memory? (60 Minutes)

19. Justices Mull Having Expert Testimony About Eyewitnesses, by Amaris Elliot-Engel, *The Legal Intelligencer* (3-8-12)
20. Time for High Court to Update Eyewitness Identification Protocols, *The Legal Intelligencer* (10-27-11)

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 10-8974, Perry v. New Hampshire.

5 Mr. Guerriero.

6 ORAL ARGUMENT OF RICHARD GUERRIERO

7 ON BEHALF OF THE PETITIONER

8 MR. GUERRIERO: Mr. Chief Justice, and may
9 it please the Court:

10 An eyewitness identification made under a
11 suggestive influence presents a unique danger of
12 misidentification and a miscarriage of justice. It is
13 that danger of misidentification which implicates due
14 process and requires an evaluation of the reliability of
15 the identification. The constitutional --

16 JUSTICE SOTOMAYOR: Counselor, does your
17 position depend on police involvement at all?

18 MR. GUERRIERO: No, Your Honor.

19 JUSTICE SOTOMAYOR: I'm -- if a private
20 investigator shows a picture or -- that has no
21 connection to the police, a company's investigator?

22 MR. GUERRIERO: What I suggest --

23 JUSTICE SOTOMAYOR: Or the news media
24 publishes a picture of someone that it thinks --

25 MR. GUERRIERO: I have a two-part answer to

1 that. The -- the significance of the suggested
2 influence is how it affects reliability. Most of the
3 time that influence, the defense will allege, is from
4 some police activity, and rightly so because they are
5 mostly involved and rightly so because police suspicion
6 is the kind of influence that would direct the witness's
7 attention and say that's the man.

8 But it's not necessarily required, and in
9 fact one of the Federal court of appeal cases, Dunnigan
10 v. Keane, involved exactly that, a private investigator,
11 where a private investigator from a bank showed
12 surveillance photos to the witness and then later the
13 witnesses made an ID.

14 JUSTICE SCALIA: Mr. Guerriero, if it's
15 not -- if it's not limited to suggestive circumstances
16 created by the police, why is unreliable eyewitness
17 identification any different from unreliable anything
18 else? So shouldn't we look at every instance of
19 evidence introduced in criminal cases to see if it was
20 reliable or not?

21 MR. GUERRIERO: No, Your Honor. I suggest
22 that eyewitness identification evidence is unique, and I
23 think that this Court recognized that in Wade and in the
24 subsequent cases, in fact described it at that time as
25 probably the leading cause of miscarriages of justice.

1 And in fact experience with the DNA exonerations that
2 we've seen recently in the last 10 or 15 years have
3 shown that.

4 JUSTICE GINSBURG: So at least for all
5 eyewitness testimony, there would have to be some
6 pretesting for reliability? Is that -- is that your
7 contention?

8 MR. GUERRIERO: No, Your Honor, and I don't
9 think that's exactly what the Court said in Wade and the
10 subsequent cases. It's the combination of eyewitness
11 identification testimony plus the suggestive influence
12 which makes -- which brings it to sort of the height of
13 suspicion and creates the greatest risk.

14 JUSTICE GINSBURG: And in this case, in
15 which category do you place the eyewitness testimony?
16 Is it police suggestion, or is it suggestive but not
17 through any manipulation on the police's part?

18 MR. GUERRIERO: In our case, we do not
19 allege any manipulation or intentional orchestration by
20 the police. But our position is that it appeared to the
21 witness, to Ms. Blandon, that Mr. Perry was in fact a
22 suspect, and she looked down and there was that
23 suspicion.

24 Now, if we had been able to have our due
25 process claim heard, the judge may or may not have

1 agreed that that was suggestive and created a risk.

2 But --

3 JUSTICE SCALIA: Do you think that our cases
4 which exclude or -- or require reversal when there is
5 eyewitness testimony impaired by the police, you think
6 that's really limited to eyewitness testimony? Suppose
7 the police created suggestiveness in another category of
8 evidence. Let's say -- let's say voice evidence, that
9 the killer had left a message on the -- on the phone and
10 the police in some manner create suggestiveness that
11 causes a witness to identify that as the voice of the
12 killer. You really think that we would say, well, this
13 is not eyewitness testimony; eyewitness testimony
14 creates a special risk? Don't you think that we would
15 say whenever the police render evidence unreliable it --
16 it should be excluded?

17 MR. GUERRIERO: I think that may be a
18 separate due process claim. For example, if the
19 police --

20 JUSTICE SCALIA: Exactly. But -- but
21 that -- that impairs your -- your argument, because if
22 we accept your argument for eyewitness we should
23 similarly accept it for everything else. There is
24 nothing special about eyewitness.

25 MR. GUERRIERO: I -- I disagree, Your Honor.

1 I think that what the Court has said is that there is
2 something special about eyewitness identification
3 testimony.

4 JUSTICE SCALIA: I'm saying we don't mean
5 it.

6 (Laughter.)

7 MR. GUERRIERO: Well --

8 JUSTICE SCALIA: I'm saying that it's
9 unbelievable that if the -- if the police created
10 testimony, not eyewitness testimony but testimony that
11 was unreliable because of police suggestiveness, I think
12 we would throw that out as well. Don't you think so?

13 MR. GUERRIERO: I -- well, I think that in
14 any case, and I think the Court has said this in other
15 circumstances, that in any case a defendant could raise
16 a due process claim and say, either because of the way
17 the prosecution handled the evidence or because of the
18 -- the combination of rulings on evidence, that there
19 was a due process violation that implicated fundamental
20 fairness.

21 JUSTICE KENNEDY: In this case, suppose that
22 the police talked to this -- to the lady that was in the
23 -- in the apartment and saw the thing out the window and
24 said, we -- we think we've solved this case but you
25 can't look at this man. We don't want to you look at

1 this man. Don't tell us. We're not going to let you
2 look out that window. It seems to me that the defendant
3 might have a due process argument that the police
4 interfered, that she couldn't say right when he was
5 there, that's not the man.

6 I don't know what you want the police to do
7 in this case. It seems to me it would have been, A,
8 risking this argument from the defendant, and B,
9 improper police conduct, not to ask the woman is this
10 the man?

11 MR. GUERRIERO: I disagree, Your Honor. If
12 the police wanted to ask her to make an identification,
13 they could have done a line-up procedure or a photo
14 line-up procedure fairly promptly that would be distinct
15 from and much more fair than the show-up at the scene.
16 And there was no emergency or exigency here that would
17 require a show-up.

18 JUSTICE SCALIA: What about -- what about
19 unreliable eyewitness testimony in favor of the
20 defendant? Let's assume the same suggestiveness that
21 causes you to exclude it when it's been introduced by
22 the prosecution, but here it's being introduced by the
23 defendant to show that it was somebody else, okay? Is
24 that going to be excluded?

25 MR. GUERRIERO: It may be excluded under the

1 rules of evidence, but the Due Process Clause doesn't --

2 JUSTICE SCALIA: Do you think it should be
3 excluded under the rules of evidence? If you say it's
4 so unreliable -- this is a one-way door?

5 MR. GUERRIERO: The Due Process Clause --

6 JUSTICE SCALIA: All of the evidence that --
7 that causes the defendant to be convicted is excluded,
8 but -- but any -- any evidence -- any evidence on the
9 other side is not?

10 MR. GUERRIERO: Well, the defendant is
11 obviously not trying to deprive the State of its liberty
12 in the same way that the State is trying to deprive the
13 defendant of his liberty at trial, so the Due Process
14 Clause would not apply in that sense. That's not to say
15 that there wouldn't be evidentiary grounds for the State
16 to raise that objection.

17 JUSTICE SCALIA: Well, you see, when -- when
18 it's the State that causes the unreliability, I can see
19 why it is a -- a ground that can be invoked only by the
20 defendant. But when you come up with a theory that it
21 doesn't matter whether the State was the cause or not, I
22 don't know why it wouldn't work both ways, that the
23 evidence is inherently unreliable and it ought to be
24 excluded whether it helps the defendant or hurts the
25 defendant.

1 MR. GUERRIERO: It -- it --

2 JUSTICE SCALIA: Once -- once you take the
3 State out of the mix there is no reason to limit it to
4 the -- to the defendant.

5 JUSTICE GINSBURG: You -- you answered that
6 due process works only in favor of the defendant.

7 MR. GUERRIERO: That's right.

8 JUSTICE GINSBURG: Not in favor of the
9 State.

10 MR. GUERRIERO: That's right.

11 JUSTICE GINSBURG: And that is your only --
12 your only distinction. You are saying that this is a
13 one -- one-way --

14 MR. GUERRIERO: That's right, Justice
15 Ginsburg.

16 JUSTICE GINSBURG: -- street.

17 JUSTICE SCALIA: Well --

18 JUSTICE ALITO: I take it from your -- I
19 take it from your answers that simple unreliability is
20 not enough. If there's testimony --

21 MR. GUERRIERO: That's right.

22 JUSTICE ALITO: -- eyewitness testimony that
23 seems of very dubious unreliability, that cannot be
24 excluded.

25 MR. GUERRIERO: That's right. I --

1 JUSTICE ALITO: Something more is needed.

2 MR. GUERRIERO: That's right, and I might
3 even go further.

4 JUSTICE ALITO: Something more is needed;
5 suggestiveness is needed.

6 MR. GUERRIERO: That's right.

7 JUSTICE ALITO: But suggestiveness doesn't
8 require any police involvement? Is that right?

9 MR. GUERRIERO: That's right.

10 JUSTICE ALITO: Can you just define what you
11 mean by suggestiveness?

12 MR. GUERRIERO: Well, I think the court has
13 given examples. If it's effectively a show-up or a
14 show-up. The example in Foster involved a couple of
15 different kinds of suggestiveness. One was where the
16 police did a line-up where the defendant was the only
17 common person.

18 JUSTICE ALITO: Yes, but those are all
19 situations where the police is involved, the police are
20 involved.

21 MR. GUERRIERO: Right. The nonpolice
22 examples of suggestiveness that rise to the due process
23 level are mostly going to be show-ups. The example in
24 Dunnigan v. Keane was a private investigator showing,
25 from the bank, that they had an ATM card that was stolen

1 from the person.

2 JUSTICE ALITO: Well, what if you have
3 cross-racial identification? Would that qualify on the
4 ground that studies have shown that those may be less
5 reliable.

6 MR. GUERRIERO: That may be a separate
7 grounds to move for a jury instruction or for an expert.
8 I'm not sure that -- we certainly don't argue here and
9 it wasn't argued below that that's a separate due
10 process ground.

11 JUSTICE SCALIA: Why not? I mean, that's
12 the point. Why not? What about an eyewitness
13 identification from 200 yards? You know, normally you'd
14 leave it to the jury and the jury would say that's very
15 unlikely. But you want to say it has to be excluded and
16 if it's not you retry the person. What is magic about
17 suggestiveness as opposed to all of the other matters
18 that could cause eyewitness identification to be wrong?

19 MR. GUERRIERO: Two answers to that, Your
20 Honor. First, it's not that these things are always
21 excluded, and in fact the Court has set a very high bar.
22 I mean, the standard is this evidence is excluded only
23 if it's very substantially likely to lead to a
24 misidentification. So --

25 JUSTICE ALITO: I understand that, but I

1 need to know what you mean by suggestiveness. What does
2 that mean? Can you just give me a definition of it?

3 MR. GUERRIERO: It is conduct or
4 circumstances that point -- that tell the witness that's
5 the man. And most commonly it would be showing a single
6 photograph or presenting the person as a suspect or it
7 appearing, as in this case, that the -- the defendant
8 was a suspect. And that's essentially how the Court has
9 defined it, as conduct that says that's the man.

10 So there may be some things that the defense
11 argues that are suggestive and the trial court looks at
12 it and says, you know, that's a very slight suggestion.
13 You say he is the only guy in the line-up with a
14 mustache. I don't even -- I'm not going any further. I
15 don't think that's sufficient suggestion. That doesn't
16 qualify as saying that's the man.

17 JUSTICE KAGAN: But just to repeat Justice
18 Scalia's question, once you're not talking about police
19 suggestiveness, once you're talking about suggestiveness
20 that arises from non-State conduct, why should we be
21 focused on suggestiveness as opposed to any other cause
22 of unreliability?

23 MR. GUERRIERO: Well, because that's what --
24 my first reason is that that's what the Court focused on
25 in Wade as the main danger.

1 JUSTICE KAGAN: Well, the Court was focusing
2 on police suggestiveness. That's the context of all our
3 cases. Now, you might say, well, look, there is a
4 bigger problem and the bigger problem is the
5 unreliability of identifications generally, but that
6 doesn't relate to suggestiveness per se.

7 MR. GUERRIERO: Well, I think our position
8 is in between there. We are not saying that there is a
9 due process right to have eyewitness evidence excluded
10 generally without some suggestiveness. What we are
11 saying is that if the suggestion comes from a nonpolice
12 source or if it, as in this case, involved the police
13 but their involvement was unintentional, it's just
14 accidental, that that suggestiveness should still be
15 considered because --

16 JUSTICE ALITO: What does that mean?

17 JUSTICE GINSBURG: Do you distinguish -- do
18 you distinguish the husband's situation? He was an
19 eyewitness too, but there was a motion to suppress her
20 testimony. Is that an example where there is an
21 eyewitness testimony but no suggestiveness? Why didn't
22 you move to suppress the husband's statement?

23 MR. GUERRIERO: Trial counsel simply did not
24 move to suppress that testimony. I don't have a good
25 explanation and, to be frank, I would have filed the

1 motion to suppress his testimony.

2 JUSTICE GINSBURG: So you'd put them both in
3 the same category?

4 MR. GUERRIERO: I would have.

5 CHIEF JUSTICE ROBERTS: Why isn't it -- this
6 may be -- just again following up on Justice Alito's
7 question, but there is always a degree of
8 suggestiveness. It's not like the person is picked
9 randomly off the street and saying, you know, do you
10 know this person? It's in the context of an
11 investigation. The person has some contact with it. So
12 there is always some suggestiveness that, well, this
13 person might have something to do with what went on.

14 MR. GUERRIERO: That's right. And if it
15 rises to a level of what the Court has given as examples
16 of a show-up or the same defendant appearing in a
17 line-up or something else that says that's the man, then
18 that raises a red flag. And it's not a --

19 CHIEF JUSTICE ROBERTS: But whenever --
20 whenever the witness is asked, at least there is a
21 suggestion that this might be the man. And I don't know
22 why you would think that's any greater than this is the
23 man. The police don't come up usually and say, this is
24 the person that we think did it; is that who you saw?
25 They say, did you see this guy?

1 MR. GUERRIERO: Actually, I disagree with
2 that aspect of your question, Your Honor. And in fact I
3 think the proper police procedure in certainly the
4 police departments that I'm familiar with will instruct
5 the witness that, do not assume that anyone that we
6 think is a suspect is in this line-up. And that's in
7 the standard witness instructions, and they may even do
8 multiple line-ups where they say, okay, we are going to
9 show you three sets of eight and the suspect -- or there
10 may or may not be a suspect in any of them. We just
11 want you to look at this set and see if anyone --

12 CHIEF JUSTICE ROBERTS: Well what about a
13 situation like the one we had here, where you're not
14 talking about a line-up.

15 MR. GUERRIERO: That's right.

16 CHIEF JUSTICE ROBERTS: But you're talking
17 about the scene of a crime, and the police says, do you
18 know this person, did you see this person, or anything
19 else? That in itself, any type of identification in the
20 course of an investigation, I think you would have to
21 say is suggestive, because the person is not picked up
22 randomly.

23 MR. GUERRIERO: It is, but the key is that
24 it's not the suggestion that results in exclusion. It's
25 the suggestion that raises the red flag that allows the

1 defendant to say, would the trial court please evaluate
2 this according to the standards.

3 CHIEF JUSTICE ROBERTS: So this is -- again,
4 this is just following up, I guess. But I remember in
5 law school one of the things in criminal law, the
6 professor says, all right, everybody be quiet. And then
7 a certain amount of time goes by and then he starts
8 asking people, well, how much time went by? And
9 people -- some people say 4 minutes, some people say,
10 you know, 1 minute. And it turns out, if I'm
11 remembering correctly, to be a lot shorter than most
12 people think.

13 So that's at least, the point that was
14 trying to be made anyway, at least as unreliable as
15 eyewitness testimony. So your argument would have to
16 cover that, wouldn't it?

17 MR. GUERRIERO: I --

18 CHIEF JUSTICE ROBERTS: You know, how long
19 were you there before this individual came into the
20 shop? The person says, I was there for 5 minutes, and
21 that ruins the person's alibi, when it turns out, you
22 know, study after study would say it really was 45
23 seconds or 1 minute.

24 MR. GUERRIERO: I think it's important to
25 look back at what the Court said in Wade and in fact how

1 what the Court said in Wade has been borne out. Of
2 course, there is aspects of unreliability to any kind of
3 evidence. Somebody could come and claim that there is
4 issues with false confessions or issues with forensic
5 evidence. I think last term somebody made a claim --
6 tried to assert a claim regarding DNA evidence that was
7 akin to an eyewitness identification claim.

8 But the point is that this kind of evidence
9 was singled out by the Court and recognized as having
10 particular dangers, and it's been borne out by the
11 studies, not psychological --

12 JUSTICE KENNEDY: But again, that was in the
13 context of procedures that the police had instituted.

14 MR. GUERRIERO: It may be that --

15 JUSTICE KENNEDY: And your -- and your
16 rationale goes much beyond it. In a way you're
17 infringing on the province of the jury. I don't usually
18 like to reminisce, but there was a case I had where a
19 prosecution witness was very, very certain, all too
20 certain, and I said: Do you ever take your wife out to
21 dinner or go out to dinner with friends? And he said:
22 Oh, yes. I said: Has it ever happened to you that
23 midway in the meal you say, is that our waiter, and
24 you've seen -- the waiter has brought you the menu, he
25 has taken your order, he has brought your food, and you

1 were under no stress at the time.

2 MR. GUERRIERO: Right.

3 JUSTICE KENNEDY: And there was good light.

4 So you teach the jury this way. And you're
5 just -- you're just usurping the province of the jury,
6 it seems.

7 MR. GUERRIERO: I don't think so, Your
8 Honor. I mean, I think what this Court has said is that
9 this is a special category of evidence that has to be
10 red-flagged by or can be red-flagged by the defense for
11 the trial judge to look at it and say --

12 JUSTICE BREYER: What is --

13 MR. GUERRIERO: -- on a case by -- I'm
14 sorry.

15 JUSTICE BREYER: Go ahead. You were saying
16 on a case -- all you want to do is red-flag it for the
17 judge.

18 MR. GUERRIERO: And then the trial judge
19 would look at it and in the rare case where he says it's
20 very substantially likely, which we agree is a high
21 standard --

22 JUSTICE BREYER: All right. Now, how does
23 that differ from what exists in I think every State and
24 certainly in the Federal Rules in Rule 403? The judge
25 may exclude evidence if its relevance is outweighed by

1 its prejudice or misleading the jury. So why, in any
2 instance where you think that this statement about to
3 come in is unreliable for various reasons, you say:
4 Judge, will you please look please look at Rule 403; I
5 have some experts over here and whatever else you want
6 that would show that this is misleading to the jury for
7 all the reasons you have said in your brief, right.

8 So -- so since that is already the law and
9 it does apply to every piece of evidence, including all
10 the things we've been talking about, what is it that you
11 want to change?

12 MR. GUERRIERO: Well, to answer the first
13 part of your question, what's different about this
14 evidence is that --

15 JUSTICE BREYER: I didn't say what's
16 different about it. I'm not looking for a difference.
17 I'm looking -- I'm saying they are all the same. And
18 indeed we do what you want right now. It's called Rule
19 403 in the Federal system. What I'm asking you is what
20 is it you want done, since all you want is the judge to
21 look at it carefully, that is not done at this moment?

22 MR. GUERRIERO: The analysis under 403,
23 which New Hampshire of course has as well, will accord a
24 certain weight and value to the opportunity of counsel
25 to cross-examine the witness and to make arguments to

1 the jury. And unlike any other kind of evidence, this
2 Court has said, precious though it is, the right of
3 cross-examination does not always --

4 JUSTICE BREYER: Well, the judges don't, I'm
5 sure -- I'm not 100 percent sure, you'd have to ask a
6 trial judge. But I am sure there are instances where
7 judges say under Rule 403: I conclude it is misleading
8 and it is prejudicial and it can't be made up for,
9 therefore I exclude it.

10 All right, that happens. Now, since that's
11 what you want the judge to do, I repeat my question:
12 What is the difference between what you're asking for
13 and what already exists in the law? .

14 MR. GUERRIERO: The difference --

15 JUSTICE BREYER: Unless -- well, go ahead.

16 MR. GUERRIERO: I'm sorry.

17 The difference is that under a normal 403
18 analysis, when I told the judge, when I said she never
19 could describe his face, she couldn't even say what
20 clothes he was wearing, the judge will respond to me and
21 say, that's fine. That's all great fodder for
22 cross-examination. But the difference with this kind of
23 evidence is that it's not just ---

24 JUSTICE BREYER: Whoa, wait. Stop you
25 there, because now what you seem to be saying is it

1 isn't the case that you simply want the judge to look at
2 this with care, rather you want the judge to change her
3 result. You want sometimes this to be excluded where
4 under 403 it is sometimes not excluded. Right. Now, I
5 ask -- if that's what you want, that's a different
6 matter. That's a substantive standard. And so you're
7 proposing a different substantive standard and I want to
8 know what it is.

9 MR. GUERRIERO: It's -- it's the standard
10 that this Court has established, if it's reasonably --
11 reasonably likely or substantially likely to lead to a
12 risk of misidentification at trial, very substantially
13 likely.

14 JUSTICE ALITO: That would be really a great
15 change from the way trials are now conducted, wouldn't
16 it. Let me give you this example. A victim is raped
17 and the victim doesn't really have a very good
18 opportunity to see the perpetrator. It's dark, the
19 person has a mask and so forth. A couple of weeks go by
20 and the victim reads an article in the paper that says
21 so-and-so has been arrested for a rape in another part
22 of the city. There is a picture of that person in the
23 paper and the victim says, that's the person who raped
24 me.

25 Now, you want to make it possible for the

1 judge to say that victim may not testify and identify
2 the person that that person -- that the victim says was
3 the perpetrator of the rape, on the ground that the
4 newspaper picture was suggestive, even though there
5 wasn't any police involvement and when you look at all
6 the circumstances, the identification is unreliable.

7 Now, maybe that's a good system, but that is
8 a drastic change, is it not, from the way criminal
9 trials are now conducted?

10 MR. GUERRIERO: Well, it's certainly not the
11 change from what the law is in the Federal circuits that
12 we cited. And I would also point out that in one of the
13 --

14 JUSTICE ALITO: Do you know of cases like
15 that in which the judge has said that eyewitness
16 identification cannot come in?

17 MR. GUERRIERO: In Thigpen v. Cory, which is
18 a Sixth Circuit case, the court said -- in fact they
19 specifically used the phrase "police machinations" --
20 that this did not arise from police machinations. It
21 was basically happenstance in that case that the witness
22 was -- the witness identified the defendant and it was
23 excluded as unreliable.

24 JUSTICE KENNEDY: But we've said in our
25 case, Neil v. Biggers -- that was a rape case and we

1 allowed it. We allowed the eyewitness.

2 MR. GUERRIERO: Well -- and I think the
3 Court said in all its cases, and in particular in
4 Simmons, that each case --

5 JUSTICE KENNEDY: And, in fact we said that
6 it was unnecessarily suggestive, but that it was still
7 reliable.

8 MR. GUERRIERO: And it may be. I mean, it
9 may -- you could have an extremely -- you could have a
10 -- the police could do a show-up intending to produce an
11 ID, but if the witness got a very good look at the
12 person, was calm, was maybe a police officer like in
13 Brathwaite and the court said, we don't care how
14 deliberate this -- and even if there is manipulation, we
15 don't care how much of that there is, we find it's
16 reliable here.

17 JUSTICE KAGAN: Suppose that there was some
18 other category of testimony which proved even more
19 unreliable than the category that you're talking about.
20 Let's say that it turned out study after study after
21 study that jailhouse informants lie. And so the
22 testimony of jailhouse informants is likely to be just
23 completely unreliable, to, you know, double as much as
24 eyewitness testimony. Same rule for that?

25 MR. GUERRIERO: I think it would be a very

1 high burden for the defense to meet there. But if the
2 finding was that there are times that a witness, that --
3 like in the eyewitness situation, where the witness
4 truly believes that they are identifying the right
5 person, but they are actually not and it could result in
6 a miscarriage of justice, then I do believe fundamental
7 fairness requires the Court to say due process doesn't
8 allow that evidence.

9 JUSTICE KAGAN: Okay. Well, now we are
10 talking about, now we are setting up a standard that
11 applies outside eyewitness testimony. It's just
12 testimony that we find to be -- categories of testimony
13 that we find to be extremely unreliable will be subject
14 to this new due process red flag. Is that right?

15 MR. GUERRIERO: Well, I don't think so, Your
16 Honor. But more for a factual reason in that the Court
17 said in 1967 that this is the leading cause of
18 miscarriage of justice. The studies and -- not just
19 studies, but the transcripts and records of actual
20 trials.

21 JUSTICE KAGAN: No, I understand you have
22 very good empirical evidence which should lead us all to
23 wonder about the reliability of eyewitness testimony.
24 I'm just suggesting that eyewitness testimony is not the
25 only kind of testimony which people can do studies on

1 and find that it's more unreliable than you would think.

2 MR. GUERRIERO: Well, maybe if somebody else
3 came along and said, we've done a study and we find this
4 kind of evidence, that in 75 percent of the wrongful
5 convictions, this evidence contributed to the
6 miscarriage of justice, then I would think the Court
7 should take a look at that. But I don't think any other
8 evidence matches that.

9 JUSTICE GINSBURG: What about all the other
10 safeguards that you have? You can ask the judge to tell
11 the jury: Be careful; eyewitness testimony is often
12 unreliable. You can point that out in
13 cross-examination.

14 MR. GUERRIERO: Yes.

15 JUSTICE GINSBURG: All those questions. You
16 can say something about it in your summation to the
17 jury. And as Justice Breyer brought up, you have the
18 evidence rule that says if prejudicial value outweighs
19 probative value that the judge can say, I'm not going to
20 let it in. Why aren't all those safeguards enough?

21 MR. GUERRIERO: If all of those safeguards
22 were enough, even when the police made --

23 JUSTICE GINSBURG: Well, leaving aside the
24 police, because there -- there is an interest in
25 deterrence, in deterring the police from manipulating

1 evidence.

2 MR. GUERRIERO: I don't think deterrence is
3 the primary basis of the court's cases, Your Honor,
4 because the Court has said that if it proves to be
5 reliable, no matter how manipulative the police were,
6 this evidence comes in. So the basis of the rule is not
7 primarily determined -- deterrence; it's the risk of an
8 unfair trial and the risk of a miscarriage of justice.

9 JUSTICE GINSBURG: There is a difference
10 between suggestive and suggested by the police.

11 MR. GUERRIERO: I'm sorry, Your Honor, I --

12 JUSTICE GINSBURG: If the suggestion comes
13 from the police, then the evidence will be excluded. If
14 the suggestion comes from someplace else, unless we
15 change the rule --

16 MR. GUERRIERO: Well I think that that's
17 a --

18 JUSTICE GINSBURG: -- it would be admitted.

19 MR. GUERRIERO: I mean, I think that that's
20 a -- that's a tricky issue to consider, because
21 suggestion coming from the police is different from
22 manipulation. And if -- if the rule is unintended
23 suggestion from the police implicates due process, then
24 Perry was entitled to a due process analysis, because
25 the unintended suggestion here was apparent police

1 suspicion as he stood there.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. GUERRIERO: Thank you.

4 CHIEF JUSTICE ROBERTS: General Delaney.

5 ORAL ARGUMENT OF MICHAEL A. DELANEY

6 ON BEHALF OF THE RESPONDENT

7 MR. DELANEY: Mr. Chief Justice and may it
8 please the Court:

9 An eyewitness identification implicates due
10 process concerns only when the police arrange a
11 confrontation to elicit a witness's identification of a
12 suspect and use unnecessarily suggestive techniques that
13 skew the fact-finding process. The central concern --

14 JUSTICE SOTOMAYOR: Now we've changed the
15 language of Wade when it talks about intentional or
16 unintentional. And you're suggesting that police
17 manipulation always has to be intentionally suggestive?

18 MR. DELANEY: I'm not --

19 JUSTICE SOTOMAYOR: Even if the policeman
20 tells you he wasn't really thinking or focusing on a
21 distinguishing characteristic in the line-up?

22 MR. DELANEY: That may play a role, Justice
23 Sotomayor, but only in a limited sense, and not in the
24 way the Petitioner is suggesting we look at
25 unintentional conduct. First, for the due process

1 inquiry to trigger, there must be an arranged
2 confrontation of a suspect and a witness by the police.

3 JUSTICE SOTOMAYOR: Could you tell me what
4 you think would have happened here? there was a reason
5 the police asked this defendant to stay put. They
6 didn't want him to leave the scene, correct?

7 MR. DELANEY: That -- that's correct.

8 JUSTICE SOTOMAYOR: In your judgment -- I
9 think Justice Kennedy hit the nail on the head. My
10 suspicion is that at some point they would have asked
11 the witnesses in the building and engaged in a show-up.
12 What's so different between intentionally doing the
13 show-up and holding the defendant in the back yard
14 standing there next to a police officer, so that anyone
15 who wants to, like this woman, who wants to find the
16 guy, can just point to that one? What's the difference?

17 MR. DELANEY: The difference in this case is
18 the role that the police played in bringing about
19 potential suggestion under your hypothetical. What the
20 Due Process Clause is concerned about is the role of the
21 police in essentially stacking the deck, putting their
22 thumb on the scale and skewing the fact-finding process.
23 It goes to the intent of the process --

24 JUSTICE SOTOMAYOR: No. I mean, the way not
25 to skew it was to put him in the police car and just let

1 him sit there in the dark. So they intentionally made
2 him wait at the scene of the crime.

3 I'm not talking about whether this was
4 necessary or unnecessary, because I think that a
5 perfectly good argument could be made that the police
6 acted reasonably and necessarily; all right? It makes
7 no sense to move a defendant that far from the scene of
8 a crime if you're not sure he is the one who committed
9 the crime, he or she.

10 But I'm -- I'm going to the question of how
11 do we define, if we write this opinion, manipulation
12 without getting into a mens rea type analysis and adding
13 yet another layer to Biggers.

14 MR. DELANEY: Well, first, I don't think you
15 need to go there in this case. You can simply say that,
16 based on the factual findings of the State court, the
17 police did not induce any type of show-up --

18 JUSTICE SCALIA: But doesn't -- we face that
19 problem anyway, even if we -- whether or not we decide
20 in this case that it doesn't matter that the police
21 manipulated it, we are always going to have the problem
22 of when has there been police manipulation; right?

23 MR. DELANEY: That's correct.

24 JUSTICE SCALIA: I mean, that -- that's not
25 a creation of this -- of this case.

1 MR. DELANEY: That's correct.

2 JUSTICE SCALIA: And I -- I would guess that
3 in the case you're talking about, just telling the
4 person to stay where he is, is not -- now, it would be
5 different if -- if the defendant was -- was caught two
6 blocks away and the police bring him back to the scene
7 of the crime and make him stand there so that the woman
8 can see him from the window. That's quite different.

9 MR. DELANEY: It is quite different. And
10 Stovall tells us that the test is an objective one. We
11 look at the totality of the circumstances to determine
12 whether there has been suggestive conduct.

13 Now, in that regard --

14 CHIEF JUSTICE ROBERTS: When you say
15 that's -- when you say that's different, you're not --
16 you're not suggesting that that would be suggestive, are
17 you?

18 MR. DELANEY: No, I'm not.

19 CHIEF JUSTICE ROBERTS: Because presumably,
20 that's the same argument -- that's for the jury and the
21 counsel. They can say during cross-examination the guy
22 was two blocks away, you know, and -- and wasn't it only
23 because the police brought him back that you -- all of
24 that. I don't see what difference it makes in terms of
25 whether you have a suppression hearing before the trial.

1 MR. DELANEY: That's correct, Mr. Chief
2 Justice. It would not make a difference in that regard.
3 And on the facts of this case, we do have clear factual
4 finding that this police officer in no way -- in no way
5 induced this witness to move towards the window and
6 identify a suspect who just happened to be standing next
7 to a police officer.

8 If the concern under due process in this
9 area has been a deterrence rationale, which this Court
10 has stated in both *Neil v. Biggers* and in *Manson v.*
11 *Brathwaite*, that must be the guiding principle.

12 JUSTICE KAGAN: Well, it's both; right,
13 General Delaney? I mean, the Court has certainly talked
14 about deterrence, but the Court also has very
15 substantial discussions in all of these opinions about
16 reliability. And from the criminal defendant's point of
17 view, it doesn't really much matter whether the
18 unreliability is caused by police conduct or by
19 something else.

20 So -- so tell me a little bit why you think
21 the police conduct here, you know, that has to be there
22 in every case?

23 MR. DELANEY: That is true, Justice Kagan,
24 that -- that the opinions have discussed both issues.
25 And I would offer two considerations. First, to the

1 extent that the courts have talked about reliability as
2 the linchpin or the likelihood of misidentification
3 playing a role, they have only done that read in context
4 within and only after an unnecessarily suggestive
5 circumstance that they had applied.

6 JUSTICE KAGAN: It seems that that's not
7 right. I mean, the reason we want to deter this conduct
8 is because the conduct results in misidentifications and
9 unreliable testimony. That's the reason that deterrence
10 is an important goal, is because this conduct leads to
11 unreliable testimony.

12 MR. DELANEY: That is correct, and if we
13 expand that out and we apply that rationale to the
14 circumstances of a case not involving police activity,
15 we lose that deterrence rationale. There is no
16 deterrence involved in a suggestive circumstance that
17 does not involve the police. Civilians are not going to
18 be repeat players in this system.

19 JUSTICE KENNEDY: And what you're -- what
20 you're saying, I take it, in the answer to Justice
21 Kagan, was that there is really a two-part step. First,
22 was the police procedure unnecessarily suggestive? And
23 then if it was, are there other reliability -- was
24 reliability impaired?

25 So you go -- you ask both questions.

1 MR. DELANEY: And that is the Biggers test.
2 And if we looked at reliability further as sort of the
3 touchstone of our due process inquiry, we would need to
4 misplace completely the role of examining whether the
5 suggestive circumstances are unnecessary. An -- an
6 inquiry into necessity only makes sense in the context
7 of a police investigation or police work. And if we
8 look at Stovall, certainly there is an example of a case
9 that was a show-up, where this Court said that, despite
10 the clearly suggestive circumstances, that show-up was
11 imperative and necessary because the witness may have
12 been about to die.

13 The Court did not conduct a reliability
14 analysis. So if reliability is the linchpin, it puts
15 the Stovall holding in question and really Stovall would
16 be undermined.

17 JUSTICE ALITO: What you're saying -- what
18 you're saying seems to suggest that the rule we're
19 talking about here is really not an aspect of due
20 process per se, but, like the Fourth Amendment
21 exclusionary rule, it's a special due process
22 exclusionary rule that is meant to deter conduct that
23 could result in a constitutional violation.

24 Is that right?

25 MR. DELANEY: I -- I think that's correct,

1 Justice Alito. And the analogy I would use would be to
2 your perjury cases. In Mooney you have clearly set a
3 due process standard that prevents police or prosecutors
4 from knowingly using false evidence. And the concern
5 there is how the police will skew the fact-finding
6 process. Stovall and the identification cases are very
7 similar to that.

8 Our concern in essence is that the police
9 through unnecessary suggestion in that circumstance are
10 going to skew the fact-finding process and in this
11 instance, in essence, create a false or altered memory.

12 JUSTICE ALITO: If -- if the exclusionary
13 aspect of this is not part of due process itself, then
14 doesn't it follow that what due process requires is
15 reliability? So doesn't that mean that the Petitioner's
16 argument is correct, the due process standard is simply
17 reliability, not suggestiveness?

18 MR. DELANEY: It's -- the standard is not
19 reliability, Justice Alito. The standard for due
20 process in this area is the use of orchestrated police
21 suggestion.

22 JUSTICE KENNEDY: What -- what about cases
23 with inflammatory evidence, too many lurid photos or
24 testimony that ignites prejudice in the community?
25 That's -- that's a -- that's reliability.

1 MR. DELANEY: That is, and we have both
2 constitutional and non-constitutional tools and
3 procedures right now to address that. At the base, we
4 require prosecutors under Jackson v. Virginia to have
5 some minimum level of evidence so that a rational trier
6 of fact can establish guilt beyond a reasonable doubt.

7 Above that, under the Sixth Amendment, we
8 provide tools and procedures that allow a defendant to
9 assess the reliability of evidence through
10 cross-examination and summation and the right to
11 counsel. And beyond that, we have non-constitutional
12 sources under the Rules of Evidence that are
13 specifically designed to assess the relevance and the
14 reliability of the evidence. But if we go before that
15 and say that the Due Process Clause after all that has
16 some additional standing in -- in your jurisprudence to
17 assess reliability, we really have gone to a very
18 different place.

19 JUSTICE ALITO: You -- you have two cases.
20 You have Mr. Perry's case and you have another case
21 that's very similar. In fact, it's identical, except
22 that in that instance the police officer talking to the
23 witness said, would you take a look out the window and
24 see if you recognize anybody.

25 Now, from the perspective of the defendants,

1 the cases are -- seem -- as far as whether they get a
2 fair trial, the cases are identical, are they not? The
3 evidence is the same. The suggestiveness is the same.

4 MR DELANEY: No, Justice Alito. Those cases
5 are quite different. And to the extent we did have
6 objective evidence that the police here had in some way
7 brought that woman to the window to, in essence, conduct
8 a show-up, then we may have triggered the first prong of
9 Biggers. And the court would then be required to do two
10 things: First, to determine whether the circumstances
11 were suggestive; and independent of that, also determine
12 whether it was necessary or not, depending on the
13 circumstances of the investigation.

14 So if in fact the police officer had
15 directed the witness to the window, there may be at
16 least grounds for the Biggers and Manson analysis to
17 come into play. These facts are very different from
18 that.

19 JUSTICE KAGAN: Well, I'm not sure you
20 answered Justice Alito's questions about why there
21 should be this difference between these two cases. Now
22 you might want to say that where police conduct is
23 involved, the chances of unreliable identification are
24 greater. Or you may want to say something else. But
25 the question is: If we are focused on reliability, why

1 are those two cases any different?

2 MR. DELANEY: Well, if we do look back to
3 determine whether the circumstances involving the police
4 are any more -- of more serious concern, if we look back
5 to Wade, this Court did talk about the unique role of
6 police suggestion in this context of confrontations.
7 And it specifically focused on the manner and the degree
8 of suggestion in which the manner that police or
9 prosecution present a witness, presents a witness to a
10 suspect, what impact that can have.

11 That unique aspect of police suggestibility,
12 the fact that a police officer when it brings someone
13 forward is going to influence a witness to a high
14 degree, does play a role and is the grounds upon which
15 the Stovall cases have been built.

16 JUSTICE SOTOMAYOR: So tell me -- they gave
17 the hypothetical of the police pointing out the
18 defendant out the window. But earlier you said it might
19 be a different case if the defendant was two blocks away
20 and they brought him back. Same scenario. They do
21 that, bring him back two blocks; make him stand at the
22 scene of the crime; and go upstairs, talk to the woman
23 and she spontaneously says: It's the guy standing over
24 there. That would entitle the defendant to a Wade
25 motion? To a Wade hearing?

1 MR. DELANEY: You would look at the
2 totality of the circumstances. And to the extent from
3 an objective standpoint it could be demonstrated that
4 the police intentionally brought that witness back to
5 the scene --

6 JUSTICE SOTOMAYOR: We are now -- we are now
7 at mens rea again. So what has surprised me about this
8 case is in some ways the way the State court wrote this.
9 Because if the State court had simply said something
10 like, there was no unnecessary show-up here, they were
11 just holding someone until they could figure out what
12 happened, there was no suggestiveness by the police,
13 because the woman pointed out the window, throw out the
14 motion, we wouldn't be here. The argument has become
15 something else now because you're trying to define a
16 level of intent on the part of the police to create
17 unreliability that I think just complicates the inquiry.

18 MR. DELANEY: And I -- and, Justice
19 Sotomayor, I'm not trying to create that complication.
20 And in fact, I would -- I would reference the State
21 court decision a little bit differently. It did ground
22 its holding specifically in a finding that there were no
23 sort of suggestive techniques at play here and no
24 inducement. The trial court order very specifically
25 said it disagrees with the show-up characterization,

1 that the witness had pointed out the Petitioner without
2 any inducement from the police officer. The officer did
3 not direct the witness's attention to the window, and
4 the officer did not ask whether a man in the parking lot
5 was the man who broke into the cars. On those facts,
6 that can dispose of this case without getting into the
7 issue of mens rea.

8 JUSTICE SOTOMAYOR: Well, what's happened is
9 that your briefing and your counter's briefing is
10 broader than I think needs to be on the facts of this
11 case. But putting that aside, you've addressed this as
12 the need for police manipulation. If you define it that
13 way, then we do get into a mens rea discussion rather
14 than what I think Biggers and Wade were about, which is
15 are the circumstances created by the police
16 unnecessarily suggestive.

17 MR. DELANEY: Yes. And I agree with you
18 that the inquiry under the -- under the first prong of
19 Biggers is just that. It's an objective inquiry based
20 on the totality of the circumstances.

21 If there are no further questions, because
22 the defendant's conviction was the product of a fair
23 trial, because the State court properly applied this
24 Court's jurisprudence and precedent in the area of
25 eyewitness identification, and because the Petitioner's

1 proposed rule would markedly expand this Court's due
2 process jurisdiction, we respectfully request that the
3 State court judgment be affirmed.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Ms. Saharsky.

7 ORAL ARGUMENT OF NICOLE A. SAHARSKY

8 ON BEHALF OF THE UNITED STATES,

9 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

10 MS. SAHARSKY: Mr. Chief Justice, and may it
11 please the Court:

12 A due process inquiry is required only when
13 there is a police-arranged confrontation in order to
14 obtain an identification and then the police
15 unnecessarily suggest that a certain suspect is guilty.
16 And that's because, as the State has said, the Court's
17 central concern in these cases is the State putting a
18 thumb on the scales, gaining an unfair advantage. Just
19 as, as Justice Scalia said, the State can't create a
20 false document and introduce it at trial, it can't
21 manipulate someone's memory and then use that evidence
22 to prove guilt at trial.

23 JUSTICE KAGAN: So do you mean to say,
24 Miss Saharsky, that there can never be a due process
25 violation from the admission of unreliable evidence?

1 Assuming that the State has not created that evidence,
2 has not produced that evidence, but the State knows that
3 the evidence is unreliable or has a very substantial
4 chance of being so, that that can never be a due process
5 violation?

6 MS. SAHARSKY: I'm saying that's where the
7 Court's cases are now. The State can't knowingly
8 introduce perjured testimony, but you're not talking
9 about perjured, knowingly perjured testimony.

10 If the question is just unreliable, the
11 Court has said on numerous occasions -- it's rejected
12 claims like that and said: The Constitution doesn't
13 protect to ensure all evidence is reliable. It provides
14 a process by which the court can test reliability
15 through cross-examination, confrontation, et cetera.
16 The Court has -- And that was in Crawford.

17 The Court has also said -- if I can just add
18 one more thing -- in the due process context, that where
19 the check comes in is in Jackson v. Virginia, that the
20 verdict has to have enough evidence to be supported each
21 element of the crime beyond a reasonable that a rational
22 jury could find it. So that is a due process check.

23 But where the Court's cases stand today, the
24 Court has not found, so far as we can tell, a case where
25 it said that the mere introduction of unreliable

1 evidence would isolate the Due Process Clause. And
2 every time it's been confronted with a claim like that,
3 in Dowling, for example, in Colorado v. Connelly, the
4 Court has rejected such a claim.

5 JUSTICE KAGAN: I'll give you an extreme
6 example. The extreme example is where an identification
7 has been produced by torture, but the torture has been
8 through a non-State actor. Same answer?

9 MS. SAHARSKY: That is an extreme example.
10 There are many reasons why, A, the prosecution would
11 never introduce that kind of evidence to begin with, and
12 B, that there would be other checks on the process in
13 addition to the confrontation and cross-examination
14 types of things that we talked about.

15 There would be a check on the process
16 through Brady and Giglio, for example, that if the
17 government knew that those were the circumstances of the
18 identification, they would have to turn that evidence
19 over to the other side. There would also be checks in
20 terms of the trial process if the government actually
21 put on evidence like that. So it is -- it is very
22 unlikely that such a thing would happen.

23 We are not saying that the Court has to hold
24 in this case that due process could never play a role
25 there. But what we are saying here is this is very

1 routine, run-of-the-mill evidence. Someone who saw what
2 happened and wants to come into court and tell the jury
3 that, and as Justice Kennedy noted, you know, what
4 Petitioner is asking for here is to take all of those
5 away from the jury, really usurping the jury function
6 and having these mini trials where the court itself is
7 trying to decide reliability.

8 JUSTICE KENNEDY: It is interesting. I was
9 trying to find a case where some other class of evidence
10 was excluded because it's unreliability. And in
11 Thompson v. Louisville, as you say, is just insufficient
12 evidence, and that's different. Inflammatory evidence
13 might be an example.

14 MS. SAHARSKY: Yes. I mean, that's
15 different because --

16 JUSTICE KENNEDY: Lurid photos or something
17 like that.

18 MS. SAHARSKY: I mean, there you have, first
19 of all, a separate constitutional provision of an
20 impartial jury, and have you a direct influence upon the
21 jury. So it's not just unreliable evidence being a due
22 process problem. You have this separate Sixth Amendment
23 protection and then you have it acting directly on the
24 jury. So we think that's a different case. In the due
25 process context where the Court's cases have really

1 focused is on the States tilting the scales, the States
2 corrupting the process by knowingly introducing perjured
3 testimony, or by for example refusing to disclose
4 material exculpatory evidence --

5 JUSTICE KENNEDY: I think there were some
6 early cases when fingerprint testimony couldn't come in,
7 when fingerprint technology was just new. I don't know
8 if those were due process or not.

9 MS. SAHARSKY: I can't say. I mean, when
10 you look at the Court's more current cases though, to
11 the extent the Court has heard argument like this
12 evidence is too unreliable, we needed a special
13 Constitutional rule. For example, in *Ventris*, with
14 respect to jail house snitches, the Court rejected that
15 argument. When the Court was told in *Colorado v.*
16 *Connelly* there were concerns about reliability. It
17 said: No, reliability is up to the jury, and it uses
18 the State rules of evidence, and this court's not going
19 to be a rule-making organ for rules of procedure. The
20 Constitution puts in place the various checks on the
21 process: Compulsory process, cross-examination, et
22 cetera. And then outside of that, it's really the role
23 of the States to mold the trial process.

24 JUSTICE ALITO: I was intrigued by what your
25 brief said about Federal Rule of Evidence 403. Do you

1 think that a Federal judge under that rule may exclude
2 the testimony of a witness on the ground that the
3 witness is, in the judgment of the trial judge,
4 completely unbelievable?

5 MS. SAHARSKY: Well, I mean you would need
6 to meet the standard of Rule 403 which is that the --
7 the probative value of the witness would be
8 substantially outweighed by unfair prejudice. I think
9 it is unlikely that evidence would -- of an eyewitness,
10 which the Court has said, particularly in cases like
11 Biggers and Manson, is fairly probative, important
12 evidence; the Court wanted to let it in, even in the
13 circumstances if where you know, the police played a
14 role in manipulation. So probably no, the Court
15 wouldn't -- wouldn't take the --

16 JUSTICE ALITO: But you think in theory that
17 could be done? So if you put on a cooperating witness
18 in the case and this witness has made 100 inconsistent
19 statements previously and has been convicted of perjury,
20 that the judge can just say you can't put that witness
21 on because that person is -- is a liar, and I'm not
22 going to have the witness testify in my courtroom?

23 MS. SAHARSKY: Well, I mean Rule 403 isn't
24 talking about whether evidence is true or false. It's
25 talking about unfair prejudice to the jury, unfair

1 prejudice being -- outweighing the probative value of
2 the testimony. So you know, I think it would be a --
3 call for the judge in that individual case. I don't
4 know that that -- that that kind of argument has been
5 made very often.

6 But it's not just that trial protection;
7 there are numerous trial protections outside of the
8 constitutional limits that the States have put into
9 place specifically with respect to eyewitness
10 identification testimony. For example, there are
11 special jury instructions that most States use, and New
12 Hampshire used special jury instructions here. And
13 there is something that's really notable about these
14 instructions, which is that what Petitioner wants is
15 when the jury has made a determination here, looking at
16 factors like how far was the witness away from the
17 person, how long was it before -- between the crime and
18 when she made the identification -- the jury heard all
19 of those factors, heard argument on it, was instructed
20 on those things and it made a determination; and what
21 Petitioner wants is for a trial court -- this Court,
22 after the fact -- to use those exact same factors and
23 come to a different conclusion.

24 JUSTICE KENNEDY: Was -- was the Daubert
25 case our expert witness case where you have to have a

1 threshold showing? Was that due process or was that
2 just -- that was just rule of evidence.

3 MS. SAHARSKY: Yes, it was just interpreting
4 rule of evidence 70 -- 702. So you know, at the end of
5 the day what -- what Petitioner is really asking for is
6 not some kind of threshold inquiry, but really taking
7 the question of reliability away from the jury, and it
8 would be a very big change in our system. And --

9 CHIEF JUSTICE ROBERTS: Well, we --

10 JUSTICE SOTOMAYOR: -- that already follow
11 your adversary rules. I think it's not just one or two.
12 It's about five or six.

13 The floodgates open there? How many -- how
14 many suppressions of witness identification has occurred
15 in those circuits?

16 MS. SAHARSKY: It is not many, but the
17 principle the Petitioner is arguing for is a significant
18 one. It is that the Due Process Clause protects
19 against -- protects reliability, and I assure you that
20 once this Court says that this is the case, that there
21 will be defendants throughout the United States making
22 arguments about all different kinds of evidence not
23 involving the police being unreliable, and that that all
24 needs to be taken away for -- from the jury, and --

25 CHIEF JUSTICE ROBERTS: Well, suppose the --

1 lie detectors, for example, that's been taken away from
2 the jury on a categorical basis, right?

3 MS. SAHARSKY: Well, there are some State
4 rules of evidence that do that, but I mean, we are
5 talking about as a matter of due process that it is
6 fundamentally unfair at trial to not allow -- this --
7 to -- this evidence if given to the trial would be
8 fundamentally unfair. And you know, the Constitution
9 has enshrined the jury as the fundamental guarantee --
10 the fundamental protector of liberty; and to think that
11 that same Constitution through the Due Process Clause
12 means that run-of-the-mill evidence has to be taken away
13 from the juries, that the trial court can itself look at
14 factors like how good of a view the person had?

15 JUSTICE ALITO: There surely is some minimal
16 due process requirement for the admission of evidence,
17 isn't there? Are you saying there is none? If the
18 State abolished the hearsay rule, could it -- would it
19 not be a violation of due process if the prosecution
20 introduced quadruple hearsay?

21 MS. SAHARSKY: Well, I think that there
22 would initially be a problem with respect to the
23 Confrontation Clause and the court would probably go
24 through the analysis that way. We are not saying that
25 the court --

1 JUSTICE ALITO: Let me give -- you're right.
 2 Let me give you another example. Let's say you have
 3 --the State puts on a witness who -- who says this
 4 person did it because I saw it in my crystal ball.

5 MS. SAHARSKY: Right. And I think that the
 6 answer that I would give is the same one to the question
 7 Justice Kagan asked, which is where the Court is now,
 8 the Court has never that the introduction of some kind
 9 of evidence is so unreliable it'd violate due process.
 10 In Dowling, for example, it had evidence that --

11 JUSTICE KENNEDY: Is tea leaf reading okay?

12 MS. SAHARSKY: What I'm saying is the Court
 13 doesn't need to address that question here. It also
 14 doesn't need to foreclose it. But this is very
 15 run-of-the-mill evidence. But it doesn't mean that the
 16 Court could never find that some kind of evidence is so
 17 problematic that the Due Process Clause could preclude
 18 its admission, but what we're talking about here is
 19 fairly run-of-the-mill evidence.

20 I would just point the Court to the decision
 21 in Dowling which was about a prior conviction for which
 22 the person had been acquitted; and then that evidence
 23 was let in at his trial, and he said that's a problem.
 24 That evidence is too unreliable and too prejudicial, and
 25 the Court said that's not for the Due Process Clause.

1 The Constitution gives you the process to test evidence.
2 It doesn't ensure that all of the evidence that's going
3 be introduced be reliable. And that's what Petitioner
4 is saying here today, and that would be a very expansive
5 view of the Due Process Clause that just can't be
6 reconciled with cases like Dowling and Colorado v.
7 Connelly.

8 If the Court has no further questions we'd
9 submit that the judgment of the court below should be
10 affirmed.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Guerriero, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF RICHARD GUERRIERO

14 ON BEHALF OF THE PETITIONER

15 MR. GUERRIERO: I will try to make three
16 points in those 2 minutes.

17 I would ask the Court to consider the
18 circumstances that would be excluded if the Court
19 accepts the rule proposed by the State, that there has
20 to be some intentional manipulation or intentional
21 orchestration. Suppose that rather than the accidental
22 or happenstance show-up we had here, suppose that the
23 accident was in the line-up at the police station, and
24 the police were completely in good faith, getting to the
25 mental state issue, but in spite of their good faith

1 there was suggestion in the line-up. Would the trial
2 court look at that and say even though this was a
3 suggestive line-up we are not going to consider a due
4 process claim because it wasn't intentional or
5 deliberate manipulation? We would suggest that that
6 would be contrary to the principle that the primary evil
7 is the risk of misidentification.

8 Consider another circumstance. Suppose
9 there are two witnesses at the police station, and in
10 spite of the best efforts and good rules of the police,
11 witness one looks at the line-up and then -- or looks at
12 the photo line-up so that they can't be changed, let's
13 say, and leaves the line-up and somehow communicates to
14 witness two, I picked the one on the bottom at the
15 right. I think that's the one. That suggestion would
16 be very powerful from the person who experienced the
17 very same crime.

18 JUSTICE SCALIA: Tell that to the jury.
19 What jury isn't going to be -- I mean the more
20 persuasive your argument is, the more likely it is that
21 a jury will take care of that.

22 MR. GUERRIERO: The problem is that the
23 witnesses who have -- are under the suggestive influence
24 actually believed what they are testifying to, and
25 the -- that's why the Court said in Wade

1 cross-examination for this one kind of evidence -- not
2 floodgates, but this one kind of evidence,
3 cross-examination may not always be enough. The
4 witness's sincerity has a powerful effect on the jury.

5 The last point I want to make is this is not
6 going to open the floodgates, as we say, or create a
7 slew of new claims. Under the Watkins case this Court
8 knows that there -- there is not even required to have a
9 separate hearing on this evidence, and the reason a
10 separate hearing isn't required is because these issues
11 would be fleshed out in front of the jury.

12 This is only a question of what legal
13 standard applies when the judge hears the defendant's
14 objection that this violates due process, there is a --
15 there is a substantial likelihood of misidentification.
16 So it's not any new claims. It's not any separate
17 hearings. It's simply a question of what exactly is the
18 due process rule.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 10:58 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PERRY *v.* NEW HAMPSHIRE

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

No. 10–8974. Argued November 2, 2011—Decided January 11, 2012

Around 3 a.m. on August 15, 2008, the Nashua, New Hampshire Police Department received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller’s apartment building. When an officer responding to the call asked eyewitness Nubia Bandon to describe the man, Bandon pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Petitioner Barion Perry’s arrest followed this identification.

Before trial, Perry moved to suppress Bandon’s identification on the ground that admitting it at trial would violate due process. The New Hampshire trial court denied the motion. To determine whether due process prohibits the introduction of an out-of-court identification at trial, the Superior Court said, this Court’s decisions instruct a two-step inquiry: The trial court must first decide whether the police used an unnecessarily suggestive identification procedure; if they did, the court must next consider whether that procedure so tainted the resulting identification as to render it unreliable and thus inadmissible. Perry’s challenge, the court found, failed at step one, for Bandon’s identification did not result from an unnecessarily suggestive procedure employed by the police. A jury subsequently convicted Perry of theft by unauthorized taking.

On appeal, Perry argued that the trial court erred in requiring an initial showing that police arranged a suggestive identification procedure. Suggestive circumstances alone, Perry contended, suffice to require court evaluation of the reliability of an eyewitness identification before allowing it to be presented to the jury. The New Hampshire Supreme Court rejected Perry’s argument and affirmed his conviction.

Held: The Due Process Clause does not require a preliminary judicial

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inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. Pp. 6–19.

(a) The Constitution protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Only when evidence “is so extremely unfair that its admission violates fundamental conceptions of justice,” *Dowling v. United States*, 493 U. S. 342, 352 (internal quotation marks omitted), does the Due Process Clause preclude its admission.

Contending that the Due Process Clause is implicated here, Perry relies on a series of decisions involving police-arranged identification procedures. See *Stovall v. Denno*, 388 U. S. 293; *Simmons v. United States*, 390 U. S. 377; *Foster v. California*, 394 U. S. 440; *Neil v. Biggers*, 409 U. S. 188; and *Manson v. Brathwaite*, 432 U. S. 98. These cases detail the approach appropriately used to determine whether due process requires suppression of an eyewitness identification tainted by police arrangement. First, due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Id.*, at 107, 109; *Biggers*, 409 U. S., at 198. Even when the police use such a procedure, however, suppression of the resulting identification is not the inevitable consequence. *Brathwaite*, 432 U. S., at 112–113; *Biggers*, 409 U. S., at 198–199. Instead, due process requires courts to assess, on a case-by-case basis, whether improper police conduct created a “substantial likelihood of misidentification.” *Id.*, at 201. “[R]eliability [of the eyewitness identification] is the linchpin” of that evaluation. *Brathwaite*, 432 U. S., at 114. Where the “indicators of [a witness’s] ability to make an accurate identification” are “outweighed by the corrupting effect” of law enforcement suggestion, the identification should be suppressed. *Id.*, at 114, 116. Otherwise, the identification, assuming no other barrier to its admission, should be submitted to the jury. Pp. 6–10.

(b) Perry argues that it was mere happenstance that all of the cases in the *Stovall* line involved improper police action. The rationale underlying this Court’s decisions, Perry asserts, calls for a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. This Court disagrees.

If “reliability is the linchpin” of admissibility under the Due Process Clause, *Brathwaite*, 432 U. S., at 114, Perry contends, it should not matter whether law enforcement was responsible for creating the suggestive circumstances that marred the identification. This argu-

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ment removes *Brathwaite*'s statement from its mooring, attributing to it a meaning that a fair reading of the opinion does not bear. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct.

Perry's contention also ignores a key premise of *Brathwaite*: A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement use of improper procedures in the first place. This deterrence rationale is inapposite in cases, like Perry's, where there is no improper police conduct. Perry also places significant weight on *United States v. Wade*, 388 U. S. 218, describing it as a decision not anchored to improper police conduct. But the risk of police rigging was the very danger that prompted the Court in *Wade* to extend a defendant's right to counsel to cover postindictment lineups and showups.

Perry's position would also open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. There is no reason why an identification made by an eyewitness with poor vision or one who harbors a grudge against the defendant, for example, should be regarded as inherently more reliable than Blandon's identification here. Even if this Court could, as Perry contends, distinguish "suggestive circumstances" from other factors bearing on the reliability of eyewitness evidence, Perry's limitation would still involve trial courts, routinely, in preliminary examinations, for most eyewitness identifications involve some element of suggestion. Pp. 10–14.

(c) In urging a broadly applicable rule, Perry maintains that eyewitness identifications are uniquely unreliable. The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen the evidence for reliability before allowing the jury to assess its creditworthiness. The Court's unwillingness to adopt such a rule rests, in large part, on its recognition that the jury, not the judge, traditionally determines the reliability of evidence. It also takes account of other safeguards built into the adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment rights to counsel and to confront and cross-examine the eyewitness, eyewitness-specific instructions warning juries to take care in appraising identification evidence, and state and federal rules of evidence permitting trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. Many of these safeguards were availed of by Perry's defense. Given the safeguards generally applicable in criminal trials, the introduction of Blandon's eyewitness tes-

Syllabus

timony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair. Pp. 14–18.

Affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. THOMAS, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIREON WRIT OF CERTIORARI TO THE SUPREME COURT OF
NEW HAMPSHIRE

[January 11, 2012]

JUSTICE GINSBURG delivered the opinion of the Court.

In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safeguards apart, admission of evidence in state trials is ordinarily governed by state law, and the reliability of relevant testimony typically falls within the province of the jury to determine. This Court has recognized, in addition, a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.

An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is “a very substantial likelihood of irreparable misidentification,” *Simmons v. United States*, 390 U. S. 377, 384 (1968), the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the

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police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice.¹ Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

I
A

Around 3 a.m. on August 15, 2008, Joffre Ullon called the Nashua, New Hampshire, Police Department and

¹The dissent, too, appears to urge that all suggestive circumstances raise due process concerns warranting a pretrial ruling. See *post*, at 6, 9, 14–17. Neither Perry nor the dissent, however, points to a single case in which we have required pretrial screening absent a police-arranged identification procedure. Understandably so, for there are no such cases. Instead, the dissent surveys our decisions, heedless of the police arrangement that underlies every one of them, and inventing a “longstanding rule,” *post*, at 6, that never existed. Nor are we, as the dissent suggests, imposing a *mens rea* requirement, *post*, at 1, 7, or otherwise altering our precedent in any way. As our case law makes clear, what triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive.

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reported that an African-American male was trying to break into cars parked in the lot of Ullon's apartment building. Officer Nicole Clay responded to the call. Upon arriving at the parking lot, Clay heard what "sounded like a metal bat hitting the ground." App. 37a–38a. She then saw petitioner Barion Perry standing between two cars. Perry walked toward Clay, holding two car-stereo amplifiers in his hands. A metal bat lay on the ground behind him. Clay asked Perry where the amplifiers came from. "[I] found them on the ground," Perry responded. *Id.*, at 39a.

Meanwhile, Ullon's wife, Nubia Blandon, woke her neighbor, Alex Clavijo, and told him she had just seen someone break into his car. Clavijo immediately went downstairs to the parking lot to inspect the car. He first observed that one of the rear windows had been shattered. On further inspection, he discovered that the speakers and amplifiers from his car stereo were missing, as were his bat and wrench. Clavijo then approached Clay and told her about Blandon's alert and his own subsequent observations.

By this time, another officer had arrived at the scene. Clay asked Perry to stay in the parking lot with that officer, while she and Clavijo went to talk to Blandon. Clay and Clavijo then entered the apartment building and took the stairs to the fourth floor, where Blandon's and Clavijo's apartments were located. They met Blandon in the hallway just outside the open door to her apartment.

Asked to describe what she had seen, Blandon stated that, around 2:30 a.m., she saw from her kitchen window a tall, African-American man roaming the parking lot and looking into cars. Eventually, the man circled Clavijo's car, opened the trunk, and removed a large box.²

²The box, which Clay found on the ground near where she first encountered Perry, contained car-stereo speakers. App. 177a–178a.

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Clay asked Blandon for a more specific description of the man. Blandon pointed to her kitchen window and said the person she saw breaking into Clavijo's car was standing in the parking lot, next to the police officer. Perry's arrest followed this identification.

About a month later, the police showed Blandon a photographic array that included a picture of Perry and asked her to point out the man who had broken into Clavijo's car. Blandon was unable to identify Perry.

B

Perry was charged in New Hampshire state court with one count of theft by unauthorized taking and one count of criminal mischief.³ Before trial, he moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process. Blandon witnessed what amounted to a one-person showup in the parking lot, Perry asserted, which all but guaranteed that she would identify him as the culprit. *Id.*, at 15a–16a.

The New Hampshire Superior Court denied the motion. *Id.*, at 82a–88a. To determine whether due process prohibits the introduction of an out-of-court identification at trial, the Superior Court said, this Court's decisions instruct a two-step inquiry. First, the trial court must decide whether the police used an unnecessarily suggestive identification procedure. *Id.*, at 85a. If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible. *Ibid.* (citing *Neil v. Biggers*, 409 U. S. 188 (1972), and *Manson v. Brathwaite*, 432 U. S. 98 (1977)).

Perry's challenge, the Superior Court concluded, failed at step one: Blandon's identification of Perry on the night

³The theft charge was based on the taking of items from Clavijo's car, while the criminal mischief count was founded on the shattering of Clavijo's car window.

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of the crime did not result from an unnecessarily suggestive procedure “manufacture[d] . . . by the police.” App. 86a–87a. Blandon pointed to Perry “spontaneously,” the court noted, “without any inducement from the police.” *Id.*, at 85a–86a. Clay did not ask Blandon whether the man standing in the parking lot was the man Blandon had seen breaking into Clavijo’s car. *Ibid.* Nor did Clay ask Blandon to move to the window from which she had observed the break-in. *Id.*, at 86a.

The Superior Court recognized that there were reasons to question the accuracy of Blandon’s identification: the parking lot was dark in some locations; Perry was standing next to a police officer; Perry was the only African-American man in the vicinity; and Blandon was unable, later, to pick Perry out of a photographic array. *Id.*, at 86a–87a. But “[b]ecause the police procedures were not unnecessarily suggestive,” the court ruled that the reliability of Blandon’s testimony was for the jury to consider. *Id.*, at 87a.

At the ensuing trial, Blandon and Clay testified to Blandon’s out-of-court identification. The jury found Perry guilty of theft and not guilty of criminal mischief.

On appeal, Perry repeated his challenge to the admissibility of Blandon’s out-of-court identification. The trial court erred, Perry contended, in requiring an initial showing that the police arranged the suggestive identification procedure. Suggestive circumstances alone, Perry argued, suffice to trigger the court’s duty to evaluate the reliability of the resulting identification before allowing presentation of the evidence to the jury.

The New Hampshire Supreme Court rejected Perry’s argument and affirmed his conviction. *Id.*, at 9a–11a. Only where the police employ suggestive identification techniques, that court held, does the Due Process Clause require a trial court to assess the reliability of identification evidence before permitting a jury to consider it. *Id.*,

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at 10a–11a.

We granted certiorari to resolve a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police. 563 U. S. ____ (2011).⁴

II

A

The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State’s evidence include the Sixth Amendment rights to counsel, *Gideon v. Wainwright*, 372 U. S. 335, 343–345 (1963); compulsory process, *Taylor v. Illinois*, 484 U. S. 400, 408–409 (1988); and confrontation plus cross-examination of witnesses, *Delaware v. Fensterer*, 474 U. S. 15, 18–20 (1985) (*per curiam*).

⁴ Compare *United States v. Bouthot*, 878 F. 2d 1506, 1516 (CA1 1989) (Due process requires federal courts to “scrutinize all suggestive identification procedures, not just those orchestrated by the police.”); *Dunnigan v. Keane*, 137 F. 3d 117, 128 (CA2 1998) (same); *Thigpen v. Cory*, 804 F. 2d 893, 895 (CA6 1986) (same), with *United States v. Kimberlin*, 805 F. 2d 210, 233 (CA7 1986) (Due process check is required only in cases involving improper state action.); *United States v. Zeiler*, 470 F. 2d 717, 720 (CA3 1972) (same); *State v. Addison*, 160 N. H. 792, 801, 8 A. 3d 118, 125 (2010) (same); *State v. Reid*, 91 S. W. 3d 247, 272 (Tenn. 2002) (same); *State v. Nordstrom*, 200 Ariz. 229, 241, 25 P. 3d 717, 729 (2001) (same); *Semple v. State*, 271 Ga. 416, 417–418, 519 S. E. 2d 912, 914–915 (1999) (same); *Harris v. State*, 619 N. E. 2d 577, 581 (Ind. 1993) (same); *State v. Pailon*, 590 A. 2d 858, 862–863 (R. I. 1991) (same); *Commonwealth v. Colon-Cruz*, 408 Mass. 533, 541–542, 562 N. E. 2d 797, 805 (1990) (same); *State v. Brown*, 38 Ohio St. 3d 305, 310–311, 528 N. E. 2d 523, 533 (1988) (same); *Wilson v. Commonwealth*, 695 S. W. 2d 854, 857 (Ky. 1985) (same).

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Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. See *Kansas v. Ventris*, 556 U. S. 586, 594, n. (2009) (“Our legal system . . . is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses.”). Only when evidence “is so extremely unfair that its admission violates fundamental conceptions of justice,” *Dowling v. United States*, 493 U. S. 342, 352 (1990) (internal quotation marks omitted), have we imposed a constraint tied to the Due Process Clause. See, e.g., *Napue v. Illinois*, 360 U. S. 264, 269 (1959) (Due process prohibits the State’s “knowin[g] use [of] false evidence,” because such use violates “any concept of ordered liberty.”).

Contending that the Due Process Clause is implicated here, Perry relies on a series of decisions involving police-arranged identification procedures. In *Stovall v. Denno*, 388 U. S. 293 (1967), first of those decisions, a witness identified the defendant as her assailant after police officers brought the defendant to the witness’ hospital room. *Id.*, at 295. At the time the witness made the identification, the defendant—the only African-American in the room—was handcuffed and surrounded by police officers. *Ibid.* Although the police-arranged showup was undeniably suggestive, the Court held that no due process violation occurred. *Id.*, at 302. Crucial to the Court’s decision was the procedure’s necessity: The witness was the only person who could identify or exonerate the defendant; the witness could not leave her hospital room; and it was uncertain whether she would live to identify the defendant in more neutral circumstances. *Ibid.*

A year later, in *Simmons v. United States*, 390 U. S. 377 (1968), the Court addressed a due process challenge to police use of a photographic array. When a witness identi-

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fies the defendant in a police-organized photo lineup, the Court ruled, the identification should be suppressed only where “the photographic identification procedure was so [unnecessarily] suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Id.*, at 384–385. Satisfied that the photo array used by Federal Bureau of Investigation agents in *Simmons* was both necessary and unlikely to have led to a mistaken identification, the Court rejected the defendant’s due process challenge to admission of the identification. *Id.*, at 385–386. In contrast, the Court held in *Foster v. California*, 394 U. S. 440 (1969), that due process required the exclusion of an eyewitness identification obtained through police-arranged procedures that “made it all but inevitable that [the witness] would identify [the defendant].” *Id.*, at 443.

Synthesizing previous decisions, we set forth in *Neil v. Biggers*, 409 U. S. 188 (1972), and reiterated in *Manson v. Brathwaite*, 432 U. S. 98 (1977), the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement. The Court emphasized, first, that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Id.*, at 107, 109; *Biggers*, 409 U. S., at 198. Even when the police use such a procedure, the Court next said, suppression of the resulting identification is not the inevitable consequence. *Brathwaite*, 432 U. S., at 112–113; *Biggers*, 409 U. S., at 198–199.

A rule requiring automatic exclusion, the Court reasoned, would “g[o] too far,” for it would “kee[p] evidence from the jury that is reliable and relevant,” and “may result, on occasion, in the guilty going free.” *Brathwaite*, 432 U. S., at 112; see *id.*, at 113 (when an “identification is reliable despite an unnecessarily suggestive [police] identification procedure,” automatic exclusion “is a Draconian

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sanction,” one “that may frustrate rather than promote justice”).

Instead of mandating a *per se* exclusionary rule, the Court held that the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a “substantial likelihood of misidentification.” *Biggers*, 409 U. S., at 201; see *Brathwaite*, 432 U. S., at 116. “[R]eliability [of the eyewitness identification] is the linchpin” of that evaluation, the Court stated in *Brathwaite*. *Id.*, at 114. Where the “indicators of [a witness] ability to make an accurate identification” are “outweighed by the corrupting effect” of law enforcement suggestion, the identification should be suppressed. *Id.*, at 114, 116. Otherwise, the evidence (if admissible in all other respects) should be submitted to the jury.⁵

Applying this “totality of the circumstances” approach, *id.*, at 110, the Court held in *Biggers* that law enforcement’s use of an unnecessarily suggestive showup did not require suppression of the victim’s identification of her assailant. 409 U. S., at 199–200. Notwithstanding the improper procedure, the victim’s identification was reliable: She saw her assailant for a considerable period of time under adequate light, provided police with a detailed description of her attacker long before the showup, and had “no doubt” that the defendant was the person she had seen. *Id.*, at 200 (internal quotation marks omitted). Similarly, the Court concluded in *Brathwaite* that police use of an unnecessarily suggestive photo array did not

⁵Among “factors to be considered” in evaluating a witness’ “ability to make an accurate identification,” the Court listed: “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” *Manson v. Brathwaite*, 432 U. S. 98, 114 (1977) (citing *Neil v. Biggers*, 409 U. S. 188, 199–200 (1972)).

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require exclusion of the resulting identification. 432 U. S., at 114–117. The witness, an undercover police officer, viewed the defendant in good light for several minutes, provided a thorough description of the suspect, and was certain of his identification. *Id.*, at 115. Hence, the “indicators of [the witness] ability to make an accurate identification [were] hardly outweighed by the corrupting effect of the challenged identification.” *Id.*, at 116.

B

Perry concedes that, in contrast to every case in the *Stovall* line, law enforcement officials did not arrange the suggestive circumstances surrounding Blandon’s identification. See Brief for Petitioner 34; Tr. of Oral Arg. 5 (counsel for Perry) (“[W]e do not allege any manipulation or intentional orchestration by the police.”). He contends, however, that it was mere happenstance that each of the *Stovall* cases involved improper police action. The rationale underlying our decisions, Perry asserts, supports a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. We disagree.

Perry’s argument depends, in large part, on the Court’s statement in *Brathwaite* that “reliability is the linchpin in determining the admissibility of identification testimony.” 432 U. S., at 114. If reliability is the linchpin of admissibility under the Due Process Clause, Perry maintains, it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification.

Perry has removed our statement in *Brathwaite* from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear. As just explained, *supra*, at 8–9, the *Brathwaite* Court’s reference to reliability appears in a portion of the opinion concerning the appropriate remedy *when the police use an unneces-*

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sarily suggestive identification procedure. The Court adopted a judicial screen for reliability as a course preferable to a *per se* rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct. 432 U. S., at 112–113.⁶

Perry’s contention that improper police action was not essential to the reliability check *Brathwaite* required is echoed by the dissent. *Post*, at 3–4. Both ignore a key premise of the *Brathwaite* decision: A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. See 432 U. S., at 112. Alerted to the prospect that identification evidence improperly obtained may be excluded, the Court reasoned, police officers will “guard against unnecessarily suggestive procedures.” *Ibid*. This deterrence rationale is inapposite in cases, like Perry’s, in which the police engaged in no improper conduct.

Coleman v. Alabama, 399 U. S. 1 (1970), another decision in the *Stovall* line, similarly shows that the Court has linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identi-

⁶The Court’s description of the question presented in *Brathwaite* assumes that improper state action occurred: “[Does] the Due Process Clause of the Fourteenth Amendment compe[l] the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary.” 432 U. S., at 99.

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fication. The defendants in *Coleman* contended that a witness' in-court identifications violated due process, because a pretrial stationhouse lineup was "so unduly prejudicial and conducive to irreparable misidentification as fatally to taint [the later identifications]." 399 U. S., at 3 (plurality opinion). The Court rejected this argument. *Id.*, at 5–6 (plurality opinion), 13–14 (Black, J., concurring), 22, n. 2 (Burger, C. J., dissenting), 28, n. 2 (Stewart, J., dissenting). No due process violation occurred, the plurality explained, because nothing "the police said or did prompted [the witness] virtually spontaneous identification of [the defendants]." *Id.*, at 6. True, Coleman was the only person in the lineup wearing a hat, the plurality noted, but "nothing in the record show[ed] that he was required to do so." *Ibid.* See also *Colorado v. Connelly*, 479 U. S. 157, 163, 167 (1986) (Where the "crucial element of police overreaching" is missing, the admissibility of an allegedly unreliable confession is "a matter to be governed by the evidentiary laws of the forum, . . . and not by the Due Process Clause.").

Perry and the dissent place significant weight on *United States v. Wade*, 388 U. S. 218 (1967), describing it as a decision not anchored to improper police conduct. See Brief for Petitioner 12, 15, 21–22, 28; *post*, at 2–4, 8–10. In fact, the risk of police rigging was the very danger to which the Court responded in *Wade* when it recognized a defendant's right to counsel at postindictment, police-organized identification procedures. 388 U. S., at 233, 235–236. "[T]he confrontation *compelled by the State* between the accused and the victim or witnesses," the Court began, "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*, at 228 (emphasis added). "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification," the Court continued, "has been the degree of suggestion inher-

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ent in the manner in which *the prosecution* presents the suspect to witnesses for pretrial identification.” *Ibid.* (emphasis added). To illustrate the improper suggestion it was concerned about, the Court pointed to police-designed lineups where “all in the lineup but the suspect were known to the identifying witness, . . . the other participants in [the] lineup were grossly dissimilar in appearance to the suspect, . . . only the suspect was required to wear distinctive clothing which the culprit allegedly wore, . . . the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, . . . the suspect is pointed out before or during a lineup, . . . the participants in the lineup are asked to try on an article of clothing which fits only the suspect.” *Id.*, at 233 (footnotes omitted). Beyond genuine debate, then, prevention of unfair police practices prompted the Court to extend a defendant’s right to counsel to cover postindictment lineups and showups. *Id.*, at 235.

Perry’s argument, reiterated by the dissent, thus lacks support in the case law he cites. Moreover, his position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. External suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness’ testimony. As one of Perry’s *amici* points out, many other factors bear on “the likelihood of misidentification,” *post*, at 9—for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness. Brief for American Psychological Association as *Amicus Curiae* 9–12. There is no reason why an identification made by an eyewitness with poor vision, for ex-

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ample, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a “threat to the fairness of trial,” *post*, at 14, than the identification Bandon made in this case. To embrace Perry’s view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.

Perry maintains that the Court can limit the due process check he proposes to identifications made under “suggestive circumstances.” Tr. of Oral Arg. 11–14. Even if we could rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence, Perry’s limitation would still involve trial courts, routinely, in preliminary examinations. Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned “theft suspect,” or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have “suggested” to the witness that the defendant was the person the witness observed committing the crime.

C

In urging a broadly applicable due process check on eyewitness identifications, Perry maintains that eyewitness identifications are a uniquely unreliable form of evidence. See Brief for Petitioner 17–22 (citing studies showing that eyewitness misidentifications are the leading cause of wrongful convictions); Brief for American Psychological Association as *Amicus Curiae* 14–17 (describing

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research indicating that as many as one in three eyewitness identifications is inaccurate). See also *post*, at 14–17. We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that “the annals of criminal law are rife with instances of mistaken identification.” *Wade*, 388 U. S., at 228.

We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant’s trial fundamentally unfair. See, e.g., *Ventris*, 556 U. S., at 594, n. (declining to “craft a broad exclusionary rule for uncorroborated statements obtained [from jailhouse snitches],” even though “rewarded informant testimony” may be inherently untrustworthy); *Dowling*, 493 U. S., at 353 (rejecting argument that the introduction of evidence concerning acquitted conduct is fundamentally unfair because such evidence is “inherently unreliable”). We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Our unwillingness to enlarge the domain of due process as *Perry* and the dissent urge rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. See *supra*, at 7. We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant’s Sixth Amendment right to confront the eyewitness. See *Maryland v. Craig*, 497 U. S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.”). Another is the

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defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted,⁷ likewise warn the jury to take care in appraising identification evidence. See, e.g., *United States v. Telfaire*, 469 F.2d 552, 558–559 (CA DC 1972) (*per curiam*) (D. C. Circuit Model Jury Instructions) (“If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care.”). See also *Ventris*, 556 U. S., at 594, n. (citing jury instructions that informed jurors about the unreliability of uncorroborated jailhouse-informant testimony as a reason to resist a ban on such testimony); *Dowling*, 493

⁷See Model Crim. Jury Instr. No. 4.15 (CA3 2009); *United States v. Holley*, 502 F.2d 273, 277–278 (CA4 1974); Pattern Crim. Jury Instr. No. 1.29 (CA5 2001); Pattern Crim. Jury Instr. No. 7.11 (CA6 2011); Fed. Crim. Jury Instr. No. 3.08 (CA7 1999); Model Crim. Jury Instr. for the District Courts No. 4.08 (CA8 2011); Model Crim. Jury Instr. No. 4.11 (CA9 2010); Crim. Pattern Jury Instr. No. 1.29 (CA10 2011); Pattern Jury Instr. (Crim. Cases) Spec. Instr. No. 3 (CA11 2010); Rev. Ariz. Jury Instr., Crim., No. 39 (3d ed. 2008); 1 Judicial Council of Cal. Crim. Jury Instr. No. 315 (Summer 2011); Conn. Crim. Jury Instr. 2.6–4 (2007); 2 Ga. Suggested Pattern Jury Instr. (Crim. Cases) No. 1.35.10 (4th ed. 2011); Ill. Pattern Jury Instr., Crim., No. 3.15 (Supp. 2011); Pattern Instr., Kan. 3d, Crim., No. 52.20 (2011); 1 Md. Crim. Jury Instr. & Commentary §§2.56, 2.57(A), 2.57(B) (3d ed. 2009 and Supp. 2010); Mass. Crim. Model Jury Instr. No. 9.160 (2009); 10 Minn. Jury Instr. Guides, Crim., No. 3.19 (Supp. 2006); N. H. Crim. Jury Instr. No. 3.06 (1985); N. Y. Crim. Jury Instr. “Identification—One Witness” and “Identification—Witness Plus” (2d ed. 2011); Okla. Uniform Jury Instr., Crim., No. 9–19 (Supp. 2000); 1 Pa. Suggested Standard Crim. Jury Instr. No. 4.07B (2d ed. 2010); Tenn. Pattern Jury Instr., Crim., No. 42.05 (15th ed. 2011); Utah Model Jury Instr. CR404 (2d ed. 2010); Model Instructions from the Vt. Crim. Jury Instr. Comm. Nos. CR5–601, CR5–605 (2003); W. Va. Crim. Jury Instr. No. 5.05 (6th ed. 2003).

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U. S., at 352–353. The constitutional requirement that the government prove the defendant’s guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

State and federal rules of evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. See, e.g., Fed. Rule Evid. 403; N. H. Rule Evid. 403 (2011). See also Tr. of Oral Arg. 19–22 (inquiring whether the standard Perry seeks differs materially from the one set out in Rule 403). In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence. See, e.g., *State v. Clopten*, 2009 UT 84, A33, 223 P. 3d 1103, 1113 (“We expect . . . that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].”).

Many of the safeguards just noted were at work at Perry’s trial. During her opening statement, Perry’s court-appointed attorney cautioned the jury about the vulnerability of Blandon’s identification. App. 115a (Blandon, “the eyewitness that the State needs you to believe[,] can’t pick [Perry] out of a photo array. How carefully did she really see what was going on? . . . How well could she really see him?”). While cross-examining Blandon and Officer Clay, Perry’s attorney constantly brought up the weaknesses of Blandon’s identification. She highlighted: (1) the significant distance between Blandon’s window and the parking lot, *id.*, at 226a; (2) the lateness of the hour, *id.*, at 225a; (3) the van that partly obstructed Blandon’s view, *id.*, at 226a; (4) Blandon’s concession that she was “so scared [she] really didn’t pay attention” to what Perry was wearing, *id.*, at 233a; (5) Blandon’s inability to describe Perry’s facial features or other identifying marks, *id.*, at 205a, 233a–235a; (6) Blandon’s failure to pick Perry

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out of a photo array, *id.*, at 235a; and (7) Perry’s position next to a uniformed, gun-bearing police officer at the moment Blandon made her identification, *id.*, at 202a–205a. Perry’s counsel reminded the jury of these frailties during her summation. *Id.*, at 374a–375a (Blandon “wasn’t able to tell you much about who she saw She couldn’t pick [Perry] out of a lineup, out of a photo array [Blandon said] [t]hat guy that was with the police officer, that’s who was circling. Again, think about the context with the guns, the uniforms. Powerful, powerful context clues.”).

After closing arguments, the trial court read the jury a lengthy instruction on identification testimony and the factors the jury should consider when evaluating it. *Id.*, at 399a–401a. The court also instructed the jury that the defendant’s guilt must be proved beyond a reasonable doubt, *id.*, at 390a, 392a, 395a–396a, and specifically cautioned that “one of the things the State must prove [beyond a reasonable doubt] is the identification of the defendant as the person who committed the offense,” *id.*, at 398a–399a.

Given the safeguards generally applicable in criminal trials, protections availed of by the defense in Perry’s case, we hold that the introduction of Blandon’s eyewitness testimony, without a preliminary judicial assessment of its reliability, did not render Perry’s trial fundamentally unfair.

* * *

For the foregoing reasons, we agree with the New Hampshire courts’ appraisal of our decisions. See *supra*, at 4–5. Finding no convincing reason to alter our precedent, we hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circum-

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stances arranged by law enforcement. Accordingly, the judgment of the New Hampshire Supreme Court is

Affirmed.

THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
NEW HAMPSHIRE

[January 11, 2012]

JUSTICE THOMAS, concurring.

The Court correctly concludes that its precedents establish a due process right to the pretrial exclusion of an unreliable eyewitness identification only if the identification results from police suggestion. I therefore join its opinion. I write separately because I would not extend *Stovall v. Denno*, 388 U. S. 293 (1967), and its progeny even if the reasoning of those opinions applied to this case. The *Stovall* line of cases is premised on a “substantive due process” right to “fundamental fairness.” See, *e.g.*, *id.*, at 299 (concluding that whether a suggestive identification “resulted in such unfairness that it infringed [the defendant’s] right to due process of law” is “open to all persons to allege and prove”); *Manson v. Brathwaite*, 432 U. S. 98, 113 (1977) (“The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment”). In my view, those cases are wrongly decided because the Fourteenth Amendment’s Due Process Clause is not a “secret repository of substantive guarantees against ‘unfairness.’” *BMW of North America, Inc. v. Gore*, 517 U. S. 559, 598–599 (1996) (SCALIA, J., joined by THOMAS, J., dissenting); see also *McDonald v. Chicago*, 561 U. S. ___, ___ (2010) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 7) (“The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property

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could define the substance of those rights strains credulity"). Accordingly, I would limit the Court's suggestive eyewitness identification cases to the precise circumstances that they involved.

SOTOMAYOR, J., dissenting

SUPREME COURT OF THE UNITED STATES

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BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
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[January 11, 2012]

JUSTICE SOTOMAYOR, dissenting.

This Court has long recognized that eyewitness identifications’ unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial. Our cases thus establish a clear rule: The admission at trial of out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process. The Court today announces that that rule does not even “com[e] into play” unless the suggestive circumstances are improperly “police-arranged.” *Ante*, at 2, 11.

Our due process concern, however, arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification. By rendering protection contingent on improper police arrangement of the suggestive circumstances, the Court effectively grafts a *mens rea* inquiry onto our rule. The Court’s holding enshrines a murky distinction—between suggestive confrontations intentionally orchestrated by the police and, as here, those inadvertently caused by police actions—that will sow confusion. It ignores our precedents’ acute sensitivity to the hazards of intentional and unintentional suggestion alike and unmoors our rule from the very interest it protects, inviting arbitrary re-

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sults. And it recasts the driving force of our decisions as an interest in police deterrence, rather than reliability. Because I see no warrant for declining to assess the circumstances of this case under our ordinary approach, I respectfully dissent.¹

I

The “driving force” behind *United States v. Wade*, 388 U. S. 218 (1967), *Gilbert v. California*, 388 U. S. 263 (1967), and *Stovall v. Denno*, 388 U. S. 293 (1967), was “the Court’s concern with the problems of eyewitness identification”—specifically, “the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.” *Manson v. Brathwaite*, 432 U. S. 98, 111–112 (1977). We have pointed to the “formidable” number of “miscarriage[s] of justice from mistaken identification” in the annals of criminal law. *Wade*, 388 U. S., at 228. We have warned of the “vagaries” and “‘proverbially untrustworthy’” nature of eyewitness identifications. *Ibid.* And we have singled out a “major factor contributing” to that proverbial unreliability: “the suggestibility inherent in the context of the pretrial identification.” *Id.*, at 228, 235.

Our precedents make no distinction between intentional and unintentional suggestion. To the contrary, they explicitly state that “[s]uggestion can be created intentionally or unintentionally in many subtle ways.” *Id.*, at 229. Rather than equate suggestive conduct with misconduct, we specifically have disavowed the assumption that suggestive influences may only be “the result of police procedures intentionally designed to prejudice an accused.” *Id.*, at 235; see also *id.*, at 236 (noting “grave potential for prejudice, intentional or not, in the pretrial lineup”); *id.*, at

¹ Because the facts of this case involve police action, I do not reach the question whether due process is triggered in situations involving no police action whatsoever.

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239 (describing lack of lineup regulations addressing “risks of abuse and unintentional suggestion”). “Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused.” *Moore v. Illinois*, 434 U. S. 220, 224 (1977). The implication is that even police acting with the best of intentions can inadvertently signal “‘that’s the man.’” *Wade*, 388 U. S., at 236; see also *Kirby v. Illinois*, 406 U. S. 682, 690–691 (1972) (“[I]t is always necessary to ‘scrutinize *any* pretrial confrontation . . .’”).²

In *Wade* itself, we noted that the “potential for improper influence [in pretrial confrontations] is illustrated by the circumstances . . . [i]n the present case.” 388 U. S., at 233–234. We then highlighted not the lineup procedure, but rather a preprocedure encounter: The two witnesses who later identified Wade in the lineup had seen Wade outside while “await[ing] assembly of the lineup.” *Id.*, at 234. Wade had been standing in the hallway, which happened to be “observable to the witnesses through an open door.” *Ibid.* One witness saw Wade “within sight of an FBI agent”; the other saw him “in the custody of the agent.” *Ibid.* In underscoring the hazards of these circumstances, we made no mention of whether the encounter had been arranged; indeed, the facts suggest that it was not.

More generally, our precedents focus not on the act of suggestion, but on suggestion’s “corrupting effect” on

²*Wade* held that the dangers of pretrial identification procedures necessitated a right to counsel; that same day, *Stovall* held that a defendant ineligible for the *Wade* rule was still entitled to challenge the confrontation as a due process violation. Because the two were companion cases advancing interrelated rules to avoid unfairness at trial resulting from suggestive pretrial confrontations, *Wade*’s exposition of the dangers of suggestiveness informs both contexts. See *Manson v. Brathwaite*, 432 U. S. 98, 112 (1977) (“*Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability”).

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reliability. *Brathwaite*, 432 U. S., at 114. Eyewitness evidence derived from suggestive circumstances, we have explained, is uniquely resistant to the ordinary tests of the adversary process. An eyewitness who has made an identification often becomes convinced of its accuracy. “Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification.” *Simmons v. United States*, 390 U. S. 377, 383–384 (1968) (emphasis added); see also *Wade*, 388 U. S., at 229 (witness is “not likely” to recant). Suggestion bolsters that confidence.

At trial, an eyewitness’ artificially inflated confidence in an identification’s accuracy complicates the jury’s task of assessing witness credibility and reliability. It also impairs the defendant’s ability to attack the eyewitness’ credibility. *Stovall*, 388 U. S., at 298. That in turn jeopardizes the defendant’s basic right to subject his accuser to meaningful cross-examination. See *Wade*, 388 U. S., at 235 (“[C]ross-examination . . . cannot be viewed as an absolute assurance of accuracy and reliability . . . where so many variables and pitfalls exist”). The end result of suggestion, whether intentional or unintentional, is to fortify testimony bearing directly on guilt that juries find extremely convincing and are hesitant to discredit. See *id.*, at 224 (“[A]t pretrial proceedings . . . the results might well settle the accused’s fate and reduce the trial itself to a mere formality”); *Gilbert*, 388 U. S., at 273 (“[T]he witness’ testimony of his lineup identification will enhance the impact of his in-court identification on the jury”).

Consistent with our focus on reliability, we have declined to adopt a *per se* rule excluding all suggestive identifications. Instead, “reliability is the linchpin” in deciding admissibility. *Brathwaite*, 432 U. S., at 114. We have explained that a suggestive identification procedure “does

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not in itself intrude upon a constitutionally protected interest.” *Id.*, at 113, n. 13; see also *Neil v. Biggers*, 409 U. S. 188, 198–199 (1972) (rejecting the proposition that “unnecessary suggestiveness alone requires the exclusion of evidence”). “Suggestive confrontations are disapproved because they increase the likelihood of misidentification”—and “[i]t is the likelihood of misidentification which violates a defendant’s right to due process.” *Id.*, at 198; see also *United States ex rel. Kirby v. Sturges*, 510 F. 2d 397, 406 (CA7 1975) (Stevens, J.) (“The due process clause applies only to proceedings which result in a deprivation of life, liberty or property. . . . [I]f a constitutional violation results from a showup, it occurs in the courtroom, not in the police station”). In short, “what the *Stovall* due process right protects is an evidentiary interest.” *Brathwaite*, 432 U. S., at 113, n. 14.

To protect that evidentiary interest, we have applied a two-step inquiry: First, the defendant has the burden of showing that the eyewitness identification was derived through “impermissibly suggestive” means.³ *Simmons*, 390 U. S., at 384. Second, if the defendant meets that burden, courts consider whether the identification was

³Our precedents refer to “impermissibly,” “unnecessarily,” and “unduly” suggestive circumstances interchangeably. See, e.g., *Brathwaite*, 432 U. S., at 105, n. 8, 107–108, 110, 112–113 (“impermissibly” and “unnecessarily”); *Neil v. Biggers*, 409 U. S. 188, 196–199 (1972) (“impermissibly” and “unnecessarily”); *Coleman v. Alabama*, 399 U. S. 1, 3–5 (1970) (“unduly” and “impermissibly”); *Simmons v. United States*, 390 U. S. 377, 383–384 (1968) (“unduly” and “impermissibly”). The Circuits have followed suit. E.g., *Thigpen v. Cory*, 804 F. 2d 893, 895 (CA6 1986) (“unduly”); *Green v. Loggins*, 614 F. 2d 219, 223 (CA9 1980) (“unnecessarily or impermissibly”). All reinforce our focus not on the act of suggestion, but on whether the suggestiveness rises to such a level that it undermines reliability. Police machinations can heighten the likelihood of misidentification, but they are no prerequisite to finding a confrontation “so impermissibly suggestive as to give rise to a very substantial likelihood of . . . misidentification.” *Simmons*, 390 U. S., at 384.

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reliable under the totality of the circumstances. That step entails considering the witness' opportunity to view the perpetrator, degree of attention, accuracy of description, level of certainty, and the time between the crime and pretrial confrontation, then weighing such factors against the "corrupting effect of the suggestive identification." *Brathwaite*, 432 U. S., at 108, 114. Most identifications will be admissible. The standard of "fairness as required by the Due Process Clause," *id.*, at 113, however, demands that a subset of the most unreliable identifications—those carrying a "very substantial likelihood of . . . misidentification"—will be excluded. *Biggers*, 409 U. S., at 198.

II

A

The majority today creates a novel and significant limitation on our longstanding rule: Eyewitness identifications so impermissibly suggestive that they pose a very substantial likelihood of an unreliable identification will be deemed inadmissible at trial *only* if the suggestive circumstances were "police-arranged." *Ante*, at 2. Absent "improper police arrangement," "improper police conduct," or "rigging," the majority holds, our two-step inquiry does not even "com[e] into play." *Ante*, at 2, 11. I cannot agree.

The majority does not simply hold that an eyewitness identification must be the product of police action to trigger our ordinary two-step inquiry. Rather, the majority maintains that the suggestive circumstances giving rise to the identification must be "police-arranged," "police rigg[ed]," "police-designed," or "police-organized." *Ante*, at 2, 12–13. Those terms connote a degree of intentional orchestration or manipulation. See Brief for Respondent 19 (no indication that police "deliberately tried to manipulate any evidence"); Brief for United States as *Amicus Curiae* 18 ("[N]o one deliberately arranged the circumstances to obtain an identification"). The majority cate-

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gorically exempts all eyewitness identifications derived from suggestive circumstances that were not police-manipulated—however suggestive, and however unreliable—from our due process check. The majority thus appears to graft a *mens rea* requirement onto our existing rule.⁴

As this case illustrates, police intent is now paramount. As the Court acknowledges, Perry alleges an “*accidental* showup.” Brief for Petitioner 34 (emphasis added); see *ante*, at 4. He was the only African-American at the scene of the crime standing next to a police officer. For the majority, the fact that the police did not intend that showup, even if they inadvertently caused it in the course of a police procedure, ends the inquiry. The police were questioning the eyewitness, Blandon, about the perpetrator’s identity, and were intentionally detaining Perry in the parking lot—but had not intended for Blandon to identify the perpetrator from her window. Presumably, in the majority’s view, had the police asked Blandon to move to the window to identify the perpetrator, that could have made all the difference. See Tr. of Oral Arg. 32, 37.

I note, however, that the majority leaves what is required by its arrangement-focused inquiry less than clear. In parts, the opinion suggests that the police must arrange an identification “procedure,” regardless of whether they “inten[d] the arranged procedure to be suggestive.” *Ante*, at 2, n. 1; see also *ante*, at 7–8. Elsewhere, it indicates that the police must arrange the “suggestive circumstances” that lead the witness to identify the accused. See

⁴The majority denies that it has imposed a *mens rea* requirement, see *ante*, at 2, n. 1, but by confining our due process concerns to police-arranged identification procedures, that is just what it has done. The majority acknowledges that “whether or not [the police] intended the arranged procedure to be suggestive” is irrelevant under our precedents, *ibid.*, but still places dispositive weight on whether or not the police intended the procedure itself.

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ante, at 1–2, 10–11, 18–19. Still elsewhere it refers to “improper” police conduct, *ante*, at 1–2, 9–12, connoting bad faith. Does police “arrangement” relate to the procedure, the suggestiveness, or both? If it relates to the procedure, do suggestive preprocedure encounters no longer raise the same concerns? If the police need not “inten[d] the arranged procedure to be suggestive,” *ante*, at 2, n. 1, what makes the police action “improper”? And does that mean that good-faith, unintentional police suggestiveness in a police-arranged lineup can be “impermissibly suggestive”? If no, the majority runs headlong into *Wade*. If yes, on what basis—if not deterrence—does it distinguish unintentional police suggestiveness in an accidental confrontation?

The arrangement-focused inquiry will sow needless confusion. If the police had called Perry and Bandon to the police station for interviews, and Bandon saw Perry being questioned, would that be sufficiently “improper police arrangement”? If Perry had voluntarily come to the police station, would that change the result? Today’s opinion renders the applicability of our ordinary inquiry contingent on a murky line-drawing exercise. Whereas our two-step inquiry focuses on overall reliability—and could account for the spontaneity of the witness’ identification and degree of police manipulation under the totality of the circumstances—today’s opinion forecloses that assessment by establishing a new and inflexible step zero.

B

The majority regards its limitation on our two-step rule as compelled by precedent. Its chief rationale, *ante*, at 7–13, is that none of our prior cases involved situations where the police “did not arrange the suggestive circumstances.” *Ante*, at 10; see also *ante*, at 2, n. 1. That is not necessarily true, given the seemingly unintentional encounter highlighted in *Wade*. But even if it were true, it is

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unsurprising. The vast majority of eyewitness identifications that the State uses in criminal prosecutions are obtained in lineup, showup, and photograph displays arranged by the police. Our precedents reflect that practical reality.

It is also beside the point. Our due process concerns were not predicated on the source of suggestiveness. Rather, “[i]t is the likelihood of misidentification which violates a defendant’s right to due process,” *Biggers*, 409 U. S., at 198, and we are concerned with suggestion insofar as it has “corrupting effect[s]” on the identification’s reliability. *Brathwaite*, 432 U. S., at 114. Accordingly, whether the police have created the suggestive circumstances intentionally or inadvertently, the resulting identification raises the same due process concerns. It is no more or less likely to misidentify the perpetrator. It is no more or less powerful to the jury. And the defendant is no more or less equipped to challenge the identification through cross-examination or prejudiced at trial. The arrangement-focused inquiry thus untethers our doctrine from the very “‘evidentiary interest’” it was designed to protect, inviting arbitrary results. *Id.*, at 113, n. 14.

Indeed, it is the majority’s approach that lies in tension with our precedents. Whereas we previously disclaimed the crabbed view of suggestiveness as “the result of police procedures intentionally designed to prejudice an accused,” *Wade*, 388 U. S., at 235, the majority’s focus on police rigging and improper conduct will revive it. Whereas our precedents were sensitive to intentional and unintentional suggestiveness alike, see *supra*, at 2–3, today’s decision narrows our concern to intentionally orchestrated suggestive confrontations. We once described the “primary evil to be avoided” as the likelihood of misidentification. *Biggers*, 409 U. S., at 198. Today’s decision, however, means that even if that primary evil is at its apex, we need not avoid it at all so long as the suggestive circum-

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stances do not stem from improper police arrangement.

C

The majority gives several additional reasons for why applying our due process rule beyond improperly police-arranged circumstances is unwarranted. In my view, none withstands close inspection.

First, the majority insists that our precedents “aim to deter police from rigging identification procedures,” so our rule should be limited to applications that advance that “primary aim” and “key premise.” *Ante*, at 2, 11 (citing *Brathwaite*, 432 U. S., at 112). That mischaracterizes our cases. We discussed deterrence in *Brathwaite* because *Brathwaite* challenged our two-step inquiry as *lacking* deterrence value. *Brathwaite* argued that deterrence demanded a *per se* rule excluding all suggestive identifications. He said that our rule, which probes the reliability of suggestive identifications under the totality of the circumstances, “cannot be expected to have a significant deterrent impact.” *Id.*, at 111.

We rebutted *Brathwaite*’s criticism in language the majority now wrenches from context: Upon summarizing *Brathwaite*’s argument, we acknowledged “several interests to be considered.” *Ibid.* We then compared the two rules under each interest: First, we noted the “driving force” behind *Wade* and its companion cases—“the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability”—and found both approaches “responsive to this concern,” but the *per se* rule to go “too far” in suppressing reliable evidence. 432 U. S., at 111–112. We noted a “second factor”—deterrence—conceding that the *per se* rule had “more significant deterrent effect,” but noting that our rule “also has an influence on police behavior.” *Id.*, at 112. Finally, we noted a “third factor”—“the effect on the administration of justice”—describing the *per se* rule as having serious drawbacks on

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this front. *Ibid.* That was no list of “primary aim[s].” Nor was it a ringing endorsement of the primacy of deterrence. We simply underscored, in responding to Brathwaite, that our rule was not without deterrence benefits. To the contrary, we clarified that deterrence was a subsidiary concern to reliability, the “driving force” of our doctrine. It is a stretch to claim that our rule cannot apply wherever “[t]his deterrence rationale is inapposite.” *Ante*, at 11.

Second, the majority states that *Coleman v. Alabama*, 399 U. S. 1 (1970), held that “[n]o due process violation occurred . . . because nothing ‘the police said or did prompted’” the identification and shows that our rule is linked “only to improper police arrangement.” *Ante*, at 11–12. That misreads the decision. In *Coleman*, the petitioners challenged a witness’ in-court identification of them at trial on grounds that it had been tainted by a suggestive pretrial lineup. We held that no due process violation occurred because the in-court identification appeared to be “entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup,” and thus could not be said to stem from an identification procedure “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” 399 U. S., at 5–6 (plurality opinion). We then dismissed each of the asserted suggestive influences as having had no bearing on the identification at all: The petitioners claimed that the police intimated to the witness that his attackers were in the lineup; we found the record “devoid of evidence that anything the police said or did” induced the identification. *Id.*, at 6. The petitioners claimed that they alone were made to say certain words; we found that the witness identified petitioners before either said anything. One petitioner claimed he was singled out to wear a hat; we found that the witness’ identification “d[id] not appear . . . based on the fact that he remembered that [the attacker] had worn a hat.” *Ibid.*

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Thus, far from indicating that improper police conduct is a prerequisite, *Coleman* merely held that there had been no influence on the witness. In fact, in concluding that the lineup was not “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,” *Coleman* indicates that the two-step inquiry is not truncated at the threshold by the absence of police misconduct.

Third, the majority emphasizes that we should rely on the jury to determine the reliability of evidence. See *ante*, at 15–16. But our cases are rooted in the assumption that eyewitness identifications upend the ordinary expectation that it is “the province of the jury to weigh the credibility of competing witnesses.” *Kansas v. Ventris*, 556 U. S. 586, 594, n. (2009). As noted, jurors find eyewitness evidence unusually powerful and their ability to assess credibility is hindered by a witness’ false confidence in the accuracy of his or her identification. That disability in no way depends on the intent behind the suggestive circumstances.

The majority’s appeals to protecting the jury’s domain, moreover, appeared in dissent after dissent from our decisions. See *Foster v. California*, 394 U. S. 440, 447 (1969) (Black, J., dissenting) (“[T]he jury is the sole tribunal to weigh and determine facts” and “must . . . be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth”); *Simmons*, 390 U. S., at 395 (Black, J., concurring in part and dissenting in part) (“The weight of the evidence . . . is not a question for the Court but for the jury”). So too does the majority’s assurance that other constitutional protections like the Sixth Amendment rights to compulsory process and confrontation can suffice to expose unreliable identifications. Compare *ante*, at 6, with *Foster*, 394 U. S., at 448–449 (Black, J., dissenting) (“The Constitution sets up its own standards of unfairness in criminal trials,” including the Sixth Amendment “right to compulsory process” and “right to

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confront . . . witnesses”). So too does the majority’s appeal to leave reliability to the rules of evidence. Compare *ante*, at 17, with *Foster*, 394 U. S., at 448 (Black, J., dissenting) (“Rules of evidence are designed in the interests of fair trials”), and *Stovall*, 388 U. S., at 306 (Black, J., dissenting) (“[T]he result . . . is to put into a constitutional mould a rule of evidence”). Those arguments did not prevail then; they should not prevail here.

Fourth, the majority suggests that applying our rule beyond police-arranged suggestive circumstances would entail a heavy practical burden, requiring courts to engage in “preliminary judicial inquiry” into “most, if not all, eyewitness identifications.” *Ante*, at 13, 18. But that is inaccurate. The burden of showing “impermissibly suggestive” circumstances is the defendant’s, so the objection falls to the defendant to raise. And as is implicit in the majority’s reassurance that Perry may resort to the rules of evidence in lieu of our due process precedents, trial courts will be entertaining defendants’ objections, pretrial or at trial, to unreliable eyewitness evidence in any event. The relevant question, then, is what the standard of admissibility governing such objections should be. I see no reason to water down the standard for an equally suggestive and unreliable identification simply because the suggestive confrontation was unplanned.

It bears reminding, moreover, that we set a high bar for suppression. The vast majority of eyewitnesses proceed to testify before a jury. To date, *Foster* is the only case in which we have found a due process violation. 394 U. S., at 443. There has been no flood of claims in the four Federal Circuits that, having seen no basis for an arrangement-based distinction in our precedents, have long indicated that due process scrutiny applies to all suggestive identification procedures. See *Dunnigan v. Keane*, 137 F. 3d 117, 128 (CA2 1998); *United States v. Bouthot*, 878 F. 2d 1506, 1516 (CA1 1989); *Thigpen v. Cory*, 804 F. 2d 893, 895 (CA6

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1986); see also *Green v. Loggins*, 614 F. 2d 219, 223 (CA9 1980). Today's decision nonetheless precludes even the possibility that an unintended confrontation will meet that bar, mandating summary dismissal of every such claim at the threshold.

Finally, the majority questions how to “rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence,” such as “poor vision” or a prior “grudge,” *ante*, at 13–14, and more broadly, how to distinguish eyewitness evidence from other kinds of arguably unreliable evidence. *Ante*, at 14–15. Our precedents, however, did just that. We emphasized the “‘formidable number of instances in the records of English and American trials’” of “miscarriage[s] of justice from mistaken identification.” *Wade*, 388 U. S., at 228. We then observed that “‘the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.’” *Id.*, at 229. Moreover, the majority points to no other type of evidence that shares the rare confluence of characteristics that makes eyewitness evidence a unique threat to the fairness of trial. Jailhouse informants, cf. *ante*, at 15, unreliable as they may be, are not similarly resistant to the traditional tools of the adversarial process and, if anything, are met with particular skepticism by juries.

It would be one thing if the passage of time had cast doubt on the empirical premises of our precedents. But just the opposite has happened. A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago, though it merits barely a parenthetical mention in the majority opinion. *Ante*, at 14. Over the past three decades, more than two thousand studies related to eyewitness identification have been published. One state supreme court recently appointed a special master to conduct an exhaustive survey of the current state of the scientific evidence and conclud-

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ed that “[t]he research . . . is not only extensive,” but “it represents the ‘gold standard in terms of the applicability of social science research to law.’” *State v. Henderson*, 208 N. J. 208, 283, 27 A. 3d 872, 916 (2011). “Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings.” *Ibid.*; see also Schmechel, O’Toole, Easterly, & Loftus, Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence, 46 *Jurimetrics* 177, 180 (2006) (noting “nearly unanimous consensus among researchers about the [eyewitness reliability] field’s core findings”).

The empirical evidence demonstrates that eyewitness misidentification is “the single greatest cause of wrongful convictions in this country.”⁵ Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.⁶ Study after study demonstrates

⁵ *State v. Henderson*, 208 N. J. 208, 231, 27 A. 3d 872, 885 (2011); see also, e.g., *Benn v. United States*, 978 A. 2d 1257, 1266 (D. C. 2009); *State v. Dubose*, 285 Wis. 2d 143, 162, 699 N. W. 2d 582, 592 (2005); Dept. of Justice, Office of Justice Programs, E. Connors, T. Lundregan, N. Miller, & T. McEwen, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 24 (1996); B. Cutler & S. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 8 (1995); Wells, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience, 83 *J. of Applied Psychology* No. 3 360 (1998).

⁶ B. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 9, 48, 279 (2011); see also, e.g., Innocence Project, Facts on Post-Conviction DNA Exonerations (75% of postconviction DNA exoneration cases in the U. S. involved eyewitness misidentification), http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (as visited Jan. 11, 2012, and available in Clerk of Court’s case file); Dept. of Justice, National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement iii (1999) (85% of 28

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that eyewitness recollections are highly susceptible to distortion by postevent information or social cues;⁷ that jurors routinely overestimate the accuracy of eyewitness identifications;⁸ that jurors place the greatest weight on eyewitness confidence in assessing identifications⁹ even though confidence is a poor gauge of accuracy;¹⁰ and that suggestiveness can stem from sources beyond police-orchestrated procedures.¹¹ The majority today nevertheless adopts an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened.

III

There are many reasons why Perry's particular situation might not violate due process. The trial court found

felony convictions overturned on DNA evidence involved eyewitness misidentification).

⁷See, e.g., Gabbert, Memon, Allan, & Wright, Say it to My Face: Examining the Effects of Socially Encountered Misinformation, 9 Legal & Criminological Psychol. 215 (2004); Douglass & Steblay, Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 864–865 (2006).

⁸See Brigham & Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 22–24, 28 (1983) (nearly 84% of study respondents overestimated accuracy rates of identifications); see also, e.g., Sigler & Couch, Eyewitness Testimony and the Jury Verdict, 4 N. Am. J. Psychol. 143, 146 (2002).

⁹See Cutler & Penrod, Mistaken Identification, at 181–209; Lindsay, Wells, & Rumpel, Can People Detect Eyewitness-Identification Accuracy Within and Across Situations? 66 J. Applied Psychol. 79, 83 (1981).

¹⁰See Brewer, Feast, & Rishworth, The Confidence-Accuracy Relationship in Eyewitness Identification, 8 J. Experimental Psychol. Applied 44, 44–45 (2002) (“average confidence-accuracy correlations generally estimated between little more than 0 and .29”); see also, e.g., Sporer, Penrod, Read, & Cutler, Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, 118 Psychol. Bull. 315 (1995).

¹¹See Brief for Wilton Dedge et al. as *Amici Curiae* 8, n. 13.

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that the circumstances surrounding Blandon’s identification did not rise to an impermissibly suggestive level. It is not at all clear, moreover, that there was a very substantial likelihood of misidentification, given Blandon’s lack of equivocation on the scene, the short time between crime and confrontation, and the “fairly well lit” parking lot. App. 56. The New Hampshire Supreme Court, however, never made findings on either point and, under the majority’s decision today, never will.

* * *

The Court’s opinion today renders the defendant’s due process protection contingent on whether the suggestive circumstances giving rise to the eyewitness identification stem from improper police arrangement. That view lies in tension with our precedents’ more holistic conception of the dangers of suggestion and is untethered from the evidentiary interest the due process right protects. In my view, the ordinary two-step inquiry should apply, whether the police created the suggestive circumstances intentionally or inadvertently. Because the New Hampshire Supreme Court truncated its inquiry at the threshold, I would vacate the judgment and remand for a proper analysis. I respectfully dissent.

UNITED STATES OF AMERICA, Appellee, v. ANDRES DE LEON-QUINONES,
Defendant, Appellant.

No. 07-1395

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

588 F.3d 748; 2009 U.S. App. LEXIS 26617

December 7, 2009, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by **De Leon-Quinones v. United States**, 130 S. Ct. 2361, 176 L. Ed. 2d 575, 2010 U.S. LEXIS 3091 (U.S., 2010)

Post-conviction relief denied at, Post-conviction relief dismissed at **De Leon-Quinones v. United States**, 2011 U.S. Dist. LEXIS 95783 (D.P.R., Aug. 25, 2011)

PRIOR HISTORY: [*1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF PUERTO RICO. Hon. Jose Antonio Fuste, U.S. District Judge.

DISPOSITION:

AFFIRMED.

COUNSEL: Guillermo A. Macari-Grillo for appellant.

Vernon B. Miles, Assistant United States Attorney, with whom Rosa Emilia Rodriguez-Velez, United States Attorney, Nelson Perez-Sosa, Assistant United States Attorney, Chief, Appellate Division and Thomas F. Klumper, Assistant United States Attorney, were on brief, for appellee.

JUDGES: Before Torruella, Baldock * and Howard, Circuit Judges.

*

Of the Tenth Circuit, sitting by designation.

OPINION BY: HOWARD

OPINION

HOWARD, Circuit Judge. A jury convicted the appellant, Andres De Leon-Quinones ("De Leon"), of robbing two banks in Puerto Rico, the EuroBank and the Doral Bank. *See* 18 U.S.C. § 2113(a). The jury also convicted De Leon of carrying a firearm during and in

relation to the EuroBank robbery. *See* 18 U.S.C. § 924(c)(1)(A).

De Leon appeals his convictions on the firearms count and the Doral Bank robbery count. He makes three arguments, two of which challenge the sufficiency of the evidence presented at trial. De Leon argues that the evidence presented at trial was insufficient to establish that he carried a real firearm during the EuroBank robbery [*2] and that he was the person who robbed the Doral Bank. Part and parcel of his argument that he was not sufficiently identified as the Doral Bank robber is De Leon's claim that the district court violated his due process rights when it allowed two witnesses, Doral Bank employees Sasha Gonzalez ("Gonzalez") and Jaime Massanet ("Massanet"), to identify him during trial as the robber. De Leon's third argument, also related to his insufficient identification, is that the court erred when it allowed the prosecutor to ask leading questions when examining the identification witnesses. After review, we affirm both of the challenged counts of conviction.

I. Background

We provide the bulk of the facts here, adding more or elaborating when necessary in our later discussion of the issues. We state these facts in a manner consistent with record support.

A. The robberies

On a January morning in 2006, De Leon arrived at the EuroBank branch bank located in Canovanas, Puerto Rico and waited for it to open. After the bank manager let him in, De Leon pulled out a gun and informed the manager and the other bank employees that he was holding up the bank. De Leon then shepherded the manager and employees into [*3] the manager's office. Once there, De Leon asked the employees where the money was located. In response to this query, the manager sent two employees to take De Leon to the bank's safe. Once the safe was open, De Leon stuffed approximately \$ 60,000 into bags. He then directed all of the bank employees to lay down near the register area and left the bank.

Another bank in Puerto Rico, the Doral Bank, had been robbed by two men just a few weeks earlier. The two men had entered the bank shortly after it opened and loitered in the lobby area. The bank's senior officer, Massanet, approached one of the men, later identified as De Leon, and asked the man if he needed assistance. De Leon responded that he did and asked for the bank's manager. When Massanet informed De Leon that the manager had yet to arrive, De Leon told Massanet that he was holding up the bank. Massanet ushered De Leon and the other man through a door into the vault area. As the other man waited by the door, Massanet, with De Leon behind him, approached the vault door. Crouching down, Massanet tried to open the door, which had two combination locks. De Leon put on latex gloves as he watched Massanet work the combinations. Opening [*4] the vault door, however, proved to be a two-man job and Massanet called out for another employee to help him. At this point, the other robber complained that Massanet was taking too long and told De Leon to get money from the tellers instead.

After taking money from one teller, De Leon approached another teller, Gonzalez, and took money from her drawer. De Leon and the other man then left the bank. Immediately after the robbery, Gonzalez told authorities that the man who took money from her drawer wore a red shirt, a red cap, and latex gloves over his hands. She said that the other robber wore a black shirt. Photographs taken from the bank's surveillance video corroborated these descriptions.

Some time after the Doral Bank robbery, authorities asked Massanet and Gonzalez, individually, whether they could identify one of the robbers from an array of six photographs, including one of De Leon. Gonzalez could not identify anyone. Massanet, after narrowing his choices to two photographs, ultimately identified De Leon.

B. The trial

At trial, the government first presented evidence on the EuroBank robbery, calling the manager and two other employees to testify. In addition to discussing the [*5] robbery generally, the three employees testified specifically that De Leon carried a gun during the robbery, collectively referring to it as a "pistol," "revolver," and "firearm." One of the bank employees who accompanied De Leon to the bank's safe further described the gun as "nickel plated." Each of the three employees explained that they had the opportunity to view De Leon and the weapon at close range.

Later, the government presented evidence regarding the Doral Bank robbery. The government first called Massanet. He testified that the man in the lobby with whom he spoke wore a red cap and later put on latex gloves. Massanet also stated that he "stared" at this man when he first approached him in the bank lobby. Nevertheless, when the prosecutor asked Massanet if this man was present in the courtroom, Massanet testified that he did not see him. The government then called Gonzalez. She discussed the robbery, testifying that the man who took the money from her drawer was "very close up" to her and that she looked at him for approximately three seconds before he told her to look away. But, similar to Massanet, Gonzalez could not identify De Leon in the court room. When Gonzalez finished [*6] testifying, the court took a brief recess.

At some point during this recess, Gonzalez approached the prosecutor. She told him that when De Leon left the courtroom during the recess, she recognized him as the man who had robbed her. Around this same time, Massanet approached a government law enforcement agent and told him the same thing. Shortly after passing this information along, both Gonzalez and Massanet saw De Leon being led back into the courtroom in handcuffs.

When proceedings resumed, the government informed the court of these developments. With the court's permission, the government recalled both witnesses, starting with Gonzalez. The prosecutor asked Gonzalez if it was true that she recognized De Leon as he left the courtroom. De Leon objected to this question as leading but the court permitted it. Gonzalez answered affirmatively. The prosecutor then asked Gonzalez whether or not the person who robbed her was in the courtroom. Gonzalez again said yes

and identified De Leon. When the prosecutor asked her why she had been unable to identify De Leon previously, she indicated that computer monitors in front of De Leon had obscured her view of him. A similar exchange occurred between [*7] the prosecutor and Massanet. Massanet identified De Leon as the Doral Bank robber and testified that he had been unable to identify De Leon previously because De Leon's head was down, and he thought that De Leon was just another lawyer. When cross-examined, both witnesses acknowledged that they had seen De Leon return to the courtroom in handcuffs.

The jury ultimately convicted De Leon on all three counts of the indictment. This appeal ensued.

II. Discussion

A. Sufficiency of the evidence: firearms count

De Leon argues that the evidence presented at trial was insufficient to allow a reasonable jury to convict him of carrying a firearm during the EuroBank robbery. Because he moved for an acquittal on these grounds, our review is de novo. *See United States v. Cruz-Rodriguez*, 541 F.3d 19, 26 (1st Cir. 2008). In assessing sufficiency, "we examine the evidence, both direct and circumstantial, in the light most favorable to the prosecution and decide whether that evidence, including all plausible inferences drawn therefrom, would allow a rational factfinder to conclude beyond a reasonable doubt that the defendant committed the charged count or crime." *United States v. Cruz-Diaz*, 550 F.3d 169, 172 n.3 (1st Cir. 2008).

A [*8] conviction under 18 U.S.C. § 924(c) requires proof that the defendant used a real firearm when committing the predicate offense. *See United States v. Taylor*, 54 F.3d 967, 975 (1st Cir. 1995) (noting that "a toy or replica will not do"). n1 "Although § 924(c) requires proof that the gun is real, the government's proof need not 'reach a level of scientific certainty.'" *United States v. Roberson*, 459 F.3d 39, 47 (1st Cir. 2006) (quoting *Taylor*, 54 F.3d at 976). Indeed, as we have said many times, "[d]escriptive lay testimony can be sufficient to prove that the defendant used a real gun." *Cruz-Diaz*, 550 F.3d at 173.

----- Footnotes -----1

For purposes of § 924(c), a firearm is defined as:

(A) any weapon (including a starter gun) which will or is deigned to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm. 18 U.S.C. § 921(a)(3).

----- End Footnotes -----

Here, there was sufficient evidence, both direct and circumstantial, that De Leon used a real firearm during the EuroBank robbery. The direct evidence included the testimony of

three bank employees. [*9] These employees, each of whom observed the object carried by De Leon at close range, called it either a "revolver," "pistol," or a "firearm." *See Taylor, 54 F.3d at 967* ("Three eyewitnesses to the BayBank robbery, each of whom observed the object gripped by appellant at close range, testified that it was a gun. This evidence is enough to allow a rational jury to find that appellant carried a real gun."). One employee further testified that the "pistol or revolver" carried by De Leon was "nickel plated," a description which is consistent with the jury's finding that De Leon carried a real gun. *See Cruz-Diaz, 550 F.3d at 173* (holding that the evidence was sufficient to establish that the defendant used a real firearm where, among other things, a witness described the gun as being "nickel plated"). Moreover, none of the witnesses called the gun a "toy gun," or "replica gun" or otherwise described it in a way that would indicate that the gun was not real. *See id.* (finding that the evidence was sufficient to establish that the defendant used a real firearm where, among other things, "none of the witnesses in this case, all of whom had ample time to view the gun, described it as a BB or [*10] toy gun").

There was also circumstantial evidence indicating that De Leon carried a real firearm. At trial, some of the employees stated that they were "afraid" that De Leon might hurt someone with the gun. And, throughout the robbery, the employees at the bank reacted as if the gun was real, following De Leon's various orders. *See id.* From the totality of the evidence, including the reactions of the witnesses, the jury was entitled to infer that De Leon carried a real firearm. *See id.*

De Leon's opening salvo is that the prosecutor was legally required to ask the witnesses whether they thought that De Leon's firearm was real. This argument is a non-starter. De Leon does not cite, nor are we aware of, any precedent that requires the prosecution to specifically ask witnesses whether the firearm carried was real in order to establish a violation of § 924(c). Although asking such a question might inure to the government's benefit, particularly in cases where the government is relying solely on eyewitness testimony to prove that a real firearm was used, the government is entitled, within reason, to present its case as it sees fit.

De Leon's next argument, tangentially related to the first, [*11] is similarly unavailing. He begins by observing that the witnesses never specified whether his gun was real, merely testifying that he carried a "pistol," "revolver," or "firearm." He argues that because the witnesses never used the word real, or some comparable adjective when describing the object he carried, the testimony was not specific enough to enable a rational factfinder to convict him of the firearms offense.

Through this argument, De Leon asks us to divorce the words "pistol," "revolver," and "firearm" from their natural meanings. We decline the invitation. These words are most naturally understood to refer to real firearms, and the jury was entitled to take the words at face-value when reaching its verdict. *See Taylor, 54 F.3d at 967*. We note that this conclusion that the government satisfied its burden in no way handicaps a defendant's ability to cast doubt on the government's proof. During cross-examination, De Leon easily could have tested the witnesses' perceptions of the object he was carrying or

further could have emphasized the lack of specificity in witness answers during closing argument. His failure to do either, although lost opportunities to be sure, does not [*12] somehow render the evidence the government presented insufficient.

B. Sufficiency of the evidence: identification

De Leon argues that the district court erred when it did not suppress the identification evidence on due process grounds. Without this identification evidence, his argument continues, the evidence presented was insufficient to convict him of the Doral Bank robbery. Because the success of De Leon's sufficiency claim hinges on the success of his due process argument, we examine the due process argument first.

Typically, the district court's ultimate decision to admit or suppress identification evidence is subject to a plenary, de novo standard of review, with the underlying findings of fact reviewed for clear error. *See United States v. Rivera-Rivera*, 555 F.3d 277, 283 (1st Cir. 2009). But because De Leon never sought to suppress the identification evidence below, our review is for plain error only. *See United States v. Henderson*, 320 F.3d 92, 102 (1st Cir. 2003); *see also United States v. Sanders*, 547 F.2d 1037, 1040 (8th Cir. 1976). To establish plain error, a defendant "must show an error that was plain, (i.e., obvious and clear under current law), prejudicial (i.e., affected [*13] the outcome of the district court proceedings), and seriously impaired the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Griffin*, 524 F.3d 71, 76 (1st Cir. 2008).

Identification evidence is for the jury in all but "extraordinary cases." *Henderson*, 320 F.3d at 100. That said, a trial court should suppress identification evidence on due process grounds where there is a "very substantial likelihood" that there was an "irreparable misidentification." *Rivera-Rivera*, 555 F.3d at 282; *see also Simmons v. United States*, 390 U.S. 377, 395-96, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). Determining whether suppression is necessary involves a two-step analysis. *Rivera-Rivera*, 555 F.3d at 283; *United States v. Holliday*, 457 F.3d 121, 125 (1st Cir. 2006). First, the court should determine whether the identification procedure that preceded the identification was "unnecessarily suggestive." *Rivera-Rivera*, 555 F.3d at 283. If it was, the court must then decide whether the identification itself is reliable "notwithstanding the suggestive procedure." *United States v. Lopez-Lopez*, 282 F.3d 1, 10 (1st Cir. 2002). If the court finds the identification to be reliable, it is admissible. *See Henderson*, 320 F.3d at 101; [*14] *see also United States v. Alexander*, 868 F.2d 492, 495 (1st Cir. 1989) (explaining that even if the procedure at issue "could be termed unnecessarily suggestive, a court need not suppress the identification unless it lacked a sufficient basis for reliability").

As the sequence of this analysis makes clear, reliability is the key. *See Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) (observing that "reliability is the linchpin in determining the admissibility of identification testimony"). Reliability is assessed by taking into account the "totality of the circumstances." *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Among other things,

the reliability assessment entails considering "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the defendant; (4) the level of certainty demonstrated by the witness at the confrontation; [and] (5) the length of time between the crime and the confrontation." **Henderson, 320 F.3d at 100** (citing **Neil, 409 U.S. at 199-200**).

The two-step inquiry into suggestiveness and reliability applies to both the in-court and out-of-court identifications, [*15] provided that the defendant claims that an unnecessarily suggestive, extra-judicial confrontation or procedure "tainted" the identification at issue. **Id. at 100**. That analysis applies here, as De Leon claims that the in-court identifications were tainted by an unnecessarily suggestive confrontation that occurred outside the presence of the jury -- before identifying him in court, both identification witnesses saw De Leon returning to the courtroom in handcuffs. De Leon further argues, as he must, that the identifications are unreliable under the totality of the circumstances.

1. Suggestiveness

The encounter that De Leon labels as unnecessarily suggestive may be likened to a "one-man show up," a classically suggestive identification procedure. *See Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)*. Both witnesses saw De Leon, and only De Leon, in handcuffs before they identified him in court.

The government asserts that this confrontation cannot be deemed unnecessarily suggestive because it was not orchestrated or staged by the government. This argument is not particularly persuasive, however, and we have rejected a similar one in the past. In *United States v. Bouthot*, we explained: "Because the [*16] due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process." **878 F.2d 1506, 1516 (1st Cir. 1989)**; *but see Lopez-Lopez, 282 F.3d at 10-11* (holding that no impermissibly suggestive confrontation occurred where the witnesses identified a handcuffed defendant after inadvertently confronting him at a police station). Accordingly, we will assume that the encounter was unnecessarily suggestive and turn to the second step of the analysis.

2. Reliability of the in-court identifications

The reliability analysis is inherently witness-specific. Gonzalez's identification of De Leon presents a closer case than Massanet's does, and we begin with her. As noted above, five factors guide the inquiry.

Application of the first four factors supports a finding of reliability. First, during the commission of the crime, Gonzalez had the opportunity to view the robber from a close vantage point. The photographs taken [*17] from the bank's surveillance video show

that the robber stood next to Gonzalez when he took money from her drawer. And Gonzalez testified at trial that the robber was "very close up" to her, and that she looked at him for three seconds before he told her to look away.

Second, Gonzalez's testimony further indicates that she paid a high degree of attention to both the defendant and her surroundings during the robbery. She stated that, after the robbery, she told the authorities that the other robber wore a black shirt and that the person who took money from her drawer wore a red shirt, a red cap, and latex gloves. These detailed descriptions were corroborated by Massanet's testimony and photographs taken from the bank's surveillance video. *See Rivera-Rivera*, 555 F.3d at 284 (finding the identification reliable where, among other things, the witness' "recollection of detail reflect[ed] attentiveness to his surroundings"). Third, Gonzalez also provided an accurate description of the defendant, and fourth, she expressed certainty when finally identifying De Leon in open court.

The fifth and final factor, the length of time between the crime and the in-court identification, points in neither [*18] direction. The in-court identification was not particularly fresh, coming seven months after the robbery. But this lapse of time does not severely undermine the reliability of the in-court identification, especially since we have found similar lapses to be "de minimis compared to other cases." *See Rivera-Rivera*, 555 F.3d at 284-85 (discussing a six-month lapse between the crime and the in-court identification).

For his part, De Leon attacks the reliability of Gonzalez's in-court identification in three ways. First, he suggests that the opportunity for observation factor cannot support a finding of reliability since Gonzalez only looked at the robber for a few seconds. Second, he notes that Gonzalez initially failed to identify him in open court and had to be recalled to the stand to identify him. Finally, he presses the fact that Gonzalez was unable to pick him out of a pre-trial photographic lineup arranged by the authorities.

We begin with the last point, the appellant's strongest. If Gonzalez had an adequate opportunity to observe him during the robbery and paid close attention during this time, it stands to reason that she would have been able to identify De Leon from the photographic [*19] line-up, something she failed to do. Naturally, this casts some doubt upon the reliability of her in-court identification. But the prevailing view is that where there has been a prior "failed" identification, it is typically grist for the jury's mill. *See* 2 Wayne R. LaFare et al., *Criminal Procedure* § 7.4 (3d ed. Supp. 2008-2009). As one court observed, "a witness's prior inability to identify a defendant goes to the credibility of the in-court identification and not to its admissibility, and thus raises a proper question of fact for the jury to determine." *United States v. Briggs*, 700 F.2d 408, 413 (7th Cir. 1983); *see also United States ex rel. Kosik v. Napoli*, 814 F.2d 1151, 1160 (7th Cir. 1987) ("[A] previous failure to make a positive identification from a photo array does not necessarily, or even normally, make the later identification less certain.") (citations omitted); *United States v. Douglas*, 489 F.3d 1117, 1126 (11th Cir. 2007); *State v. King*, 156 N.H. 371, 934 A.2d 556, 562 (N.H. 2007). The view is sound. A variety of reasons might exist for a witness's previous inability to identify the defendant, none of

which would cast serious doubt on the reliability of a later identification. [*20] For example, the previous opportunity to identify the defendant could have come on the heels of the crime, at a time when the witness was too traumatized to think clearly. Or the witness may have been unable to identify the defendant not out of uncertainty, but because the witness feared retaliation upon a positive identification. To allow a failed identification to always bar a later identification would make little sense.

Of course, in some cases a witness's failure to identify the defendant on a prior occasion, in conjunction with other factors, might create enough doubt about the reliability of a later identification to preclude its admission. The question is whether this is such a case, given Gonzalez's relatively brief opportunity to view the robber and her initial failure to identify De Leon in open court.

We have our doubts. Gonzalez's initial in-court failure to identify was partially explained at trial. She testified that a computer monitor obscured her view of De Leon. The district court further found -- and De Leon does not contest -- that De Leon avoided looking at Gonzalez during her initial identification attempt. And although Gonzalez's original encounter with De Leon [*21] was brief, she observed him from a very close distance and carefully enough to allow her to recall specific details about his clothing. At the least, given these tensions, we cannot say that the district court committed plain or obvious error in allowing Gonzalez to identify De Leon, especially in light of the rule that a court should only withhold identification evidence from the jury in "extraordinary cases."

Henderson, 320 F.3d at 100.

As to Massanet's identification of De Leon, we may be brief. In all material respects, Massanet's in-court identification of De Leon is *more* reliable than Gonzalez's. He had an equal, if not better, opportunity to observe De Leon during the robbery. He spent more time with De Leon during the robbery and acknowledged that he "stared" at De Leon when approaching him in the bank lobby. And, unlike Gonzalez, Massanet successfully identified De Leon on a previous occasion, picking De Leon's photograph out of a six-picture photographic lineup. n2

----- Footnotes -----2

De Leon does not claim that this photographic lineup was suggestive.

----- End Footnotes-----

As with Gonzalez's identification, we conclude that the district court committed no clear or obvious error in allowing Massanet to identify De [*22] Leon. Because we reject De Leon's due process argument, his sufficiency argument also is doomed. A rational factfinder could have concluded, based on testimony from Massanet and Gonzalez, that De Leon was the individual who robbed the Doral Bank. We therefore uphold De Leon's conviction on the count charging him with that robbery.

C. Leading questions

De Leon advances an additional, related, evidentiary argument. He asserts that the district court abused its discretion when it allowed the prosecutor to ask Gonzalez and Massanet leading questions when they returned to the stand to identify him. The exchange between the prosecutor and Gonzalez was as follows:

Prosecutor: When I questioned you earlier and asked you if you recognized the person who robbed you on December 30th, 2005 and you said no; is that correct?

Gonzalez: My answer was that I did not recognize the person.

Prosecutor: Thank you. And is it correct that it was brought to my attention that as a particular person was leaving the courtroom that you did recognize that person?

Gonzalez: Yes, that's correct. n3

----- Footnotes -----3

A similar exchange occurred between the prosecutor and Massanet.
----- End Footnotes-----

Although the questions asked were undoubtedly leading, any [*23] error in allowing them was harmless. The questions were geared toward explaining why the witnesses were back on the stand, not toward garnering a positive identification of De Leon. The questions that the witnesses were asked immediately before they identified De Leon were *not* leading questions. n4 Moreover, "[t]he evil of leading a friendly witness is that the information may supply a false memory." **United States v. Hansen, 434 F.3d 92, 105 (1st Cir. 2006)**. Here, De Leon does not claim that the leading questions prompted inaccurate testimony from the witnesses, nor does the record support such a claim.

----- Footnotes -----4

The exchange between the prosecutor and Gonzalez is illustrative:

Prosecutor: And what I would like for you [to] do, ma'am, is take a look around the courtroom, and stand up if you have to, and tell the Court whether or not you see the person who robbed you on December 30th, 2005?

Gonzalez: Yes, I recognize that person.

Prosecutor: And will you point to him and describe what he is wearing, please?

Gonzalez: Well, the person is the one who is sitting between the two gentlemen and he is wearing [a] long-sleeved white shirt.

A similar exchange occurred between the prosecutor and Massanet.
----- End Footnotes-----

III. [*24] Conclusion

For the reasons provided above, the convictions are affirmed.

AFFIRMED.

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

State v. Larry R. Henderson (A-8-08)(062218)

[NOTE: This is a companion case to State v. Cecelia X. Chen, also filed today.]

Argued January 20, 2009 -- Reargued March 28, 2011 -- Decided August 24, 2011

RABNER, C.J., writing for a unanimous Court.

In this appeal the Court considers the viability of the current legal standard for analyzing the reliability of eyewitness identifications.

Rodney Harper was shot to death in a Camden apartment early in the morning on January 1, 2003. James Womble was present when two men forcefully entered the apartment, seeking to collect money from Harper. Womble knew one of the men, co-defendant, George Clark, but the other man was a stranger. According to the State's evidence, Clark shot Harper while the stranger held a gun on Womble in a small, dark hallway. Thirteen days later, police showed Womble a photo array from which he identified defendant as the stranger. That identification lies at the heart of this decision.

The trial court conducted a pre-trial Wade hearing to determine the admissibility of Womble's identification of defendant. That hearing revealed that the identification procedure was presided over by a detective who was not a primary investigator in the case. Nonetheless, when Womble was unable to make a final identification, the two investigating officers intervened and encouraged him to "do what you have to do and we'll be out of here." Womble followed by identifying defendant. Womble never recanted the identification, but during the Wade hearing he testified that he felt as though Detective Weber was "nudging" him to choose defendant's photo, and that there was pressure to make a choice.

At the conclusion of the hearing, the trial court found that the officers' behavior was not impermissibly suggestive and ruled that evidence of the identification was admissible. The trial court applied the two-part Manson/Madison test to evaluate the admissibility of the eyewitness identification. See Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Madison, 109 N.J. 223 (1998). The test requires courts to determine first if police identification procedures were impermissibly suggestive; if so, courts then weigh five reliability factors to decide if the identification evidence is nonetheless admissible. The court found that there was "nothing in this case that was improper, and certainly nothing that was so suggestive as to result in a substantial likelihood of misidentification at all." The court also noted that Womble displayed no doubts about his identification, that he had the opportunity to view defendant at the crime scene, and that Womble fixed his attention on defendant "because he had a gun on him."

At trial, additional evidence relevant to Womble's identification was adduced. This included Womble's testimony about his ingestion of crack cocaine and alcohol on the night of the shooting; that the lighting was dark in the hallway where Womble and defendant interacted; and that Womble remembered looking at the gun pointed at his chest. Womble also admitted that he smoked about two bags of crack cocaine each day from the time of the shooting until speaking with police ten days later. Womble also testified that when he first looked at the photo array, he did not see anyone he recognized. To make a final identification, Womble said that he "really had to search deep." He was nonetheless "sure" of his identification. Womble identified defendant from the witness stand.

Neither Clark nor defendant testified at trial. The primary evidence against defendant was Womble's identification and the detective's testimony about defendant's post-arrest statement. At the close of trial, the court relied on the existing model jury charge on eyewitness identification. Defendant did not object to the charge. The jury acquitted defendant of murder and aggravated manslaughter charges, and convicted him of reckless manslaughter, aggravated assault, and weapons charges. He was sentenced to an aggregate eleven-year term subject

to a parole ineligibility period of almost six years.

The Appellate Division reversed, presuming that the identification procedure in this case was impermissibly suggestive under the first prong of the Manson/Madison test. The court remanded for a new Wade hearing to determine whether the identification was nonetheless reliable under the test's second prong. The panel anchored its finding to what it considered to be a material breach of the Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures. Among other things, the Guidelines require that "whenever practical, the person conducting the photographic identification procedure should be someone other than the primary investigator assigned to the case." The panel found that the investigating officers "consciously and deliberately intruded into the process for the purpose of assisting or influencing Womble's identification of defendant." In such circumstances, the panel "conclude[d] that a presumption of impermissible suggestiveness must be imposed, and a new Wade hearing conducted."

The Supreme Court granted the State's petition for certification, 195 N.J. 521 (2008), and also granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey and the Innocence Project. In their briefs and oral argument, the parties and amici raised questions about possible shortcomings in the Manson/Madison test in light of recent scientific research. The Supreme Court remanded the case and appointed the Honorable Geoffrey Gaulkin, P.J.A.D. (retired and temporarily assigned on recall) to preside at the remand hearing as a Special Master to evaluate the scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies. The Special Master later issued an extensive and very fine report, much of which the Court adopts.

HELD: The current legal standard for assessing eyewitness identification evidence must be revised because it does not offer an adequate measure for reliability; does not sufficiently deter inappropriate police conduct; and overstates the jury's ability to evaluate identification evidence. Two modifications to the standard are required. First, when defendants can show some evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings. Second, the court system must develop enhanced jury charges on eyewitness identification for trial judges to use. Defendant is entitled to a new pretrial hearing consistent with this opinion to determine the admissibility of the eyewitness evidence introduced at his trial.

1. This Court previously has observed that eyewitness "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." Most misidentifications stem from the fact that human memory is malleable; they are not the result of malice. An array of variables can affect and dilute eyewitness memory. The recent scientific studies that were examined in this record prove that the possibility of mistaken identification is real, and the consequences severe. (pp. 23-34)

2. The current standards for determining the admissibility of eyewitness identification evidence derive from the principles the United States Supreme Court set forth in Manson in 1977. New Jersey formally adopted Manson's framework in Madison. The Manson/Madison test entails a two step process. First, the court must decide whether the identification procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." In carrying out the second part of the analysis, the court will focus on the reliability of the identification. (pp. 34-40)

3. Virtually all of the scientific evidence considered on remand emerged after Manson. Most research is conducted through controlled lab experiments. Research that has emerged in the years since Manson was decided reveals that an array of variables can affect and dilute memory and lead to misidentifications. The variables are divided into two categories: system variables, which are factors like lineup procedures that are within the control of the criminal justice system; and estimator variables, which are factors related to the witness, the perpetrator, or the event itself - like distance, lighting, or stress - over which the legal system has no control. The Court summarizes its findings for each of the system and estimator variables consistent with the proper standards for reviewing special-master reports and scientific evidence. Among the Court's findings on system variables are the following: where the identification procedures are administered by someone who knows the identity of the suspect there is an increased likelihood of misidentification; feedback by administrators affects the reliability of identification and should be avoided; and the record casts doubt on the reliability of showups, or single-person lineups conducted more than two hours after the

event. Regarding some of the estimator variables, the Court finds that the reliability of an identification can be affected by: high levels of stress on the eyewitness; when the interaction is brief, the presence of a visible weapon; cross-racial recognition; and witness interaction with non-State actors like co-witnesses and other sources of information. In addition, the studies reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result, there is a need to promote greater juror understanding of those issues. (pp. 40-92)

4. The remand hearing revealed that Manson/Madison does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony. Remedying the problems with the current Manson/Madison test requires an approach that addresses its shortcomings: one that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory. Two principal changes to the current system are needed. First, the revised framework should allow all relevant system and estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness. Second, courts should develop and use enhanced jury charges to assist jurors in evaluating eyewitness identification evidence. Under our revised approach, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. The State must then offer proof to show that the proffered eyewitness identification is reliable, accounting for system and estimator variables. However, the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless. The ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. If, after weighing the evidence presented, a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions. (pp. 103-122)

5. The Court directs that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case. Those instructions are to be included in the court's comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted. Expert testimony may also be introduced at trial, but only if otherwise appropriate. The Court anticipates, however, that with enhanced jury instructions, there will be less need for expert testimony. To help implement this decision, the Court asks the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identification and submit them to this Court for review before they are implemented. (pp. 122-128)

6. Returning to the facts of this case, the investigating officers intervened after Womble, the eyewitness, informed the lineup administrator that he could not make an identification from the final two photos. The officers conveyed a message that there was an identification to be made and they encouraged Womble to make one. The suggestive nature of the officers' comments entitled defendant to a pretrial hearing, and he received one in which the trial court applied the Manson/Madison test. The Court now remands to the trial court for an expanded hearing consistent with the principles outlined in this decision. If the trial court finds that the identification should not have been admitted, then the parties should present argument as to whether a new trial is needed. If Womble's identification was properly admitted, then defendant's conviction should be affirmed. (pp. 128-129)

7. The Court must determine whether the new rule should be applied retroactively. Applying the relevant factors, the Court determines that today's ruling will apply to future cases only, except for defendant Henderson and defendant Cecilia Chen, the subject of a companion case filed today. As to future cases, today's ruling will take effect thirty days from the date this Court approves new model jury charges on eyewitness identification. (pp. 129-132)

The judgment of the Appellate Division is **MODIFIED** and **AFFIRMED**, and the matter is **REMANDED** to the trial court for further proceedings consistent with the Court's opinion.

JUSTICES LONG, LaVECCHIA, ALBIN, RIVERA-SOTO and HOENS join in CHIEF JUSTICE RABNER's opinion.

SUPREME COURT OF NEW JERSEY
A-8 September Term 2008
062218

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LARRY R. HENDERSON,

Defendant-Respondent.

Argued January 20, 2009 -- Remanded February 26, 2009
Special Master's Report Filed June 21, 2010 --
Reargued March 28, 2011 - Decided August 24, 2011

On certification to the Superior Court,
Appellate Division, whose opinion is
reported at 397 N.J. Super. 398 (2008).

Deborah C. Bartolomey, Deputy Attorney
General, argued the cause for appellant
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Jersey, attorney).

Joshua D. Sanders and Joseph E. Krakora,
Assistant Deputy Public Defenders, argued
the cause for respondent (Yvonne Smith
Segars, Public Defender, attorney).

Alison S. Perrone argued the cause for
amicus curiae Association of Criminal
Defense Lawyers of New Jersey.

Barry C. Scheck, a member of the New York
bar, argued the cause for amicus curiae
Innocence Project, Inc. (Gibbons, attorneys;
Mr. Scheck, Lawrence S. Lustberg, and Ellen
P. Lubensky, on the briefs).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

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I. Introduction

In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence, which New Jersey adopted soon after, a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications. See Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Madison, 109 N.J. 223 (1988).

In this case, defendant claims that an eyewitness mistakenly identified him as an accomplice to a murder. Defendant argues that the identification was not reliable

because the officers investigating the case intervened during the identification process and unduly influenced the eyewitness. After a pretrial hearing, the trial court found that the officers' behavior was not impermissibly suggestive and admitted the evidence. The Appellate Division reversed. It held that the officers' actions were presumptively suggestive because they violated guidelines issued by the Attorney General in 2001 for conducting identification procedures.

After granting certification and hearing oral argument, we remanded the case and appointed a Special Master to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies. He later issued an extensive and very fine report, much of which we adopt.

We find that the scientific evidence considered at the remand hearing is reliable. That evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised. Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken

identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful convictions across the country.

We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications. Those factors include system variables like lineup procedures, which are within the control of the criminal justice system, and estimator variables like lighting conditions or the presence of a weapon, over which the legal system has no control. To its credit, the Attorney General's Office incorporated scientific research on system variables into the guidelines it issued in 2001 to improve eyewitness identification procedures. We now review both sets of variables in detail to evaluate the current Manson/Madison test.

In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.

Two principal steps are needed to remedy those concerns. First, when defendants can show some evidence of suggestiveness,

all relevant system and estimator variables should be explored at pretrial hearings. A trial court can end the hearing at any time, however, if the court concludes from the testimony that defendant's threshold allegation of suggestiveness is groundless. Otherwise, the trial judge should weigh both sets of variables to decide if the evidence is admissible.

Up until now, courts have only considered estimator variables if there was a finding of impermissibly suggestive police conduct. In adopting this broader approach, we decline to order pretrial hearings in every case, as opposed to cases in which there is some evidence of suggestiveness. We also reject a bright-line rule that would require suppression of reliable evidence any time a law enforcement officer missteps.

Second, the court system should develop enhanced jury charges on eyewitness identification for trial judges to use. We anticipate that identification evidence will continue to be admitted in the vast majority of cases. To help jurors weigh that evidence, they must be told about relevant factors and their effect on reliability. To that end, we have asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current model charge on eyewitness identification and address various system and estimator variables. With the use of more focused jury charges on those issues, there will be less need to call expert

witnesses at trial. Trial courts will still have discretion to admit expert testimony when warranted.

The factors that both judges and juries will consider are not etched in stone. We expect that the scientific research underlying them will continue to evolve, as it has in the more than thirty years since Manson. For the same reason, police departments are not prevented from improving their practices as we learn more about variables that affect memory. New approaches, though, must be based on reliable scientific evidence that experts generally accept.

The changes outlined in this decision are significant because eyewitness identifications bear directly on guilt or innocence. At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials. Ultimately, we believe that the framework described below will both protect the rights of defendants, by minimizing the risk of misidentification, and enable the State to introduce vital evidence.

The revised principles in this decision will apply purely prospectively except for defendant Larry Henderson and defendant Cecilia Chen, the subject of a companion case also decided today. See State v. Chen, ___ N.J. ___ (2011). We remand defendant Henderson's case for a new pretrial hearing consistent

with this opinion to determine the admissibility of the eyewitness evidence introduced at his trial.

II. Facts and Procedural History

A. Facts

In the early morning hours of January 1, 2003, Rodney Harper was shot to death in an apartment in Camden. James Womble witnessed the murder but did not speak with the police until they approached him ten days later.

Womble and Harper were acquaintances who occasionally socialized at the apartment of Womble's girlfriend, Vivian Williams. On the night of the murder, Womble and Williams brought in the New Year in Williams' apartment by drinking wine and champagne and smoking crack cocaine. Harper had started the evening with them but left at around 10:15 p.m. Williams also left roughly three hours later, leaving Womble alone in the apartment until Harper rejoined him at 2:00 to 2:30 a.m.

Soon after Harper returned, two men forcefully entered the apartment. Womble knew one of them, co-defendant George Clark, who had come to collect \$160 from Harper. The other man was a stranger to Womble.

While Harper and Clark went to a different room, the stranger pointed a gun at Womble and told him, "Don't move, stay right here, you're not involved in this." He remained with the stranger in a small, narrow, dark hallway. Womble testified

that he "got a look at" the stranger, but not "a real good look." Womble also described the gun pointed at his torso as a dark semiautomatic.

Meanwhile, Womble overheard Clark and Harper argue over money in the other room. At one point, Harper said, "do what you got to do," after which Womble heard a gunshot. Womble then walked into the room, saw Clark holding a handgun, offered to get Clark the \$160, and urged him not to shoot Harper again. As Clark left, he warned Womble, "Don't rat me out, I know where you live."

Harper died from the gunshot wound to his chest on January 10, 2003. Camden County Detective Luis Ruiz and Investigator Randall MacNair were assigned to investigate the homicide, and they interviewed Womble the next day. Initially, Womble told the police that he was in the apartment when he heard two gunshots outside, that he left to look for Harper, and that he found Harper slumped over in his car in a nearby parking lot, where Harper said he had been shot by two men he did not know.

The next day, the officers confronted Womble about inconsistencies in his story. Womble claimed that they also threatened to charge him in connection with the murder. Womble then decided to "come clean." He admitted that he lied at first because he did not want to "rat" out anyone and "didn't want to get involved" out of fear of retaliation against his elderly

father. Womble led the investigators to Clark, who eventually gave a statement about his involvement and identified the person who accompanied him as defendant Larry Henderson.

The officers had Womble view a photographic array on January 14, 2003. That event lies at the heart of this decision and is discussed in greater detail below. Ultimately, Womble identified defendant from the array, and Investigator MacNair prepared a warrant for his arrest. Upon arrest, defendant admitted to the police that he had accompanied Clark to the apartment where Harper was killed, and heard a gunshot while waiting in the hallway. But defendant denied witnessing or participating in the shooting.

A grand jury in Camden County returned an indictment charging Henderson and Clark with the following offenses: first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and possession of a weapon having been convicted of a prior offense, N.J.S.A. 2C:39-7(a) (Henderson) and -7(b) (Clark).

B. Photo Identification and Wade Hearing

As noted above, Womble reviewed a photo array at the Prosecutor's Office on January 14, 2003, and identified

defendant as his assailant. The trial court conducted a pretrial Wade¹ hearing to determine the admissibility of that identification. Investigator MacNair, Detective Ruiz, and Womble all testified at the hearing. Cherry Hill Detective Thomas Weber also testified.

Detective Weber conducted the identification procedure because, consistent with guidelines issued by the Attorney General, he was not a primary investigator in the case. See Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1 (2001) (Attorney General Guidelines or Guidelines). According to the Guidelines, discussed in detail below, primary investigators should not administer photo or live lineup identification procedures "to ensure that inadvertent verbal cues or body language do not impact on a witness." Ibid.

Ruiz and MacNair gave Weber an array consisting of seven "filler" photos and one photo of defendant Henderson. The eight photos all depicted headshots of African-American men between the ages of twenty-eight and thirty-five, with short hair, goatees, and, according to Weber, similar facial features. At the hearing, Weber was not asked whether he knew which

¹ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

photograph depicted the suspect. (Later at trial, he said he did not know.)

The identification procedure took place in an interview room in the Prosecutor's Office. At first, Weber and Womble were alone in the room. Weber began by reading the following instructions off a standard form:

In a moment, I will show you a number of photographs one at a time. You may take as much time as you need to look at each one of them. You should not conclude that the person who committed the crime is in the group merely because a group of photographs is being shown to you. The person who committed the crime may or may not be in the group, and the mere display of the photographs is not meant to suggest that our office believes the person who committed the crime is in one of the photographs. You are absolutely not required to choose any of the photographs, and you should feel not obligated to choose any one. The photographs will be shown to you in random order. I am not in any way trying to influence your decision by the order of the pictures presented. Tell me immediately if you recognize the person that committed the crime in one of the photographs. All of the photographs will be shown to you even if you select a photograph.

Please keep in mind that hairstyles, beards, and mustaches are easily changed. People gain and lose weight. Also, photographs do not always show the true complexion of a person. It may be lighter or darker than shown in the photograph. If you select a photograph, please do not ask me whether I agree with or support your selection. It is your choice alone that counts. Please do not discuss whether you selected a photograph with any other witness

who may be asked to look at these photographs.

To acknowledge that he understood the instructions, Womble signed the form.

Detective Weber pre-numbered the eight photos, shuffled them, and showed them to Womble one at a time. Womble quickly eliminated five of the photos. He then reviewed the remaining three, discounted one more, and said he "wasn't 100 percent sure of the final two pictures." At the Wade hearing, Detective Weber recalled that Womble "just shook his head a lot. He seemed indecisive." But he did not express any fear to Weber.

Weber left the room with the photos and informed MacNair and Ruiz that the witness had narrowed the pictures to two but could not make a final identification. MacNair and Ruiz testified at the hearing that they did not know whether defendant's picture was among the remaining two photos.

MacNair and Ruiz entered the interview room to speak with Womble. According to MacNair's testimony at the Wade hearing, he and Ruiz believed that Womble was holding back -- as he had earlier in the investigation -- based on fear. Ruiz said Womble was "nervous, upset about his father."

In an effort to calm Womble, MacNair testified that he "just told him to focus, to calm down, to relax and that any type of protection that [he] would need, any threats against

[him] would be put to rest by the Police Department." Ruiz added, "just do what you have to do, and we'll be out of here." In response, according to MacNair, Womble said he "could make [an] identification."

MacNair and Ruiz then left the interview room. Ruiz testified that the entire exchange lasted less than one minute; Weber believed it took about five minutes. When Weber returned to the room, he reshuffled the eight photos and again displayed them to Womble sequentially. This time, when Womble saw defendant's photo, he slammed his hand on the table and exclaimed, "[t]hat's the mother [-----] there." From start to finish, the entire process took fifteen minutes.

Womble did not recant his identification, but during the Wade hearing he testified that he felt as though Detective Weber was "nudging" him to choose defendant's photo, and "that there was pressure" to make a choice.

After hearing the testimony, the trial court applied the two-part Manson/Madison test to evaluate the admissibility of the eyewitness identification. See Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154; Madison, supra, 109 N.J. 232-33. The test requires courts to determine first if police identification procedures were impermissibly suggestive; if so, courts then weigh five reliability factors to decide if the identification evidence is nonetheless admissible. See

Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154; Madison, supra, 109 N.J. 232-33.

The trial court first found that the photo display itself was "a fair makeup." Under the totality of the circumstances, the judge concluded that the photo identification was reliable. The court found that there was "nothing in this case that was improper, and certainly nothing that was so suggestive as to result in a substantial likelihood of misidentification at all." The court also noted that Womble displayed no doubts about identifying defendant Henderson, that he had the opportunity to view defendant at the crime scene, and that Womble fixed his attention on defendant "because he had a gun on him."

C. Trial

The following facts -- relevant to Womble's identification of defendant -- were adduced at trial after the court determined that the identification was admissible: Womble smoked two bags of crack cocaine with his girlfriend in the hours before the shooting; the two also consumed one bottle of champagne and one bottle of wine; the lighting was "pretty dark" in the hallway where Womble and defendant interacted; defendant shoved Womble during the incident; and Womble remembered looking at the gun pointed at his chest. Womble also admitted smoking about two bags of crack cocaine each day from the time of the shooting until speaking with police ten days later.

At trial, Womble elaborated on his state of mind during the identification procedure. He testified that when he first looked at the photo array, he did not see anyone he recognized. As he explained, "[m]y mind was drawing a blank . . . so I just started eliminating photos." To make a final identification, Womble said that he "really had to search deep." He was nonetheless "sure" of the identification.

Womble had no difficulty identifying defendant at trial eighteen months later. From the witness stand, Womble agreed that he had no doubt that defendant -- the man in the courtroom wearing "the white dress shirt" -- "is the man who held [him] at bay with a gun to [his] chest."

Womble also testified that he discarded a shell casing from the shooting at an intersection five or six blocks from the apartment; he helped the police retrieve the casing ten days later. No guns or other physical evidence were introduced linking defendant to the casing or the crime scene.

Neither Clark nor defendant testified at trial. The primary evidence against defendant, thus, was Womble's identification and Detective MacNair's testimony about defendant's post-arrest statement.²

² The prosecution played a tape of Clark's statement at trial as well. It placed Henderson at the apartment but largely exculpated him. According to the record, the parties acknowledged that references in the statement to a co-defendant,

At the close of trial on July 20, 2004, the court relied on the existing model jury charge on eyewitness identification and instructed the jury as follows:

[Y]ou should consider the observations and perceptions on which the identification is based, and Womble's ability to make those observations and perceptions. If you determine that his out-of-court identification is not reliable, you may still consider Womble's in-court identification of Gregory Clark and Larry Henderson if you find that to be reliable. However, unless the identification here in court resulted from Womble's observations or perceptions of a perpetrator during the commission of an offense rather than being the product of an impression gained at an out-of-court identification procedure such as a photo lineup, it should be afforded no weight. The ultimate issues of the trustworthiness of both in-court and out-of-court identifications are for you, the jury to decide.

To decide whether the identification testimony is sufficiently reliable evidence . . . you may consider the following factors:

First of all, Womble's opportunity to view the person or persons who allegedly committed the offense at the time of the offense; second, Womble's degree of attention on the alleged perpetrator when he allegedly observed the crime being committed; third, the accuracy of any prior description of the perpetrator given [b]y Womble; fourth, you should consider the fact

namely Henderson, would have to be redacted under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Defense counsel did not seek redaction, though, specifically because the court had admitted the photo lineup and because of the tape's exculpatory nature.

that in Womble's sworn taped statement of January 11th, 2003 to the police . . . , Womble did not identify anyone as the person or persons involved in the shooting of Rodney Harper

Next, you should consider the degree of certainty, if any, expressed by Womble in making the identification. . . .³

You should also consider the length of time between Womble's observation of the alleged offense and his identification You should consider any discrepancies or inconsistencies between identifications

Next, the circumstances under which any out-of-court identification was made including in this case the evidence that during the showing to him of eight photos by Detective Weber he did not identify Larry Henderson when he first looked at them and later identified Larry Henderson from one of those photos.

. . . . You may also consider any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination whether the identification made by Womble is reliable or not.

Defendant did not object to the charge or ask for any additional instructions related to the identification evidence presented at trial.

³ After defendant's conviction, this Court decided State v. Romero, 191 N.J. 59, 76 (2007), which held that jurors are to be warned that "a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification."

On July 20, 2004, the jury acquitted defendant of murder and aggravated manslaughter, and convicted him of reckless manslaughter, N.J.S.A. 2C:11-4(b)(1), aggravated assault, and two weapons charges. In a bifurcated trial the next day, the jury convicted defendant of the remaining firearms offense: possession by a previously convicted person. The court sentenced him to an aggregate eleven-year term of imprisonment, with a period of parole ineligibility of almost six years under the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant appealed his conviction and sentence.

D. Appellate Division

The Appellate Division presumed that the identification procedure in this case was impermissibly suggestive under the first prong of the Manson/Madison test. State v. Henderson, 397 N.J. Super. 398, 414 (App. Div. 2008). The court reversed and remanded for a new Wade hearing to determine whether the identification was nonetheless reliable under the test's second prong. Id. at 400, 414-15.

The panel anchored its finding to what it considered to be a material breach of the Attorney General Guidelines. Id. at 412. Among other things, the Guidelines require that "'whenever practical' the person conducting the photographic identification procedure 'should be someone other than the primary investigator assigned to the case.'" Id. at 411 (citing State v. Herrera,

187 N.J. 493, 516 (2006)). The panel specifically found that the investigating officers, MacNair and Ruiz, "consciously and deliberately intruded into the process for the purpose of assisting or influencing Womble's identification of defendant." Id. at 414. The officers' behavior, the court explained, "certainly violate[d] the spirit of the Guidelines." Id. at 412. In such circumstances, the panel "conclude[d] that a presumption of impermissible suggestiveness must be imposed, and a new Wade hearing conducted." Id. at 400.

E. Certification and Remand Order

We granted the State's petition for certification, 195 N.J. 521 (2008), and also granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey (ACDL) and the Innocence Project (collectively "amici"). In their briefs and at oral argument, the parties and amici raised questions about possible shortcomings in the Manson/Madison test in light of recent scientific research.

In an unpublished Order dated February 26, 2009, attached as Appendix A, we "concluded that an inadequate factual record exist[ed] on which [to] test the current validity of our state law standards on the admissibility of eyewitness identification." App. A at *3. We therefore remanded the matter

summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part Manson/Madison test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence.

[Ibid.]

We appointed the Honorable Geoffrey Gaulkin, P.J.A.D. (retired and temporarily assigned on recall) to preside at the remand hearing as a Special Master.

Pursuant to the Order, the following parties participated in the remand hearing: the Attorney General, the Public Defender (representing defendant⁴), and amici.

The parties and amici collectively produced more than 360 exhibits, which included more than 200 published scientific studies on human memory and eyewitness identification. During the ten-day remand hearing, the Special Master heard testimony from seven expert witnesses. Three of them -- Drs. Gary Wells, Steven Penrod, and Roy Malpass -- testified about the state of scientific research in the field of eyewitness identification.

Dr. Wells, who was called as a witness by the Innocence Project, holds a Ph.D. in Experimental Social Psychology and serves as a Professor of Psychology at Iowa State University.

⁴ Defendant was still in prison on September 17, 2009, when the remand proceedings began. Through counsel, he waived his right to appear. Defendant was paroled on November 30, 2009, after which he again waived his appearance.

Since 1977, Dr. Wells has published more than 100 articles on eyewitness identification research. He assisted the Attorney General's Office in connection with the formulation of the Attorney General Guidelines.

Dr. Penrod, who was called as a witness by defendant, is a Distinguished Professor of Psychology at John Jay College of Criminal Justice in New York. He holds a degree in law and a Ph.D. in Psychology. Dr. Penrod has also published extensively in the area of eyewitness identification and has served on the editorial board of numerous psychology journals.

Dr. Malpass, who was called by the State, is also widely published. He holds a Ph.D., and his academic career spans more than four decades. Dr. Malpass is currently a Professor of Psychology and Criminal Justice at the University of Texas, El Paso, where he runs the university's Eyewitness Identification Research Lab.

The parties and amici also presented the testimony of three law professors: James Doyle, Jules Epstein, and Dr. John Monahan. The professors discussed the intersection of eyewitness identification research and the legal system.

Dr. Monahan and Professor Doyle were called as witnesses by the Innocence Project. Dr. Monahan has a Ph.D. in Clinical Psychology, is a Distinguished Professor of Law at the University of Virginia, and holds dual appointments in the

Departments of Psychology and Psychiatric and Neurobehavioral Sciences. He coauthored the casebook Social Science in Law (7th ed. 2010), and has published extensively on that topic.

Professor Doyle is Director of the Center for Modern Forensic Practice at John Jay College of Criminal Justice. In 1987, he co-authored a treatise titled Eyewitness Testimony: Civil and Criminal, which he regularly updates.

Defendant presented Professor Epstein as a witness. He is an Associate Professor of Law at Widener University School of Law, who has spent more than a decade representing criminal defendants in Philadelphia. He, too, has written extensively on eyewitness identification.

The State also called James Gannon to testify. From 1986 to 2007, he worked with the Morris County Prosecutor's Office, ultimately serving as Deputy Chief of Investigations. During his career, he investigated approximately 120 homicides. He continues to train law enforcement personnel locally and internationally. Gannon testified about practical constraints police officers sometimes face in conducting investigations.

III. Proof of Misidentifications

In this case, the parties heavily dispute the admissibility and reliability of Womble's eyewitness identification of defendant. We therefore begin with some important, general observations about eyewitness identification evidence, which are

derived mostly from the remand hearing as well as prior case law.

In 2006, this Court observed that eyewitness "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country." State v. Delgado, 188 N.J. 48, 60 (2006) (citations omitted); see also Romero, supra, 191 N.J. at 73-74 ("Some have pronounced that mistaken identifications 'present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished.'" (citation omitted)). That same year, the International Association of Chiefs of Police published training guidelines in which it concluded that "[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification 5 (2006).

Substantial evidence in the record supports those statements. Nationwide, "more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." Romero, supra, 191 N.J. at 74 (citing Innocence Project report); Brandon L. Garrett, Convicting the

Innocent: Where Criminal Prosecutions Go Wrong 8-9, 279 (2011)⁵ (finding same in 190 of first 250 DNA exoneration cases). In half of the cases, eyewitness testimony was not corroborated by confessions, forensic science, or informants. See The Innocence Project, Understand the Causes: Eyewitness Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited August 16, 2011). Thirty-six percent of the defendants convicted were misidentified by more than one eyewitness. Garrett, supra, at 50. As we recognized four years ago, "[i]t has been estimated that approximately 7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications." Romero, supra, 191 N.J. at 74 (citing Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 7 (1995)).

New Jersey is not immune. The parties noted that misidentifications factored into three of the five reported DNA exonerations in our State. In one of those cases, this Court had reversed convictions for rape and robbery because the trial court failed to instruct the jury that people may have greater difficulty in identifying members of a different race. See

⁵ This book was published after the remand hearing, and a part was submitted to the Court and addressed by the parties. The book analyzes the first 250 DNA exoneration cases in the United States, and its author reviewed the full trial record in most of those matters. See Garrett, supra, at 7.

State v. Cromedy, 158 N.J. 112, 121-23, 132 (1999) (citing social science studies). After the decision, DNA tests led to Cromedy's exoneration.

But DNA exonerations are rare. To determine whether statistics from such cases reflect system-wide flaws, police departments have allowed social scientists to analyze case files and observe and record data from real-world identification procedures.

Four such studies -- two from Sacramento, California and two from London, England -- produced data from thousands of actual eyewitness identifications. See Bruce W. Behrman & Sherrie L. Davey, Eyewitness Identification in Actual Criminal Cases: An Archival Analysis, 25 Law & Hum. Behav. 475 (2001) (compiling records from fifty-eight live police lineups from area around Sacramento); Bruce W. Behrman & Regina E. Richards, Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis, 29 Law & Hum. Behav. 279 (2005) (assessing 461 photo and live lineup records from same area); Tim Valentine et al., Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups, 17 Applied Cognitive Psychol. 969 (2003) (analyzing 584 lineup records from police stations in and around London); Daniel B. Wright & Anne T. McDaid, Comparing System and Estimator

Variables Using Data from Real Line-Ups, 10 Applied Cognitive Psychol. 75 (1996) (evaluating 1,561 records from same area).

For the larger London study, 39% of eyewitnesses identified the suspect, 20% identified a filler, and 41% made no identification. See Wright & McDaid, supra, at 77. Thus, about one-third of eyewitnesses who made an identification (20 of 59) in real police investigations wrongly selected an innocent filler. The results were comparable for the Valentine study. See Valentine, supra, at 974. Across both Sacramento studies, 51% of eyewitnesses identified the suspect, 16% identified a filler, and 33% identified no one. See Behrman & Davey, supra, at 482; Behrman & Richards, supra, at 285. In other words, nearly 24% of those who made an identification (16 of 67) mistakenly identified an innocent filler.

Although the studies revealed alarming rates at which witnesses chose innocent fillers out of police lineups, the data cannot identify how many of the suspects actually selected were the real culprits. See Behrman & Davey, supra, at 478. Researchers have conducted field experiments to try to answer that more elusive question: how often are innocent suspects wrongly identified?

Three experiments targeted unassuming convenience store clerks and one focused on bank tellers. See John C. Brigham et al., Accuracy of Eyewitness Identifications in a Field Setting,

42 J. Personality & Soc. Psychol. 673 (1982); Carol Krafka & Steven Penrod, Reinstatement of Context in a Field Experiment on Eyewitness Identification, 49 J. Personality & Soc. Psychol. 58 (1985); Stephanie J. Platz & Harmon M. Hosch, Cross-Racial/Ethnic Eyewitness Identification: A Field Study, 18 J. Applied Soc. Psychol. 972 (1988); Melissa A. Pigott et al., A Field Study on the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy, 17 J. Police Sci. & Admin. 84 (1990) (bank teller study).

Each study unfolded with different variations of the following approach: a customer walked into a store and tried to buy a can of soda with a \$10 traveler's check; he produced two pieces of identification and chatted with the clerk; and the encounter lasted about three minutes. See, e.g., Krafka & Penrod, supra, at 62. Two to twenty-four hours later, a different person entered the same store and asked the same clerk to identify the man with the traveler's check; the clerk was told that the suspect might not be among the six photos presented; and no details of the investigation were given. Ibid. Only after making a choice was the clerk told that he or she had participated in an experiment. Id. at 63.

Across the four experiments, researchers gathered data from more than 500 identifications. Dr. Penrod testified that on average, 42% of clerks made correct identifications, 41%

identified photographs of innocent fillers, and 17% chose to identify no one. See Brigham et al., supra, at 677; Krafka & Penrod, supra, at 64-65; Pigott et al., supra, at 86-87; Platz & Hosch, supra, at 978. Those numbers, like the results from the Sacramento and London studies, reveal high levels of misidentifications.

In two of the studies, researchers showed some clerks target-absent arrays -- lineups that purposely excluded the perpetrator and contained only fillers. See Krafka & Penrod, supra, at 64-65; Pigott et al., supra, at 86. In those experiments, Dr. Penrod testified that 64% of eyewitnesses made no identification, but 36% picked a foil. See Krafka & Penrod, supra, at 64; Pigott et al., supra, at 86. Those field experiments suggest that when the true perpetrator is not in the lineup, eyewitnesses may nonetheless select an innocent suspect more than one-third of the time.

Any one of the above studies, standing alone, reveals a troubling lack of reliability in eyewitness identifications.

We accept that eyewitnesses generally act in good faith. Most misidentifications stem from the fact that human memory is malleable; they are not the result of malice. As discussed below, an array of variables can affect and dilute eyewitness memory.

Along with those variables, a concept called relative judgment, which the Special Master and the experts discussed, helps explain how people make identifications and raises concerns about reliability. Under typical lineup conditions, eyewitnesses are asked to identify a suspect from a group of similar-looking people. "[R]elative judgment refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory relative to other lineup members." Gary L. Wells, The Psychology of Lineup Identifications, 14 J. Applied Soc. Psychol. 89, 92 (1984) (emphasis in original). As a result, if the actual perpetrator is not in a lineup, people may be inclined to choose the best look-alike. Id. at 93. Psychologists have noted that "[t]his is not a surprising proposition." Gary L. Wells, What Do We Know About Eyewitness Identification?, 48 Am. Psychologist 553, 560 (1993). Also not surprising is that it enhances the risk of misidentification. Ibid.

In one relative-judgment experiment, 200 witnesses were shown a staged crime. Id. at 561. Half of the witnesses were then shown a lineup that included the perpetrator and five fillers; the other half looked at a lineup with fillers only. Ibid. All of the witnesses were warned that the culprit might not be in the array and were given the option to choose no one. Ibid. From the first group, 54% made a correct identification

and 21% believed, incorrectly, that the perpetrator was not in the array. Ibid. If witnesses rely on pure memory instead of relative judgment, the accurate identifications from the first group should have translated roughly into 54% making no choice in the second, target-absent group. Instead, only 32% of witnesses from the second group said that the culprit was not present, while 68% misidentified a filler. Ibid. Consistent with the concept of relative judgment, witnesses chose other fillers who looked more like the perpetrator to them, instead of making no identification. Ibid.

Relative judgment touches the core of what makes the question of eyewitness identification so challenging. Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false -- which are the product of reliable memories and which are distorted by one of a number of factors.

Nearly four decades ago, Chief Judge Bazelon remarked skeptically that in the face of such uncertainty, "we have bravely assumed that the jury is capable of evaluating [eyewitness] reliability." United States v. Brown, 461 F.2d 134, 145 n.1 (D.C. Cir. 1972) (Bazelon, C.J., concurring & dissenting). Five years later, in Manson, supra, the Supreme Court noted that in most cases "[w]e are content to rely upon the good sense and judgment of American juries" because

eyewitness identification "evidence with some element of untrustworthiness is customary grist for the jury mill." 432 U.S. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155. Justice Marshall, in dissent, expressed a contrary view. See id. at 120, 97 S. Ct. at 2255-56, 53 L. Ed. 2d at 157 (Marshall, J., dissenting). A "fundamental fact of judicial experience," Justice Marshall wrote, is that jurors "unfortunately are often unduly receptive to [eyewitness identification] evidence." Ibid.

We presume that jurors are able to detect liars from truth tellers. But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness." See Jules Epstein, The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination, 36 Stetson L. Rev. 727, 772 (2007). Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

As discussed below, lab studies have shown that eyewitness confidence can be influenced by factors unrelated to a witness' actual memory of a relevant event. See Amy Bradfield Douglass & Nancy Steblay, Memory Distortion in Eyewitnesses: A Meta-

Analysis of the Post-identification Feedback Effect, 20 Applied Cognitive Psychol. 859, 864-65 (2006) (addressing effects of confirmatory feedback on confidence). Indeed, this Court has already acknowledged that accuracy and confidence “may not be related to one another at all.” See Romero, supra, 191 N.J. at 75 (citation omitted).

DNA exoneration cases buttress the lab results. Almost all of the eyewitnesses in those cases testified at trial that they were positive they had identified the right person. See Garrett, supra, 63-64 (noting also that in 57% of the trials, “the witnesses had earlier not been certain at all”).

In the face of those proofs, we are mindful of the observation that “there is almost nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” Watkins v. Sowders, 449 U.S. 341, 352, 101 S. Ct. 654, 661, 66 L. Ed. 2d 549, 558-59 (Brennan, J., dissenting) (quoting Elizabeth Loftus, Eyewitness Testimony 19 (1979)) (emphasis in original).

The State challenges the above concepts in various ways: it argues that some studies evaluating real police files and investigations are unreliable because it is unclear whether the witnesses were given proper pre-lineup warnings, see, e.g., Valentine et al., supra; that misidentification statistics gleaned from more than 200 nationwide DNA exonerations are

insufficient to conclude that a serious problem exists; that the only DNA exonerations relevant to this case are the five cases from New Jersey, which all predated the Attorney General Guidelines; that exculpatory DNA evidence does not necessarily prove a defendant is innocent; and that DNA exonerations only remind us that the criminal justice system is imperfect.

That broad-brush approach, however, glosses over the consistency and importance of the comprehensive scientific research that is discussed in the record. Recent studies -- ranging from analyses of actual police lineups, to laboratory experiments, to DNA exonerations -- prove that the possibility of mistaken identification is real, and the consequences severe.

IV. Current Legal Framework

The current standards for determining the admissibility of eyewitness identification evidence derive from the principles the United States Supreme Court set forth in Manson in 1977. See Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154. New Jersey formally adopted Manson's framework in Madison, supra, 109 N.J. at 232-33.

Madison succinctly outlined Manson's two-step test as follows:

[A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the

objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence.

[Madison, supra, 109 N.J. at 232 (citations omitted).]

As the Supreme Court explained, "reliability is the linchpin in determining the admissibility of identification testimony." Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154. To assess reliability, courts must consider five factors adopted from Neil v. Biggers: (1) the "opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness's degree of attention"; (3) "the accuracy of his prior description of the criminal"; (4) "the level of certainty demonstrated at the time of the confrontation"; and (5) "the time between the crime and the confrontation." Madison, supra, 109 N.J. at 239-40 (quoting Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154 (citing Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972))) (internal quotation marks omitted). Those factors are to be weighed against "the corrupting effect of the suggestive identification itself."

Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154.

Procedurally, a defendant must first "proffer . . . some evidence of impermissible suggestiveness" to be entitled to a Wade hearing. State v. Rodriguez, 264 N.J. Super. 261, 269 (App. Div. 1993) (citations omitted), aff'd o.b., 135 N.J. 3 (1994); State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div. 1985). At the hearing, if the court decides the procedure "was in fact impermissibly suggestive," it then considers the reliability factors. See Madison, supra, 109 N.J. at 232. The State then "has the burden of proving by clear and convincing evidence that the identification[] . . . had a source independent of the police-conducted identification procedures." Id. at 245 (citing Wade, supra, 388 U.S. at 240, 87 S. Ct. at 1939, 18 L. Ed. 2d at 1164) (additional citation omitted). Overall, the reliability determination is to be made from the totality of the circumstances. Id. at 233 (citing Neil v. Biggers, supra, 409 U.S. at 199, 93 S. Ct. at 382, 34 L. Ed. 2d at 411).

Manson, supra, intended to address several concerns: problems with the reliability of eyewitness identification; deterrence; and the effect on the administration of justice. 432 U.S. at 111-13, 97 S. Ct. at 2251-52, 53 L. Ed. 2d at 152-53. Underlying Manson's approach are certain assumptions: that

jurors can detect untrustworthy eyewitnesses, see id. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155; and that the test would deter suggestive police practices, see id. at 112, 97 S. Ct. at 2252, 53 L. Ed. 2d at 152. As to the latter point, the Court adopted a totality approach over a per se rule of exclusion to avoid "keep[ing] evidence from the jury that is reliable and relevant." Ibid.

Manson and Madison provide good examples for how the two-pronged test is applied. In Manson, supra, an undercover narcotics officer, Trooper Glover, observed a defendant during a drug buy. 432 U.S. at 100-01, 97 S. Ct. at 2245-46, 53 L. Ed. 2d at 145-46. Glover did not know the person and described him to backup officers after the transaction. Based on the description, one of the officers left a photo of the defendant on Glover's desk. Glover later identified the defendant from the single photo. Id. at 101, 97 S. Ct. at 2246, 53 L. Ed. 2d at 145-46.

Although the Court recognized that "identifications arising from single-photograph displays may be viewed in general with suspicion," it found that the corrupting effect of the challenged identification did not outweigh Glover's ability to make an accurate identification. Id. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155 (citation omitted). After assessing each of the five reliability factors, the Court concluded that the

identification was admissible because it could not "say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification.'" Id. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155 (citing Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968)). "Short of that," the Court noted, the "evidence is for the jury to weigh." Ibid.

This Court applied the same test in Madison. Two months after an armed robbery, a detective administering a photo lineup showed a victim twenty-four black-and-white photographs containing at least one photo of the defendant. Madison, supra, 109 N.J. at 225. Next, the detective showed the victim an additional thirty-eight color photographs, "thirteen or fourteen of which depicted defendant as the center of attention at a birthday celebration held in his honor." Id. at 235.

The Court found the identification procedure "impermissibly suggestive" based on "the sheer repetition of defendant's picture." Id. at 234. It then remanded to the trial court to evaluate, under the second prong, "whether the identification[] . . . had an independent source" that could outweigh the substantial suggestiveness of the process. See id. at 245.

Since Madison, this Court, on occasion, has refined the Manson/Madison framework. In Cromedy, supra, the Court examined numerous social science studies showing that identifications are

less reliable when the witness and perpetrator are of different races. 158 N.J. at 121. In response, the Court held that jury instructions on the reliability of cross-racial identifications are necessary when "identification is a critical issue in the case" and there is no independent evidence corroborating the identification. Id. at 132.

More recently in Romero, supra, the Court recognized that "[j]urors likely will believe eyewitness testimony 'when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all.'" 191 N.J. at 75 (quoting Watkins, supra, 449 U.S. at 352, 101 S. Ct. at 661, 66 L. Ed. 2d at 558 (Brennan, J., dissenting)). The Court cited "social science research noting the fallibility of eyewitness identifications" and directed that juries be instructed as follows in eyewitness identification cases:

Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

[Id. at 75-76.]

In Delgado, supra, the Court directed that "law enforcement officers make a written record detailing [all] out-of-court identification procedure[s], including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." 188 N.J. at 63. See also Herrera, supra, 187 N.J. at 504 (finding showup identification procedures inherently suggestive).

Despite those important, incremental changes, we have repeatedly used the Manson/Madison test to determine the admissibility of eyewitness identification evidence. As we noted in Herrera, "[u]ntil we are convinced that a different approach is required after a proper record has been made in the trial court, we continue to follow the [Manson/Madison] approach." Ibid.; see also State v. Adams, 194 N.J. 186, 201 (2008).

That record is now before us. It enables us to consider whether the Manson/Madison framework remains valid and appropriate or if a different approach is required. To make that determination, we first look to the scope of the scientific evidence since 1977. We then examine its content.

V. Scope of Scientific Research

Virtually all of the scientific evidence considered on remand emerged after Manson. In fact, the earliest study the

State submitted is from 1981, and only a handful of the more than 200 scientific articles in the record pre-date 1970.

During the 1970s, when the Supreme Court decided Manson, researchers conducted some experiments on the malleability of human memory. But according to expert testimony, that decade produced only four published articles in psychology literature containing the words "eyewitness" and "identity" in their abstracts. By contrast, the Special Master estimated that more than two thousand studies related to eyewitness identification have been published in the past thirty years.

Some recent studies have successfully gathered real-world data from actual police identification procedures. See, e.g., Behrman & Davey, supra; Valentine et al., supra. But most eyewitness identification research is conducted through controlled lab experiments. Unlike analyses of real-world data, experimental studies allow researchers to control and isolate variables. If an experiment is designed well, scientists can then draw relevant conclusions from different conditions.

There have been two principal methods of conducting eyewitness lab research. In some experiments, eyewitnesses have been shown staged events without knowing they were witnessing something artificial. See, e.g., Krafka & Penrod, supra. In other studies, witnesses generally knew they were participating in an experiment from the outset. See e.g., Lynn Garrioch &

C.A. Elizabeth Brimacombe, Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence, 25 Law & Hum. Behav. 299 (2001). Most experiments manipulate variables, like the witness' and suspect's race, for example, and use target-present and target-absent lineups to test the effect the variable has on accuracy. (The scientific literature often uses the term "lineup" to refer to live lineups and/or photo arrays; we sometimes use the word interchangeably as well.)

Authoritative researchers generally present the results of their experiments in peer-reviewed psychology journals. "The peer review process is a method of quality control that ensures the validity and reliability of experimental research." Roy S. Malpass et al., The Need for Expert Psychological Testimony on Eyewitness Identification, in Expert Testimony on the Psychology of Eyewitness Identification 3, 14 (Brian L. Cutler ed., 2009). The process is designed to ensure that studies "have passed a rigorous test and are generally considered worthy of consideration by the greater scientific community" before they are published. Ibid. Of the hundreds of laboratory studies in the record, nearly all have been published in prominent, peer-reviewed journals.

Although one lab experiment can produce intriguing results, its data set may be small. For example, if only twenty people participated in an experiment, it may be difficult to generalize

the results beyond the individual study. Meta-analysis aims to solve that problem.

"A meta-analysis is a synthesis of all obtainable data collected in a specified topical area. The benefits of a meta-analysis are that greater statistical power can be obtained by combining data from many studies." Id. at 15. The more consistent the conclusions from aggregated data, the greater confidence one can have in those conclusions. More than twenty-five meta-analyses were presented at the hearing.

Despite its volume and breadth, the record developed on remand has its limitations. Results from meta-analysis, for example, still come mostly from controlled experiments. See State v. Marquez, 967 A.2d 56, 75 (Conn. 2009) (noting lack of "real-world data" in certain research areas (citation omitted)).⁶ To determine whether such experiments reliably predict how people behave in the real world, researchers have tried to compare results across different types of studies.

⁶ In Marquez, supra, the Connecticut Supreme Court concluded that "scientific literature . . . with respect to eyewitness identification procedures is far from universal or even well established, and that the research is in great flux." 967 A.2d at 77. Marquez considered six scientific articles and reports in reaching that conclusion, id. at 72-78, including an Illinois field study that has been strongly criticized, see id. at 75 & n.24; see also Daniel L. Schacter et al., Policy Forum: Studying Eyewitness Investigations in the Field, 32 Law & Hum. Behav. 3 (2008). The more extensive record presented and tested on remand provides a stronger basis for an assessment of eyewitness identification research.

Dr. Penrod presented data from a meta-analysis comparing studies in which witnesses knew they were participating in experiments and those in which witnesses observed what they thought were real crimes and were not told otherwise until after making an identification. See Ralph Norman Haber & Lyn Haber, A Meta-Analysis of Research on Eyewitness Lineup Identification Accuracy, Paper presented at the Annual Convention of the Psychonomics Society, Orlando, Florida 8-9 (Nov. 16, 2001). The analysis revealed that identification statistics from across the studies were remarkably consistent: in both sets of studies, 24% of witnesses identified fillers. See id. at 9 (also finding 34% filler identification rates when witnesses observed slideshows or videos of crimes). Those statistics are similar to data from real cases. As discussed in section III above, in police investigations in Sacramento and London, roughly 20% of eyewitnesses identified fillers. See Behrman & Davey, supra, at 482; Behrman & Richards, supra, at 285; Valentine et al., supra, at 974; Wright & McDaid, supra, at 77. Thus, although lab and field experiments may be imperfect proxies for real-world conditions, certain data they have produced are relevant and persuasive.

Critics, including the State, point out that most experiments occur on college campuses and use college students as witnesses in a way that does not replicate real life. Expert

testimony, though, highlighted that college students are among the best eyewitnesses in light of their general health, visual acuity, recall, and alertness. But real eyewitnesses, the critics contend, act more carefully when they identify real suspects. As the Special Master noted, it is hard to credit that argument in light of archival studies and the exoneration cases. Even with the best of intentions, misidentifications occur in the real world.

A similar criticism suggests that lab experiments cannot replicate the intensity and stress that crime victims experience, which leaves stronger memory traces. But as discussed below, studies have shown consistently that high degrees of stress actually impair the ability to remember. See, e.g., Kenneth A. Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 687, 699 (2004).

Finally, the State argues that lab studies are designed so that about half of the participants will not be able to make an identification; a "base rate" of 50% is commonly used with half of the witnesses viewing a lineup with the suspect and half looking at fillers only. The State argues those results cannot be generalized to the real world, where the actual base rate may be much higher.

As Dr. Wells testified, statistical analysis permits researchers to estimate the results under any base rate. That said, in reality, we simply cannot know how often the suspect in an array is the actual perpetrator. But not knowing real-world base rates does not render experimental studies meaningless.

To be sure, many questions about memory and the psychology of eyewitness identifications remain unanswered. And eyewitness identification research remains probabilistic, meaning that science cannot say whether an identification in an actual case is accurate or not. Instead, science has sought to answer, in the aggregate, which identification procedures and external variables are tied to an increased risk of misidentification.

Mindful of those limitations, we next examine the research on human memory.

VI. How Memory Works

Research contained in the record has refuted the notion that memory is like a video recording, and that a witness need only replay the tape to remember what happened. Human memory is far more complex. The parties agree with the Special Master's finding that memory is a constructive, dynamic, and selective process.

The process of remembering consists of three stages: acquisition -- "the perception of the original event"; retention -- "the period of time that passes between the event and the

eventual recollection of a particular piece of information"; and retrieval -- the "stage during which a person recalls stored information." Elizabeth F. Loftus, Eyewitness Testimony 21 (2d ed. 1996). As the Special Master observed,

[a]t each of those stages, the information ultimately offered as "memory" can be distorted, contaminated and even falsely imagined. The witness does not perceive all that a videotape would disclose, but rather "get[s] the gist of things and constructs a "memory" on "bits of information . . . and what seems plausible." The witness does not encode all the information that a videotape does; memory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; [and] the witness's retrieval of stored "memory" can be impaired and distorted by a variety of factors, including suggestive interviewing and identification procedures conducted by law enforcement personnel.

[Internal citations omitted.]

Researchers in the 1970s designed a number of experiments to test how and to what extent memories can be distorted. One experiment began by showing subjects film clips of auto accidents. Elizabeth F. Loftus & John C. Palmer, Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory, 13 J. Verbal Learning & Verbal Behav. 585, 586 (1974). Researchers then asked test subjects to estimate the speed at which the cars traveled, and the answers differed markedly based on the question posed. On average, those asked "how fast were the cars going when they smashed into each

other?" guessed higher speeds than subjects asked the same question with the word collided, bumped, hit, or contacted. Ibid. The first group estimated a median speed of 40.5 miles per hour when the cars "smashed"; the last group guessed the speed at 31.8 miles per hour when the cars "contacted." Ibid. Thus, a simple difference in language was able to cause a substantial change in the reconstruction of memory.

A similar study showed college students a film of a car accident and asked some of them to guess how fast the car was going "along the country road"; the rest were asked how fast the car was going when it "passed the barn" along the country road. Elizabeth F. Loftus, Leading Questions and the Eyewitness Report, 7 Cognitive Psychol. 560, 566 (1975). One week later, the same students were asked if they had seen a barn in the film. Approximately 17% of students who were originally asked the "passed the barn" question said there was a barn, and just under 3% from the other group remembered a barn. Ibid. In reality, there was no barn. Ibid.; see also Elizabeth F. Loftus & Jacqueline E. Pickrell, The Formation of False Memories, 25 Psychiatric Annals 720 (1995); Elizabeth F. Loftus & Guido Zanni, Eyewitness Testimony: The Influence of the Wording of a Question, 5 Bull. Psychonomic Soc'y 86 (1975).

Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array

of variables can affect and dilute memory and lead to misidentifications.

Scientific literature divides those variables into two categories: system and estimator variables. System variables are factors like lineup procedures which are within the control of the criminal justice system. Gary L. Wells, Applied Eyewitness-Testimony Research: System Variables and Estimator Variables, 36 J. Personality & Soc. Psychol. 1546, 1546 (1978). Estimator variables are factors related to the witness, the perpetrator, or the event itself -- like distance, lighting, or stress -- over which the legal system has no control. Ibid.

We review each of those variables in turn. For each, we address relevant scientific evidence, the Special Master's findings, and instances where the State takes issue with those findings.

We summarize findings for each of those variables consistent with the proper standards for reviewing special-master reports and scientific evidence. Courts generally defer to a special master's credibility findings regarding the testimony of expert witnesses. State v. Chun, 194 N.J. 54, 96 (2008) (citing State v. Locurto, 157 N.J. 463, 471 (1999)). We evaluate a special master's factual findings

in the same manner as we would the findings and conclusions of a judge sitting as a finder of fact. We therefore accept the

fact findings to the extent that they are supported by substantial credible evidence in the record, but we owe no particular deference to the legal conclusions of the Special Master.

[Id. at 93 (citations omitted).]

Scientific theories can be accepted as reliable when they are “based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field.” State v. Moore, 188 N.J. 182, 206 (2006) (quoting Rubanick v. Witco Chem. Corp., 125 N.J. 421, 449 (1991)); see also Hisenaj v. Kuehner, 194 N.J. 6, 17 (2008). In general, proponents can prove the reliability of scientific evidence by offering “(1) the testimony of knowledgeable experts; (2) authoritative scientific literature; [and] (3) persuasive judicial decisions which acknowledge such general acceptance of expert testimony.” Rubanick, supra, 125 N.J. at 432 (internal citation and quotation marks omitted); see Moore, supra, 188 N.J. at 206. We also look for general acceptance of scientific evidence within the relevant scientific community. Chun, supra, 194 N.J. at 91 (citing State v. Harvey, 151 N.J. 117, 169-70 (1997) (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (remaining citations omitted))).

A. System Variables

We begin with variables within the State’s control.

1. Blind Administration

An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array.

Dr. Wells testified that double-blind lineup administration is "the single most important characteristic that should apply to eyewitness identification" procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision.

Research has shown that lineup administrators familiar with the suspect may leak that information "by consciously or unconsciously communicating to witnesses which lineup member is the suspect." See Sarah M. Greathouse & Margaret Bull Kovera, Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification, 33 Law & Hum. Behav. 70, 71 (2009). Psychologists refer to that phenomenon as the "expectancy effect": "the tendency for experimenters to obtain results they expect . . . because they have helped to shape that response." Robert Rosenthal & Donald B. Rubin, Interpersonal Expectancy Effects: The First 345 Studies, 3 Behav. & Brain Sci. 377, 377 (1978). In a seminal

meta-analysis of 345 studies across eight broad categories of behavioral research, researchers found that "[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero." Ibid.

Even seemingly innocuous words and subtle cues -- pauses, gestures, hesitations, or smiles -- can influence a witness' behavior. Ryann M. Haw & Ronald P. Fisher, Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy, 89 J. Applied Psychol. 1106, 1107 (2004); see also Steven E. Clark et al., Lineup Administrator Influences on Eyewitness Identification Decisions, 15 J. Experimental Psychol.: Applied 63, 66-73 (2009). Yet the witness is often unaware that any cues have been given. See Clark et al., supra, at 72.

The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect. An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is.

The State understandably notes that police departments, no matter their size, have limited resources, and those limits can make it impractical to administer lineups double-blind in all

cases. An alternative technique, which Dr. Wells referred to as the "envelope method," helps address that challenge. It relies on single-blind administration: an officer who knows the suspect's identity places single lineup photographs into different envelopes, shuffles them, and presents them to the witness. The officer/administrator then refrains from looking at the envelopes or pictures while the witness makes an identification. This "blinding" technique is cost-effective and can be used when resource constraints make it impractical to perform double-blind administration.

We find that the failure to perform blind lineup procedures can increase the likelihood of misidentification.

2. Pre-identification Instructions

Identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. There is a broad consensus for that conclusion. The Attorney General Guidelines currently include the instruction; the Special Master considers it "uncontroversial"; and the State agrees that "[w]itness instructions are regarded as one of the most useful techniques for enhancing the reliability of identifications" (quoting the Special Master).

Pre-lineup instructions help reduce the relative judgment phenomenon described in section III. Without an appropriate

warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members.

The scientists agree. In two meta-analyses, they found that telling witnesses in advance that the suspect may not be present in the lineup, and that they need not make a choice, led to more reliable identifications in target-absent lineups. See Nancy Mehrkens Steblay, Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects, 21 Law & Hum. Behav. 283, 285-86, 294 (1997); Steven E. Clark, A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification, 29 Law & Hum. Behav. 395, 418-20 (2005). In one experiment, 45% more people chose innocent fillers in target-absent lineups when administrators failed to warn that the suspect may not be there. See Roy S. Malpass & Patricia G. Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 J. Applied Psychol. 482, 485 (1981).

The failure to give proper pre-lineup instructions can increase the risk of misidentification.

3. Lineup Construction

The way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing.

A number of features affect the construction of a fair lineup. First, the Special Master found that "mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup." See Roy S. Malpass et al., Lineup Construction and Lineup Fairness, in 2 The Handbook of Eyewitness Psychology: Memory for People, at 155, 156 (R.C.L. Lindsay et al. eds., 2007). As a result, a suspect should be included in a lineup comprised of look-alikes. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness' confidence in the identification because the selection process seemed easy. See David F. Ross et al., When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop-Out' Effect and the 10- to 12-Second Rule, 21 Applied Cognitive Psychol. 677, 687 (2007); Gary L. Wells & Amy L. Bradfield, Measuring the Goodness of Lineups: Parameter Estimation, Question Effects, and Limits to the Mock Witness Paradigm, 13 Applied Cognitive Psychol. S27, S30 (1999).

Second, lineups should include a minimum number of fillers. The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness' ability to distinguish the culprit from an innocent person. As Dr. Wells testified, no magic number exists, but there appears to be general agreement that a minimum of five fillers should be used.

See Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement 29 (1999); Attorney General Guidelines, supra, at 2.

Third, based on the same reasoning, lineups should not feature more than one suspect. As the Special Master found, "if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of 'lucky' guesses is magnified."

The record is unclear as to whether the use of fillers that match a witness' pre-lineup description is more reliable than fillers that resemble an actual suspect (to the extent there is a difference between the two). Compare Steven E. Clark & Jennifer L. Tunnicliff, Selecting Lineup Foils in Eyewitness Identification Experiments: Experimental Control and Real-World Simulation, 25 Law & Hum. Behav. 199, 212 (2001), and Gary L. Wells et al., The Selection of Distractors for Eyewitness Lineups, 78 J. Applied Psychol. 835, 842 (1993), with Stephen Darling et al., Selection of Lineup Foils in Operational Contexts, 22 Applied Cognitive Psychol. 159, 165-67 (2008). Further research may help clarify this issue.

We note that the Attorney General Guidelines require that fillers "generally fit the witness' description" and that "[w]hen there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of

the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features." Attorney General Guidelines, supra, at 2-3; see also R.C.L. Lindsay et al., Default Values in Eyewitness Descriptions, 18 Law & Hum. Behav. 527, 528 (1994) ("Innocent suspects may be at risk when the witness provides a limited or vague description of the criminal and the lineup foils, although selected to match the description, are noticeably different from the suspect in appearance.").

Of course, all lineup procedures must be recorded and preserved in accordance with the holding in Delgado, supra, 188 N.J. at 63, to ensure that parties, courts, and juries can later assess the reliability of the identification.

We find that courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification. When appropriate, jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness' confidence.

4. Avoiding Feedback and Recording Confidence

Information received by witnesses both before and after an identification can affect their memory. The earlier discussion of Dr. Loftus' study -- in which she asked students how fast a car was going when it passed a non-existent barn -- revealed how

memories can be altered by pre-identification remarks. Loftus, Leading Questions and the Eyewitness Report, supra, at 566.

Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.

There is substantial research about confirmatory feedback. A meta-analysis of twenty studies encompassing 2,400 identifications found that witnesses who received feedback "expressed significantly more . . . confidence in their decision compared with participants who received no feedback." Douglass & Steblay, supra, at 863. The analysis also revealed that "those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general." Id. at 864-65; see also 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 (1998).

The effects of confirmatory feedback may be the same even when feedback occurs forty-eight hours after an identification. Gary L. Wells et al., Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay, 9 J. Experimental Psychol.: Applied 42, 49-50 (2003). And those effects can be lasting. See Jeffrey S. Neuschatz et al., The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory, 19 Applied Cognitive Psychol. 435, 449 (2005).

The Court concluded in Romero, supra, "that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification." 191 N.J. at 76. The hearing confirmed that observation. The Special Master found that eyewitness confidence is generally an unreliable indicator of accuracy, but he acknowledged research showing that highly confident witnesses can make accurate identifications 90% of the time. The State places great weight on that research. See, e.g., Neil Brewer & Gary L. Wells, The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates, 12 J. Experimental Psychol.: Applied 11, 15 (2006); Siegfried Ludwig Sporer et al., Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, 118 Psychol. Bull. 315, 315-19, 322 (1995); see also Gary L. Wells &

Elizabeth A. Olson, Eyewitness Testimony, 54 Ann. Rev. Psychol. 277, 283-84 (2003) (noting complexity of issue).⁷

We glean certain principles from this information. Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record -- written or otherwise -- of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.

We rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring that practice. See Delgado, supra, 188 N.J. at 63 (requiring written record of identification procedure).

To be sure, concerns about feedback are not limited to law enforcement officers. As discussed below, confirmatory feedback from non-State actors can also affect the reliability of identifications and witness confidence. See infra at section

⁷ This section focuses only on post-identification confidence. Meta-analysis shows that eyewitness confidence in the ability to make an identification before viewing a lineup does not correlate with accuracy. See Brian L. Cutler & Steven D. Penrod, Forensically Relevant Moderators of the Relation Between Eyewitness Identification Accuracy and Confidence, 74 J. Applied Psychol. 650, 652 (1989).

VI.B.9. See, e.g., C.A. Elizabeth Luus & Gary L. Wells, The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects, 79 J. Applied Psychol. 714, 717-18 (1994).

Our focus at this point, though, is on system variables. To reiterate, we find that feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness' report of how he or she viewed an event.

5. Multiple viewings

Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

It is typical for eyewitnesses to look through mugshot books in search of a suspect. Investigations may also involve multiple identification procedures. Based on the record, there is no impact on the reliability of the second identification procedure "when a picture of the suspect was not present in photographs examined earlier." Gunter Koehnken et al., Forensic Applications of Line-Up Research, in Psychological Issues in Eyewitness Identification 205, 218 (Siegfried L. Sporer et al. eds., 1996).

Multiple identification procedures that involve more than one viewing of the same suspect, though, can create a risk of "mugshot exposure" and "mugshot commitment." Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone -- who had been depicted in the earlier photos -- at a later identification procedure. A meta-analysis of multiple studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot. Kenneth A. Deffenbacher et al., Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 299 (2006).

Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, "a significant number" then "reaffirm[] their false identification" in a later lineup -- even if the actual target is present. See Koehnken et al., supra, at 219.

Thus, both mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification. As a result,

law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.

6. Simultaneous v. Sequential Lineups

Lineups are presented either simultaneously or sequentially. Traditional, simultaneous lineups present all suspects at the same time, allowing for side-by-side comparisons. In sequential lineups, eyewitnesses view suspects one at a time.

Defendant and amici submit that sequential lineups are preferable because they lead to fewer misidentifications when the culprit is not in the lineup. The Attorney General Guidelines recommend that sequential lineups be utilized when possible, but the State also points to recent studies that have called that preference into doubt. Because the science supporting one procedure over the other remains inconclusive, we are unable to find a preference for either.

The strongest support for sequential lineups comes from a 2001 meta-analysis comparing data from more than 4,000 lineup experiments. See Nancy Steblay et al., Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison, 25 Law & Hum. Behav. 459 (2001). Across studies, simultaneous procedures produced more of both accurate and inaccurate identifications, and sequential procedures produced fewer misidentifications in target-absent

lineups. Id. at 466, 468-69. In other words, witnesses were more likely to make selections -- accurate and inaccurate -- with simultaneous lineups, and they made fewer, but more accurate, identifications with sequential, target-absent lineups.

Some experts believe that the theory of relative judgment helps explain the results; with sequential lineups, witnesses cannot compare photos and choose the lineup member that best matches their memory. See id. at 469. Those researchers note that "[t]o the extent any difference . . . is due to correct guessing, there is no reason to recommend simultaneous lineups." Ibid.

Other experts, including Dr. Malpass, are unconvinced. They believe that researchers have not yet clearly shown that sequential presentation is the "active ingredient" in reducing misidentifications. Roy S. Malpass et al., Public Policy and Sequential Lineups, 14 Legal & Criminological Psychol. 1, 5-6 (2009); Dawn McQuiston-Surrett et al., Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory, 12 Psychol. Pub. Pol'y & L. 137, 163 (2006) ("[W]e believe that current explanations for why sequential presentation should reduce both mistaken identifications and correct identifications are underdeveloped."); see also Scott D. Gronlund et al., Robustness of the Sequential Lineup Advantage, 15 J.

Experimental Psychol.: Applied 140, 149 (2009) ("Based on our study [of more than 2,000 participants], the sequential advantage does not appear to be a robust finding.").⁸

As research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient, authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure. See Rubanick, supra, 125 N.J. at 432, 449. As a result, we do not limit either one at this time.

7. Composites

When a suspect is unknown, eyewitnesses sometimes work with artists who draw composite sketches. Composites can also be prepared with the aid of computer software or non-computerized "tool kits" that contain picture libraries of facial features. Gary L. Wells & Lisa E. Hasel, Facial Composite Production by Eyewitnesses, 16 Current Directions Psychol. Sci. 6, 6-7 (2007).

As the Special Master observed, based on the record, "composites produce poor results." In one study, college freshman used computer software to generate composites of students and teachers from their high schools. Margaret Bull Kovera et al., Identification of Computer-Generated Facial

⁸ We do not consider the disputed Illinois field study, see Sheri H. Mecklenburg, Ill. Police Dep't, Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures (2006), referred to supra at ____ n.5 (slip op. at 43 n.5).

Composites, 82 J. Applied Psychol. 235, 239 (1997). Different students who had attended the same schools were only able to name 3 of the 500 people depicted in the composites. Id. at 241. But see Wells & Hasel, supra, at 6 (acknowledging rarity of studies comparing sketch artists, whose skills vary widely, to computer systems).

Researchers attribute those results to a mismatch between how composites are made and how memory works. See Wells & Hasel, supra, at 9. Evidence suggests that people perceive and remember faces "holistically" and not "at the level of individual facial features." Ibid. Thus, creating a composite feature-by-feature may not comport with the holistic way that memories for faces "are generally processed, stored, and retrieved." See ibid.

It is not clear, though, what effect the process of making a composite has on a witness' memory -- that is, whether it contaminates or confuses a witness' memory of what he or she actually saw. Compare Gary L. Wells et al., Building Face Composites Can Harm Lineup Identification Performance, 11 J. Experimental Psychol.: Applied 147, 148, 154 (2005) (finding "that building a composite significantly lowered accuracy for identifying the original face"), with Michael A. Mauldin & Kenneth R. Laughery, Composite Production Effects on Subsequent Facial Recognition, 66 J. Applied Psychol. 351, 355 (1981)

(finding "[w]hen subjects produce a[] . . . composite . . . they are more likely to recognize the target face in a subsequent recognition task").

As Dr. Wells acknowledged, "[t]he sparse, underpowered, and inconsistent literature on the effects of composite production on later recognition stands in contrast to the import of the question." Wells et al., Building Face Composites Can Harm Lineup Identification Performance, supra, at 148. We also note that researchers "are not yet prepared to argue that the use of composites should be significantly curtailed in criminal investigations." Id. at 155.

Without more accepted research, courts cannot make a finding on the effect the process of making a composite has on a witness. See Rubanick, supra, 125 N.J. at 432, 449. We thus do not limit the use of composites in investigations.

8. Showups

Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission. The Special Master noted that they are a "useful -- and necessary -- technique when used in appropriate circumstances," but they carry their "own risks of misidentifications."

By their nature, showups are suggestive and cannot be performed blind or double-blind. Nonetheless, as the Special Master found, "the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours" because "the benefits of a fresh memory seem to balance the risks of undue suggestion."

We have previously found showups to be "inherently suggestive," see Herrera, supra, 187 N.J. at 504, and other states have limited the admissibility of showup identifications. In Wisconsin, evidence of a showup is inadmissible unless, based on the totality of circumstances, the showup was necessary. State v. Dubose, 699 N.W.2d 582, 584-85 (Wis. 2005). Courts in Massachusetts require that there be "good reason for the use of a showup." Commonwealth v. Martin, 850 N.E.2d 555, 562-63 (Mass. 2006). In New York, showups at police stations are presumptively suggestive and are suppressed "unless exigency warrants otherwise." State v. Duuvon, 571 N.E.2d 654, 656 (N.Y. 1991) (citations omitted).

Studies that have evaluated showup identifications illustrate that the timeframe for their reliability appears relatively small. A Canadian field experiment that analyzed results from more than 500 identifications revealed that photo showups performed within minutes of an encounter were just as accurate as lineups. A. Daniel Yarmey et al., Accuracy of

Eyewitness Identifications in Showups and Lineups, 20 Law & Hum. Behav. 459, 464 (1996). Two hours after the encounter, though, 58% of witnesses failed to reject an "innocent suspect" in a photo showup, as compared to 14% in target-absent photo lineups. Ibid.

Researchers have also found that "false identifications are more numerous for showups [compared to lineups] when an innocent suspect resembles the perpetrator." See Nancy Steblay et al., Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison, 27 Law & Hum. Behav. 523, 523 (2003) (conducting meta-analysis). In addition, research reveals that showups increase the risk that witnesses will base identifications more on similar distinctive clothing than on similar facial features. See Jennifer E. Dysart et al., Show-ups: The Critical Issue of Clothing Bias, 20 Applied Cognitive Psychol. 1009, 1019 (2006); see also Yarmey et al., supra, at 461, 470 (showing greater likelihood of misidentification when culprit and innocent suspect looked alike and wore same clothing).

Experts believe the main problem with showups is that -- compared to lineups -- they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes.

Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification. As with lineups, showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification. That said, lineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive. See Herrera, supra, 187 N.J. at 504.

B. Estimator variables

Unlike system variables, estimator variables are factors beyond the control of the criminal justice system. See Wells, Applied Eyewitness-Testimony Research: System Variables and Estimator Variables, supra, at 1546. They can include factors related to the incident, the witness, or the perpetrator. Estimator variables are equally capable of affecting an eyewitness' ability to perceive and remember an event. Although the factors can be isolated and tested in lab experiments, they occur at random in the real world.

1. Stress

Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. The Special Master found that "while moderate levels of stress improve cognitive processing and might

improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator." The State agrees that high levels of stress are more likely than low levels to impair an identification.

Scientific research affirms that conclusion. A meta-analysis of sixty-three studies showed "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." See Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, supra, at 687, 699.

One field experiment tested the impact of stress on the memories of military personnel. See Charles A. Morgan III et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265 (2004). More than 500 active-duty military personnel, with an average of four years in the service, experienced two types of interrogation after twelve hours of confinement in survival school training: "a high-stress interrogation (with real physical confrontation) and a low-stress interrogation (without physical confrontation)." Id. at 267-68. Both interrogations lasted about 40 minutes. Id. at 268. Twenty-four hours later, the subjects were shown either a live lineup or a sequential or simultaneous photo array, and

asked to identify their interrogators. Id. at 269-70.

Across the procedures, subjects performed more poorly when they identified their high-stress interrogators. Id. at 272. For example, when viewing live line-ups, 30% of subjects accurately identified high-stress interrogators, but 62% did so for low-stress interrogators. Ibid. The study's authors concluded that

[c]ontrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 min[utes], . . . [t]hese data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error.

[Id. at 274.]

Although the study was conducted under a rather different setting, all three experts at the hearing considered its findings in the context of eyewitness evidence.

We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes "high" stress, which must be assessed based on the facts presented in individual cases.

2. Weapon Focus

When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the

culprit. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.

A meta-analysis of nineteen weapon-focus studies that involved more than 2,000 identifications found a small but significant effect: an average decrease in accuracy of about 10% when a weapon was present. Nancy M. Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-17 (1992). In a separate study, half of the witnesses observed a person holding a syringe in a way that was personally threatening to the witness; the other half saw the same person holding a pen. Anne Maass & Gunther Koehnken, Eyewitness Identification: Simulating the "Weapon Effect", 13 Law & Hum. Behav. 397, 401-02 (1989). Sixty-four percent of witnesses from the first group misidentified a filler from a target-absent lineup, compared to 33% from the second group. See id. at 405; see also Kerri L. Pickel, Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect, in 2 The Handbook of Eyewitness Psychology: Memory for People, supra, at 339, 353-54 (noting that "unusual items [like weapons] attract attention").

Weapon focus can also affect a witness' ability to describe a perpetrator. A meta-analysis of ten studies showed that "weapon-absent condition[s] generated significantly more

accurate descriptions of the perpetrator than did the weapon-present condition." Steblay, A Meta-Analytic Review of the Weapon Focus Effect, supra, at 417.

The duration of the crime is also an important consideration. Dr. Steblay concluded that weapon-focus studies speak to real-world "situations in which a witness observes a threatening object . . . in an event of short duration." Id. at 421. As Dr. Wells testified, the longer the duration, the more time the witness has to adapt to the presence of a weapon and focus on other details.

Thus, when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator.

3. Duration

Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification. The Special Master found that "while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure." See Colin G. Tredoux et al., Eyewitness Identification, in 1 Encyclopedia of Applied Psychology 875, 877 (Charles Spielberger ed., 2004).

There is no measure to determine exactly how long a view is needed to be able to make a reliable identification. Dr.

Malpass testified that very brief but good views can produce accurate identifications, and Dr. Wells suggested that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration.

Whatever the threshold, studies have shown, and the Special Master found, "that witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful." See, e.g., Elizabeth F. Loftus et al., Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 Applied Cognitive Psychol. 3, 10 (1987).

4. Distance and Lighting

It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.

Scientists have refined those common-sense notions with further study. See, e.g., R.C.L. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 Law & Hum. Behav. 526 (2008). Research has also shown that people have difficulty estimating distances. See, e.g., id. at 533.

5. Witness Characteristics

Characteristics like a witness' age and level of intoxication can affect the reliability of an identification.

The Special Master found that "the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications" and that "low alcohol intake produces fewer misidentifications than high alcohol intake." See also Jennifer E. Dysart et al., The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups, 87 J. Applied Psychol. 170, 174 (2002). That finding is undisputed.

The Special Master also found that "[a] witness's age . . . bears on the reliability of an identification." A meta-analysis has shown that children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults. See Joanna D. Pozzulo & R.C.L. Lindsay, Identification Accuracy of Children Versus Adults: A Meta-Analysis, 22 Law & Hum. Behav. 549, 563, 565 (1998). Showups in particular "are significantly more suggestive or leading with children." See Jennifer E. Dysart & R.C.L. Lindsay, Show-up Identifications: Suggestive Technique or Reliable Method?, in 2 The Handbook of Eyewitness Psychology: Memory for People 137, 147 (2007).

Some research also shows that witness accuracy declines with age. Across twelve studies, young witnesses -- ranging

from nineteen to twenty-four years old -- were more accurate when viewing target-absent lineups than older witnesses -- ranging from sixty-eight to seventy-four years old. See James C. Bartlett & Amina Memon, Eyewitness Memory in Young and Older Adults, in 2 The Handbook of Eyewitness Psychology: Memory for People, supra, at 309, 317-19. On average, 53% of young witnesses recognized that the target was not in the lineup, compared to only 31% of older witnesses. Id. at 318.

But the target's age may matter as well. As Dr. Penrod testified, "there's an own-age bias," meaning that witnesses are "better at recognizing people of [their] own age than . . . people of other ages." That effect may appear in studies that use college-age students as targets, for example. See id. at 321-23 (concluding that "young adults show better memory for young faces . . . than older faces, whereas seniors show either no effect or the opposite effect"); see also Melissa Boyce et al., Belief of Eyewitness Identification Evidence, in 2 The Handbook of Eyewitness Psychology: Memory for People, supra, at 501, 512 ("Perhaps people should only use age as a factor in deciding whether to believe an eyewitness if there is a large age difference between the witness and the suspect.").

Thus, the data about memory and older witnesses is more nuanced, according to the scientific literature. In addition, there was little other testimony at the hearing on the topic.

Based on the record before us, we cannot conclude that a standard jury instruction questioning the reliability of identifications by all older eyewitnesses would be appropriate for use in all cases.

6. Characteristics of Perpetrator

Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator. The Special Master found that "[d]isguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications." According to the State, those findings are "so well-known that criminals employ them in their work."

Disguises as simple as hats have been shown to reduce identification accuracy. See Brian L. Cutler et al., Improving the Reliability of Eyewitness Identification: Putting Context into Context, 72 J. Applied Psychol. 629, 635 (1987).

If facial features are altered between the time of the event and the identification procedure -- if, for example, the culprit grows a beard -- the accuracy of an identification may decrease. See K.E. Patterson & A.D. Baddeley, When Face Recognition Fails, 3 J. Experimental Psychol.: Hum. Learning & Memory 406, 410, 414 (1977).

7. Memory Decay

Memories fade with time. And as the Special Master observed, memory decay "is irreversible"; memories never

improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute.

A meta-analysis of fifty-three "facial memory studies" confirmed "that memory strength will be weaker at longer retention intervals [the amount of time that passes] than at briefer ones." Kenneth A. Deffenbacher et al., Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. Experimental Psychol: Applied 139, 142 (2008). In other words, the more time that passes, the greater the possibility that a witness' memory of a perpetrator will weaken. See Krafka & Penrod, supra, at 65 (finding substantial increase in misidentification rate in target-absent arrays from two to twenty-four hours after event). However, researchers cannot pinpoint precisely when a person's recall becomes unreliable.

8. Race-bias

"A cross-racial identification occurs when an eyewitness is asked to identify a person of another race." Cromedy, supra, 158 N.J. at 120. In Cromedy, after citing multiple social science sources, this Court recognized that a witness may have more difficulty making a cross-racial identification. Id. at 120-23, 131.

A meta-analysis conducted after Cromedy, involving thirty-nine studies and nearly 5,000 identifications, confirmed the Court's prior finding. See Christian A. Meissner & John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol. Pub. Pol'y & Law 3, 21 (2001).

Cross-racial recognition continues to be a factor that can affect the reliability of an identification. See also infra at section X.

9. Private Actors

The current Model Jury Charge states that judges should refer to "factors relating to suggestiveness, that are supported by the evidence," including "whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification." Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (2007). The charge was added after this Court in Herrera invited the Model Jury Charge Committee to consider including express references to suggestibility. Herrera, supra, 187 N.J. at 509-10 (citing State v. Long, 721 P.2d 483 (Utah 1980)). In response, the Committee relied heavily on proposed charging language in Long.

The Model Jury Charge properly reflects that private -- that is, non-State -- actors can affect the reliability of eyewitness identifications, just as the police can. The record on remand supports that conclusion. Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding "that post-identification feedback does not have to be presented by the experimenter or an authoritative figure (e.g. police officer) in order to affect a witness' subsequent crime-related judgments." See Elin M. Skagerberg, Co-Witness Feedback in Line-ups, 21 Applied Cognitive Psychol. 489, 494 (2007). Feedback and suggestiveness can come from co-witnesses and others not connected to the State.

Co-witness feedback may cause a person to form a false memory of details that he or she never actually observed. In an early study, 200 college students "viewed a film clip, read and evaluated a description of that film ostensibly given by another witness, and wrote out their own description based on their memory of the film." Elizabeth F. Loftus & Edith Greene, Warning: Even Memory for Faces May Be Contagious, 4 Law & Hum. Behav. 323, 328 (1980). The short film depicted a man who parked his car, briefly entered a small grocery store, and upon returning, "got into an argument with a young man who looked as if he were trying to break into the car." Ibid.

Some of the students were shown accurate descriptions of the event, and the rest read descriptions that contained false details. See ibid. Some students, for example, observed a young man with straight hair but then read testimony that described the hair as wavy. Id. at 328-29. "This procedure was intended to simulate the situation where a witness to an event is subsequently exposed, either through conversation or reading a newspaper article, to a version given by another witness." Id. at 324. Results showed that one-third (34%) of students included a false detail -- like wavy hair -- when they later described the target. Id. at 329. By contrast, only 5% of the students who read a completely factual narrative made similar mistakes. Ibid. In a related experiment, "[i]f the other witness referred to a misleading detail [a nonexistent mustache], [69]% of the subjects later 'recognized' an individual with that feature. Control subjects did so far less often (13%)." Id. at 323, 330.

More recent studies have yielded comparable findings. See Lorraine Hope et al., "With a Little Help from My Friends . . .": The Role of Co-Witness Relationship in Susceptibility to Misinformation, 127 Acta Psychologica 476, 481 (2008) (noting that all participants "were susceptible to misinformation from their co-witness and, as a consequence, produced less accurate recall accounts than participants who did not interact with

another witness"); see also Helen M. Paterson & Richard I. Kemp, Comparing Methods of Encountering Post-Event Information: The Power of Co-Witness Suggestion, 20 Applied Cognitive Psychol. 1083, 1083 (2006) ("Results suggest that co-witness information had a particularly strong influence on eyewitness memory, whether encountered through co-witness discussion or indirectly through a third party."); John S. Shaw, III et al., Co-Witness Information Can Have Immediate Effects on Eyewitness Memory Reports, 21 Law. & Hum. Behav. 503, 503, 516 (1997) ("[W]hen participants received incorrect information about a co-witness's response, they were significantly more likely to give that incorrect response than if they received no co-witness information."); Rachel Zajac & Nicola Henderson, Don't It Make My Brown Eyes Blue: Co-Witness Misinformation About a Target's Appearance Can Impair Target-Absent Lineup Performance, 17 Memory 266, 275 (2009) ("[P]articipants who were [wrongly] told by the [co-witness] that the accomplice had blue eyes were significantly more likely than control participants to provide this information when asked to give a verbal description.").

One of the experiments evaluated the effect of the nature of the witnesses' relationships with one another and compared co-witnesses who were strangers, friends, and couples. Hope et al., supra, at 478. The study found that "witnesses who were previously acquainted with their co-witness (as a friend or

romantic partner) were significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." Id. at 481.

Private actors can also affect witness confidence. See Luus & Wells, supra, at 714. In one study, after witnesses made identifications -- all of which were incorrect -- some witnesses were either told that their co-witness made the same or a different identification. Id. at 717. Confidence rose when witnesses were told that their co-witness agreed with them, and fell when co-witnesses disagreed. See id. at 717-18; see also Skagerberg, supra, at 494-95 (showing similar results).

In addition, all three experts, Drs. Malpass, Penrod, and Wells, testified at the remand hearing that co-witnesses can influence memory and recall.

To uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants. We again rely on our supervisory powers under Article VI, Section 2, Paragraph 3 of the State Constitution in requiring those steps. See Delgado, supra, 188 N.J. at 63.

Based on the record, we find that non-State actors like co-

witnesses and other sources of information can affect the independent nature and reliability of identification evidence and inflate witness confidence -- in the same way that law enforcement feedback can. As a result, law enforcement officers should instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources.

We address this issue further in Chen, supra.

10. Speed of Identification

The Special Master also noted that the speed with which a witness makes an identification can be a reliable indicator of accuracy. The State agrees. (Although the factor is not a pure system or estimator variable, we include it at this point for convenience.)

Laboratory studies offer mixed results. Compare Steven M. Smith et al., Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?, 85 J. Applied Psychol. 542, 542 (2000) (noting "[d]ecision time and lineup fairness were the best postdictors of accuracy"), and David Dunning & Scott Perretta, Automaticity and Eyewitness Accuracy: A 10- to 12-Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications, 87 J. Applied Psychol. 951, 959 (2002) (finding across four studies that identifications were nearly 90% accurate when witnesses identified targets within ten to twelve

seconds of seeing a lineup), with Ross et al., supra, at 688 (noting that rapid identifications were only 59%, not 90%, accurate and finding twenty-five seconds to be "time boundary" between accurate and inaccurate identifications).

Because of the lack of consensus in the scientific community, we make no finding on this issue. See Rubanick, supra, 125 N.J. at 432, 449. To the extent speed is relevant in any event, researchers also caution that it may only be considered if the lineup is fair and unbiased. See Ross et al., supra, at 688-89.

C. Juror Understanding

Some of the findings described above are intuitive. Everyone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person's face. Some findings are less obvious. Although many may believe that witnesses to a highly stressful, threatening event will "never forget a face" because of their intense focus at the time, the research suggests that is not necessarily so. See supra at section VI.B.1.

Using survey questionnaires and mock-jury studies, experts have attempted to discern what lay people understand, and what information about perception and memory are beyond the ken of the average juror. Based on those studies, the Special Master found "that laypersons are largely unfamiliar" with scientific

findings and "often hold beliefs to the contrary." Defendant and amici agree. The State does not. The State argues that the sources the Special Master cited are unreliable, and that jurors generally understand how memory functions and how it can be distorted.

The parties devote much attention to this issue. But the debate relates largely to the need for enhanced jury instructions and the possible use of expert testimony. Left unanswered amidst many objections is this question: if even only a small number of jurors do not appreciate an important, relevant concept, why not help them understand it better with an appropriate jury charge?

Survey questionnaires provide the most direct evidence of what jurors know about memory and eyewitness identifications. Researchers conducting the surveys ask jurors questions about memory and system and estimator variables. The results can then be compared to expert responses in separate surveys.

Survey studies have generated varied results. The Special Master relied on data from a 2006 survey (the "Benton Survey") that asked 111 jurors in Tennessee questions about eyewitness identification and memory. See 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, 118 (2006). Juror responses differed

from expert responses on 87% of the issues. Id. at 119-21. Among other issues, only 41% of jurors agreed with the importance of pre-lineup instructions, and only 38% to 47% agreed with the effects of the accuracy-confidence relationship, weapon focus, and cross-race bias. Id. at 120. By comparison, about nine of ten experts agreed on the effects of all of those issues. Ibid.

The State disputes the Benton study for various reasons and instead highlights results from Canadian surveys conducted in 2009, which showed a substantially higher level of juror understanding. See J. Don Read & Sarah L. Desmarais, Expert Psychology Testimony on Eyewitness Identification: A Matter of Common Sense?, in Expert Testimony on the Psychology of Eyewitness Identification, at 115, 120-27. The majority of jury-eligible participants in those surveys agreed with experts on the importance of lineup instructions, the accuracy-confidence relationship, cross-race bias, and weapon focus. See id. at 121-22. Still, as the survey authors acknowledged, "substantial differences in knowledge and familiarity between experts and laypersons were readily apparent for 50% of the eyewitness topics." Id. at 127.

Mock-jury studies provide another method to try to discern what jurors know. The State argues that mock-jury research is unreliable because it is not possible to replicate the

atmosphere of a criminal trial in a mock-trial setting. While true, that comment does not justify scuttling the studies entirely. Also, the growing use of mock trials by the private bar undercuts the strength of the assertion. See generally Martha Neil, Practice Makes Perfect: Mock Trials Gain Ground as a Way to Get Inside Track in Real Trial, 89 A.B.A. J. 34 (2003).

The Special Master did cite the studies. In one mock-jury experiment, researchers showed jurors different versions of a videotaped mock trial about an armed robbery of a liquor store. Brian L. Cutler et al., Juror Sensitivity to Eyewitness Identification Evidence, 14 Law & Hum. Behav. 185, 186-87 (1990). To test how sensitive jurors were to the effect of weapon focus, some heard an eyewitness testify that the defendant pointed a gun at her during the robbery, while others heard that the gun was hidden in the robber's jacket. Id. at 188. Similarly, some jurors heard the eyewitness declare that she was 80% confident that she had correctly identified the robber, while others heard that she was 100% confident. Id. at 189. Researchers used similar methods to test reactions to eight other system and estimator variables. See id. at 188-89.

The study revealed that mock-jurors "were insensitive to the effects of disguise, weapon presence, retention interval, suggestive lineup instructions, and procedures used for constructing and carrying out the lineup" but "gave

disproportionate weight to the confidence of the witness.” Id. at 190. Stated otherwise, eyewitness confidence “was the most powerful predictor of verdicts” regardless of other variables. Id. at 185. The authors thus concluded that jurors do “not evaluate eyewitness memory in a manner consistent with psychological theory and findings.” See id. at 190.

Neither juror surveys nor mock-jury studies can offer definitive proof of what jurors know or believe about memory. But they reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result, there is a need to promote greater juror understanding of those issues.

D. Consensus Among Experts

The Special Master found broad consensus within the scientific community on the relevant scientific issues. Primarily, he found support in a 2001 survey of sixty-four experts, mostly cognitive and social psychologists. See Saul M. Kassir et al., On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psychologist 405, 407 (2001) (the “Kassir Report”). Ninety-two percent of the participating experts had published articles or books on eyewitness identification, and many in the group had testified as expert witnesses in almost 1,000 court cases, collectively. Id. at 409.

Ninety percent or more of the experts found research on the following topics reliable: suggestive wording; lineup instruction bias; confidence malleability; mugshot bias; post-event information; child suggestivity; alcohol intoxication; and own-race bias. Id. at 412. Seventy to 87% found the following research reliable: weapon focus; the accuracy-confidence relationship; memory decay; exposure time; sequential presentation; showups; description-matched foils; child-witness accuracy; and lineup fairness. Ibid.

The State suggests that some of the experts surveyed in the Kassin Report had motives to overstate the science because they were also forensic consultants who have been paid for testifying at trials. See id. 414-15. As a result, the State discounts the results in the Report. The Report's authors recognized this potential for bias and looked for distinctions between answers provided by "forensic consultants" and the 44% of scientists who had never testified in court. Ibid. The analysis revealed "no significant difference" between the two groups. Id. at 415.

The studies and meta-analyses published in the ten years since the Kassin Report show a growing consensus in certain areas of eyewitness identification research. For example, only 60% of experts in 2001 found research on the relationship between stress and identification accuracy to be reliable. Id. at 412. At the remand hearing, all three experts testified that

results from the military stress experiment, see Morgan III et al., supra, and other studies have reinforced views about the relationship between high stress and the reliability of identifications.

Among the experts who testified on remand, there was broad consensus regarding the Special Master's findings. The State's expert, Dr. Malpass, agreed with nearly all of the conclusions offered by Drs. Wells and Penrod. As Dr. Malpass wrote in 2009, "there is general agreement about the scientific findings of the eyewitness community," as evidenced by meta-analytic reviews, primary texts, and surveys of scientific experts, and "[a] review of these areas suggests that it would be very difficult to sustain the position that many of the findings in research on eyewitness memory lack general agreement within the scientific community." Malpass et al., The Need for Expert Psychological Testimony on Eyewitness Identification, supra, at 15.

VII. Responses to Scientific Studies

Beyond the scientific community, law enforcement and reform agencies across the nation have taken note of the scientific findings. In turn, they have formed task forces and recommended or implemented new procedures to improve the reliability of eyewitness identifications. See, e.g., Ad Hoc Innocence Comm. to Ensure the Integrity of the Criminal Process, Am. Bar Ass'n, Achieving Justice: Freeing the Innocent, Convicting the Guilty

(2006); Int'l Ass'n of Chiefs of Police, supra; Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement, supra.

New Jersey has been at the forefront of that effort. In 2001, under the leadership of then-Attorney General John J. Farmer, Jr., New Jersey became "the first state in the Nation to officially adopt the recommendations issued by the Department of Justice" and issue guidelines for preparing and conducting identification procedures. See Letter from Attorney General John J. Farmer, Jr., to All County Prosecutors et al., at 1 (Apr. 18, 2001) (AG Farmer Letter), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

The Attorney General Guidelines "incorporate[d] more than 20 years of scientific research on memory and interview techniques." Ibid. The preamble describes the document as a list of "best practices." See Attorney General Guidelines, supra, at 1. The list is divided into two broad categories: composing photo or live lineups, and conducting identification procedures. Many, but not all, of the practices measure up to current scientific standards. Although we have discussed parts of the Guidelines in the preceding sections, we summarize them as a whole for the sake of completeness.

The Guidelines applied the following "best practices" to live and photo lineups: "Include only one suspect in each

identification procedure"; select fillers based on the "witness' description of the perpetrator"; if the description is limited, inadequate, or differs significantly from the suspect's appearance, "fillers should resemble the suspect in significant features"; include a minimum of four or five fillers; consider placing the suspect in different lineup positions when conducting more than one lineup in a case with multiple witnesses; and "[a]void reusing fillers in lineups" when showing the same witness a new suspect. Id. at 1-3. When constructing photo lineups, officers should also "[e]nsure that no writings or information concerning previous arrest(s) will be visible to the witness"; "[v]iew the array, once completed, to ensure that the suspect does not unduly stand out"; and "[p]reserve the presentation order of the photo lineup" and the photos themselves. Id. at 2.

The Guidelines also set out specific rules for administering lineups. To avoid administrator feedback, "the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case." Id. at 1. If that is impractical, the non-blind lineup administrator "should be careful to avoid inadvertent signaling to the witness of the 'correct' response." Ibid.

Under the Guidelines, administrators should instruct witnesses "that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification." Ibid. The Guidelines also state a preference for sequential over simultaneous lineup presentation. See ibid.

During the procedure, administrators must "[a]void saying anything to the witness that may influence the witness' selection." Id. at 3-6. If the witness makes an identification, officers should "avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty." Ibid.

Officers must record the results obtained from the witness. See id. at 7. As part of that process, officers are to record both the outcome of the identification and "the witness' own words regarding how sure he or she is." Ibid. If a witness fails to make an identification, that too should be recorded. Ibid. In addition, officers should instruct witnesses not to discuss the procedure or its results with other witnesses. Id. at 4-7.

The Attorney General Guidelines are thorough and exacting. We once again commend the Attorney General's Office for responding to important social scientific evidence and promoting the reliability of eyewitness identifications. See Delgado,

supra, 188 N.J. at 62; see also Romero, supra, 191 N.J. at 74. Since 2001, when the recommended Guidelines went into effect, they may well have prevented wrongful convictions.

However, the Guidelines are a series of recommended best practices. The Attorney General expressly noted that identifications that do not follow the recommended Guidelines should not be deemed "inadmissible or otherwise in error." AG Farmer Letter, supra, at 3. Although the State argues that the Court should defer to other branches of government to deal with the evolving social scientific landscape, it remains the Court's obligation to guarantee that constitutional requirements are met, and to ensure the integrity of criminal trials. See Romero, supra, 191 N.J. at 74-75 (citing court's supervisory authority under N.J. Const. art. VI, § 2, ¶ 3); Delgado, supra, 188 N.J. at 62 (same); see also State v. Daniels, 182 N.J. 80, 95-96 (2004).

Other state and local authorities have instituted similar changes to their eyewitness identification procedures. In 2005, for example, the Attorney General of Wisconsin issued a set of identification guidelines recommending, among other things, "double-blind, sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased instructions to eyewitnesses, and assessments of confidence immediately after identifications." Office of the Attorney

Gen., Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification 1 (2005); see also Dallas Police Dep't, Dallas Police Department General Order § 304.01 (2009); Denver Police Dep't, Operations Manual § 104.44 (2006); Police Chiefs' Ass'n of Santa Clara County, Line-up Protocol for Law Enforcement (2002).

North Carolina was among the first states to pass legislation mandating, among other things, pre-lineup instructions and blind and sequential lineup administration. See N.C. Gen. Stat. § 15A-284.50 to .53. Illinois, Maryland, Ohio, West Virginia, and Wisconsin have passed similar laws regarding lineup practices. See 725 Ill. Comp. Stat. 5/107A-5; Md. Code Ann., Pub. Safety § 3-506; Ohio Rev. Code Ann. § 2933.83; W. Va. Code Ann. § 62-1E-1 to -3; Wis. Stat. § 175.50.

VIII. Parties' Arguments

The parties and amici submitted voluminous briefs of high quality, both before and after the remand hearing. We summarize their positions without repeating arguments already addressed. In short, defendant and amici endorse the Special Master's factual and scientific findings in their entirety. We have already discussed many of the State's responses to those findings. We now outline the parties' and amici's arguments as to the Appellate Division decision and the viability of the

Manson/Madison framework in light of the record developed on remand.

The State argues vigorously against the Appellate Division's holding that a breach of the Attorney General Guidelines results in a presumption of impermissible suggestiveness. The State contends that such an approach would penalize the Attorney General for adopting Guidelines designed to improve identification practices, and reward defendants who intimidate witnesses. In this case, the State submits, two officers merely tried to reassure a threatened and reluctant witness; they did not attempt to influence the witness' selection of a particular photograph. The State maintains that the Appellate Division's response would hamper this and like prosecutions and hinder policy makers in the future.

As to the current Manson/Madison framework, the State argues that there is insufficient evidence to warrant a change in the familiar procedure for evaluating eyewitness identification evidence. First, the State believes that the likelihood of misidentifications is overstated. See, supra, at section III.

Second, the State offers various arguments as to why the Manson/Madison framework is an adequate construct to evaluate identification evidence before trial: the right to a pretrial Wade hearing is already extensive and requires only "some

showing" of impermissible suggestiveness; the Manson/Madison test is broad enough to incorporate all system and estimator variables; and the Manson/Madison test instructs judges to focus on confidence demonstrated at the time of confrontation, before any post-identification, confirmatory feedback.

Along with Manson/Madison, the State identifies other safeguards that protect against wrongful convictions: the Attorney General Guidelines; pretrial, open-file discovery, see R. 3:13-3; exclusion of highly prejudicial identifications that result from suggestive conduct or words by a private actor under N.J.R.E. 403; jury voir dire; numerous peremptory jury challenges; cross-examination; defense summations; and comprehensive jury instructions.

Because eyewitness identification science is probabilistic -- meaning that it cannot determine if a particular identification is accurate -- the State also argues that the legal system should continue to rely on jurors to assess the credibility of eyewitnesses. To guide juries, the State favors appropriate, flexible jury instructions. The State maintains that expert testimony is not advisable because the relevant subjects are not beyond the ken of the average juror.

Among other things, the State also rejects the use of the analogy that human memory is like trace evidence, which all the other parties advance.

Defendant embraces the decision of the Appellate Division and agrees that a violation of the Attorney General Guidelines should create a presumption of impermissible suggestiveness. With regard to the Manson/Madison test, defendant and amici argue that more than thirty years of scientific evidence undercut the assumptions underlying the Supreme Court's decision in Manson. They believe that for the following reasons, the Manson/Madison framework is insufficient to ensure defendants' due process rights to a fair trial: courts only consider the five reliability factors in Manson/Madison after finding suggestiveness, even though some of those factors may themselves be unreliable because of suggestive police behavior; the framework focuses only on police misconduct despite research that shows estimator variables and feedback from private actors can also affect reliability; its all-or-nothing remedy of suppression is too inflexible; it fails to provide jurors context and guidance; and it does not deter suggestive police procedures.

To correct those flaws, defendant and the ACDL initially proposed two alternative frameworks to replace Manson/Madison. Among other arguments, they analogized to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and argued that eyewitness evidence should be excluded per se if an

identification procedure violated the Attorney General Guidelines or if a judge found other evidence of suggestiveness.

Consistent with the Special Master's report, they now urge this Court to require a reliability hearing in every case in which the State intends to present identification evidence. At the hearing, they submit that a wide range of system and estimator variables would be relevant, and the State should bear the burden of establishing reliability. In addition, they agree with the Special Master that juries should receive expanded instructions that address specific variables and are tailored to the facts of the case.

The Innocence Project proposes a different scheme along the following lines: defendants would first have to allege that an identification was unreliable; the burden would then shift to the State to prove, in essence, that neither estimator nor system variables rendered the identification unreliable -- to be accomplished through testimony of the eyewitness about the circumstances under which she saw the perpetrator, and proof from law enforcement about the identification procedure used; the burden would next shift back to the defendant to prove by a preponderance of evidence "that there exists a substantial probability of a mistaken identification"; and if the court does not suppress the evidence, defendant could file motions to seek

to limit or redact identification testimony and present expert testimony at trial.

Notably, under the Innocence Project's approach, a violation of the Attorney General Guidelines would be a factor for the trial court -- and juries -- to consider; it would not lead to per se exclusion. At the admissibility hearing, the Innocence Project recommends that trial courts consider both system and estimator variables, and be required to make detailed findings about them; afterward, judges would be in a position before trial to tell the parties which instructions, if any, they plan to give the jury about relevant variables in the case.

Finally, the Innocence Project encourages this Court to adopt comprehensive jury instructions that are easy to understand, so that jurors can evaluate eyewitness evidence appropriately. The Innocence Project maintains that those instructions should be read to the jury both before an eyewitness' testimony and at the conclusion of the case. If at the end of trial the court doubts the accuracy of an identification, the Innocence Project argues that the judge should give a cautionary instruction to treat that evidence with great caution and distrust.

The State argues that the Innocent Project's proposal would invite an unnecessary pretrial fishing expedition in every criminal case involving eyewitness evidence. Instead, the State

contends that the initial burden should remain on defendants to show some evidence of suggestiveness, which the State claims is not an onerous threshold.

IX. Legal Conclusions

A. Scientific Evidence

We find that the scientific evidence presented is both reliable and useful. See Moore, supra, 188 N.J. at 206. Despite arguments to the contrary, we agree with the Special Master that "[t]he science abundantly demonstrates the many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications."

The research presented on remand is not only extensive, but as Dr. Monahan testified, it represents the "gold standard in terms of the applicability of social science research to the law." Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings. As reflected above, consensus exists among the experts who testified on remand and within the broader research community. See Chun, supra, 194 N.J. at 91; see also Frye, supra, 293 F. at 1014.

Other courts have accepted eyewitness identification research pertaining to a number of the variables discussed. See, e.g., United States v. Bartlett, 567 F.3d 901, 906 (7th Cir. 2009) (confidence-accuracy relationship and memory decay), cert. denied, ___ U.S. ___, 130 S. Ct. 1137, 175 L. Ed. 971 (2010); United States v. Brownlee, 454 F.3d 131, 142-44 (3d Cir. 2006) ("inherent unreliability" of eyewitness identifications and accuracy-confidence relationship); United States v. Smith, 621 F. Supp. 2d 1207, 1215-17 (M.D. Ala. 2009) (cross-racial identifications, impact of high stress, and feedback); State v. Chapple, 660 P.2d 1208, 1220-22 (Ariz. 1983) (memory decay, stress, feedback, and confidence-accuracy); People v. McDonald, 690 P.2d 709, 718 (Cal. 1984) ("The consistency of the results of [eyewitness identification] studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice."), overruled on other grounds by People v. Mendoza, 4 P.3d 265 (Cal. 2000); Benn v. United States, 978 A.2d 1257, 1265-68 (D.C. 2009) (citing expert consensus regarding system and estimator variables); People v. LeGrand, 867 N.E.2d 374, 380 (N.Y. 2007) (confidence-accuracy relationship, feedback, and confidence malleability); State v. Copeland, 226 S.W.3d 287, 299-300, 302 (Tenn. 2007) (weapons effect, stress, cross-racial identification, age, and opportunity to view); State v. Clopten, 223 P.3d 1103, 1113 & n.

22 (Utah 2009) (citing with approval research on multiple system and estimator variables). But see Marquez, supra, 967 A.2d at 77 (finding scientific literature "is far from universal or even well established" and that "research is in great flux") (discussed supra at ____ n.5 (slip op. at 43 n.5)).

This is not our first foray into the realm of eyewitness identification research and its applicability to the law. In Cromedy, this Court relied on numerous social scientific studies when we held that special jury instructions were needed in appropriate cases involving cross-racial identifications. See Cromedy, supra, 158 N.J. at 120-23, 131. We observed that "the empirical data . . . provide[d] an appropriate frame of reference for requiring . . . jury instructions." Id. at 132.

More recently in Romero, supra, this Court held that "there [was] insufficient data to support the conclusion that, as a matter of due process, people of the same race but different ethnicity . . . require a Cromedy instruction whenever they are identified by someone of a different ethnicity." 191 N.J. at 71-72. Of the three studies the Court reviewed, one included a small number of participants and two "did not test for the reliability of identifications of Hispanics by non-Hispanics." Id. at 70-71. The Court distinguished the dearth of social scientific research in the field of cross-ethnic bias from "the

convincing social science data demonstrating the potential unreliability of cross-racial identifications.” See id. at 69.

When social scientific experiments in the field of eyewitness identification produce “an impressive consistency in results,” those results can constitute adequate data on which to base a ruling. See Cromedy, supra, 158 N.J. at 132. Thus, based on the testimony and ample record developed at the hearing, we recognize that a number of system and estimator variables can affect the reliability of eyewitness identifications. We recount those variables after considering the vitality of the Manson/Madison framework, a question we turn to now.

B. The Manson/Madison Test Needs to Be Revised

When this Court adopted the framework outlined in Manson, it recognized that suggestive police procedures may “so irreparably ‘taint[]’ the out-of-court and in-court identifications” that a defendant is denied due process. Madison, supra, 109 N.J. at 239. To protect due process concerns, the Manson Court’s two-part test rested on three assumptions: (1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test’s focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy

eyewitness testimony. See Manson, supra, 432 U.S. at 112-16, 97 S. Ct. at 2252-54, 53 L. Ed. 2d at 152-55.

We remanded this case to determine whether those assumptions and other factors reflected in the two-part Manson/Madison test are still valid. We conclude from the hearing that they are not.

The hearing revealed that Manson/Madison does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony.

First, under Manson/Madison, defendants must show that police procedures were "impermissibly suggestive" before courts can consider estimator variables that also bear on reliability. See Madison, supra, 109 N.J. at 232. As a result, although evidence of relevant estimator variables tied to the Neil v. Biggers factors is routinely introduced at pretrial hearings, their effect is ignored unless there is a finding of impermissibly suggestive police conduct. In this case, for example, the testimony at the Wade hearing related principally to the lineup procedure. Because the court found that the procedure was not "impermissibly suggestive," details about the witness' use of drugs and alcohol, the dark lighting conditions, the presence of a weapon pointed at the witness' chest, and

other estimator variables that affect reliability were not considered at the hearing. (They were explored later at trial.)

Second, under Manson/Madison, if a court finds that the police used impermissibly suggestive identification procedures, the trial judge then weighs the corrupting effect of the process against five "reliability" factors. Id. at 239-40. But three of those factors -- the opportunity to view the crime, the witness' degree of attention, and the level of certainty at the time of the identification -- rely on self-reporting by eyewitnesses; and research has shown that those reports can be skewed by the suggestive procedures themselves and thus may not be reliable. Self-reporting by eyewitnesses is an essential part of any investigation, but when reports are tainted by a suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.

Third, rather than act as a deterrent, the Manson/Madison test may unintentionally reward suggestive police practices. The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.

Fourth, the Manson/Madison test addresses only one option for questionable eyewitness identification evidence: suppression. Yet few judges choose that ultimate sanction.⁹ An all-or-nothing approach does not account for the complexities of eyewitness identification evidence.

Finally, Manson/Madison instructs courts that "the reliability determination is to be made from the totality of the circumstances in the particular case." Id. at 239. In practice, trial judges routinely use the test's five reliability factors as a checklist. The State maintains that courts may consider additional estimator variables. Even if that is correct, there is little guidance about which factors to consider, and courts and juries are often left to their own intuition to decide which estimator variables may be important and how they matter.

⁹ The State correctly notes that there is no way to know the precise number of identifications that may have been suppressed at the trial court level, but even the State conceded at oral argument that suppression "does not happen often." We also note that with the exception of one case reversed on appeal, we have found no reported Appellate Division decision since 1977 that reversed a conviction because the trial court failed to suppress identification evidence. State v. Ford, 165 N.J. Super. 249 (1978), rev'd on dissent, 79 N.J. 136 (1979). (The Special Master found one unreported Appellate Division decision, which we do not cite consistent with Rule 1:36-3.)

As a result of those concerns, we now revise the State's framework for evaluating eyewitness identification evidence.¹⁰

C. Revised Framework

Remedying the problems with the current Manson/Madison test requires an approach that addresses its shortcomings: one that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory -- because we recognize that most identifications will be admitted in evidence.

Two principal changes to the current system are needed to accomplish that: first, the revised framework should allow all

¹⁰ We have no authority, of course, to modify Manson. The expanded protections stem from the due process rights guaranteed under the State Constitution. Compare N.J. Const. art. I, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."), with U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."); see Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 239 (2008) ("[W]e have, from time to time, construed Article 1, Paragraph 1 [of the New Jersey Constitution] to provide more due process protections than those afforded under the United States Constitution."); see also State v. Reid, 194 N.J. 386, 396-97 (2008) (recognizing greater protection of individual rights under New Jersey Constitution).

relevant system and estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.

The new framework also needs to be flexible enough to serve twin aims: to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the State's interest in presenting critical evidence at trial. With that in mind, we first outline the revised approach for evaluating identification evidence and then explain its details and the reasoning behind it.

First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. See State v. Rodriquez, supra, 264 N.J. Super. at 269; State v. Ortiz, supra, 203 N.J. Super. at 522; cf. State v. Michaels, 136 N.J. 299, 320 (1994) (using same standard to trigger pretrial hearing to determine if child-victim's statements resulted from suggestive or coercive interview techniques). That evidence, in general, must be tied to a system -- and not an estimator -- variable. But see Chen, supra (extending right to hearing for suggestive conduct by private actors).

Second, the State must then offer proof to show that the proffered eyewitness identification is reliable -- accounting for system and estimator variables -- subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless. We discuss this further below. See infra at ____ (slip op. at 114-15).

Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. See Manson, supra, 432 U.S. at 116, 97 S. Ct. at 2254, 53 L. Ed. 2d at 155 (citing Simmons, supra, 390 U.S. at 384, 88 S. Ct. at 971, 19 L. Ed. 2d at 1253); Madison, supra, 109 N.J. at 239 (same). To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.¹¹

Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide

¹¹ A defendant, of course, may make a tactical choice not to explore an estimator variable pretrial, in order to "save up" cross-examination for trial.

appropriate, tailored jury instructions, as discussed further below.

To evaluate whether there is evidence of suggestiveness to trigger a hearing, courts should consider the following non-exhaustive list of system variables:

1. Blind Administration. Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" described above, to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?

2. Pre-identification Instructions. Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?

3. Lineup Construction. Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. Feedback. Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. Recording Confidence. Did the administrator record the witness' statement of confidence immediately after the

identification, before the possibility of any confirmatory feedback?

6. Multiple Viewings. Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?

7. Showups. Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. Private Actors. Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. Other Identifications Made. Did the eyewitness initially make no choice or choose a different suspect or filler?

The court should conduct a Wade hearing only if defendant offers some evidence of suggestiveness. If, however, at any time during the hearing the trial court concludes from the testimony that defendant's initial claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing. Under those circumstances, the court need not permit the defendant or require the State to

elicit more evidence about estimator variables; that evidence would be reserved for the jury.

By way of example, assume that a defendant claims an administrator confirmed an eyewitness' identification by telling the witness she did a "good job." That proffer would warrant a Wade hearing. Assume further that the administrator credibly denied any feedback, and the eyewitness did the same. If the trial court finds that the initial allegation is completely hollow, the judge can end the hearing absent any other evidence of suggestiveness. In other words, if no evidence of suggestiveness is left in the case, there is no need to explore estimator variables at the pretrial hearing. Also, trial courts always have the authority to direct the mode and order of proofs, and they may exercise that discretion to focus pretrial hearings as needed.

If some actual proof of suggestiveness remains, courts should consider the above system variables as well as the following non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility:

1. Stress. Did the event involve a high level of stress?
2. Weapon focus. Was a visible weapon used during a crime of short duration?

3. Duration. How much time did the witness have to observe the event?

4. Distance and Lighting. How close were the witness and perpetrator? What were the lighting conditions at the time?

5. Witness Characteristics. Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?

6. Characteristics of Perpetrator. Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?

7. Memory decay. How much time elapsed between the crime and the identification?

8. Race-bias. Does the case involve a cross-racial identification?

Some of the above estimator variables overlap with the five reliability factors outlined in Neil v. Biggers, supra, 409 U.S. at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411, which we nonetheless repeat:

9. Opportunity to view the criminal at the time of the crime.

10. Degree of attention.

11. Accuracy of prior description of the criminal.

12. Level of certainty demonstrated at the confrontation.

Did the witness express high confidence at the time of the

identification before receiving any feedback or other information?

13. The time between the crime and the confrontation.

(Encompassed fully by "memory decay" above.)

The above factors are not exclusive. Nor are they intended to be frozen in time. We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now. By providing the above lists, we do not intend to hamstring police departments or limit them from improving practices. Likewise, we do not limit trial courts from reviewing evolving, substantial, and generally accepted scientific research. But to the extent the police undertake new practices, or courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community. See Chun, supra, 194 N.J. at 91; Moore, supra, 188 N.J. at 206; Rubanick, supra, 125 N.J. at 432.

We adopt this approach over the initial recommendation of defendant and the ACDL that any violation of the Attorney General Guidelines should require per se exclusion of the resulting eyewitness identification. Although that approach might yield greater deterrence, it could also lead to the loss of a substantial amount of reliable evidence. We believe that

the more flexible framework outlined above protects defendants' right to a fair trial at the same time it enables the State to meet its responsibility to ensure public safety.

D. Pretrial Hearing

As stated above, to obtain a pretrial hearing, a defendant must present some evidence of suggestiveness. Pretrial discovery, which this opinion has enhanced in certain areas, would reveal, for example, if a line-up did not include enough fillers, if those fillers did not resemble the suspect, or if a private actor spoke with the witness about the identification. Armed with that and similar information, defendants could request and receive a hearing.

The hearing would encompass system and estimator variables upon a showing of some suggestiveness that defendant can support. For various reasons, estimator variables would no longer be ignored in the court's analysis until it found that an identification procedure was impermissibly suggestive. First, broader hearings will provide more meaningful deterrence. To the extent officers wish to avoid a pretrial hearing, they must avoid acting in a suggestive manner. Second, more extensive hearings will address reliability with greater care and better reflect how memory works. Suggestiveness can certainly taint an identification, which justifies examining system variables. The same is true for estimator variables like high stress, weapon-

focus, and own-race bias. Because both sets of factors can alter memory and affect eyewitness identifications, both should be explored pretrial in appropriate cases to reflect what Manson acknowledged: that "reliability is the linchpin in determining the admissibility of identification testimony." Manson, supra, 432 U.S. at 114, 97 S. Ct. at 2253, 53 L. Ed. 2d at 154.

But concerns about estimator variables alone cannot trigger a pretrial hearing; only system variables would. This approach differs from the procedure endorsed by the Special Master and proposed by defendant and amici, which would essentially require pretrial hearings in every case involving eyewitness identification evidence. Several reasons favor the approach we outline today.

First, we anticipate that eyewitness identification evidence will likely not be ruled inadmissible at pretrial hearings solely on account of estimator variables. For example, it is difficult to imagine that a trial judge would preclude a witness from testifying because the lighting was "too dark," the witness was "too distracted" by the presence of a weapon, or he or she was under "too much" stress while making an observation. How dark is too dark as a matter of law? How much is too much? What guideposts would a trial judge use in making those judgment calls? In all likelihood, the witness would be allowed to testify before a jury and face cross-examination designed to

probe the weaknesses of her identification. Jurors would also have the benefit of enhanced instructions to evaluate that testimony -- even when there is no evidence of suggestiveness in the case. As a result, a pretrial hearing triggered by, and focused on, estimator variables would likely not screen out identification evidence and would largely be duplicated at trial.

Second, courts cannot affect estimator variables; by definition, they relate to matters outside the control of law enforcement. More probing pretrial hearings about suggestive police procedures, though, can deter inappropriate police practices.

Third, as demonstrated above, suggestive behavior can distort various other factors that are weighed in assessing reliability. That warrants a greater pretrial focus on system variables.

Fourth, we are mindful of the practical impact of today's ruling. Because defendants will now be free to explore a broader range of estimator variables at pretrial hearings to assess the reliability of an identification, those hearings will become more intricate. They will routinely involve testimony from both the police and eyewitnesses, and that testimony will likely expand as more substantive areas are explored. Also,

trial courts will retain discretion to allow expert testimony at pretrial hearings.

In 2009, trial courts in New Jersey conducted roughly 200 Wade hearings, according to the Administrative Office of the Courts. If estimator variables alone could trigger a hearing, that number might increase to nearly all cases in which eyewitness identification evidence plays a part. We have to measure that outcome in light of the following reality that the Special Master observed: judges rarely suppress eyewitness evidence at pretrial hearings. Therefore, to allow hearings in the majority of identification cases might overwhelm the system with little resulting benefit.

We do not suggest that it is acceptable to sacrifice a defendant's right to a fair trial for the sake of saving court resources, but when the likely outcome of a hearing is a more focused set of jury charges about estimator variables, not suppression, we question the need for hearings initiated only by estimator variables.

Appellate review does remain as a backstop to correct errors that may not be caught at or before trial, and the enhanced framework may provide a greater role in that regard in certain cases. If a reviewing court determines that identification evidence should not have been admitted in

accordance with the above standards, it can reverse a conviction.

We also note that trial courts should make factual findings at pretrial hearings about relevant system and estimator variables to lay the groundwork for proper jury charges and to facilitate meaningful appellate review.

Finally, we do not adopt the analogy between trace evidence and eyewitness identifications. To be sure, like traces of DNA or drops of blood, memories are part of our being. By necessity, though, the criminal justice system collects and evaluates trace evidence and eyewitness identification evidence differently. Unlike vials of blood, memories cannot be stored in evidence lockers. Instead, we must strive to avoid reinforcement and distortion of eyewitness memories from outside effects, and expose those influences when they are present. But we continue to rely on people as the conduits of their own memories, on attorneys to cross-examine them, and on juries to assess the evidence presented. For that reason, we favor enhanced jury charges to help jurors perform that task.

E. Trial

As is true today, juries will continue to hear about all relevant system and estimator variables at trial, through direct and cross-examination and arguments by counsel. In addition, when identification is at issue in a case, trial courts will

continue to "provide[] appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." Cromedy, supra, 158 N.J. at 128. Based on the record developed on remand, we direct that enhanced instructions be given to guide juries about the various factors that may affect the reliability of an identification in a particular case.

Those instructions are to be included in the court's comprehensive jury charge at the close of evidence. In addition, instructions may be given during trial if warranted. For example, if evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory. Trial courts retain discretion to decide when to offer instructions.

As discussed earlier, the State maintains that many jurors, through their life experiences and intuition, generally understand how memory works. See supra at section VI.C. To the extent some jurors do not, the State argues that cross-examination, defense summations, the current jury charge, fellow jurors, and other safeguards can help correct misconceptions.

But we do not rely on jurors to divine rules themselves or glean them from cross-examination or summation. Even with matters that may be considered intuitive, courts provide focused

jury instructions. For example, we remind jurors to scrutinize the testimony of a cooperating witness with care. See Model Jury Charge (Criminal), "Testimony of Cooperating Co-Defendant or Witness" (2006). A simple reason underlies that approach: it is the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.

Moreover, science reveals that memory and eyewitness identification evidence present certain complicated issues. See supra at section VI; see also Cromedy, supra, 158 N.J. at 120-23. In the past, we have responded by developing jury instructions consistent with accepted scientific findings. See Cromedy, supra, 158 N.J. at 132-33 (requiring cross-racial identification charge). We acted similarly in response to social science evidence about Battered Women's Syndrome and Child Sexual Abuse Accommodation Syndrome. See State v. Townsend, 186 N.J. 473, 500 (2006); State v. P.H., 178 N.J. 378, 399-400 (2004). Ultimately, as the Special Master found, "[w]hether the science confirms commonsense views or dispels preconceived but not necessarily valid intuitions, it can properly and usefully be considered by both judges and jurors in making their assessments of eyewitness reliability." (citing P.H., supra, 178 N.J. at 395).

Expert testimony may also be introduced at trial, but only if otherwise appropriate. The Rules of Evidence permit expert

testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702.

Expert testimony is admissible if it meets three criteria:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

[State v. Jenewicz, 193 N.J. 440, 454 (2008) (citations omitted).]

Those criteria can be met in some cases by qualified experts seeking to testify about the import and effect of certain variables discussed in section VI. That said, experts may not opine on the credibility of a particular eyewitness. See State v. Frisby, 174 N.J. 583, 595 (2002); see also State v. W.B., 205 N.J. 588, 613 (2011) (precluding "expert testimony about the statistical credibility of victim-witnesses").

Other federal and state courts have also recognized the usefulness of expert testimony relating to eyewitness identification. See, e.g., Bartlett, supra, 567 F.3d at 906; Brownlee, supra, 454 F.3d at 141-44; Chapple, supra, 660 P.2d at 1220; McDonald, supra, 690 P.2d at 721; Benn, supra, 978 A.2d at 1270; LeGrand, supra, 867 N.E.2d at 377-79; Copeland, supra, 226 S.W.3d at 300; Clopten, supra, 223 P.3d at 1108.

We anticipate, however, that with enhanced jury instructions, there will be less need for expert testimony. Jury charges offer a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility. See United States v. Hall, 165 F.3d 1095, 1119-20 (7th Cir.) (Easterbrook, J., concurring), cert. denied, 527 U.S. 1029, 119 S. Ct. 2381, 144 L. Ed. 2d 784 (1999). That said, there will be times when expert testimony will benefit the trier of fact. We leave to the trial court the decision whether to allow expert testimony in an individual case.

Finally, in rare cases, judges may use their discretion to redact parts of identification testimony, consistent with Rule 403. For example, if an eyewitness' confidence was not properly recorded soon after an identification procedure, and evidence revealed that the witness received confirmatory feedback from the police or a co-witness, the court can bar potentially distorted and unduly prejudicial statements about the witness' level of confidence from being introduced at trial.

X. Revised Jury Instructions

To help implement this decision, we ask the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identification and submit them to this Court for review before they are implemented. Specifically, we ask them to consider all of the system and estimator variables in section VI for which we have found scientific support that is generally accepted by experts, and to modify the current model charge accordingly.

Although we do not adopt the sample charges offered by the Innocence Project, we ask the Committees to examine their format and recommendations with care. We also invite the Attorney General, Public Defender, and ACDL to submit proposed charges and comments to the Committees.

We add a substantive point about the current charge for cross-racial identification. In 1999, the Court in Cromedy directed that the charge be given "only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." Cromedy, supra, 158 N.J. at 132. Since then, the additional research on own-race bias discussed in section VI.B.8, and the more complete record about eyewitness identification in general, justify

giving the charge whenever cross-racial identification is in issue at trial.

Because of the widespread use the revised jury instructions will have in upcoming criminal trials, we ask the Committees to present proposed charges to the Court within ninety days.

XI. Application

We return to the facts of this case. After Womble, the eyewitness, informed the lineup administrator that he could not make an identification from the final two photos, the investigating officers intervened. They told Womble to focus and calm down, and assured him that the police would protect him from retaliation. "Just do what you have to do," they instructed. From that exchange, Womble could reasonably infer that there was an identification to be made, and that he would be protected if he made it. The officers conveyed that basic message to him as they encouraged him to make an identification.

The suggestive nature of the officers' comments entitled defendant to a pretrial hearing, and he received one. Applying the Manson/Madison test, the trial judge admitted the evidence. We now remand to the trial court¹² for an expanded hearing consistent with the principles outlined in this decision.

¹² The Appellate Division directed that the matter be assigned to a different judge on remand. See Henderson, supra, 397 N.J. Super. at 416. That issue is moot because the original trial judge has retired.

Defendant may probe all relevant system and estimator variables at the hearing. In addition to suggestiveness, the trial court should consider Womble's drug and alcohol use immediately before the confrontation, weapon focus, and lighting, among other relevant factors.

We express no view on the outcome of the hearing. If the trial court finds that the identification should not have been admitted, then the parties should present argument as to whether a new trial is needed. We do not review the record for harmless error only because the parties have not yet argued that issue. If Womble's identification was properly admitted, then defendant's conviction should be affirmed.

XII. Retroactivity Analysis

Today's decision announces a new rule of law. For decades, trial courts have applied the Manson/Madison test to determine the admissibility of identification evidence. This opinion "breaks new ground" by modifying that framework. See State v. Cummings, 184 N.J. 84, 97 (2005) (quoting State v. Knight, 145 N.J. 233, 250-51 (1996)). Because the holding "is sufficiently novel and unanticipated," we must consider whether the new rule should be applied retroactively. Knight, supra, 145 N.J. at 251 (citing State v. Lark, 117 N.J. 331, 339 (1989)).

When a decision sets forth a new rule, three factors are considered to determine whether to apply the rule retroactively:

"(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." Ibid. (quoting State v. Nash, 64 N.J. 464, 471 (1974)).

The factors are not of equal weight. The first factor -- the purpose of the rule -- "is often the pivotal consideration." Ibid. (quoting State v. Burstein, 85 N.J. 394, 406 (1981)). When, as here, "the new rule is designed to enhance the reliability of the factfinding process," courts consider "the likelihood of untrustworthy evidence being admitted under the old rule" and "whether the defendant had alternate ways of contesting the integrity of the evidence being introduced against him." Burstein, supra, 85 N.J. at 408.

The remaining two factors "come to the forefront" when the rule's purpose alone does not resolve the question of retroactivity. Knight, supra, 145 N.J. at 252. As to the second factor -- the degree of reliance on the prior rule -- the central consideration is "whether the old rule was administered in good faith reliance [on] then-prevailing constitutional norms." State v. Purnell, 161 N.J. 44, 55 (1999) (quotation marks and citations omitted; alteration in original). The third factor -- the effect on the administration of justice --

"recognizes that courts must not impose unjustified burdens on our criminal justice system." Knight, supra, 145 N.J. at 252. When the effect is unknown but undoubtedly substantial, that weighs in favor of limited retroactive application. See State v. Bellamy, 178 N.J. 127, 142-43 (2003); Purnell, supra, 161 N.J. at 56; State v. Czachor, 82 N.J. 392, 409-10 (1980).

The Court can apply a new rule in one of four ways: (1) "purely prospectively . . . to cases in which the operative facts arise after the new rule has been announced"; (2) "in future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is set forth"; (3) "'pipeline retroactivity,' rendering it applicable in all future cases, the case in which the rule is announced, and any cases still on direct appeal"; and (4) "complete retroactive effect . . . to all cases." Knight, supra, 145 N.J. at 249 (internal citations omitted).

Applying the relevant factors, we first note that defendants have been able to challenge identification evidence under Manson and Madison and present arguments both before and at trial. Second, both the State and trial courts have, without question, relied in good faith on settled constitutional principles in applying the Manson/Madison test for many years. Last, there is no doubt that applying the new framework

retroactively would affect an immense number of cases -- far too many to tally -- because eyewitness identifications are a staple of criminal trials. To reopen the vast group of cases decided over several decades, which relied not only on settled law but also on eyewitness memories that have long since faded, would "wreak havoc on the administration of justice." State v. Dock, 205 N.J. 237, 258 (2011).

We therefore apply today's ruling to future cases only, except for defendant Henderson (and defendant Cecilia Chen, the subject of a companion case filed today). As to future cases, today's ruling will take effect thirty days from the date this Court approves new model jury charges on eyewitness identification.

XIII. Conclusion

At the core of our system of criminal justice is the "twofold aim . . . that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935). In the context of eyewitness identification evidence, that means that courts must carefully consider identification evidence before it is admitted to weed out unreliable identifications, and that juries must receive thorough instructions tailored to the facts of the case to be able to evaluate the identification evidence they hear.

To be effective, both tasks cannot rely on a dated, analytical framework that has lost some of its vitality. Rather, they must be informed by sound evidence on memory and eyewitness identification, which is generally accepted by the relevant scientific community. Only then can courts fulfill their obligation both to defendants and the public.

The modified framework to evaluate eyewitness identification evidence in this opinion attempts to meet that challenge. It relies on the developments of the last thirty years of science to promote fair trials and ensure the integrity of the judicial process.

The framework avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake. Instead, it allows for a more complete exploration of system and estimator variables to preclude sufficiently unreliable identifications from being presented and to aid juries in weighing identification evidence.

We add that enhanced hearings are not meant to be the norm in every case. They will only be held when defendants allege some evidence of suggestiveness, and even then, courts retain the power to end a hearing if the testimony reveals that defendant's claim of suggestiveness is entirely baseless.

We also expect that in the vast majority of cases, identification evidence will likely be presented to the jury.

The threshold for suppression remains high. Juries will therefore continue to determine the reliability of eyewitness identification evidence in most instances, with the benefit of cross-examination and appropriate jury instructions.

As a result, we believe that it is essential to educate jurors about factors that can lead to misidentifications, which in and of itself will promote deterrence. To that end, we have reviewed various system and estimator variables in detail, which should assist in the development of enhanced model jury charges. Using those charges in future criminal trials is a critical step in the overall scheme.

We thank Judge Gaulkin, the parties, and amici for their exemplary service in conducting and participating in a thorough, useful remand hearing. They have provided a valuable service to the Court and the public.

XIV. Judgment

For the reasons set forth above, we modify and affirm the judgment of the Appellate Division, and modify the framework for assessing eyewitness identification evidence in criminal cases. We remand to the trial court for further proceedings consistent with this opinion.

JUSTICES LONG, LaVECCHIA, ALBIN, RIVERA-SOTO and HOENS join in CHIEF JUSTICE RABNER's opinion.

Appendix A: Remand Order

SUPREME COURT OF NEW JERSEY
A-8 September Term 2008

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

O R D E R

LARRY R. HENDERSON,

Defendant-Appellant.

This matter having come to the Court on a grant of certification, 195 N.J. 521 (2008), to address whether evidence of eyewitness identification used against defendant was impermissibly suggestive and thus inadmissible under the two-part test applied in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and followed as a state law standard in State v. Madison, 109 N.J. 223, 232-33 (1988);

And that test requiring inquiry into, first, whether the identification procedure was impermissibly suggestive, and second, whether the procedure was so suggestive as to result in a very substantial likelihood of irreparable misidentification, Madison, supra, 109 N.J. at 232;

And the second inquiry requiring consideration of five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention;

(3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation, id. at 239-40;

And the Court having granted leave to appear as amicus curiae to the Association of Criminal Defense Lawyers of New Jersey and The Innocence Project;

And the parties and amici having submitted arguments about the reliability of identification evidence and the current framework for evaluating the admissibility of such evidence;

And the Court having noted previously that, based on recent empirical research, "[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country," State v. Delgado, 188 N.J. 48, 60-61 & n.6 (2006);

And the Court having further recognized that in 2001 the New Jersey Attorney General established Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures to reduce suggestive eyewitness identifications in this state, State v. Herrera, 187 N.J. 493, 502 n.2, 511-20 (2006);

And the parties and amici having raised and argued questions about the possible shortcomings of the Manson/Madison test in light of more recent scientific research;

And this Court having determined on prior occasions that when resolution of a critical issue depends on a full and

complete record the Court should await, before decision, the development of such a record, State v. Moore, 180 N.J. 459, 460-61 (2004); Am. Trucking Ass'ns v. State, 164 N.J. 183, 183-84 (2000); see also Herrera, supra, 187 N.J. at 504;

And the Court having heard argument of the parties and having concluded that an inadequate factual record exists on which it can test the current validity of our state law standards on the admissibility of eyewitness identification;

And the Court having concluded that, until such a record is established, the Court should not address the question of the admissibility of the eyewitness identification presented in this case;

And for good cause appearing;

It is ORDERED that the matter is remanded summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part Manson/Madison test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence; and it is further

ORDERED that, subject to any rulings by the trial court regarding the proofs to be submitted on remand, defendant and the State each shall present before that court testimony and

other proof, including expert testimony, in support of their respective positions; and it is further

ORDERED that the Attorney General of New Jersey and the Office of the Public Defender, as well as amici, The Association of Criminal Defense Lawyers of New Jersey and The Innocence Project, shall each participate in developing the aforesaid record; and it is further

ORDERED that on the entry of the trial court's opinion on remand, the parties and amici shall each have twenty-one days within which to file briefs and appendices in this Court and five days thereafter to file any responding briefs; and it is further

ORDERED that on the completion of the briefing, the Court will determine whether additional oral arguments are required; and it is further

ORDERED that jurisdiction is otherwise retained.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of February, 2009.

A handwritten signature in black ink, reading "Stephen W. Townsend". The signature is fluid and cursive, with the first name "Stephen" and last name "Townsend" clearly legible.

CLERK OF THE SUPREME COURT

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO, and HOENS join in the Court's Order.

SUPREME COURT OF NEW JERSEY

NO. A-8

SEPTEMBER TERM 2008

ON CERTIFICATION TO Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LARRY R. HENDERSON,

Defendant-Respondent.

DECIDED August 24, 2011

Chief Justice Rabner PRESIDING

OPINION BY Chief Justice Rabner

CONCURRING/DISSENTING OPINIONS BY _____

DISSENTING OPINION BY _____

CHECKLIST	MODIFIED AND AFFIRMED/ REMANDED	
CHIEF JUSTICE RABNER	X	
JUSTICE LONG	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE RIVERA-SOTO	X	
JUSTICE HOENS	X	
TOTALS	6	

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
BENJAMIN WALKER,	:	
	:	
Appellant	:	No. 1477 EDA 2008

Appeal from the Judgment of Sentence Entered December 12, 2007,
Court of Common Pleas, Philadelphia County,
Criminal Division, at No. CP-51-CR-1201561-2005.

BEFORE: SHOGAN, LAZARUS and KELLY, JJ.

MEMORANDUM:

FILED AUGUST 23, 2010

Appellant, Benjamin Walker, appeals from the judgment of sentence entered following his conviction of two counts of robbery and one count each of aggravated assault, firearms not to be carried without a license, person prohibited from possession of a firearm, and criminal conspiracy. We affirm.

The trial court summarized the history of this case as follows:

This case involves two separate gun-point robberies. The first occurred on October 15, 2005. At approximately one in the morning, three students from Drexel University, [Ms.] Moreno, [Ms.] Howe, and [Ms.] Costello, were walking south on Thirty-Sixth Street, at the intersection of Baring Street. At this intersection is a church with a lighted archway. A man alleged to be [Appellant] approached the women, pulled out a black handgun about six to eight inches in length, cocked it back and demanded his victims give him whatever money they had. After the women explained they didn't have any money, [Appellant]

demanded they give him their cell phones. Each complied, giving their cell phones and digital cameras.

The victims immediately went to the campus security, who in turn escorted the victims to a police station in order for them to give a statement about the incident, describing [Appellant]. Two days later, the victims met with Philadelphia Police Detective William Farrell to determine if they could identify the perpetrator from two photo arrays, each containing eight individuals. Detective Farrell, as a member of the Southwest Detectives, worked closely with Drexel University Public Safety and the University of Pennsylvania Police Department. As a result of conversations with the various departments, Detective Farrell included [Appellant] in the photo arrays, along with another suspect and other individuals closely resembling [Appellant] and the other suspect. All three victims were separated and handed a photo array at the same time. Ms. Moreno and Ms. Howe identified [Appellant] out of the photo arrays. Three months later, on January 18, 2006, Ms. Moreno attended an in-person lineup including [Appellant]. She identified [Appellant].

The second robbery occurred on October 28, 2005. At approximately three in the morning, [Mr.] Ghitis and [Ms.] Leone, students at the University of Pennsylvania were walking west on Pine Street, between Fortieth and Forty-first Street. Pine Street in this particular area is residential, with several lampposts lining the street. Walking toward the couple was [Appellant] and his co-conspirator. As [Appellant] and his co-conspirator approached the couple, [Appellant] separated from his co-conspirator and flashed a silver handgun, about six to eight inches in length. Ms. Leone started to scream. [Appellant] threw her onto the ground and ordered her to be quiet. [Appellant's] co-conspirator simultaneously threw Mr. Ghitis down onto steps of a house nearby. [Appellant] and his co-conspirator demanded whatever their victims had, to which both immediately complied. Mr. Ghitis gave his wallet, watch and cell phone to [Appellant's] co-conspirator. Ms. Leone gave her pocketbook to [Appellant]. Ms. Leone, still upset over the incident, continued to cry and scream. [Appellant], already in possession of Ms. Leone's pocketbook, demanded that she shut up, and then he repeatedly struck her on [the] back of the head with his gun. [Appellant] ordered Mr. Ghitis to tell Ms. Leone to

be quiet. Mr. Ghitis managed to calm Ms. Leone down, [Appellant] let Ms. Leone go, and shortly afterwards [Appellant] and his co-conspirator fled.

The victims found each other immediately after the incident, called the police, and went to the University of Pennsylvania Hospital, where Ms. Leone received several stitches for the lacerations on her head. Detective Philip Lydon of the University of Pennsylvania police department met with the victims separately about the incident at about three-thirty that morning in the hospital, where the victims both gave their account of the events and described [Appellant]. They met with Detective Lydon at his headquarters about three hours later. At headquarters, Detective Lydon separated the victims and showed three separate photo arrays of individuals that had similar characteristics to [Appellant]. Ms. Leone looked at the first array and told Detective Lydon that she could not recognize anyone. Upon viewing the second array, Ms. Leone immediately identified [Appellant], viscerally reacting to his picture. Ms. Leone was shown a third array, which included an individual the police suspected was [Appellant's] co-conspirator, but she could not identify him. She spent about three to four minutes looking at the arrays. Detective Lydon did not comment to her as to whether [Appellant] was the suspect after she made her identification. The same procedure was conducted with Mr. Ghitis. He pointed out [Appellant], but was less than one hundred percent positive. Again, Detective Lydon did not comment to him as to whether [Appellant] was indeed the suspect after Mr. Ghitis made the identification.

Trial Court Opinion, 12/15/08, at 3-5 (citations omitted).

Appellant was arrested and charged with various crimes related to the two sets of robberies. Appellant filed pre-trial motions, which were denied. On November 2, 2007, at the conclusion of trial, the jury convicted Appellant of the crimes specified above, which were brought in relation to the incident perpetrated against the two students from the University of Pennsylvania.

Also on November 2, 2007, the jury returned verdicts of not guilty on all charges brought pertaining to the incident suffered by the three students from Drexel University. On December 12, 2007, the trial court sentenced Appellant to an aggregate term of incarceration of seventeen and one-half to thirty-five years, followed by five years of probation. On December 19, 2007, Appellant filed post sentence motions, which were denied by operation of law. This appeal followed.

Appellant presents the following issues for our review:

1. Did not the preliminary hearing court err in denying a proper request for an eyewitness to attend a lineup where there had been no face-to-face post-incident confrontation between the witness and [A]ppellant and where the suggestiveness of an in-court identification under those circumstances deprived [A]ppellant of due process of law?
2. Did not the trial court err in granting the Commonwealth's motion to consolidate two separate and wholly unrelated cases?
3. Did not the trial court err in denying [A]ppellant's motion to admit expert testimony on the subject of eyewitness identification issues at the motion to suppress or trial?
4. Did not the trial court err in denying [A]ppellant's request for supplemental jury [questions] which were carefully targeted toward revealing juror's deep-seated beliefs on race, cross-racial identifications and other issues crucial to [A]ppellant's defense?
5. Did not the trial court err in denying [A]ppellant's request of the trial court to take judicial notice of certain scientifically proven facts relating to eyewitness identification?
6. Did not the trial court err in denying [A]ppellant's motion *in limine* to prohibit inadmissible evidence and argument regarding the accuracy of the witness' identification of

[A]ppellant as related to her level of confidence in that identification where scientific evidence proves that there is no correlation between how certain a witness is of his/her identification and the accuracy of that identification?

7. Did the trial court err by failing to properly instruct the jury regarding the issues relating to the witness' identification of [A]ppellant as the man who robbed her where the proffered instruction was supported by science and decisional law?

8. Did not the trial court err by sentencing [A]ppellant to an aggravated sentence which was excessive, manifestly unjust and which shocked the conscience?

Appellant's Brief at 4-5.

Appellant first argues that the preliminary hearing court abused its discretion in denying his request that the victim, Ms. Leone, participate in a face-to-face lineup. Appellant contends that the victim only saw the perpetrator of the crime for a short period of time and had identified Appellant through a black-and-white Xerox photo array. Basically, Appellant asserts that the victim would be face-to-face with Appellant for the first time in a courtroom during the preliminary hearing, and that an in-court identification under those circumstances would be inherently suggestive.

As Appellant concedes in his appellate brief, an accused does not have a constitutional right to a pre-trial lineup. ***Commonwealth v. Sexton***, 485 Pa. 17, 23-24, 400 A.2d 1289, 1292 (1979). Our Supreme Court has instructed that the grant or denial of a request for a lineup is within the trial court's discretion and the decision will not be disturbed absent an abuse of

discretion. ***Commonwealth v. Brown***, 544 Pa. 406, 416-417, 676 A.2d 1178, 1182 (1996) (citing ***Commonwealth v. Rush***, 522 Pa. 379, 562 A.2d 285 (1989)). Moreover, “[o]ur Supreme Court has decreed that only in those cases where an identification lacking a strong indicia of reliability is the sole evidence against the defendant should a defendant’s timely request for a lineup be granted.” ***Commonwealth v. Beverly***, 547 A.2d 766, 767 (Pa. Super. 1988), *appeal denied*, 523 Pa. 630, 564 A.2d 1259 (1989) (citing ***Sexton***).

In assessing whether the totality of the circumstances support an independent basis for identification of a defendant as perpetrator of a crime our Court has observed:

Factors to be considered in evaluating the likelihood of misidentification in a particular instance are:

. . . the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

The most important factor in the totality of the circumstances test is the opportunity of the witness to view the suspect at the time of the crime.

Commonwealth v. Edwards, 762 A.2d 382, 391 (Pa. Super. 2000) (citations omitted).

In addressing this claim of error, the trial court offered the following apt analysis, which we adopt as our own:

Ms. Leone testified that she had a face-to-face confrontation with [Appellant] for approximately two minutes before she was knocked down. She gave a statement to the police providing a description of [Appellant] less than an hour after the incident, and she identified [Appellant] from a photo array less than four hours after the incident. Ms. Leone was unwavering in her testimony, repeatedly asserting that she immediately knew when she selected [Appellant] from the photo arrays that it was [Appellant] that robbed and assaulted her. Such a finding is consistent with prior Pennsylvania cases. See Edwards, 762 A.2d at 391 (holding counsel effective despite failure to request a lineup before robbery victim made an in-court identification because the victim had a face-to-face confrontation with the defendant and was able to identify him in a photo array); [Commonwealth v.] Davis, 439 A.2d [195,] 200 [(Pa. Super. 1981)] (holding there was no denial of due process when burglary victim made an in-court identification based on his witnessing the defendant run around him to exit the house). Accordingly, the court properly denied the motion for a pre-hearing lineup.

Trial Court Opinion, 12/15/08, at 6. Thus, in light of the fact that Ms. Leone's identification of Appellant was reliable, Appellant has failed to establish that the court erred in denying his request for a lineup prior to the preliminary hearing. Therefore, this issue lacks merit.¹

¹ To the extent that Appellant now claims that the black-and-white photo array used by police was unduly suggestive because Appellant was wearing a dark shirt in his photo and several of the other photos depicted men in light shirts, and his face was larger in his photo than the faces of the other men, we deem this issue to be waived for failure to present the claim to the trial court. It is undisputed that, pursuant to Pennsylvania Rule of Appellate Procedure 302, "[i]ssues not raised in the lower court are waived and cannot

Appellant next argues that his due process rights were violated by the trial court permitting the Commonwealth to consolidate the two robberies for a single trial. Specifically, Appellant contends that the two robberies were unrelated and the Commonwealth failed to demonstrate a common scheme or modus operandi in these robberies.

Whether indictments should be joined or severed is a matter entrusted to the discretion of the trial judge and the decision of the trial judge will not be reversed on appeal absent an abuse of that discretion. ***Commonwealth v. Natividad***, 565 Pa. 348, 360, 773 A.2d 167, 174 (2001). Consolidation and severance of criminal matters are governed by Rules of Criminal Procedure 582 and 583, which provide in relevant part as follows:

RULE 582. JOINDER--TRIAL OF SEPARATE INDICTMENTS OR INFORMATION

(A) Standards

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(b) the offenses charged are based on the same act or transaction.

* * *

be raised for the first time on appeal." Pa.R.A.P. 302(a). Thus, only claims properly presented in the trial court are preserved for appeal.

RULE 583. SEVERANCE OF OFFENSES OR DEFENDANTS

The court may order separate trials of offenses . . . if it appears that any party may be prejudiced by offenses . . . being tried together.

Pa.R.Crim.P. 582, 583.

In ***Commonwealth v. Burton***, 770 A.2d 771 (Pa. Super. 2001), *appeal denied*, 582 Pa. 669, 868 A.2d 1197 (2005), this Court summarized the appropriate tests to be applied under these rules as follows:

Pursuant to these rules, we must determine:

"[1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative; [3] whether the defendant will be unduly prejudiced by the consolidation of the offenses."

[***Commonwealth v. Boyle***, 733 A.2d 633,] at 635 [(Pa. Super. 1999)] (quoting ***Commonwealth v. Collins***, 703 A.2d 418, 422 (Pa. 1997)). In deciding whether the evidence of each offense would be admissible in a separate trial, we must keep in mind that

"evidence of distinct crimes are [sic] not admissible against a defendant being prosecuted for another crime solely to show his bad character and his propensity for committing criminal acts. However, evidence of other crimes . . . may be admissible . . . where the evidence is relevant for some other legitimate purpose"

Id. at 636 (citations omitted). Legitimate purposes include:

"(1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so

related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other."

Id. (quoting ***Commonwealth v. Buchanan***, 689 A.2d 930, 932 (Pa. Super. 1997)).

Burton, 770 A.2d at 778. Our Supreme Court has further instructed that consolidation of indictments requires only that there are shared similarities in the details of each crime. ***Commonwealth v. Newman***, 528 Pa. 393, 400, 598 A.2d 275, 278 (1991). ***See also Commonwealth v. Taylor***, 671 A.2d 235, 240-241 (Pa. Super. 1996), *appeal denied*, 546 Pa. 642, 683 A.2d 881 (1996) (holding similarities of three robberies established common scheme to permit consolidation where description of perpetrator by victims was similar, perpetrator wore same type of clothing in each instance, perpetrator possessed similar weapon in each offense, the victims were adult white females, and the crimes occurred within a thirty-four day period, within a close proximity to one another during the afternoon or early evening).

Here, the trial court offered the following analysis in relation to the applicable factors:

Applying the factors to this case, the robberies happened within two weeks of one another, [Appellant] targeted college-age students walking from two contiguously located college

campuses late at night. Both times, [Appellant] wore a hooded sweater, approached his victims head-on, and flashed a firearm before demanding all their possessions. Finally, and most notably, all of the victims identified [Appellant].

Trial Court Opinion, 12/15/08, at 9.

Our review of the record supports the trial court's determination and we conclude that, in the instant case, the offenses relate to each other and establish Appellant's common scheme, plan or design. The evidence established that the victims in both robberies gave similar physical descriptions of the perpetrator and the victims each identified Appellant as the person who committed the crimes. In both robberies the perpetrator possessed a handgun approximately six to eight inches long. N.T., 10/30/07, at 56; 10/31/07, at 42-41. In both instances, the perpetrator robbed small groups of students from neighboring colleges walking back to their respective campuses from parties. N.T., 10/30/07, at 51-52; 10/31/07, at 35-36. The two crimes occurred approximately thirteen days apart. N.T., 10/30/07, at 51; 10/31/07, at 35. One of the crimes occurred at 1:00 a.m. and the other at 3:00 a.m. *Id.* In the one crime, none of the victims had any money, so the perpetrator asked for anything of value, rummaged through a purse belonging to one of the victims and then took the cell phones belonging to the victims before he fled. N.T., 10/30/07, at 57, 88. In the other crime, the perpetrator asked the victims for anything of value, emptied the one victim's wallet and returned it to the victim and

also took a cell phone from the victim. N.T., 10/31/07, at 11-12. The evidence of the respective crimes forms a common scheme, plan or design embracing commission of two crimes so related to each other that proof of one tends to prove the other. Accordingly, we agree with the trial court that the evidence of each of the offenses would be admissible in a separate trial for the other.

Moreover, Appellant presents no viable argument that the jury was incapable of separating the crimes to avoid confusion. Our Supreme Court has held that “where a trial concerns distinct criminal offenses that are distinguishable in time, space, and the characters involved, a jury is capable of separating the evidence.” ***Commonwealth v. Collins***, 550 Pa. 46, 56, 703 A.2d 418, 423 (1997). Appellant has failed to prove that the jury was not able to separate evidence of the respective crimes to avoid confusion. Indeed, the record establishes that Appellant was found not guilty of charges brought in relation to the robbery of the students from Drexel University. Consequently, there is no indication that Appellant was prejudiced by the consolidation of the offenses. Accordingly, Appellant has failed to establish that the trial court abused its discretion in failing to sever the charges.

Appellant next argues that the trial court erred in denying his motion *in limine* to admit expert testimony on the subject of eyewitness identification. Appellant sought to present testimony from Dr. Solomon

Fulero, a nationally recognized expert in the field of human memory, perception and recall.

A motion *in limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered. ***Commonwealth v. Freidl***, 834 A.2d 638, 641 (Pa. Super. 2003). Questions of the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. ***Id.*** The basic requisite for the admissibility of any evidence in a case is that it be competent and relevant. ***Id.*** Though relevance has not been precisely or universally defined, the courts of this Commonwealth have repeatedly stated that evidence is admissible if, and only if, the evidence logically or reasonably tends to prove or disprove a material fact in issue, tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact. ***Id.***

Likewise, the admission of expert testimony is a matter of discretion for the trial court and will not be remanded, overruled or disturbed unless there was a clear abuse of discretion. ***Commonwealth v. Brewer***, 876 A.2d 1029, 1035 (Pa. Super. 2005), *appeal denied*, 585 Pa. 685, 887 A.2d 1239 (2005). Expert testimony may be admitted “[i]f scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist

the trier of fact to understand the evidence or to determine a fact in issue[.]” Pa.R.E. 702. Expert testimony may not be used to bolster the credibility of witnesses because witness credibility is solely within the province of the jury. ***Commonwealth v. Johnson***, 690 A.2d 274, 275 (Pa. Super. 1997) (*en banc*). As we observed in ***Commonwealth v. D.J.A.***, 800 A.2d 965, 974 (Pa. Super. 2002), *appeal denied*, 579 Pa. 700, 857 A.2d 677 (2004), the term “credibility,” as it pertains to expert opinions concerning eyewitness testimony, is “another word . . . for trustworthiness or reliability.” Our Supreme Court has long instructed that “[w]hether the expert’s opinion is offered to attack or to enhance, it assumes the same impact--an ‘unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess.’” ***Commonwealth v. Spence***, 534 Pa. 233, 245, 627 A.2d 1176, 1182 (1993) (quoting ***Commonwealth v. Gallagher***, 519 Pa. 291, 547 A.2d 355 (1988)). Thus, we are mindful that our Supreme Court has been unequivocal in rejecting expert testimony on the issue of credibility, including testimony regarding the reliability of eyewitness identifications. ***See Commonwealth v. Simmons***, 541 Pa. 211, 662 A.2d 621 (1995) (expert testimony about the reliability of eyewitness identification excluded); ***Commonwealth v. Davis***, 518 Pa. 77, 541 A.2d 315 (1988) (error to allow expert testimony that child sex abuse victims generally lack the ability to

fabricate stories of sexual experiences); **Commonwealth v. Seese**, 512 Pa. 439, 517 A.2d 920 (1986) (to permit admission of expert testimony on the issue of a witness' credibility is encroachment on jury's essential function).

In **Commonwealth v. Bormack**, 827 A.2d 503 (Pa. Super. 2003), *appeal denied*, 577 Pa. 693, 845 A.2d 816 (2004), a panel of this Court synthesized the decisions of the Pennsylvania Supreme Court pertaining to the admission of expert testimony as to the reliability of eyewitness identifications and observed that "this type of expert testimony simply is not admissible in this Commonwealth." **Id.** at 509. In holding that expert testimony addressing the accuracy of eyewitness identification would not have been admissible at trial, the **Bormack** Court reiterated that "the Pennsylvania Supreme Court has . . . been emphatic in holding that an expert may not testify as to the credibility of a witness's testimony." **Bormack**, 827 A.2d at 510 (quoting **D.J.A.**, 800 A.2d at 974). In addition, the panel in **Bormack** addressed the decisions in several diverging federal cases and concluded that "other cases addressing this issue are not binding on us." **Id.** at 512. Likewise, we are mindful that the Pennsylvania Superior Court "is obliged to follow the precedent as set forth by our Supreme Court." **Commonwealth v. Hayward**, 756 A.2d 23, 38 (Pa. Super. 2000).

Our review of the record reflects that on March 28, 2007, Appellant filed a motion *in limine* seeking permission to present the expert testimony

of Dr. Fulero regarding eyewitness identification. Such expert testimony was offered to challenge the reliability of eyewitness identification and testimony. We agree with the trial court's conclusion that, contrary to Appellant's assertion, this form of testimony would invade the exclusive province of the jury to assess credibility. Pursuant to well settled case law in Pennsylvania, such evidence has been consistently precluded from admission in the courts of this Commonwealth. Thus, we are constrained to apply the consistent precedent of our Supreme Court until it rules otherwise with regard to this type of evidence. Therefore, we discern no abuse of discretion by the trial court in refusing to grant Appellant's motion *in limine* seeking to permit expert testimony regarding the reliability of eyewitness identifications. Accordingly, Appellant's claim provides no basis for relief.

Appellant next argues that the trial court erred in denying his request for supplemental jury questions to be presented during voir dire. Basically, Appellant contends that his proposed questions "were targeted toward revealing deep-seated beliefs on race, cross-racial identifications and other issues crucial to Appellant's defense." Appellant's Brief at 36.

The purpose of voir dire is solely to ensure the empanelling of a competent, fair, impartial, and unprejudiced jury capable of following the instructions of the trial court. ***Commonwealth v. Floyd***, 937 A.2d 494, 502-503 (Pa. Super. 2007), *appeal denied*, 598 Pa. 194, 955 A.2d 349

(2008). "The scope of the voir dire rests in the sound discretion of the trial judge, whose decision will not be reversed unless palpable error is established." **Commonwealth v. Robinson**, 581 Pa. 154, 202, 864 A.2d 460, 488 (2004). Similarly, "[t]he decision on whether or not counsel may propose their own questions of potential jurors during voir dire is a matter left solely within the discretion of the trial court." **Commonwealth v. Paolello**, 542 Pa. 47, 70, 665 A.2d 439, 451 (1995). Voir dire is neither a litmus test of the effectiveness of trial strategies nor a means to empanel a jury sympathetic to a defendant's case. **See Robinson**, 581 Pa. at 202, 864 A.2d at 488 (quoting **Commonwealth v. Smith**, 518 Pa. 15, 540 A.2d 246 (1988)) ("[T]he purpose of the voir dire examination is not to provide a better basis upon which a defendant can exercise his peremptory challenges, but to determine whether any venireman has formed a fixed opinion as to the accused's guilt or innocence."). Accordingly, so long as the voir dire questions used are sufficient to ensure a fair and impartial jury capable of following the court's instructions, we will not interfere with the trial court's rulings. **See Robinson**. Thus, "[n]either counsel for the defendant nor the Commonwealth should be permitted to ask direct or hypothetical questions designed to disclose what a juror's present impression or opinion as to what his decision will likely be under certain facts which may be developed in the trial of the case." **Commonwealth v. Bomar**, 573 Pa. 426, 456, 826 A.2d

831, 849 (2003) (citing *Commonwealth v. Carson*, 559 Pa. 460, 741 A.2d 686 (1999)).²

Our review of the record reflects that Appellant filed a motion which requested the trial court to supplement the standard juror questionnaire with approximately 100 additional questions for the jurors to complete as part of the voir dire process. **See** Motion for Supplemental Juror Questionnaire, Docket Entry D-3, 3/14/07. The trial court denied Appellant's request. Prior to jury selection, Appellant again requested the trial court to supplement the juror questionnaire with three additional questions.³ The trial court likewise

² We observe that Pennsylvania Rule of Criminal Procedure 632 mandates the use of the form questionnaire contained in paragraph H of the rule. **See** Pa.R.Crim.P. 632(A), (H). Paragraph D provides that these questionnaires "shall be used in conjunction with the examination of the prospective jurors." Pa.R.Crim.P. 632(D). The Comment to Rule 632 further provides that: "Paragraph (D) makes it clear that juror information questionnaires are to be used in conjunction with the oral examination of the prospective jurors, and are not to be used as a substitute for the oral examination. Juror information questionnaires facilitate and expedite the voir dire examination by providing the trial judge and attorneys with basic background information about the jurors, thereby eliminating the need for many commonly asked questions." Pa.R.Crim.P. 632, Comment.

³ Appellant sought to have the following three questions posed to the prospective jurors:

1. Do you think that people can sincerely believe- or even be convinced that-they have identified the correct person as the perpetrator of a crime, yet be nevertheless mistaken?
Why or why not?
2. Would you be able to find a defendant not guilty even where the eyewitness has testified they were certain the

denied Appellant's subsequent request. N.T., 10/29/07, at 4-7. The record further reflects that, after the potential jurors completed their written questionnaires, the trial court conducted individual voir dire of the prospective jurors. *Id.* at 11-140.

Upon review of the argument Appellant presents in support of his allegations of error, we discern no basis upon which to grant relief. Although Appellant cites case law to document the legal standard that guides the trial court's exercise of discretion, Appellant fails to explain precisely how the voir dire process used here was defective or violated that standard, thereby requiring the award of a new trial. Mere speculation fueled by the fact of a conviction for one of the two sets of crimes charged does not establish trial court error or an abuse of discretion. Accordingly, we discern no merit in Appellant's claim in this regard.

Appellant next argues that the trial court erred in denying Appellant's request that the court take judicial notice of certain scientifically proven

defendant was the perpetrator of the crime if you found the testimony was mistaken or unreliable?

Why or why not?

3. Where one defendant is charged with two crimes at the same trial, can you hold the Commonwealth to its burden of proving each crime beyond a reasonable doubt independently of the other?

Why or why not?

See Additional Jury Questions Requested by the Defense, Docket Entry D-11A.

facts relating to eyewitness identification. Specifically, Appellant contends the trial court should have taken judicial notice of the following:

- (1) the phenomenon of “weapons focus”; (2) the reduced reliability of identification in cross-racial identification cases; (3) the significantly decreased accuracy in eyewitness identification in high-stress/traumatic criminal events; and (4) the lack of a strong correlation between witness statements of confidence and witness accuracy.

Appellant’s Brief at 39.

As we previously stated, questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and we will not reverse the court’s decision on such a question absent a clear abuse of discretion. *Commonwealth v. Maloney*, 876 A.2d 1002, 1006 (Pa. Super. 2005).

Pennsylvania Rule of Evidence 201 governs judicial notice of adjudicative facts and provides in relevant part as follows:

Rule 201. Judicial notice of adjudicative facts

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

Pa.R.E. 201.

Moreover, we are mindful of the following:

"A court may take judicial notice of an indisputable adjudicative fact." ***Interest of D.S.***, 424 Pa. Super. 350, 622 A.2d 954, 957 (1993). A fact is indisputable if it is so well established as to be a matter of common knowledge. ***Id.*** Judicial notice is intended to avoid the formal introduction of evidence in limited circumstances where the fact sought to be proved is so well known that evidence in support thereof is unnecessary. **220 *Partnership v. Philadelphia Elec. Co.***, 437 Pa. Super. 650, 650 A.2d 1094, 1096 (1994).

Judicial notice allows the trial court to accept into evidence indisputable facts to avoid the formality of introducing evidence to prove an incontestable issue. ***Interest of D.S.***, 622 A.2d at 957. However, the facts must be of a matter of common knowledge and derived from reliable sources "whose accuracy cannot reasonably be questioned." Pa.R.E. 201(b)(2).

Commonwealth v. Brown, 839 A.2d 433, 435 (Pa. Super. 2003).

Our review of the record reflects that, prior to trial, Appellant filed a motion with the trial court requesting the court to take judicial notice of scientific facts concerning the reliability of eyewitness identification. **See** Motion for Trial Court to Take Judicial Notice, Docket Entry D-5. On September 17, 2007, the trial court denied Appellant's request. As we discussed in Appellant's third issue on appeal, the admission of expert testimony concerning the reliability of eyewitness identification would invade the exclusive province of the jury to assess credibility. Thus, we are constrained to conclude that the trial court taking judicial notice of scientific facts concerning the reliability of eyewitness identification would likewise invade the province of the jury to assess credibility. Therefore, it is our

determination that the trial court was acting within its discretion when it refused to take judicial notice of the scientific facts Appellant presented. Accordingly, Appellant's contrary claim lacks merit.⁴

Appellant next argues that the trial court erred in permitting evidence regarding the accuracy of an eyewitness' identification of Appellant as related to the witness' confidence in that identification. Basically, Appellant asserts that the trial court improperly denied his motion *in limine* seeking to "bar witness testimony and prosecutorial argument concerning witness confidence." **See** Appellant's Brief at 43. Appellant believes that the trial court erred in permitting the eyewitness to testify regarding her opinion as to her certainty in the correctness of her identification of Appellant.

Before we address the merits of this issue, we must consider whether the claim has been preserved for appellate review. Initially, we observe that Appellant has failed to specify the point in the record where the eyewitness allegedly testified regarding her opinion as to her certainty in the correctness of her identification of Appellant. "When an allegation is unsupported [by]

⁴ We note that Appellant's argument is completely disingenuous in light of the fact that Appellant advocated in his third issue on appeal that these same facts, which he now contends merit judicial notice, also required expert testimony. In order for the court to take judicial notice, a fact must be indisputable and so well-established that it is a matter of common knowledge. This is diametrically opposed to the argument Appellant previously presented asserting that an expert witness was required to present these facts to the jury because the facts were beyond the knowledge of a common layperson. Thus, we cannot help but observe that these two issues presented on appeal are incongruous.

any citation to the record, such that this Court is prevented from assessing this issue and determining whether error exists, the allegation is waived for purposes of appeal.” ***Commonwealth v. Harris***, 979 A.2d 387, 393 (Pa. Super. 2009) (citing Pa.R.A.P. 2119(c) (requiring that if reference is made to the record, it must be accompanied by a citation to the record)). Appellant’s bald assertion regarding the eyewitness’ opinion testimony lacks any supporting citation or proof in the record. For this reason, we deem this issue to be waived.

Moreover, to the extent Appellant argues that he is challenging the testimony offered by Ms. Leone wherein she “graphically described the reaction she had to seeing [Appellant’s] photo in the array,” **see** Appellant’s Brief at 46, as the point in the trial where the eyewitness offered opinion testimony, we observe that such a claim is also waived.⁵

⁵ The testimony offered by Ms. Leone concerning her identification of Appellant from a photo array transpired as follows:

Q: And did you identify somebody from among those 24 pictures?

A: Yes, this man, which is that man sitting right there.

[Assistant District Attorney]: Indicating for the record the defendant at the bar of the Court.

THE COURT: The record will so reflect.

Q: Can you tell the ladies and gentlemen how long you looked at [Appellant’s] photograph before you recognized it?

"In order to preserve an issue for review, a party must make a timely and specific objection at trial. A failure to object to an offer of evidence at the time the offer is made, assigning the grounds [for objection], is a waiver upon appeal of any ground of complaint against its admission." ***Commonwealth v. Griffin***, 684 A.2d 589, 595 (Pa. Super. 1996) (citations and quotation marks omitted)

In ***Commonwealth v. Colon***, 846 A.2d 747 (Pa. Super. 2004), *appeal denied*, 582 Pa. 681, 870 A.2d 320 (2005), the appellant's counsel filed a motion *in limine* to exclude a witness' testimony. ***Id.*** at 752. The court denied the motion and the appellant's counsel failed to object on the record to the ruling. ***Id.*** Counsel also did not object when the witnesses were called to testify. ***Id.*** Relying on ***Griffin***, this Court determined the appellant waived his right to argue the issue on appeal. ***Id.*** at 573.

Our review of the record reflects that, although Appellant's counsel filed a motion *in limine* seeking to preclude testimony pertaining to the victim's certainty of her identification of Appellant, counsel did not raise any objections to the alleged opinion testimony offered by Ms. Leone which

A: Immediately. As soon as I saw his picture, I started hysterically crying and it was almost like a physical reaction. I mean, I looked at it and I looked at his face and I immediately knew it was him. There was no doubt in my mind.

N.T., 10/31/07, at 50-51.

Appellant now references in his appellate brief. **See** N.T., 10/31/07, at 51. Because no objection was made at trial, the issue is waived, and the subject matter cannot be the basis of an appeal. **See** Pa.R.A.P. 302(a) (instructing that issues not raised before the trial court are waived and cannot be raised for the first time on appeal).

Appellant next argues that the trial court erred in failing to properly instruct the jury concerning issues related to eyewitness identification. Specifically, Appellant asserts that the trial court erred when it failed to instruct the jury with Appellant's proposed points for charge relating to eyewitness identification, and instead gave the jurors a cursory instruction on identification at the time of the jury charge.

A party's obligations to object to jury instructions are set forth in Pennsylvania Rule of Criminal Procedure 647, which provides, in relevant part, as follows:

Rule 647. Request for Instructions, Charge to the Jury, and Preliminary Instructions

(B) No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate.

Pa.R.Crim.P. 647(B). **See also** Pa.R.A.P. 302(b) ("A general exception to the charge to the jury will not preserve an issue for appeal. Specific exception shall be taken to the language or omission complained of.").

Interpreting this rule, our Supreme Court has held that the plain language of Rule 647(B) requires a specific objection to assign error to a controverted aspect of or omission from a jury charge. ***Commonwealth v. Pressley***, 584 Pa. 624, 629-630, 887 A.2d 220, 223 (2005). The Court has held further that, in the event counsel fails to posit the appropriate objection prior to the jury's retirement for deliberation, the underlying point is not preserved for appellate review and will be deemed waived on appeal. ***Id.*** ***See also Commonwealth v. Sherwood***, ___ Pa. ___, ___, 982 A.2d 483, 505 (2009) (citing Pa.R.Crim.P. 647(B); ***Commonwealth v. Montalvo***, 598 Pa. 263, 280, 956 A.2d 926, 935-936 (2008)) (holding that the law is clear that in order to preserve a claim predicated on an allegedly erroneous jury instruction, a litigant must raise an objection before the jury retires to deliberate).

Our review of the record reflects that Appellant presented to the trial court proposed jury instructions on eyewitness identification. ***See*** Proposed Jury Instructions on Identification, 10/31/07, Supplemental Record. The record further reflects that the trial court gave the jury instructions regarding identification evidence. N.T., 11/1/07, at 18-19. Appellant claims the instructions given to the jury were not sufficient, but were cursory. However, we further observe that Appellant failed to make a timely objection

to the jury instructions. Indeed, as the record indicates, at the conclusion of the instructions to the jury, the following transpired:

THE COURT: I shall now confer with counsel and ask for any suggestions they may have with respect to my charge. [Defense Counsel], [Assistant District Attorney]?

[Defense Counsel]: No.

[Assistant District Attorney]: No.

N.T., 11/1/07, at 40. Accordingly, because Appellant failed to object to the trial court's jury instruction, his claim is waived.

Appellant last argues that the trial court abused its discretion in fashioning his sentence. Appellant contends that the trial court imposed an excessive sentence, which was beyond the aggravated range of the sentencing guidelines.

Because Appellant's claim challenges the discretionary aspects of a sentence, the issue must be considered to be a petition for permission to appeal as the right to pursue such claims is not absolute. ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa. Super. 2004), *appeal denied*, 580 Pa. 695, 860 A.2d 122 (2004). A party who desires to raise such a challenge must meet two requirements before an appeal of the judgment of sentence will be heard on the merits. ***Id.*** First, the appellant must set forth in his or her brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence. ***Id.***;

Pa.R.A.P. 2119(f). Second, the appellant must show that there is a substantial question that the sentence imposed is inappropriate. 42 Pa.C.S.A. § 9781(b); ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 522 A.2d 17 (1987). Whether a particular issue constitutes a substantial question about the appropriateness of sentence is a question to be evaluated on a case-by-case basis. ***Commonwealth v. Kenner***, 784 A.2d 808, 811 (Pa. Super. 2001), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2002).

Herein, the first requirement is met because Appellant's brief includes the necessary separate concise statement of the reasons relied upon for allowance of appeal pursuant to Pa.R.A.P. 2119(f). Therefore, we will next determine whether Appellant raises a substantial question requiring us to review the discretionary aspects of the sentence imposed by the sentencing court.

Appellant first claims that the sentencing court failed to properly consider several factors set forth under 42 Pa.C.S.A. § 9721(b).⁶ Specifically, Appellant claims the sentencing court imposed a sentence that "far surpassed that required to protect the public and failed to address the rehabilitative needs of [A]ppellant." Appellant's Brief at 13. We observe that the protection of the public and the rehabilitative needs of the

⁶ The factors to be considered under 42 Pa.C.S.A. § 9721(b) include: the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant. ***See Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006).

defendant are two of the several factors the trial court must consider when determining a sentence under 42 Pa.C.S.A. § 9721(b). Thus, we conclude that in this instance, Appellant has raised a substantial question. **See *Commonwealth v. Fullin***, 892 A.2d 843, 847 (Pa. Super. 2006) (concluding that the appellant raised a substantial question where it was alleged that the trial court failed to consider the factors set forth in 42 Pa.C.S.A. § 9721(b)). In addition, Appellant claims the sentencing court “relied upon factors which were already accounted for by [A]ppellant’s prior record score . . .” Appellant’s Brief at 13. Such a claim of double-counting of a prior record score also raises a substantial question for review. **See *Commonwealth v. Goggins***, 748 A.2d 721, 727-728 (Pa. Super. 2000) (*en banc*), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000) (holding that the appellant raises a substantial question by claiming that the trial court improperly double-counted criminal history and prior record).

Accordingly, because Appellant has presented two substantial questions, we will consider these two claims of error on the part of the sentencing court on appeal.⁷ Nevertheless, we conclude that Appellant is entitled to no relief on these claims, as the record reveals that the sentencing court did consider the protection of the public, Appellant’s

⁷ To the extent that Appellant has included in his appellate brief additional theories for relief which he has not presented in his Rule 2119(f) statement, we decline to address the merits of such claims.

rehabilitative needs and did not improperly double-count factors considered in Appellant's prior record score.

We reiterate that sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. **Fullin**, 892 A.2d at 847. In this context, an abuse of discretion is not shown merely by an error in judgment. **Id.** Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. **Id.**

Again, we observe that the following are included among the factors to be considered under 42 Pa.C.S.A. § 9721(b): the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant. **Fullin**, 892 A.2d at 847. In addition, when fashioning a sentence, a court may not "double count" factors already taken into account in the sentencing guidelines. **Goggins**, 748 A.2d at 732. However, "a court is required to consider the particular circumstances of the offense and the character of the defendant." **Commonwealth v. Griffin**, 804 A.2d 1, 10 (Pa. Super. 2002), *appeal denied*, 582 Pa. 671, 868 A.2d 1198 (2005). "In particular, the court should refer to the defendant's prior

criminal record, his age, personal characteristics and his potential for rehabilitation." *Id.*

Our review of the record reflects that, at the time of sentencing, the court patiently listened to Appellant's stated interest in returning to his family, getting his GED, and learning a trade. N.T., 12/10/07, at 21. The court also heard from Appellant's counsel who reinforced the fact that, while Appellant was in juvenile placement, Appellant took on initiatives, took on leadership roles, and his grades improved. Defense counsel also indicated that Appellant generally does well in a structured setting. *Id.* at 8-9, 10. The record further reflects that Rhonda Crawford, the mother of Appellant's paramour, testified on Appellant's behalf at the sentencing hearing and explained that Appellant has been a responsible caretaker for the child that Appellant fathered with his girlfriend. *Id.* at 12-15.

In addition, the assistant district attorney explained Appellant's juvenile history to the sentencing court and noted that the instant crimes "really represent [] the culmination or the end of a progression for [Appellant] that started when he was much younger." *Id.* at 26. Also, the sentencing court heard the victim impact statement prepared by Ms. Leone, which was read into the record. *Id.* at 23-25.

The sentencing court offered the following thorough explanation for the imposition of a prison sentence upon Appellant to address his rehabilitative needs and the protection of the public:

THE COURT: . . .

[Appellant] in imposing sentencing today the Court takes into account the gravity of [t]he offense as it impacts upon the victims, the needs to protect the community, the rehabilitative needs. The Court also takes into account the charges in which you are convicted, the facts and the circumstances surrounding the events, the sentencing guidelines, the history, everything in the presentence mental health reports.

The Court takes into consideration the victim impact statement and everything the Commonwealth and the defense has presented today.

The Court realizes that you have overall done a fairly good job while you were in prison. The Court appreciates the family support that you have. The Court appreciates that you have been respectful to the Court at all times, to the magistrate or the person in charge of the event.

At the same time, having said that, this is an exceptionally serious matter that you've been found guilty [of] by the jury, and this is not the first time that you have committed this type of offense. This is very disconcerting to the Court that you've been involved in four other robberies in the general area. In fact, those four robberies plus the two robberies here. That's a lot of robberies, and a very serious matter[.]

So the Court is very concerned about – even though, obviously you know responsibility. You have been very responsible to your child. You know responsibility. We've seen it in the prisons as [Defense Counsel] has indicated, you've been very responsible as well. So clearly you know responsibility. [You're] not someone who doesn't have any sense of personal responsibility. You know how to be responsible if you wish to do so. But the Court takes a look at the time you know how to take

responsibility, you know when to be a gentleman, you know when to take personal responsibility. The Court takes a look at that you know and the Court takes a look at the people who may seem to be easy prey that you take advantage of, and the Court is concerned about that.

You obviously have been doing far better – you have a strong sense of responsibility and you need to exercise that. As [Defense Counsel] has indicated you've been with the same woman for some years, you've worked on raising a child, and that is significant. You've done it.

It should be very easy to give the sentence the Commonwealth is asking for, but the Court takes into account those factors that [Defense Counsel] has raised and the[y] mitigate against the sentence of 25 to 50. At the same time, those factors – as I said you know responsibility and yet know how to exercise responsibility when you wish and you know how to take advantage of easy prey.

So the Court will impose the following sentence; it's not the sentence that [the Assistant District Attorney] has asked for and it's not the sentence your attorney has asked for.

N.T., 12/10/07, at 36-39.

Upon review, we discern no abuse of discretion, as the sentencing court carefully considered Appellant's rehabilitative needs when imposing sentence and addressed the need to protect the public from Appellant's predatory behavior. As to the issue concerning "double-counting," we likewise perceive no merit to the claim. Instantly, the sentencing judge, by considering Appellant's juvenile adjudications, acknowledged Appellant's previous behavior in which he committed the same types of crimes, in the same vicinity, upon the same types of victims. The sentencing court

emphasized that “[w]hile [Appellant] was on court supervision, he told the probation department that ‘white college kids were an easy score,’ ominously revealing and warning of his predatory propensities. . . . Two years later, this warning came true. [Appellant] violently robbed at gun-point the two victims in the instant case, both students at the University of Pennsylvania. What made this crime much worse and even more reflective of [Appellant’s] character was his terrifying act of gratuitous violence. Even after [Appellant] had obtained Ms. Leone’s property, he pistol-whipped her.” Trial Court Opinion, 12/15/08, at 20-21.

The factors surrounding Appellant’s previous crimes and the escalation of violence in the incidents were independent of those already contemplated in the guidelines and do not amount to double-counting of Appellant’s criminal history but merely further analysis of Appellant’s background to support the sentence imposed. Pennsylvania law requires the sentencing court to consider Appellant’s prior criminal record, as well as the “particular circumstances” of the offense. ***See Griffin***. Accordingly, Appellant is entitled to no relief.

Judgment of sentence affirmed.

Judgment Entered.


Prothonotary

Date: _____

**REPORT OF THE
ADVISORY COMMITTEE ON
WRONGFUL CONVICTIONS
SEPTEMBER 2011**



General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
108 Finance Building
Harrisburg, Pennsylvania 17120

The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations and conclusions contained in this report.

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The Joint State Government Commission was created by the act of July 1, 1937 (P.L.2460, No.459) as amended, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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EXECUTIVE SUMMARY

“[T]he most fundamental principle of American jurisprudence” is “that an innocent man not be punished for the crimes of another.”¹ The source of public confidence in our criminal justice system resides in its ability to separate those who are guilty from those who are not. The criminal justice system in Pennsylvania is finely tuned and balanced and almost always delivers reliable results. However, no such system, much less our own, will achieve perfection in its exercise. Due process does not require that every conceivable step at whatever cost be taken to eliminate the possibility of convicting an innocent person. Even so, the system cannot routinely accept the conviction of an innocent person without being challenged to consider measures to reduce the likelihood of error and grant redress to victims of these errors. Accepting this challenge as fully and as reasonably as we can further strengthens public confidence in the integrity of our criminal investigations and convictions.

Since 1989, 34 states and District of Columbia have been witness to 273 postconviction DNA exonerations. These exonerations represent cases in which the conviction has been indisputably determined to be wrong by continuing advances in the use of DNA science and evidence. They represent tragedy not only for the person whose life is irreparably damaged by incarceration for a crime he did not commit, but also for the victim since each *wrongful* conviction also represents the *failure to convict* the true perpetrator. These cases require us to take measures to sustain both the integrity of our convictions and the moral force of our burden of proof. If experience is the name we give our mistakes, these exonerations provide a remarkable opportunity to examine our practices and policies, and correct them to the best of our ability. Pennsylvania is not alone in the matter of tending to conviction integrity. As the narrative and appendices to this report make clear, we are the beneficiaries of work being done before us by a wide variety of legislative, judicial and executive initiatives undertaken to minimize the risk of conviction error.

These exonerations challenge long-accepted assumptions in the soundness of certain practices of the criminal justice system both nationwide and in Pennsylvania. They cast a disturbing doubt on the reliability of eyewitness identifications, confessions, and overly aggressive practices within the adversarial legal system. Victims can often be mistaken in their identifications of perpetrators, especially when influenced, often unintentionally, by subtly suggestive procedures for lineups, photo arrays, and showups. Interrogation techniques applied to suspects are calculated to obtain a confession and recurrently “work” against innocent suspects, especially those who are inexperienced, suggestible, unintelligent, mentally defective or anxious to end the interrogation. Many

¹ *Commonwealth v. Conway*, 14 A.3d 101, 114 (Pa. Super. Ct. 2011).

defendants cannot afford a private attorney and therefore receive less thorough representation by overworked public defenders and appointed counsel. In many places, this lack of adequate representation is due to underfunding of public defender offices and substantial underpayment of appointed counsel representing indigent defendants. Although untested for the trial or tested by outdated methods, inmates seeking post trial testing of DNA biological evidence often encounter unreasonable obstruction and opposition to its testing or learn that their petition is jurisdictionally barred.

Under this institutional structure, defendants have been punished for crimes they did not commit. Compounding these concerns, biological evidence is available in only a small number of cases involving violent crimes. There is every reason to believe that mistaken identifications, false confessions, inadequate legal representation, and other factors underlying wrongful convictions occur with comparable regularity in criminal cases where DNA is absent. While it is impossible to say with confidence how many innocent people are now, have been or will be imprisoned, it would be indefensible to say that every conviction or acquittal is factually correct. To this end, we must pay close attention to the lessons contained in these DNA cases. To the best of our ability, we must respond by creating practical and workable measures that serve to advance conviction integrity by minimizing the risk of error.

Senate Resolution No. 381² directs the commission “to study the underlying causes of wrongful convictions.” This charge calls for an inquiry that in other contexts is characterized as a failure analysis, much like a professional inquiry into a routine surgical procedure that unexpectedly results in a bad outcome or into a chain of events that causes a plane crash. In a failure analysis, the focus is on determining what went wrong in order to prevent recurrence of the problem. We can rightly celebrate the presumption that a great majority of criminal cases reach a just outcome. But the focus in this report is necessarily on the reasons why justice miscarries in a minority of cases. Many scholars, practitioners, law enforcement agencies, and the courts, among others, have examined these cases and advocate for a variety of responses and remedies to the problems revealed by the wrongful convictions. This report attempts to bring the General Assembly’s attention to policies for Pennsylvania that may reduce the likelihood that innocent people will suffer imprisonment for crimes they did not commit while further ensuring that the actual perpetrator of the crime is brought to justice.

The resolution directed “the Joint State Government Commission to establish an advisory committee to study the underlying causes of wrongful convictions so that the advisory committee may develop a consensus on recommendations intended to reduce the possibility that in the future innocent persons will be wrongfully convicted in this Commonwealth.” This resolution directed the advisory committee to:

- 1) review cases in which an innocent person was wrongfully convicted and subsequently exonerated;

² Sess of 2006, appendix A, *infra* p. 229.

- 2) review any other relevant materials;
- 3) identify the most common causes of wrongful convictions;
- 4) identify current laws, rules and procedures implicated in each type of causation;
- 5) identify potential solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation; and
- 6) consider implementation plans, cost implications and the impact of potential solutions on the criminal justice system.

Several cases from our Commonwealth that are related in the law review article, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform From the Pennsylvania Eight*,³ were informally reviewed. A number of the advisors were personally familiar with some of these cases, and there was a limited discussion of these and other cases.

The advisory committee divided into subcommittees on legal representation, investigation, redress and science. The advisory committee was to have reported its findings and recommendations near the end of 2008, but all the subcommittees had not completed their deliberations by that date. Rather than partially report its findings and recommendations, the advisory committee waited until all the subcommittees were able to share their recommendations with the full committee before reporting to the Senate.

Materials relevant to wrongful convictions and subsequent exonerations are widely available. The advisory committee had special access to an electronic library of material posted on Duquesne University's computerized blackboard. Among other items, postings included research reports, law review articles and other messages. Duquesne University graciously made this available to the advisory committee, and each subcommittee had its own page.

Causes of wrongful convictions are commonly determined to be "mistaken eyewitness identifications; false confessions; perjurious informant testimony; inaccurate scientific evidence; prosecutorial and defense lawyer misconduct; and inadequate funding for defense services."⁴ Some of these causes are sometimes described by varying terminology, but "at this juncture, the primary causes of wrongful convictions are well understood."⁵

³ 12 Widener L. Rev. 359 (2006); its author is John T. Rago, the chairman of the advisory comm.

⁴ Cal. Comm'n on the Fair Admin. of Just., Final Rep., Letter from the Executive Dir. (2008).

⁵ Boston Bar Ass'n, Getting it Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts 3 (Dec. 2009).

The subcommittees primarily deliberated on recommendations that have been and continue to be considered throughout other states. As some of these recommendations receive consideration, they have been adopted in some fashion by more and more jurisdictions. After all the subcommittees completed their deliberations, their recommendations were shared with the full advisory committee. The full advisory committee was afforded an opportunity to comment on all the proposals regardless of which subcommittee generated the specific proposal. Comments of advisors criticizing the proposals appear in appendix J.⁶

While there was some consensus on these recommendations, members remain sharply divided on the advisability of adopting or implementing some or all of these recommendations. Some advisors question whether a foundation has been established to recommend any of these proposals and fear that their implementation could create more injustice. Conversely, those advisors who endorse these recommendations are persuaded that well-considered and well-researched initiatives to prevent miscarriages of justice should be adopted when they are sensible and relatively easy to implement as demonstrated by law enforcement and prosecutors in a wide variety of jurisdictions.

Despite these differences, the advisory committee shares a number of interests central to maintaining public confidence in conviction integrity. Members agree that no innocent person should be punished for a crime he did not commit. Members want to promote the highest interests of public safety by making the guilty accountable for the crimes they commit. Members want our policies and practices to justify our confidence in the testimony of eyewitnesses and confessions made by the accused and used at trial. Members share a keen sensitivity to the victims of crimes and the need to minimize the risk that a victim would be called upon to endure a second trial, much less suffer the anguish that accompanies any uncertainty that comes from a DNA exoneration postconviction. Members do not want to artificially add challenges to the difficult tasks our police and prosecutors encounter every day in dealing with crimes and victims. Members seek to have the full and robust use of valid science throughout the course of our criminal investigations, prosecutions and postconviction review. And all members expect conduct from every individual and office to be of the highest ethical and professional standards of conduct that we expect from every participant in the criminal justice system.

In full consideration of all of the viewpoints and passions stirred by the subject of this report, the recommendations contained herein are tested, timely, reasonable, practical and affordable. Through careful comparisons with similar efforts undertaken around the country, none of the recommendations in this report present an outlier position. These recommended policies and practices are proven to be good for the accused, good for law enforcement, good for victims and good for our Commonwealth.

⁶ *Infra* p. 309.

Summary of Key Proposals Generated by the Subcommittees⁷

Eyewitness Identification

A rule of criminal procedure should be amended to require defense counsel in capital cases to be educated on evidence relating to eyewitness identification.

A statute should require the administration of lineups and photo arrays to be conducted by a person who does not know either which one is suspected by investigators or which one is being viewed by the witness.

Confessions

A rule of criminal procedure should be amended to require defense counsel in capital cases to be educated on evidence relating to confessions.

A statute should require custodial interrogations to be electronically recorded with a coextensive wiretap exception for law enforcement.

Indigent Defense Services⁸

Defense services for indigency should be standardized throughout our Commonwealth.

Rather than the counties, our Commonwealth should fund defense services for indigency and compensation for these attorneys should be adequate and substantially uniform.

Informant Testimony

Judges should caution a jury when testimony from a jailhouse informant is presented.

Law enforcement should electronically record the informant's statement and try to electronically record the incriminating statement made to a jailhouse informant.

⁷ The proposals appear *infra* pp. 167-207. These proposals were developed by the subcomms.; comments of advisors criticizing the proposals appear in appendix J, *infra* p. 309.

⁸ These recommendations originated from Final Rep. of the Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys. 163-97 (2003). These recommendations were intentionally underdeveloped by this advisory comm. because S. Res. No. 42 (Sess. of 2007) established a task force with an advisory comm. to "study the existing system for providing services to indigent criminal defendants." The rep. for this other res. will be published in the near future and is exclusively on this topic.

A statute should:

- 1) mandate timely disclosure of certain information to the defense when the prosecution seeks to introduce testimony from an informant that the accused incriminated himself and the evidence from the informant was obtained while investigating a felony; and
- 2) require a hearing in any capital case before admitting testimony from an informant that the accused incriminated himself.

Prosecutorial Practice

Prosecutorial offices should:

- 1) implement internal policies that encourage ethical conduct;
- 2) implement and enforce internal discipline when ethical standards are violated;
- 3) develop other mechanisms to provide internal oversight to ensure, to the fullest possible extent, the integrity of investigations, evidence development, and trial and postconviction practices; and,
- 4) adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

Pennsylvania Supreme Court should adopt proposed amendments to Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.⁹

Postconviction Relief¹⁰

The time to petition for relief based upon a statutorily specified exception to the regular time should be extended from 60 days to one year.

The statute should be amended to eliminate:

- 1) a time-based requirement to obtain postconviction relief based upon a DNA test if the test could exonerate the petitioner; and
- 2) imprisonment as a prerequisite to petition for DNA testing postconviction.

The statute should be amended to clarify:

- 1) the right to petition for DNA testing postconviction; and
- 2) that DNA test results can be compared to profiles in the State DNA Data Base pre- and postconviction.

⁹ These amendments were endorsed by Pa. Bar Ass'n.

¹⁰ Some of these will update the statute to reflect recent appellate rulings by Pa. courts and assure that interests of justice will appropriately allow postconviction testing.

The statute should be amended to allow courts to summarily dismiss frivolous and repetitive, successive petitions while authorizing them to adjudicate any petition to test DNA postconviction if required in the interests of justice.

Redress

A statute should:

- 1) allow a claim for damages to be paid by the Commonwealth to those who have been wrongfully convicted and imprisoned if their actual innocence is established; and
- 2) enable automatic expungement of the criminal history record for those found eligible by Commonwealth Court.

A statutorily created commission should convene to periodically review:

- 1) reforms adopted by other jurisdictions to ensure the integrity of their convictions; and
- 2) any additional wrongful convictions in Pennsylvania based upon actual innocence after the exoneration to determine their causes and how to avoid their recurrence.

Transitional services similar to those provided to correctly convicted individuals upon their release should be extended to individuals who have been wrongly convicted but are no longer under correctional supervision.

Science

A statute should:

- 1) require accreditation of forensic laboratories operated by the Commonwealth and its municipalities;
- 2) generally require the preservation of biological evidence relating to a criminal offense; and
- 3) criminalize the intentional destruction of biological evidence that is statutorily required to be preserved.

A statutorily created forensic advisory board should be established to:

- 1) advise the Commonwealth on the configuration of forensic laboratories and the delivery of their services to state and local government;
- 2) offer continuing education relating to forensic science to investigators, attorneys, scientists and others involved in criminal justice; and
- 3) timely investigate allegations of professional negligence and misconduct affecting the integrity of forensic analyses.

INTRODUCTION

Senate Resolution No. 381¹¹ directed “the Joint State Government Commission to establish an advisory committee to study the underlying causes of wrongful convictions so that the advisory committee may develop a consensus on recommendations intended to reduce the possibility that in the future innocent persons will be wrongfully convicted in this Commonwealth.” This resolution further directed the advisory committee to:

- 1) review cases in which an innocent person was wrongfully convicted and subsequently exonerated;
- 2) review any other relevant materials;
- 3) identify the most common causes of wrongful convictions;
- 4) identify current laws, rules and procedures implicated in each type of causation;
- 5) identify potential solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation; and
- 6) consider implementation plans, cost implications and the impact of potential solutions on the criminal justice system.

The starting point for an informal review of cases in which an innocent person was wrongfully convicted and subsequently exonerated were several cases from our Commonwealth that are related in the law review article, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*.¹² Several advisors were personally familiar with some of these cases and there was a limited discussion of these and other cases.

The advisory committee divided into subcommittees on legal representation, investigation, redress and science. The advisory committee was to have reported its findings and recommendations near the end of 2008, but all the subcommittees had not completed their deliberations by that date. Rather than partially report its findings and recommendations, the advisory committee waited until all the subcommittees were able to share their recommendations with the full committee before reporting to the Senate.

¹¹ Sess. of 2006, appendix A, *infra* p. 229.

¹² *Supra* note 3.

Materials relevant to wrongful convictions and subsequent exonerations are widely available. The advisory committee had special access to an electronic library of material posted on Duquesne University's computerized blackboard. Among other items, postings included research reports, law review articles and other messages. Duquesne University graciously made this resource available to the advisory committee and each subcommittee had its own page. Dependent upon the subcommittee, the number of postings for each ranged from scores for one to hundreds for each of the others.

"The excellent work done by academic researchers, the Innocence Project in New York, and similar Commissions in other [s]tates made the task of identifying the causes of wrongful conviction easier."¹³ These causes are "mistaken eyewitness identifications; false confessions; perjurious informant testimony; inaccurate scientific evidence; prosecutorial and defense lawyer misconduct; and inadequate funding for defense services."¹⁴ Some of these causes are sometimes described by varying terminology, but "at this juncture, the primary causes of wrongful convictions are well understood."¹⁵

Each subcommittee became aware of laws, rules and procedures from other jurisdictions that address common causes of wrongful convictions.¹⁶ These examples from elsewhere were considered as the subcommittees decided which solutions to recommend for our Commonwealth.

The full advisory committee initially convened twice in person and then the subcommittees convened via personal and telephonic conferences. Subcommittees invited individuals with relevant expertise to share their experiences and recommendations. The subcommittees deliberated primarily recommendations that have been and continue to be considered throughout other states. As some of these recommendations receive consideration, they have been adopted in some fashion by more and more jurisdictions.

After all the subcommittees completed their deliberations, their recommendations were shared with the full advisory committee. The full advisory committee was afforded an opportunity to comment on all the proposals regardless of which subcommittee generated the specific proposal. While there was some general consensus on these recommendations, particular interests remain sharply divided on the advisability of implementing these recommendations. Some advisors question that a foundation has been established to recommend any of these proposals and fear that their implementation could create more injustice rather more justice. Conversely, advisors who endorse these recommendations have not been persuaded that a foundation has been established to justify that fear recognizing that good faith, the best intentions and a genuine commitment to justice are not always enough to prevent the injustice of an innocent person being wrongfully convicted. Comments of advisors criticizing the proposals appear in the final appendix.

¹³ Cal. Comm'n on the Fair Admin. of Just., *supra* note 4.

¹⁴ *Id.*

¹⁵ Boston Bar Ass'n, *supra* note 5.

¹⁶ Appendices C through I, *infra* pp. 255-308.

Exonerations

It is difficult to accurately count the number of wrongful convictions in any jurisdiction. None is considered wrongful until there is an exoneration. The wrongfulness of convictions for some exonerees remains disputed. The focus of this advisory committee are the convictions that are wrong because the convict is factually innocent of the crime for which he was convicted. While it is reassuring that there are not large numbers of verified wrongful convictions, it is disturbing to learn of painful injustices that took a long time to discover and can never be truly remedied. The number of wrongful convictions cannot be reliably determined so that it would be falsely reassuring for our Commonwealth to ignore potential lessons from wrongful convictions here and in other jurisdictions that have the same or similar criminal justice practices and conventions. The number of false (factually wrong) convictions and false (factually wrong) acquittals simply cannot be counted nor can reliability studies be crafted to validate the probability of any verdict reflecting the factual truth. In other words, the results of a trial can not typically be validated because trials are not experiments. Trials present disputed facts to a finder of fact who must decide the facts.¹⁷ Our Commonwealth has had 11 convicts exonerated partly or totally on the basis of DNA.¹⁸ The causes of these wrongful convictions are the same as the causes of wrongful convictions proven by DNA evidence in other states. Absent this DNA, there would be no compelling reason to recognize their factual innocence.

Another source identifies 33 convicts in our Commonwealth who have been exonerated based partly or totally on evidence of actual innocence, although not all are due to DNA.¹⁹ They later became legally innocent “based on evidence” of actual innocence “not presented at the defendant's trial”.²⁰

¹⁷ Truth in any particular case is rarely known so that the outcome of adversarial proceedings cannot be used to assess and validate their rates of error. Consequently, that absence of large numbers of known errors is insufficient criteria to establish accuracy. “[W]here a method depends . . . on subjective human judgment . . . , the method is the people who employ it.” Jonathan J. Koehler, *Fingerprint Error Rates and Proficiency Tests: What They Are and Why They Matter*, 59 Hastings L. J. 1077, 1090 (2008). Existent data is inadequate to calculate any meaningful error rate of convictions.

¹⁸ Innocence Project, News & information, <http://www.innocenceproject.org/news/state.php?state=pa> (last visited June 3, 2011). The profiles of these exonerees appear in Appendix B, *infra* p. 235.

¹⁹ Nw. L. Bluhm Legal Clinic, Ctr. on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/paIndex.html> (last visited Jan. 3, 2010).

²⁰ *Id.*, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/> (last visited Jan. 27, 2011). The list of these exonerees appear *infra* p. 252.

Still another source identified 13 convicts exonerated in Pennsylvania during a recent 14-year period.²¹ These exonerations are based on “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.”²² Six of these 13 were exonerated on the basis of DNA evidence.²³

Edwin Borchard’s book about errors in criminal justice was published in 1932.²⁴ It is about 65 cases “selected from a much larger number” to refute an assertion that “[i]nnocent men are never convicted.”²⁵ One of these cases is from Pennsylvania and 61 others are from District of Columbia and other U. S. states.²⁶ The “mistake in identity” for the Pennsylvania case resulted from “inadequate investigation by prosecuting authorities and of response to popular demands for vengeance.”²⁷

Most of the recent, highly publicized exonerations have been judicially determined, but they can also occur via executive clemency in the form of pardons for innocence. These pardons for innocence have occurred in Pennsylvania and predate the more recent, high-profile exonerations based upon postconviction DNA analysis.²⁸ Erroneous criminal convictions of innocent people are thus not a new phenomenon in Pennsylvania or other states. Borchard’s book notes that “particular errors are so typical that it seems permissible to draw certain inferences from them in order that their repetition may be minimized.”²⁹ As it identifies the same errors that concern observers today, it is remarkable how relevant to this topic Borchard’s book remains when it was published almost 80 years ago. He characterizes eyewitness identification as “[p]erhaps the major source of these tragic errors.”³⁰ This characterization has been confirmed by more recent exonerations based upon DNA analysis postconviction. Perjury of witnesses “taking advantage of circumstantial evidence” was another significant cause in the cases Borchard collected and this has also been confirmed by more recent exonerations based upon DNA analysis postconviction.³¹ Overzealous and grossly negligent police work contributed to the old cases of erroneous convictions³² as well as to the more recent ones. Just as with the recent exonerations based on DNA analysis postconviction, the old cases had false confessions, frequently from those with inferior intelligence.³³ The old cases resultant from unreliable expert evidence are equivalent to more recent exonerations in

²¹ Samuel R. Gross et al., *Exonerations in the U.S. 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 559 (2005).

²² *Id.* at 524. The official acts for this article are: pardons based on innocence, judicial dismissals of criminal charges after evidence of innocence emerged and acquittals on retrial based upon evidence of no involvement in the crimes. *Id.*

²³ *Id.* at 559. The list of these exonerees appear *infra* p. 251.

²⁴ Edwin Borchard, *Convicting the Innocent* (1932).

²⁵ *Id.* at vii.

²⁶ *Id.* at vii-viii.

²⁷ *Id.* at 292.

²⁸ A sample of these exonerations were randomly selected from the middle of the last century and appear at the end of Appendix B, *infra* p. 253.

²⁹ Borchard, *supra* note 24, at xiii.

³⁰ *Id.*

³¹ *Id.* at xv.

³² *Id.*

³³ *Id.* at xvii-xviii.

which convictions were at least partly based upon invalid or unvalidated scientific assertions.³⁴ Another contemporaneous cause of these erroneous convictions is also an older cause: poor persons receiving inadequate defense.³⁵

Another old phenomenon that still persists is the finality of judgment after which “courts maintain their incompetence to” set aside unjust verdicts or correct substantial errors leaving “executive clemency as the only available remedy.”³⁶ This is precisely the current situation under 42 Pa.C.S. § 9545(b) (relating to jurisdiction and proceedings). At least for DNA testing postconviction, “[t]here is no good reason why the courts should not remain open to correct substantial errors in the administration of justice.”³⁷

An innocent defendant convicted of a crime becomes an innocent victim himself. A number of the advisors propose that statutory restitution be available to these exonerees³⁸ instead of limiting restitution to those who can successfully prove civil rights violations or malicious prosecution or who can persuade our Commonwealth to enact a special appropriation to provide this restitution as a matter of grace and favor instead of a matter of right.

COMMON CAUSES³⁹ OF WRONGFUL CONVICTIONS

Postconviction DNA exonerations	Total	Eyewitness misidentification	Invalid science	False confession or other incriminating admission	Governmental misconduct	Informants	Bad lawyering
Nationally (including Pennsylvania)	273	198 (73%)	125 (46%)	66 (24%)	46 (17%)	32 (12%)	13 (5%)
Commonwealth of Pennsylvania	11	9 (82%)	3 (27%)	4 (36%)	4 (36%)	4 (36%)	0 0

³⁴ *Id.* at xix.

³⁵ *Id.* at xx.

³⁶ *Id.* at xxi-xxii.

³⁷ *Id.* at xxii.

³⁸ *Infra* p. 234.

³⁹ Many wrongful convictions had more than one cause that contributed to the erroneous conviction. Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 1, 2011).

There was much debate within the advisory committee on the magnitude of the wrongful convictions issue, the scientific basis for the purported causes thereof and the advisability and utility of any proposed remedies. These views reflect the debate both nationally and internationally, and within the scientific and criminal justice communities. Some individuals believe that the 273 wrongful convictions⁴⁰ identified by the Innocence Project⁴¹ that have been the result of DNA exonerations are an extremely rare phenomenon. Proponents of the atypical school argue that existent investigative procedures usually work properly and accurately, and that when errors occur, they can already be remedied. They contend that proper and complete cross-examination and discovery can reveal any irregularities with investigative procedures, and that judges and juries are capable of sorting out conflicting evidence. Because there have only been 11 DNA exonerations in Pennsylvania, some don't regard them as a solid foundation for consideration of responsive policies. Of great concern to this group is the possibility that wide-scale "improvements" in investigative procedures that are intended to protect an extremely small set of innocent suspects will result in a failure to convict guilty criminals.

Others view these cases as the "tip of the iceberg." Even if the incidence is low, others think that reasonable measures to reduce the likelihood of their occurrence should be considered. They presume that the same or similar errors that led to these DNA exonerations must have occurred in convictions where DNA was not recovered or was not tested or was irrelevant as evidence. They maintain that improvements to investigative procedures can greater protect the innocent without significant loss of correct convictions. They further claim that the existent protections cited by their opponents are insufficient.

Most researchers will concede that it is extremely difficult to prove or disprove the magnitude of wrongful convictions through statistical projections beyond the existent DNA exoneration cases. However, these proven⁴² cases of wrongful convictions can be examined to determine what factors played a role in those convictions. Additionally, laboratory research has shown that certain behavioral and systemic factors can contribute to false identifications and confessions. As a policy matter, a balance between the protection of the innocent and the conviction of the guilty must be determined, as most researchers agree that there is a trade-off of varying degree between guaranteeing that no innocent person is ever wrongfully convicted and ensuring that every person who commits a crime is brought to justice. It has been suggested that reforms intended to increase the reliability of evidence through the use of best practices models could have the laudable effect of reconciling the aims of crime control (convicting the guilty) and

⁴⁰ Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/> (last visited Aug. 1, 2011).

⁴¹ "[A] national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent further injustice." Innocence Project, About Us, http://www.innocenceproject.org/Content/What_is_the_Innocence_Project_How_did_it_get_started.php (last visited Feb. 12, 2011).

⁴² There are those who will point out that a DNA exoneration "proves" nothing more than that the individual in question did not deposit the biological evidence that was found at the crime scene.

due process (protecting the innocent).⁴³ To that end, this report will provide information on the current thinking of the psychological scientific community regarding the causes of eyewitness identification errors and false confessions and survey the potential remedies that could be adopted by the Commonwealth.

Presentations

During its deliberations, the advisors heard from a number of experts in person and via phone conferences.

The full committee was able to hear from:

- **Dr. Tara Burke**, Associate Professor of Psychology, Ryerson University. She examines factors that increase the likelihood of wrongful convictions and discussed *alibi* evidence, psychological research on factors that have contributed to wrongful convictions, and researching wrongful convictions and their sources of error.
- **Dr. Ted Yeshion**,⁴⁴ Associate Professor of Forensic Science, Edinboro University of Pennsylvania of the State System of Higher Education. He related the exoneration of Alan Crotzer, who was wrongly convicted in Florida and spent more than 24 years in prison. Even though Crotzer had an *alibi* and did not know his co-defendants prior to trial, he was convicted based on the victims' misidentification of him, serological evidence and hair analysis, all of which was later disproven by DNA testing.

The subcommittees on investigation and legal representation were able to hear from:

- **Sergeant Raymond C. Guth**, Pennsylvania State Police, Criminal Investigation Section Supervisor,⁴⁵ and **Captain Bret K. Waggoner**, Pennsylvania State Police Special Investigations Division.⁴⁶ Captain Waggoner and Sergeant Guth discussed state police lineup procedures.

⁴³ Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 Tex. Tech L. Rev. 1-15 (2008).

⁴⁴ Dr. Yeshion also served as chairman of the subcomm. on sci.. He has more than 30 years experience as a forensic scientist, crime lab dir. and special agent and shared this experience during subcomm. confs. as well.

⁴⁵ Troop L, Reading.

⁴⁶ Bureau of Criminal Investigation.

- **Dr. Saul Kassin,**⁴⁷ Distinguished Professor of Psychology, John Jay College of Criminal Justice, New York City. Dr. Kassin is a nationally known expert on the psychology of false confessions. He discussed this psychology and its application to interrogations.
- **Lori Linskey,** Senior Counsel, Deputy Attorney General, New Jersey Division of Criminal Justice. Ms. Linskey presented information on sequential, double-blinded lineup procedures. New Jersey was the only state that had adopted these procedures at the time of her presentation, although legislation had been introduced in other states and some individual police departments elsewhere adopted their use.
- **Jonathyn Priest,** Commander of the Major Crimes Section, Denver Police Department, Denver, Colorado. Mr. Priest presented information on his department's 25 years' experience with recording custodial interviews and interrogations.
- **Thomas Sullivan, Esq. and Andrew Vail, Esq.,** Jenner & Block, LLP, Chicago. Sullivan and Vail presented information on the use of recordings of custodial interrogations. They survey law enforcement agencies and manage a national database of their practices regarding recordation of custodial interrogations. They related information learned over several years from these surveys.
- **Dr. Gary Wells,**⁴⁸ Distinguished Professor of Psychology, Iowa State University, is a nationally recognized expert on eyewitness identification procedures and lectured on this topic.

⁴⁷ Dr. Kassin is also Mass. Professor of Psychol. at Williams College. He pioneered the scientific study of false confessions by developing a widely accepted classification system and experimental models that enable tests of why innocent people are targeted for interrogation, why they confess and the impact this evidence has on juries. He has also studied eyewitness identifications, especially with regard to "general acceptance" within the scientific community. Kassin is the author of *Psychology* and the new *Psychology in Modules*. He has co-authored or edited other works, including: *Social Psychology* (7th edition), *Confessions in the Courtroom*, *The Psychology of Evidence and Trial Procedure*, *The American Jury on Trial: Psychological Perspectives*, and *Developmental Social Psychology*. He has written the Psychology & Social Psychology entries for Microsoft's Encyclopedia, *Encarta*, and published numerous research articles. He is a Fellow of the Am. Psychol. Ass'n (APA) and Ass'n for Psychol. Sci.. In 2007, he received a Presidential Citation Award from APA for his work on false confessions and is currently President-Elect of Div. 41 of APA (The Am. Psychol.-L. Soc'y). He lectures frequently to judges, lawyers, psychologists, psychiatrists and law enforcement groups.

⁴⁸ Dr. Wells is also Dir. of Soc. Sci. for the Am. Judicature Society's Inst. of Forensic Sci. & Pub. Pol'y. He is an internationally recognized scholar in scientific psychology and his studies of eyewitness memory are widely known and cited. He has authored over 175 articles and chapters and two books. Most of this work has been focused on the reliability of eyewitness identification. Nat'l Scie. Found. has funded his research on eyewitness identification and his findings have been incorporated into standard textbooks in psychology and law. He was a founding member of the U.S. Dep't of Just. group that developed the first set of national guidelines for eyewitness evidence and co-chaired the panel that wrote the departmental training manual for law enforcement on eyewitness identification evidence. He has worked with prosecutors and police across the U.S. to reform eyewitness identification procedures.

- **Detective William Wynn (Ret.)**, City of Philadelphia Police Department, Major Crimes Unit. Detective Wynn conducted all of the city's lineups for over 25 years and presented information on his experiences with simultaneous lineups.

The subcommittee on legal representation was able to hear from:

- **Thomas M. Place**,⁴⁹ Professor of Law, Penn State (The Dickinson School of Law). He spoke on suggested amendments to our Post Conviction Relief Act. One of these amendments would permit those who were sentenced to terms of one year or less to litigate ineffectiveness of counsel claims, which they cannot do now. A second suggested change would treat the time periods in the act as a statute of limitations that can be avoided by equitable tolling when extraordinary circumstances make timely filing impossible.⁵⁰ A third suggested change would also extend some other time limits under the act to accurately correspond with the inherent judicial power to alter an illegal sentence as well as provide potential relief for evidence that is newly discovered by those who may not have access to legal materials and may not have the skills to prepare a petition on their own. Another suggested change would conform the statute to current judicial precedent that allows DNA testing to convicts who confessed voluntarily or pled guilty.

The subcommittee on science was able to hear from:

- **Major Nancy Kovel**,⁵¹ Pennsylvania State Police, Director, Bureau of Forensic Services. Major Kovel discussed her bureau's accreditation, its services to law enforcement, preservation of evidence and DNA sampling.
- **Dr. Fred Fochtman**,⁵² Director and Chief Toxicologist at Allegheny County Office of the Medical Examiner, Forensic Laboratory Division. He discussed his division's accreditation, training, its services to law enforcement, and the preservation and admissibility of evidence.
- **Dr. Terry Melton**, President and CEO Mitotyping Technologies. She discussed accreditation, training and retention of evidence.

⁴⁹ An expert in criminal law and procedure, Professor Place is the author of *Pennsylvania Post Conviction Relief Act — Practice and Procedure*.

⁵⁰ Instead of a jurisdictional deadline, which is particularly inappropriate for proceedings that are typically initiated by *pro se* litigants when the defendant is not entitled to publicly funded counsel until after the petition has been filed.

⁵¹ Maj. Kovel has since retired from Pa. State Police. Syndi Guido directs the policy office at Pa. State Police and served as an advisor on the subcomm. on investigations but graciously assisted Maj. Kovel in providing information from the State Police to the subcomm. on sci.

⁵² Since speaking to the subcomm. on science, Dr. Fochtman became Dir. of the Wecht Inst. of Forensic Sci. & L. at Duquesne U. Sch. of L. and Dir. of the Forensic Sci. & L. Masters Program at Duquesne U.

- **Dr. Michael Rieders,**⁵³ Chairman of the Board of Directors of NMS Labs. He served as an advisor on the subcommittee on science and discussed accreditation, forensic research services and testing.

In addition to these presentations to the advisory committee, some similar presentations were made at successive, annual meetings of the Pennsylvania judiciary through Administrative Office of Pennsylvania Courts. In 2009, Dr. Kassin presented a full three-hour program on false confessions. In 2010, Jennifer E. Dysart,⁵⁴ The Honorable William R. Carpenter,⁵⁵ Bruce Godschalk,⁵⁶ and John T. Rago⁵⁷ gave presentations on eyewitness and victim identification issues as well as false confessions and their particular impact in the conviction of Godschalk. In the fall of 2010, presentations were made on custodial taping, false confessions and eyewitness identification practices at the Pennsylvania District Attorneys Association's executive committee conference in State College. These presentations were made by Dr. Kassin, Dr. Dysart, Andrew Vail, Judge Carpenter and John Rago.

In addition to the foregoing presentations and meetings, similar study commissions in California, Wisconsin, and North Carolina were consulted as was Dallas County District Attorney's Office, which established a Conviction Integrity Unit.⁵⁸ Additionally, in the summer of 2009, the chairmen of the advisory committee and subcommittees made a formal presentation at the National Conference of State Legislatures legislative summit in Philadelphia discussing wrongful convictions⁵⁹ and the committee's efforts to date. The national conference has been a source of policy information for the committee's efforts.

Subcommittee on Investigation

The subcommittee convened in person or by phone six times during 2007 through 2009. Three of the meetings were held jointly with the subcommittee on legal

⁵³ He is a Forensic Toxicologist and a licensed Laboratory Dir.

⁵⁴ Assoc. Professor at John Jay College of Crim. Just., The City U. of N.Y. Dr. Dysart is a nationally known expert on the psychology of eyewitness identification and memory science. She discussed this psychology and its application to eyewitness accounts of witnesses and victims in show ups, line-ups and photo arrays. Dr. Dysart is a frequent speaker and trainer for law enforcement agencies throughout the nation.

⁵⁵ Ct. of C.P., 38th Jud. Dist. (Montgomery Cnty., Pa.); he served as chairman of the subcomm. on legal representation.

⁵⁶ One of the 11 DNA exonerees in Pa., *infra* p. 237.

⁵⁷ Assoc. Professor of L. at Duquesne U. & founding Executive Dir. of Cyril H. Wecht Inst. of Sci. & L.; he served as chairman of the advisory comm.

⁵⁸ This unit "reviews and re-investigates legitimate post conviction claims of innocence" and "is the first of its kind in the" U.S. Dallas Cnty. Dist. Attorney's Office, <http://www.dallasda.com/>. It also prosecutes old cases if different or additional perpetrators are identified. *Id.*

⁵⁹ The summit discussed the causes of wrongful convictions and recommendations to reduce or eliminate practices leading to them.

representation. These meetings were lively, involving vigorous debate and afforded the members the opportunity to hear from several presenters, including nationally recognized researchers as well as experienced law enforcement individuals from different jurisdictions. As with the other subcommittees, this one did not share a unanimous perspective.

The work of the subcommittee was to evaluate:

- 1) The research on the causes of mistaken identifications and false confessions.⁶⁰
- 2) The remedies proposed to address these issues.
- 3) The efficacy of the remedies that have been adopted elsewhere.

Subcommittee on Legal Representation

In addition to the three meetings held jointly with the subcommittee on investigation, this subcommittee convened in person or by phone seven times during 2007 through 2009. Because the membership of this subcommittee along with the membership of the subcommittee on investigation was almost exclusively police or former police, current and former prosecutors and current and former defense attorneys, there was some overlap in the topics that they considered. This subcommittee divided into working groups to consider individual topics and report back to the subcommittee. This subcommittee did not unanimously support its proposals; for some topics, even the members of the working groups reporting back to the subcommittee disagreed. The topics were: eyewitness identification; confessions; adequacy of representation; postconviction relief; misconduct and other personnel issues; and, scientific and informant evidence.

Subcommittee on Redress

Most of the deliberations of the subcommittee on redress concerned the propriety and desirability of compensating exonerees via a statutorily claim against our Commonwealth. The *status quo* to claim compensation is via the common law action of malicious prosecution, which would likely preclude most exonerees' claims, or asserting a deprivation of civil rights under 42 U.S.C. § 1983, which would also preclude liability if there was no deprivation of these rights. Until all the proposals were circulated to the entire advisory committee, support for statutory compensation to exonerees who are actually innocent was almost unanimous in the subcommittee. The subcommittee also

⁶⁰ *Infra* pp. 21-127.

sought to extend to exonerees the same or similar transitional services for which unexonerated convicts are eligible when they leave prison. Finally, the subcommittee also developed a proposal to consider new reforms to prevent wrongful convictions and review subsequent exonerations to learn specific causes of those wrongful convictions. This subcommittee convened in person or by phone eight times during 2007 through 2009.

Subcommittee on Science

The subcommittee on science deliberated about the preservation of evidence, oversight of forensic services, training and accreditation of forensic laboratories. During its deliberations, this subcommittee consulted several forensic scientists and providers of forensic services. It surveyed both the judiciary and district attorneys to gather facts and opinions to better inform itself on the preservation of evidence and provision of forensic services. Partly because of the nature of the issues on which this subcommittee deliberated, its conferences were much less contentious than other subcommittees. As with the proposals generated from each of the other subcommittees, this subcommittee also did not unanimously support its proposals. This subcommittee convened in person or by phone 11 times during 2007 through 2009.

Organization of Report

This report is organized as follows. Research on eyewitness identification is related as are reforms in other jurisdictions and a summary of the proposals on this topic. Similarly, research on interrogations and false confessions is related as are reforms in other jurisdictions that electronically record interrogations and a summary of the proposals on this topic. These two topics were considered by the subcommittees on investigation and legal representation.

The subcommittee on legal representation discussed issues relating to postconviction relief, representation of indigent defendants, professional responsibility and informant witnesses. The discussion of these topics and the summary of the subcommittee's proposals are divided between two sections. The next two sections concern redress and science. They discuss the topics these subcommittees considered and summarize their proposals.

The full text of the proposals developed by the subcommittees appear in the section of proposals, which is followed by a section covering the costs to implement these proposals. Reforms elsewhere are summarized in the following section. The final third of this report contains appendices.

EYEWITNESS IDENTIFICATION

Mistaken Eyewitnesses are a Primary Cause of Wrongful Convictions

Eyewitness error and false confessions⁶¹ were a primary focus because of their significant role in wrongful convictions. Accordingly, a large portion of this report addresses the purported causes of investigational errors by analyzing the scientific research regarding the cause, corrective recommendations, efforts to implement these recommendations and their relative success.

Other causes of wrongful convictions have been recurrently found, but convictions based partly or completely on mistaken eyewitness identifications have been shown to comprise the vast majority of the DNA exoneration cases in the United States.⁶² As importantly, this reflects data for the past 100 years as almost every study of wrongful convictions confirms that roughly two-thirds or more involve eyewitness misidentification.

In an early 20th century study of wrongful convictions, the author described the problem of eyewitness identification:

Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused [T]he emotional balance of the victim or eyewitnesses is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. . . . How valueless are these identifications by the victim of a crime is indicated by the fact that in eight of these cases the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other⁶³

⁶¹ Of the first 273 DNA exonerations nationally, Innocence Project lists 66 of them in which a false confession or other admission contributed to the conviction. This represents almost ¼ of these cases. Of the 11 exonerations from our Commw., four are listed for a false confession or other admission as having contributed to the conviction. That number represents approximately 36% of these Pa. exonerations. Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 1, 2011).

⁶² Of these 273 exonerations, Innocence Project lists 198 of them in which eyewitness misidentification contributed to the conviction. This represents almost ¾ of these cases. Of the 11 exonerations from our Commw., nine are listed for eyewitness misidentification as having contributed to the conviction. That number represents more than 80% for these Pa. exonerations. *Id.*

⁶³ Borchard, *supra* note 24, at xiii.

Judge Frank elaborated on this work in the 1950s. His book studied 36 wrongful convictions and found mistaken eyewitnesses to be the leading cause of error.⁶⁴ Studies continued, including one published by a law review in 1987 that was later expanded and published as a book.⁶⁵

By far the most frequent cause of erroneous convictions in our catalogue of 350 cases was error by witnesses; more than half of the cases (193) involved errors of this sort. Sometimes such errors occurred in conjunction with other errors, but often they were the primary or even the sole cause of the wrongful conviction.⁶⁶

Governmental studies have shown the same. A study of the importance of DNA evidence as an adjudicatory tool made unquestionable the claim that eyewitnesses can misidentify culprits. “In all 28 cases, without the benefit of DNA evidence, the triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate.”⁶⁷ These findings are echoed in a 2002 report from Illinois, which concluded from its study of wrongful convictions that identified “several cases where there was a question about the viability or reliability of eyewitness evidence.”⁶⁸ A 2005 Canadian report contains an accumulation of scholarly and governmental studies and again confirms that mistaken eyewitnesses can and do lead to wrongful convictions (and, therefore, the continued freedom for the actual perpetrator).⁶⁹

More recently, the Innocence Project has identified contributing causes in the 273 DNA exonerations and almost $\frac{3}{4}$ of them were based partly or wholly on eyewitness misidentifications.⁷⁰ The percentage varies among sources but remains significant for other samples of wrongful convictions.⁷¹ Nationally, law enforcement has recognized this problem. The official publication of the International Association of Chiefs of Police reported on the phenomenon of wrongful convictions and emphasized the role eyewitness misidentification plays. “[T]he vast majority” of wrongful convictions “have followed clear, convincing testimony by sincere eyewitnesses, which, quite simply, turned out to be inaccurate.”⁷² In some cases of wrongful convictions, eyewitness testimony was the

⁶⁴ Jerome Frank & Barbara Frank, *Not Guilty* (1957).

⁶⁵ Michael L. Radelet et al., *In Spite of Innocence* (1992).

⁶⁶ Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 60 (1987).

⁶⁷ Edward J. Imwinkelried, *Foreword* to Nat’l Inst. of Just., U.S. Dep’t of Just., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* xiv (1996).

⁶⁸ George H. Ryan, Report of the Governor’s Commission on Capital Punishment 8 (2002).

⁶⁹ FPT Heads of Prosecutions Comm. Working Group, Can. Dep’t of Just., Report on the Prevention of Miscarriages of Justice 42 (2004).

⁷⁰ *Supra* note 62.

⁷¹ E.g., Nw. L. Bluhm Legal Clinic, False Confessions Study: Ill. Cases, <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/FalseConfessionsStudy.html> (last visited Feb. 18, 2011).

⁷² Peter Modaferrri et al., *When the Guilty Walk Free: The Role of Police in Preventing Wrongful Convictions*, The Police Chief (Oct. 2010), available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2212&issue_id=102010.

only incriminating evidence presented. In other cases of wrongful convictions, eyewitness testimony was supplemented with other incriminating evidence that was later discredited, such as visual comparison of hair.⁷³

Mistaken and false identifications can be made by different witnesses, whether an absolute stranger or an acquaintance. The ability to identify is often impeded by the criminal and the circumstances of the crime. Accordingly, police must be better trained to recognize which circumstances might increase the risk of mistaken identification, and investigative procedures must be improved to ensure use of the methods best suited to identify the correct perpetrator. Just as with other evidence collected, special care must also be taken so that eyewitness evidence is not subsequently contaminated.

Some Factors Affecting Eyewitness Identifications

Cross-Race Effect

It has been consistently shown that witnesses have greater difficulty identifying a person of another race than of the same race. This “cross-race effect” was one of the earliest causes of mistaken identification to be studied. It has been consistently shown to exist, though to varying degrees.

A number of recommendations have been made in literature regarding the cross-race effect, including:

- Increased number of fillers in other-race lineups
- Lineup constructed by a person of the same race as the suspect
- A blank lineup control procedure, in which a witness would first view a lineup without the suspect – if he did not identify anyone, he would be permitted to view the lineup containing the suspect
- Model jury instructions to warn jurors about the cross-race effect

Christian A. Meissner and John C. Brigham meta-analyzed⁷⁴ research relating to cross-race bias in 2001.⁷⁵ They observed that most researchers agree that the effect is “reliable across cultural and racial groups”, but that “little is known regarding variables

⁷³ Nat’l Inst. of Just., U.S. Dep’t of Just., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* xiv (1996).

⁷⁴ Meta-analysis is the statistical analysis of a collection of individual studies.

⁷⁵ Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol., Pub. Pol’y, & L. 3 (2001).

that might moderate the effect.”⁷⁶ Racial attitudes and physiognomic homogeneity⁷⁷ appear unrelated to memory performance,⁷⁸ whereas interracial contact is seen to be somewhat related.⁷⁹ Among their findings was a pattern in which identifications of other-race faces show lower hits and higher false identifications than those of same-race faces.⁸⁰ If the amount of study time [of the photos] is reduced, the cross-racial effect is increased. Lengthening the time between the observation of the photo and the memory test increased the effect; whites were more likely to demonstrate the effect.⁸¹ They concluded that the effect of racial attitudes had diminished over the previous 30 years, as the effects of interracial contact had increased.⁸²

Siegfried Ludwig Sporer proposed an integrated theory to explain the cross-race effect.⁸³ He noted some researchers have suggested that the cross-race effect may consist not only of a cross-race recognition problem, but a “response bias”, *i.e.*, a witness is more likely to indict a person not of his own race as the culprit, whether or not the person was seen at the crime scene. After reviewing multiple studies, he concluded that the cross-race effect is robust, and that evidence exists to support the theory of a “response bias.”

Dr. Wells and Elizabeth A. Olson reviewed the issue of Psychology, Public Policy and Law that contained the articles by Drs. Meissner, Brigham and Sporer and recommended eyewitness procedures that would ameliorate the cross-race effect, which they define as the following: “Eyewitnesses are less likely to misidentify someone of their own race than they are to misidentify someone of another race.”⁸⁴ The authors argued that the cross-race effect has been proven to exist, although the strength of it may vary, based on a number of modifying facts, including social contact, distinctive features, the extent of delay or time lapse between the crime and the lineup. While not objectionable, expert testimony on the subject would be costly and ineffective. Procedural changes can be made that would prevent mistaken identifications on the basis of the cross-race effect. These changes would attempt to prevent or minimize the cross-race effect, rather than try to correct its causes.

The New Jersey Supreme Court discussed the cross-race effect, and concluded that a model jury instruction should be drafted to address it.⁸⁵ It stated that the instruction should be given only when identification is a critical issue in the case, and there is no

⁷⁶ *Id.* at 4.

⁷⁷ The hypothesis that some groups show less variation in physical facial features within the group than other groups.

⁷⁸ Meissner & Brigham, *supra* note 75, at 7.

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 15.

⁸¹ *Id.* at 19-20.

⁸² *Id.* at 20-21.

⁸³ Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 Psychol., Pub. Pol’y, & L. 36 (2001).

⁸⁴ Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psychol., Pub. Pol’y & L. 230 (2001).

⁸⁵ *State v. Cromedy*, 727 A.2d 457, 468 (N.J. 1999).

corroborating evidence to bolster its reliability.⁸⁶ The court also stated that expert testimony on this subject would not assist a jury and therefore would be inadmissible.⁸⁷ The Model Jury Charge Committee included the following statement in New Jersey's model jury instructions, known as the *Cromedy* instruction:

The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.⁸⁸

In 2007, the New Jersey Supreme Court refused to extend this instruction to "cross-ethnic" identifications.⁸⁹ "[S]tudies do not provide substantial support for defendant's claim that a *Cromedy* jury instruction must be administered when a cross-ethnic identification is involved."⁹⁰

Ebbe B. Ebbesen and Vladimir J. Konečni suggested that the outcomes of testing of the cross-racial effect are less consistent than experts report, that the effect is small, and that the size of the effect may depend upon the witness's experience with the other racial group.⁹¹ They argued that the cross-race effect does not make cross-racial identifications inaccurate, but that they are "less accurate than within-race identifications."⁹²

Stress

Kenneth A. Deffenbacher and others meta-analyzed the effect of high stress on eyewitness memory in 2004.⁹³ They reviewed 27 independent tests of the effect of stress

⁸⁶ *Id.* at 467.

⁸⁷ *Id.* at 468.

⁸⁸ Model Jury Charge (Crim.), Identification: Out-of-Court Identification Only, available at <http://www.judiciary.state.nj.us/criminal/charges/non2c031.pdf>; Model Jury Charge (Crim.), Identification: In-Court and Out-of-Court Identifications, available at www.judiciary.state.nj.us/criminal/charges/non2c032.pdf.

⁸⁹ *State v. Romero*, 922 A.2d. 693, 701 (N.J. 2007). (Hispanic defendant and a Caucasian witness, *id.* at 695.)

⁹⁰ *Id.* at 700.

⁹¹ Ebbe B. Ebbesen & Vladimir J. Konečni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, 5 Expert Evidence 2, 16 (1996). Citing a survey of scores of cognitive and social psychologists published a decade ago, N.J. Sup. Ct. related that 90% or more found research on eight eyewitness testimonial topics to be reliable, and 70-87% of the same experts found research on nine more of these topics to be reliable. *State v. Henderson*, (A-8-08) (062218) 91 (N.J. 2011) (citations omitted). This sup. ct. ruling finds "the scientific evidence . . . both reliable and useful." *Id.* at 103. It further stated that "consensus exists . . . within the broader research community." *Id.* If so, Dr. Ebbesen would represent the minority view on a number of these topics.

⁹² *Id.*

⁹³ Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Human Behav. 687 (2004).

on identification of perpetrators and “36 tests of eyewitness recall of details associated with the crime.”⁹⁴ They noted that the research over the prior 30 years on the effects of heightened stress on eyewitness memory did not produce a consistent result.⁹⁵ The authors concluded that in experiments calculated to produce defensive responses to stimulating conditions, high levels of stress diminish the accuracy of eyewitness identification in target-present lineups.⁹⁶ Stress had no significant effect on correct rejection rates (not identifying anyone in a target absent lineup) or false alarm rates (mistakenly identifying an innocent person from a target absent lineup).⁹⁷ In sum, if the perpetrator is not in the lineup, stress should have no impact on the likelihood of a mistaken identification. However, if the perpetrator is included in the lineup, high stress can result in a failure to identify the guilty culprit or a mistaken identification of an innocent person. High stress affects the accuracy of eyewitness recall for crime-related details and seems to have a much greater negative impact on interrogative recall than on narrative or free recall.⁹⁸ They pointed out, however, that personality type can cause significant variability in the effect of stress on accuracy: neurotics lost accuracy as stress increased while emotionally stable persons showed an increased level of accuracy as stress levels increased.⁹⁹ The level of violence involved in the crime observed also varies the effect of stress.¹⁰⁰

Charles A. Morgan III and others studied 509 “active-duty military personnel enrolled in military survival school training” to assess “accuracy of suspect recognition after high-stress and low-stress interrogation”.¹⁰¹ In either photograph displays or live line-ups conducted twenty-four hours after release from prisoner of war camp, high-stress interrogations produced accurate identification rates that were less than half of the low-stress interrogations; perhaps more significantly, the rate of mistaken identifications substantially increased in the high-stress cases.¹⁰²

Contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 min, a large number of subjects in this study were unable to correctly identify their perpetrator. These data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error. . . . All

⁹⁴ *Id.*

⁹⁵ *Id.* at 689.

⁹⁶ *Id.* at 699-700.

⁹⁷ *Id.* at 701.

⁹⁸ *Id.* at 703-04.

⁹⁹ *Id.* at 703.

¹⁰⁰ *Id.*

¹⁰¹ Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered during Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265, 266-67 (2004).

¹⁰² *Id.* at 269, 272. The percentages of mistaken identifications were almost one-third higher for live line-ups and more than four-fifths higher for photo-spreads. *Id.* at 272.

professionals would do well to remember that a large number of healthy individuals may not be able to correctly identify suspects associated with highly stressful, compared to moderately stressful, events.¹⁰³

Drs. Ebbesen and Konečni related that studies of the relationship between stress and memory are inconsistent, in that multiple variables may affect stress levels, and different types of stress may affect persons differently.¹⁰⁴ They rejected the notion that stress follows an inverted U curve, with high and low level stress producing poorer results than medium level stress.¹⁰⁵ Drs. Wells's and Olson's 2003 article found that the effects of stress on memory were still subject to debate.¹⁰⁶

Weapons Focus

The weapons focal effect was identified in early research. In an early meta-analysis of 19 sets of data testing involving 2,082 subjects, all from studies available prior to March 1991, Nancy Mehrkens Steblay found that weapons presence had a small, but consistent, negative effect on lineup identification accuracy.¹⁰⁷ The author stated that this effect is increased by longer intervals between the event witnessed and the lineup and also noted that high arousal (*e.g.*, fear) and focus of attention could accentuate the effect.¹⁰⁸

The 2003 study by Dr. Wells and Olson recognized studies supporting the weapons-focus effect but added that the stress accompanying a display of a weapon by the culprit can complicate the effect.¹⁰⁹ A 2006 FBI study found that police officers involved in violent encounters are often affected by weapons focus, a few severely enough to experience dissociative symptoms.¹¹⁰ Some officers reported visual and auditory distortions when they were victims of armed assault.¹¹¹ The report added that training and experience might help police officers overcome such a response.¹¹²

Lorraine Hope and Daniel Wright studied to determine if the weapons effect could be accounted for by stimulus novelty and an associated reduction in attentional capacity.¹¹³ While the authors concluded that the novelty or unusualness of the presence of a weapon could distract attention away from the culprit's appearance and other

¹⁰³ *Id.* at 274, 277.

¹⁰⁴ Ebbesen & Konečni, *supra* note 91, at 8.

¹⁰⁵ *Id.* at 10.

¹⁰⁶ Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 282 (2003).

¹⁰⁷ Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Human Behav. 413 (1992).

¹⁰⁸ *Id.* at 421-22.

¹⁰⁹ Wells & Olson, *supra* note 106.

¹¹⁰ Crim. Just. Info. Servs. Div., U.S. Dep't of Just., *Violent Encounters: A Study of Felonious Assaults on Our Nation's Law Enforcement Officers* 70-72 (2006).

¹¹¹ *Id.* at 67-69.

¹¹² *Id.* at 75-76, 78.

¹¹³ Lorraine Hope & Daniel Wright, *Beyond Unusual? Examining the Role of Attention in the Weapon Focus Effect*, 21 Applied Cognitive Psychol. 951 (2007).

peripheral activities, they suggested that it was simplistic to assign novelty as the sole cause of weapons focus.¹¹⁴ Other factors, such as fear and the role a weapon may play in the individual's recognition of the event involving the weapon, could help account for the weapon focal effect.¹¹⁵

Drs. Ebbesen and Konečni challenged studies that conclude a weapons focus can detract from the witness's ability to identify the culprit.¹¹⁶ "[A]n agreed-upon theory for a weapon focus effect does not exist."¹¹⁷ They cautioned that the effect appears to diminish if the encounter is of a longer duration, and that studies have not quantified the duration necessary to see the drop-off occur.¹¹⁸ They asserted that additional studies are needed to determine the accuracy of witnesses who said they looked at the weapon and those who looked at the perpetrator despite the presence of a weapon.¹¹⁹

Response Latency, Eyewitness Memory Strength, Retention Interval and the Forgetting Curve

To test the accuracy of an eyewitness's memory, the witness's memory strength and retention interval must be examined. The forgetting curve represents the strength of the face recognition memory over the retention interval.¹²⁰ Dr. Deffenbacher and others meta-analyzed "the effects of retention interval on the strength of a witness's memory representation for the once-seen face."¹²¹ Their analysis confirmed that there is an "association between longer retention intervals and decreased face recognition memory".¹²² They concluded that the "[r]ate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time."¹²³

Neil Brewer and others studied response latency, attempting to verify earlier studies that suggested that identifications made within the first 10 to 12 seconds of viewing resulted in highly accurate identifications.¹²⁴ The authors found that correct identifications, on average, were made faster than incorrect identifications, but that the time boundary between correct and incorrect identifications vary, and thus the 10-12 second rule is insufficient to determine accuracy of identifications. They demonstrated that two variables, retention interval and lineup size, contribute to the variability of the optimal time boundary.

¹¹⁴ *Id.* at 957-58.

¹¹⁵ *Id.* at 959.

¹¹⁶ Ebbesen & Konečni, *supra* note 91, at 12.

¹¹⁷ *Id.* (citation omitted).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139-40 (2008).

¹²¹ *Id.* at 140.

¹²² *Id.* at 147.

¹²³ *Id.* at 148.

¹²⁴ Neil Brewer et al., *Eyewitness Identification Accuracy and Response Latency*, 30 Law & Human Behav. 31 (2006).

Drs. Ebbesen and Konečni have suggested that retention interval varies greatly among individuals and is very easily influenced.¹²⁵ An implication that the culprit is present in a lineup sometimes influences the witness to pick someone.¹²⁶ “This analysis raises the possibility that accuracy results will depend not only on variables such as duration and retention interval but also on whether witnesses are given the opportunity to say, ‘I can’t remember,’ or even the opportunity to indicate that they are less than completely confident.”¹²⁷ The authors’ own simulation studies revealed a tendency among witnesses to overestimate short event durations.¹²⁸ They added that some research suggests that at exposure durations above two minutes witnesses might begin to underestimate durations.¹²⁹

Sex, Intelligence and Age

The sex of the witness does not affect the overall ability to identify a person, and little evidence has been found to suggest that intelligence is related to identification accuracy, except for very low intelligence.¹³⁰ No strong theory relating personality to identification accuracy has emerged. In contrast, age has consistently been found to affect performance, with the elderly and very young children doing poorer than younger adults.

A 1994 study found an own-sex bias, *i.e.*, women are better at identifying women and men are better at identifying men.¹³¹ A partial own-age bias has also been discussed.¹³² While not as strong as the cross-race effect, Daniel B. Wright and Joanne N. Stroud found that an own-age effect existed in their experiments: younger adults (ages 18-25) were better at identifying younger culprits and older adults (ages 35-55) were better at identifying older adults in lineups where the culprit is present, with an increased overall accuracy rate of 10%. When the authors tested their hypothesis against culprit-absent lineups, they found no same-age bias. “It appears that older witnesses will not be more likely than younger participants to identify an innocent young suspect, but they will be more likely to fail to identify a guilty young culprit.”¹³³

In a recent study of recognition memory, Matthew J. Sharps and others found that witness recall of perpetrator clothing was accurate 80.3% of the time, and that women were better than men at describing perpetrator clothing.¹³⁴ Witness recall of perpetrator

¹²⁵ Ebbesen & Konečni, *supra* note 91, at 7-8.

¹²⁶ *Id.* at 8.

¹²⁷ *Id.* (citation omitted).

¹²⁸ *Id.* at 16.

¹²⁹ *Id.* at 17.

¹³⁰ Equivalent to that of a young child.

¹³¹ Jerry I. Shaw & Paul Skolnick, *Sex Differences, Weapon Focus, and Eyewitness Reliability*, 134 J. Soc. Psychol. 413 (1994).

¹³² Daniel B. Wright & Joanne N. Stroud, *Age Differences in Lineup Identification Accuracy: People Are Better with Their Own Age*, 26 Law & Human Behav. 641 (2002).

¹³³ *Id.* at 652.

¹³⁴ Matthew J. Sharps et al., *Eyewitness Memory in Context: Toward a Systematic Understanding of Eyewitness Evidence*, Forensic Examiner 20 (Fall 2007).

physical characteristics had a 70.6% accuracy rate. Memory for weapons varied, with an overall accuracy rate of 68.9%, although in one test, even with ideal light and optimal exposure time, most witnesses mistook a power screwdriver for a gun. Identification of peripheral hazards was extremely poor.

Additional Factors

Many other factors have been researched in an attempt to determine what causes an eyewitness to misidentify someone, including:

- Confirmation bias/tunnel vision¹³⁵
- Passage of time since the encounter
- Duration of encounter
- Level of violence involved in encounter
- Physical circumstances of the encounter (darkness, awakened from sleep, lights in eyes)
- Perception, memory storage and recall of details – filtered by experiences, training, hopes, fears, expectations, biases, desires; self-preservation instinct, fight or flight instinct
- Time distortion
- Impact of emergency and trauma
- Information acquired after the encounter

The first fix for these variables is to make the police aware of their potential impact before deciding whether an eyewitness is accurate. At trial, these issues may occasion testimony from an expert or a jury instruction.

Proposals for change generally fall into four categories, but the major ones are procedural changes to investigations and training all the key actors in the criminal justice system on causes of error and best practices to prevent or minimize them.¹³⁶ Secondary issues involve the use of expert testimony and model jury instructions. In both the areas of eyewitness identifications and false confessions, the bulk of the reviewed recommendations are aimed at preserving the best evidence of the investigation prior to

¹³⁵ This issue will be discussed at greater length in the portion of this report relating to false confessions.

¹³⁶ See, e.g., Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. Crim. L. & Criminology 807-71 (Spring 2007).

commencement of any judicial proceeding. This section of the report will describe procedural changes and training, both crucial to the investigative stage of any criminal proceeding. Where relevant, recommendations for expert testimony and jury instructions will be discussed.

Research Techniques

The literature and research in these areas are primarily the work of experimental psychologists. Historically, two groups of studies comprise the majority of the research: experimental studies that stage eyewitness encounters (frequently using college students in the roles of witness and suspect) and archival studies that review actual cases. Many of the experimental studies have been reviewed in the literature using meta-analysis for which research studies are collected, coded and interpreted using statistical methods similar to those used in primary data analysis. The result is an integrated review of findings that is more objective and exact than a narrative review.¹³⁷ Field studies, a third type of study, have not been widely done, but more are underway now. Much debate has ensued in the literature as to the validity and utility of various methods¹³⁸ studying investigative procedures, and these concerns will be noted as well.

Eyewitness Identification Procedures: Best Practices

While there have been concerns and suggestions relating to how 9-1-1 calls are answered, how crime scenes are investigated and how witnesses are initially interviewed, the bulk of curative measures discussed in the literature relate to the conduct and structure of eyewitness identification procedures, including mug books or photoarrays, composites, field identifications (showups) or lineups. Within that group of identification procedures, lineups are the most frequently discussed.

Summary of Common Best Practices Recommendations

The following recommendations summarize those practices frequently cited as the best ways to prevent mistaken identifications. These recommendations can be statutorily mandated or implemented individually by law enforcement jurisdiction. Following this section is a section describing various surveys and guidelines to implement these

¹³⁷ Meta-Stat, The Meta-analysis of Research Studies, <http://echo.edres.org:8080/meta/> (last visited Feb. 18, 2011).

¹³⁸ Including ones in a laboratory, archival ones and those in the field.

recommendations, a section examining how states and other municipalities have adopted these recommendations, and a section that discusses the research and theory behind each individual recommendation.

Recommendation: State Police and all local and regional law enforcement agencies should adopt written eyewitness identification procedures and policies.

Recommendation: Written lineup procedures should include instructions on lineup composition: lineup fillers should match the description of the culprit, not the suspect; only one suspect should be included in each lineup; and, photo arrays and live lineups should include at least six persons.

Recommendation: Written lineup procedures should include pre-lineup instructions for the witness, including:

- The culprit might or might not be present
- The witness should not feel compelled to identify anyone
- The administrator does not know who the suspect is
- It is just as important to clear innocent persons from suspicion as to identify guilty parties
- The culprit may have changed his appearance (*e.g.*, head and facial hair)
- Police will continue to investigate regardless of whether an identification is made

Recommendation: Written eyewitness procedures should direct “blind” administration of the lineup (*i.e.*, done by one who does not know the identity of the suspect).

Recommendation: Written eyewitness procedures should direct police to obtain a statement of the witness’s confidence in the identification immediately after the identification.

Recommendation: Written eyewitness procedures should direct the lineup administrator to avoid providing the witness with any post-identification feedback prior to obtaining the witness’s confidence statement.

Recommendation: If a law enforcement agency chooses to use the sequential lineup method, the written procedures for this method should include the requirement of a blind administrator and a written record of the number of laps (views of the lineup) the witness uses. Also, the lineup should be presented in the same sequence on each lap.

Recommendation: The state should grant various municipalities funds to study simultaneous versus sequential lineup procedures in the field.

Recommendation: All law enforcement agencies should provide, and personnel should receive, training in their agency's written eyewitness procedures.

Recommendation: Additional training should be provided for defense counsel in capital cases.¹³⁹

Recommendation: Showups should follow specific procedures to avoid biasing an eyewitness.

Best Practices Recommendations: Models

Jurisdictions have been establishing formal lineup procedures since the 1960s.¹⁴⁰ In 1998, a Scientific Review Paper for the American Psychology/Law Society proposed best practices guidelines for lineups and photospreads.¹⁴¹ These recommendations were “based on psychological theory about human memory and social influence, scientific findings in eyewitness experiments, and the scientific logic of testing.”¹⁴² The recommendations relied heavily on relative-judgment theory, which holds that witnesses will pick the person in the lineup that looks most like the culprit compared to the other persons in the lineup.¹⁴³ The experimental data is comprised of studies where procedures for obtaining identifications are compared, and the logic of scientific testing analogizes a lineup to an experiment. In one well-known experiment, 200 eyewitnesses to a staged crime were shown either a lineup in which the culprit was present or a lineup where the culprit was removed and not replaced. In that experiment, 54% of the witnesses who viewed the culprit-present lineup picked the culprit from the lineup and 21% made no choice. Of the witnesses who viewed the culprit-absent lineup, only 32% made no choice, and the remainder chose a foil.¹⁴⁴ The leading studies showed that witnesses tend to behave as predicted by relative-judgment theory. These studies tested various procedural changes, including use of warnings that the culprit may not be present, foils similar to the description given by the witness, dual lineups (one with culprit included, one with culprit excluded) and sequential procedures.¹⁴⁵ When these various changes were tried, false identifications decreased again, supporting the relative judgment

¹³⁹ *Infra* p. 167.

¹⁴⁰ “The earliest set of published recommendations . . . is . . . found in a 1967 article” that “outlines a joint memorandum from the Offices of the District Attorney and the Public Defender in Clark County, Nevada directed to ‘all law enforcement agencies’ in the county.” Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Human Behav.* 603, 610 (1998).

¹⁴¹ *Id.*

¹⁴² *Id.* at 612-13.

¹⁴³ *Id.* at 613, 614.

¹⁴⁴ *Id.* at 614-15.

¹⁴⁵ *Id.* at 615-17.

account. However, these measures did not generally increase accurate identifications. By treating a lineup similarly to a scientific experiment that can be contaminated, these researchers could explore methods to prevent contamination.

In May 1998, the U.S. Department of Justice's National Institute of Justice established the Technical Working Group for Eyewitness Evidence to identify those investigative procedures that can best ensure the accuracy and reliability of eyewitness evidence.¹⁴⁶ The resultant guide for law enforcement

represents a combination of the best current, workable police practices and psychological research . . . This *Guide* assumes good faith by law enforcement . . . This *Guide* describes practices and procedures that, if consistently applied, will tend to increase the accuracy and reliability of eyewitness evidence, even though they cannot guarantee the accuracy (or inaccuracy) of a particular witness' testimony in a particular case. Adherence to these procedures can decrease the number of wrongful identifications and should help to ensure that reliable eyewitness evidence is given the weight it deserves in legal proceedings.¹⁴⁷

Research recommendations that were incorporated into this guide include directives to avoid influencing the eyewitness, either before or after the identification; obtaining certainty statements immediately after the identification; recording live lineups, either photographically and by video; use of fillers in lineups who match the description of the perpetrator rather than the suspect; and instructions to witnesses that the culprit may or may not be in the lineup. To further implement the recommended procedures found in the guide for law enforcement that it published four years earlier, National Institute of Justice published a special report¹⁴⁸ in 2003 that is a law enforcement trainer's manual containing lesson plans and training materials for eyewitness interviewing procedures and eyewitness identification procedures.

A 2000 survey of eyewitness experts by Dr. Kassin and others reinforced the guidelines by finding the following issues to be reliable and in accord with their 1989 study: wording of questions, lineup instructions, pre-event expectations, post-event information, the accuracy-confidence correlation; the forgetting curve; exposure time and

¹⁴⁶ Nat'l Inst. of Just., U.S. Dep't of Just., *Eyewitness Evidence: A Guide for Law Enforcement* 3 (1999) [hereinafter *Guide*]. The technical working group was composed of law enforcement representatives, prosecutors, defense counsel and academicians. *Id.* at v-vi. Six research members of the working group prepared a review of the development of eyewitness research and the process involved in developing these guidelines. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 Am. Psychologist 581 (2000).

¹⁴⁷ *Guide*, *supra* note 146, at 2.

¹⁴⁸ Nat'l Inst. of Just., U.S. Dep't of Just., *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003).

unconscious transference.¹⁴⁹ The authors found lesser consensus on effects of color perception in monochromatic light, training of observers, elevated levels of stress, accuracy of hypnotically refreshed testimony and event violence. Greater consensus was found on weapons focus and hypnotic suggestibility effects.¹⁵⁰

Thirteen “new” propositions were reviewed during the study, and the authors related that the following were viewed as reliable:

- 1) eyewitness confidence is malleable and susceptible to influence by factors unrelated to accuracy;
- 2) exposure to mug shots of a suspect increases the likelihood of selecting the same person in a subsequent lineup;
- 3) young children are more susceptible to suggestion and other social influences than adults;
- 4) alcohol impairs eyewitness performance;
- 5) eyewitnesses find it relatively difficult to identify members of a race other than their own; and
- 6) the risk of false identification is greater in simultaneous lineups than in sequential ones.¹⁵¹

Additionally, more than two-thirds of the experts agreed that identification accuracy is increased by the use of fillers who are a match to the witness’s description of the culprit.¹⁵² They rejected the notions that identification speed is predictive of accuracy, that true and false memories can be differentiated, or that traumatic memories can be repressed and then recovered.¹⁵³

¹⁴⁹ Saul M. Kassin et al., *On the ‘General Acceptance’ of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405 (2001). Questionnaires were sent to 186 prospective participants; 64 submitted data in usable form. They included individuals in the following areas: cognitive psychology (34), personality/social (17), child/developmental (6), and clinical/counseling (3). As to credentials, 62 had Ph.D.s in psychology (4 had also earned a J.D.). The authors noted that the actual respondents “constituted a highly prolific subgroup” with a mean of 17.98 publications for the respondents, versus a mean of 7.92 publications for all prospective participants. “It appears that the experts in our study could be described as a blue-ribbon group of leading researchers.” *Id.* at 407. The list of experts was drawn from the membership rosters of Am. Psychol.-L. Soc’y; Soc’y of Applied Research on Memory & Cognition and the attendee lists of the 1995 and 1997 Eur. Ass’n of Psychol. & Law biennial meetings. Also used was a PsycINFO search for individuals who had published an article, book chapter or other paper on eyewitness identifications during the previous ten years and a list of names of eyewitness experts was solicited from subscribers to the PSYCHLAW listserve. *Id.*

¹⁵⁰ *Id.* at 413-14.

¹⁵¹ *Id.* at 410-11.

¹⁵² *Id.* at 411.

¹⁵³ *Id.*

In 2003, Dr. Wells and Olson reviewed major developments in experimental literature concerning various factors that can impact the accuracy of eyewitness identifications, including factors that relate to characteristics of the witness, the witnessed event, testimony of the witness, the lineup content, the lineup instructions and methods of testing.¹⁵⁴ Among the problems with the literature were “a relative paucity of theory and the scarcity of base-rate information from actual cases.”¹⁵⁵ They opined that while information about estimator variables may be useful for assessing the chances of mistaken identification after the fact, system variable information can help determine how eyewitness identification errors can be prevented in the first place, supporting the notion that improvements in the investigative process can proactively prevent mistaken identifications from occurring.

Also in 2003, Steven Penrod reviewed research on police identification procedures to evaluate the effectiveness of police and witnesses in eyewitness identifications.¹⁵⁶ He determined that a number of variables could affect the rate of mistaken identifications, including witnesses who identify the suspect by guessing and the construction of the lineup. He advocated the following procedural changes: use larger lineups; use blind presentation; give strong cautionary instructions; match foils to the description of the perpetrator; collect confidence judgments; sequentially present the lineup one person at a time; and use lineups “only when there is a reasonably strong likelihood the suspect is the perpetrator.”¹⁵⁷

John Turtle and others attempted to summarize best practice recommendations for collecting and preserving evidence using eyewitness procedures geared toward maximizing accurate eyewitness identifications while minimizing inaccurate ones.¹⁵⁸ These recommendations were supported by over 20 years of research and are consistent with the National Institute of Justice’s 1999 guide.¹⁵⁹ They recommended that police should select lineup fillers who match the description of the perpetrator as given by the witness, as long as the suspect does not unduly stand out.¹⁶⁰ If witness descriptions differ sufficiently, it may be prudent to use a different lineup for each witness.¹⁶¹ Before the lineup, the witness should be instructed that the culprit may not be present in the lineup, and after the lineup, the investigator should obtain the witness’s statement of certainty.¹⁶² The authors advocate blind, sequential lineups.¹⁶³ “Blind” could mean that the lineup

¹⁵⁴ Wells & Olson, *supra* note 106, at 277. Dr. Wells distinguished between estimator (relating to the witness & event) and system (relating to investigative procedures) variables in eyewitness identifications in earlier writings.

¹⁵⁵ *Id.*

¹⁵⁶ Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?* 18 Crim. Just. 36 (2003), available at http://www.americanbar.org/publications/criminal_justice_section_newsletter_home/crimjust_spring2003_eyewitness.html.

¹⁵⁷ *Id.*

¹⁵⁸ John Turtle et al., *Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, Canadian J. Police & Sec. Servs. 5 (Mar. 2003).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 9-10.

¹⁶¹ *Id.* at 11.

¹⁶² *Id.* at 11-12.

¹⁶³ *Id.* at 12-15.

administrator does not know which one is suspected or that the administrator cannot see (in the case of a photo lineup) the lineup while the witness is viewing it.¹⁶⁴ The authors list four situations in which sequential lineups may give less accurate results than simultaneous ones, and as such, they do not recommend using sequential lineups in those situations: the witness is a child under the age of 10; the suspect does not match the original description by the witness on a central detail; there are multiple perpetrators; and, cases of cross-racial identifications, as the ability of a witness to accurately identify a person of a different race does not improve with the use of a sequential procedure.¹⁶⁵

In 2003, a survey was sent to police departments in 500 jurisdictions of various population sizes across the United States.¹⁶⁶ Of these, 220 surveys were returned; smaller cities and counties had the lowest return rate.¹⁶⁷ Most of the lineups in the survey were photographic, although the largest cities conducted more live lineups than the other jurisdictions.¹⁶⁸ The mean number of photographs in a photo lineup was 6.5.¹⁶⁹ Most of the respondents reported usually placing suspects in the middle of lineups.¹⁷⁰ Both sequential and simultaneous lineups were used, although overall use of sequential lineups was small.¹⁷¹ Eighty-three percent of the officers selected foils on the basis of similarity to the suspect,¹⁷² and 94% stated that they used their own judgment to determine if the lineup was fair.¹⁷³ The suspect's attorney is not present at the lineup approximately 50% of the time.¹⁷⁴ With regard to pre- and post-lineup instructions, 52% stated that witnesses are told that they don't have to choose anyone; 20% warn that the culprit's appearance may have changed; 26% tell witnesses to select only if they are sure; 95% say they give witnesses the option of not selecting anyone; and 86% obtain a confidence assessment.¹⁷⁵

The U.S. Department of Justice's Office of Community Oriented Policing Services and Police Executive Research Forum held conferences in 2006, intended to promote effective homicide investigations.¹⁷⁶ The resultant report recommended law enforcement agencies to examine their current policies and compare them to the following procedures to determine if they are appropriate for their agencies:

- Instructions—All eyewitnesses should be told that the culprit may or may not be present in the lineup.

¹⁶⁴ *Id.* at 13-14.

¹⁶⁵ *Id.* at 14-15.

¹⁶⁶ Michael S. Wogalter et al., *A National Survey of U.S. Police on Preparation and Conduct of Identification Lineups*, 10 *Psychol., Crime & L.* 69, 70-71 (2004).

¹⁶⁷ *Id.* at 71.

¹⁶⁸ *Id.* at 71-72.

¹⁶⁹ *Id.* at 72.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 73.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 74.

¹⁷⁶ James M. Cronin et al., *Promoting Effective Homicide Investigations 1* (2007), available at <http://www.cops.usdoj.gov/files/RIC/Publications/promoting%20effective%20homicide%20investigations.pdf>.

- Double blind—Lineups should be administered by law enforcement personnel who do not know the identity of the culprit. Although implementing double-blind lineups may create operational challenges, many departments have overcome those challenges.
- One suspect per lineup—A lineup should include only one suspect.
- Number of lineup members—At least six photographs should be used in any photo array, and six persons in any live lineup.
- Sequential—To the extent possible, photographs and live lineup members should be presented sequentially to eyewitnesses.
- Number of viewings—Eyewitnesses should be limited to no more than two cycles (laps) when viewing photographs, and the photographs should be presented in the same order. The lineup administrator should record the results of each lap.
- Witness statements—Witnesses should not be coached in any manner, and any statements should be in the witnesses' own words.
- Lineup reports—Agencies should develop and use more complete lineup reports. Many agencies simply use “identification” or “no identification” in their reports. Agencies should require more specificity about the selection (*e.g.*, suspect, filler, no choice, and all members excluded), as well as level of eyewitness confidence and speed with which the identification was made, if applicable.
- Training—Investigators need training in, and written instructions for, carrying out new procedures.
- Computers—Agencies should consider using computers to arrange photo arrays, if possible.¹⁷⁷

A group of researchers presented a set of recommended procedures regarding eyewitness evidence, “based on a review of current psychological literature and two guides developed for law enforcement agencies by the National Institute for Justice” from 1999 and 2003, which “are generally accepted in the field.”¹⁷⁸ Kimberly MacLin and others suggested that investigators review certain witness and crime scene characteristics to determine the quality and accuracy of a witness’s memory as follows: determine if a weapon was used; determine if the witness was under a high level of stress during the

¹⁷⁷ *Id.* at 55, 59.

¹⁷⁸ M. Kimberly MacLin et al., *The Science of Collecting Eyewitness Evidence: Recommendations and the Argument for Collaborative Efforts between Researchers and Law Enforcement* 5, available at http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1030&context=christian_meissner.

event and when the stress occurred; note the race of the witness and the perpetrator; determine how much time elapsed since the crime occurred; and evaluate and note the factors that may have affected the witness's view of the perpetrator.¹⁷⁹ When interviewing the witness, they suggested: separation of multiple witnesses to guard against influence and contamination; establishment of rapport; using open-ended questions (and avoidance of leading questions); allowing witnesses to control the direction of the interview; interviewing slowly; reinstatement of the context of the original event by returning to the scene or asking the witness to imagine being there; and cautioning witnesses against guessing.¹⁸⁰

For lineup construction, they recommended: one suspect per lineup; fillers matching the verbal description of the perpetrator provided by the witness; attempt to create a "reasonable" test of the witness's memory; and selection of a person of the same race or ethnic background as the suspect to construct the lineup.¹⁸¹ While administering the lineup, they advised: pre-lineup instructions to the witness that the perpetrator may not be present; that it is permissible to respond "I don't know;" that it is as important to clear an innocent person as it is to identify a guilty one; that the offender may or may not be present at the lineup; and, that there is no obligation to identify anyone.¹⁸² They also advocated: obtaining and documenting a statement of certainty immediately following the identification; avoidance of feedback; videotaping live lineups; and documenting photo lineups.¹⁸³ They further encouraged collaboration between researchers and law enforcement to test laboratory results in the field and develop training programs for those procedures found to be scientifically valid.¹⁸⁴

Best Practices and Other Reforms by State

Connecticut

Office of The Chief State's Attorney issued a protocol to Division of Criminal Justice and the law enforcement community in 2005 that incorporates double-blind procedures where practical. The protocol is taught at comprehensive and ongoing training programs that are mandated for police and other law enforcement officers. The Advisory Commission on Wrongful Convictions was statutorily directed to monitor and evaluate the implementation of double-blind administration.¹⁸⁵

¹⁷⁹ *Id.* at 5-6.

¹⁸⁰ *Id.* at 6-7.

¹⁸¹ *Id.* at 8.

¹⁸² *Id.*

¹⁸³ *Id.* at 8-9.

¹⁸⁴ *Id.* at 10.

¹⁸⁵ Appendix D, *infra* p. 263.

Florida

In 2010, Florida's Supreme Court established its innocence commission to study ways to prevent wrongful convictions, covering the topics included in this report. In an interim report issued in June 2011, the commission issued standards for state and local law enforcement to administer photographic and live lineups. Each law enforcement agency is to establish its own written policy conforming to the commission's standards. Policies must be in place and filed with the local state's attorney's office by November 1, 2011. A final report covering the remaining topics is due in 2012.

Georgia

Representative Stephanie Stuckey Benfield was the prime sponsor of Georgia House Resolution 352 (2007), which established the House Study Committee on Eyewitness Identification Procedures. The study committee reported to the General Assembly in January 2008 and recommended enactment of a statute mandating that law enforcement agencies create written eyewitness identification policies, and passage of a resolution detailing procedures that should be incorporated into policies, including: blind administration where possible; one suspect per lineup; confidence assessments; fillers matching the description of the perpetrator; specific instructions to the witness; and documentation of the results of the identification procedure. Legislation introduced to implement these reforms failed, but all of the interested law enforcement agencies met with legislators and agreed that law enforcement should be given the opportunity to address the issue. In response, the Georgia Public Safety Training Center of the Georgia Police Academy developed a training program, which was approved by the Georgia Peace Officer Standards and Training Council for their member agencies in 2008.¹⁸⁶

Illinois

In 2003, Illinois enacted lineup reforms with these mandates:

- Record all lineups
- Disclose all photospreads and lineup photographs to defense during discovery
- Require the eyewitness to acknowledge that the suspect may not be in the lineup and that the witness does not need to make an identification
- Instruct the witness that the administrator may not know who is suspected
- Present suspects in a way that does not make them stand out¹⁸⁷

¹⁸⁶ *Id.*

¹⁸⁷ 725 Ill. Comp. Stat. 5/107A-5.

Maryland

In 2007, Maryland enacted a statute requiring law enforcement agencies to adopt written policies relating to eyewitness identification that comply with U.S. Department of Justice standards. These written policies must be filed with Department of State Police, which is required to compile the policies for public inspection.¹⁸⁸

New Jersey

Unlike our Commonwealth, New Jersey's Attorney General has sole authority over all law enforcement personnel in that state so that he could issue "Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures."¹⁸⁹ These procedures are similar to the 1999 National Institute of Justice guidelines, with two significant additions: the blind administration of lineups and a preference for the use of sequential lineups wherever possible.

Additionally, the New Jersey Supreme Court mandated

that, as a condition to the admissibility of an out-of-court identification, law enforcement officers must make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results. . . . When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared.¹⁹⁰

Furthermore, the New Jersey Supreme Court has mandated a jury charge on the reliability and believability of eyewitness testimony for an out-of-court identification.¹⁹¹

Less than a month before publication of this report, New Jersey Supreme Court ruled to allow pretrial hearings to explore "relevant system and estimator variables . . . when there is some actual evidence of suggestiveness."¹⁹² System variables are blind administration, pre-identification instructions, lineup construction, feedback, recording confidence, multiple viewings, showups, private actors, other identifications made, etc.¹⁹³ Estimator variables are stress, weapon focus, duration, distance and lighting, witness characteristics, characteristics of perpetrator, memory decay, race-bias, opportunity to view the criminal at the time of the crime, degree of attention, accuracy of prior

¹⁸⁸ Md. Code, Pub. Safety § 3-506. Currently, 121 jurisdictions have filed their policies with the State Police, which only releases them via e-mail and limited to one police agency per e-mail.

¹⁸⁹ Available at <http://www.nj.gov/lps/dcj/agguide/photoid.pdf>.

¹⁹⁰ *State v. Delgado*, 902 A.2d 888, 897 (N.J. 2006).

¹⁹¹ *State v. Romero*, 922 A.2d 693, 702-03 (N.J. 2007); Model Jury Charge (Crim.), Identification: Out-of-Court Identification is available at <http://www.judiciary.state.nj.us/criminal/charges/non2c031.pdf>.

¹⁹² *State v. Henderson*, (A-8-08)(062218) 110-11 (N.J. 2011).

¹⁹³ *Id.* at 113-14.

description of the criminal, level of certainty demonstrated at the confrontation, the time between the crime and the confrontation, etc.¹⁹⁴ Of course, these pretrial hearings would determine admissibility of an identification. Once admitted, “courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.”¹⁹⁵ The ruling also allows for expert testimony “about the import and effect of certain variables” but not “on the credibility of a particular eyewitness.”¹⁹⁶

North Carolina

In 2007, North Carolina enacted the Eyewitness Identification Reform Act.¹⁹⁷ The statute requires blind administration and sequential presentation of lineups.¹⁹⁸ If sequential presentation is infeasible, use of a computer program or folder system is authorized.¹⁹⁹ Specific instructions to eyewitnesses viewing a lineup are detailed.²⁰⁰ Lineup fillers should match the description of the perpetrator while ensuring that the suspect does not stand out, and only one suspect should be included in each lineup.²⁰¹ A confidence statement should be obtained at the time of the identification,²⁰² and lineup procedures should be documented by video, audio or in writing (in that order of preference).²⁰³

Ohio

Ohio’s recently enacted criminal procedural reform adopts eyewitness identification reforms.²⁰⁴ Both blind and blinded lineup administrators are called for, and a folder system for use of photo arrays is detailed.²⁰⁵ Each witness views each folder individually.²⁰⁶ For each folder, the witness must state whether or not the picture is of the perpetrator and his confidence in that identification.²⁰⁷ A second viewing in the same order is permitted,²⁰⁸ and all procedures, including the source of the photos, must be documented.²⁰⁹ The statute requires criminal justice entities and law enforcement agencies to adopt specific procedures with the following minimum requirements:

¹⁹⁴ *Id.* at 115-17.

¹⁹⁵ *Id.* at 111. This directive is repeated, *id.* at 123.

¹⁹⁶ *Id.* at 125.

¹⁹⁷ N.C. Gen. Stat. §§ 15A-284.50 to -284.53.

¹⁹⁸ *Id.* § 15A-284.52(b).

¹⁹⁹ *Id.* § 15A-284.52(c).

²⁰⁰ *Id.* § 15A-284.52(b)(3).

²⁰¹ *Id.* § 15A-284.52(b)(5).

²⁰² *Id.* § 15A-284.52(b)(12).

²⁰³ *Id.* § 15A-284.52(b)(14).

²⁰⁴ Ohio Rev. Code § 2933.83.

²⁰⁵ The folder system is defined to use a suspect photo, five fillers and four blank folders. *Id.* § 2933.83(A)(6)(a).

²⁰⁶ *Id.* § 2933.83(A)(6)(f).

²⁰⁷ *Id.*

²⁰⁸ *Id.* § 2933.83(A)(6)(g).

²⁰⁹ *Id.* § 2933.83(A)(6)(h).

blind/blinded administrator (unless impractical); written record; witness to be informed that the perpetrator may or may not be in lineup and that administrator does not know which one is suspected.²¹⁰ In moving to suppress, failure to comply can be used as evidence to support any claim of eyewitness misidentification; failure to comply can also be included in a jury instruction.²¹¹ The statute affirmatively states that it does not prevent law enforcement agencies or criminal justice entities “from adopting other scientifically acceptable procedures . . . that the scientific community considers more effective.”²¹²

Rhode Island and Providence Plantation

A statutorily created task force unanimously recommended:²¹³

- A written policy relating to eyewitness identifications for every law enforcement agency
- Blind administration of lineups
- Use of at least five fillers who generally fit the description of the perpetrator and do not unduly stand out
- Instructions in the eyewitness’s most fluent language that the perpetrator might or might not be displayed and that there is no necessity to identify anyone displayed
- Immediate memorialization of the eyewitness’s confidence in his selection
- No feedback about the selection should be given to the eyewitness
- Strong consideration of the use of sequential lineups
- Documentation of the identification procedure
- Incorporation of these recommendations in training by Rhode Island Municipal Police Training Academy and training all law enforcement officers in the state accordingly

²¹⁰ *Id.* § 2933.83(B).

²¹¹ *Id.* § 2933.83(C).

²¹² *Id.* § 2933.83(D).

²¹³ Task Force to Identify & Recommend Policies & Procedures to Improve the Accuracy of Eyewitness Identification, Final Rep. 6-19 (2010).

Texas

Based on recommendations from Timothy Cole Advisory Panel on Wrongful Conviction,²¹⁴ Texas amended its Code of Criminal Procedure to require.²¹⁵

- Bill Blackwood Law Enforcement Management Institute of Texas to develop a model policy and disseminate training materials for eyewitness identification procedures based on best practices supported by credible research
- Law enforcement agencies to adopt a detailed, written policy for eyewitness identification procedures, which must be consistent with the B. Blackwood Law Enforcement Management Institute model or based on research addressing selection of fillers, instructions to witnesses, documentation of the outcome, administration to a person with a language deficiency and blind administration
- A review every other year of both the model policy and the policies adopted by each law enforcement agency and an update of them as appropriate

Vermont

Act No. 60 of 2007 established the Eyewitness Identification and Custodial Interrogation Recording Study Committee. The study is focused on eyewitness identification procedures for conducting lineups and audio and audiovisual recording of custodial interrogations. The committee reported that the Vermont Police Academy currently teaches enrollees the Innocence Project's recommendations to minimize the suggestibility of the lineup, and all full-time law enforcement officers are trained there.²¹⁶ Committee recommendations included the preferred use of sequential photo lineups, so long as they are coupled with blind administration.²¹⁷ If a live lineup is used, the committee recommends following the guide published by National Institute of Justice in 1999.²¹⁸

²¹⁴ This panel noted that erroneous eyewitness identification contributed to more than 80% of the wrongful convictions in Tex. and judicial remedies apply after potentially flawed eyewitness evidence has been presented to jurors. Timothy Cole Advisory Panel on Wrongful Convictions, Rep. to the Tex. Task Force on Indigent Defense ii, 5-6 (2010), available at http://www.courts.state.tx.us/tfid/pdf/FINALTCAP_report.pdf

²¹⁵ Tex. Code Crim. Proc. art. 38.20. Noncompliance with a policy won't necessarily bar admission because admissibility is controlled by Tex. R. Evid. *Id.*

²¹⁶ Rep. of the Eyewitness Identification & Custodial Interrogation Study Comm. (2007).

²¹⁷ *Id.* Fillers should match the perpetrator's description so that the suspect doesn't stand out. *Id.*

²¹⁸ *Id.* This guide doesn't mandate sequentially presenting potential suspects.

Virginia

In 2005, Virginia enacted a statute requiring Department of State Police and each local police department and sheriff's office to "establish a written policy and procedure for conducting in-person and photographic lineups."²¹⁹ Pursuant to Joint House Resolution 79 (2004), Virginia State Crime Commission studied and made recommendations regarding lineup procedures in 2005. A sample directive²²⁰ was produced, advising law enforcement to: avoid suggestiveness; train personnel to establish uniformity and consistency; confer with Commonwealth's Attorney to determine best use of lineups and best instructions to witnesses; use blind administration; use one suspect per identification procedure; select fillers to match the witness's description of the offender; ensure that the suspect does not stand out; document the procedure; use the sequential lineup procedure; permit a second look-through of the lineup; and, obtain a certainty assessment.

West Virginia

In 2007, West Virginia enacted the Eyewitness Identification Act.²²¹ The act established procedures and protocols for lineup administration, including: witness instructions;²²² certainty assessments;²²³ and, other documentation of the procedure and optional videotaping.²²⁴ A task force was created²²⁵ to develop guidelines for policies, procedures and training²²⁶ and report to standing legislative committees.²²⁷ Blind administration of lineups and simultaneous versus sequential lineups were among the practices to be considered.²²⁸ The Superintendent of State Police was authorized "to create educational materials and conduct training programs . . . how to conduct lineups in compliance with" this law.²²⁹

Wisconsin

Wisconsin's statute mandates that each law enforcement agency adopt written policies designed to reduce eyewitness mistakes.²³⁰ Law enforcement agencies must consider including the following specific policies: the person administering a lineup or photo array should not know the identity of the suspect; the use of sequential, not

²¹⁹ Va. Code § 19.2-390.02.

²²⁰ The sample directive was based in part on Va. Beach Police Dep't written policy, No. 10.08, "Eyewitness Identification Procedures" effective Nov. 15, 2002.

²²¹ W. Va. Code §§ 62-1E-1 to -1E-3.

²²² *Id.* § 62-1E-2(a).

²²³ *Id.* § 62-1E-2(b)(3).

²²⁴ *Id.* § 62-1E-2(b).

²²⁵ *Id.* § 62-1E-2(c).

²²⁶ *Id.* § 62-1E-2(d).

²²⁷ *Id.* § 62-1E-2(f).

²²⁸ *Id.* § 62-1E-2(e).

²²⁹ *Id.* § 62-1E-3.

²³⁰ Wis. Stat. § 175.50(2).

simultaneous, showings; minimization of influence of verbal or nonverbal reactions of the person administering a showing; and, documentation of the viewing procedure and results or outcome.²³¹

Discussion of Specific Recommendations for Lineups

Recommendation:

Lineup fillers should match the description of the culprit, not the suspect.

Research and reasoning:

In 1998, Dr. Wells and others recommended that the suspect not stand out as being different from the fillers based on the eyewitness's description of the culprit or "other factors that would draw extra attention to the suspect."²³² Fillers should match the description of the culprit that was given by the eyewitness rather than the appearance of the suspect.²³³ Where the description of the perpetrator given by the eyewitness does not fit the physical characteristics of the suspect, the fillers should be selected to match both the eyewitness's description and the suspect; where there is disagreement between the two on a specific item, they recommend use of the suspect's appearance.²³⁴ If there is more than one witness, and their descriptions differ, separate lineups should be done for each witness.²³⁵ Other than suggesting that six lineup members are not enough, the authors do not specifically recommend how many to have.²³⁶

Jennifer L. Tunnicliff and Steven E. Clark conducted two experiments to test whether suspect-matched or description-matched foil selection produced less false identifications.²³⁷ The first experiment staged a crime; police officers constructed the lineups, which were viewed two weeks after the staged crime. The second used student candid yearbook photographs as the "crime scene"; other college students constructed the lineups, using college yearbook graduation photographs, with the lineups viewed one week after the initial viewing of the candid photographs. Despite the differences between the two experiments, correct identifications rates were the same across both experiments and both types of foil selection. If foils are selected to be very similar to the suspect, correct identifications fall substantially. While false identifications rates were higher for description-based lineups, the rate of error was consistent across foil selection methods, and these rates were too low for statistical interpretation. They concluded that in multiple

²³¹ Id. § 175.50(5).

²³² Wells et al., *supra* note 140, at 630.

²³³ Id. at 632.

²³⁴ Id. at 632-33.

²³⁵ Id. at 634.

²³⁶ Id. at 634-35.

²³⁷ Jennifer L. Tunnicliff & Steven E. Clark, *Selecting Foils for Identification Lineups: Matching Suspects or Descriptions?*, 24 Law & Human Behav. 231-58 (2000).

eyewitness cases, description-matched lineups should be constructed to meet each witness's description. Correct rejections were higher for suspect-matched lineups. A major issue left to further research was the question of what is "similar enough." Wells and Olson's 2003 article suggested that creating lineups with fillers who fit the description of the culprit (rather than who look like the suspect) are less likely to result in mistaken identifications, although the former method is still subject to mistakes.²³⁸

In 2006, Dr. Wells outlined six recommendations to improve lineup administration.²³⁹ His first recommendation was to include only one suspect in each lineup, with known-innocent fillers completing the lineup.²⁴⁰ He also suggested that the suspect should not "stand out."²⁴¹ Selection of fillers is critical, and witnesses must be cautioned that the perpetrator may or may not be included in the lineup.²⁴²

Heather D. Flowe and Dr. Ebbesen studied to determine if similarity of lineup members influenced the witness's identification in simultaneous and sequential lineups.²⁴³ They predicted that fillers who are low in similarity to the culprit will lead witnesses to use a more liberal decision criterion, increasing the likelihood that a suspect who looks similar to the culprit will be identified as the culprit;²⁴⁴ conversely, the more similar all the lineup members are to the suspect, the less likely the suspect will be identified as the culprit in both simultaneous and sequential lineups.²⁴⁵ When a look-alike suspect who resembled the culprit was in a lineup with fillers who did not, the suspect was more likely to be chosen in both types of lineups. The rate of choosing any face was higher when the fillers were dissimilar to the culprit. When the culprit was present in the lineup, the makeup of the lineup had no effect on sequential lineups and a marginal effect on simultaneous lineups. Position in the lineup affected accuracy differently, depending on the degree of similarity of the fillers to the culprit. The authors recommended further study of this effect.²⁴⁶

Recommendation:

Give pre-lineup instructions, specifying that:

- The culprit might or might not be present
- The witness should not feel compelled to make any identification

²³⁸ Wells & Olson, *supra* note 106, at 287.

²³⁹ Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2 Wis. L. Rev. 615, 622-31 (2006).

²⁴⁰ *Id.* at 623.

²⁴¹ *Id.* at 623-24.

²⁴² *Id.* at 624-25.

²⁴³ Heather D. Flowe & Ebbe E. Ebbesen, *The Effect of Lineup Member Similarity on Recognition Accuracy in Simultaneous and Sequential Lineups*, 31 Law & Human Behav. 33-52 (2007), available at <http://psy2.ucsd.edu/~hflowe/similaritylhb06.pdf>, at 5.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 29.

²⁴⁶ *Id.* at 35.

- The administrator does not know which one is suspected
- It is just as important to clear innocent persons from suspicion as to identify guilty parties
- The culprit may have changed his appearance (*e.g.*, head and facial hair)
- Police will continue to investigate the incident regardless of whether an identification is made

Research and reasoning:

Nancy Mehrkens Steblay published a meta-analysis of the potential effects of lineup instructions in 1997.²⁴⁷ She found a significant negative effect on identification accuracy when “biased” instructions were given to the witness, such as a statement or strong implication that the culprit is in the lineup or a failure to offer the option of not choosing, especially in non-target lineups.²⁴⁸ Use of the recommended instruction “might or might not be present” reduced mistaken identification rates by 41.6% in lineups in which the culprit was removed, and accurate identifications rates in lineups in which the culprit was present were only reduced by 1.9%. This effect occurred across photo, live and video displays, with no difference between simultaneous and sequential lineups or after a time delay between witnessing event and identification procedure.

Dr. Wells and others reviewed studies indicating that a “might or might not be present” instruction to the eyewitness can reduce identifications when the culprit is absent from the lineup but has no impact when he is present in the lineup. In one study, 78% of the witnesses selected someone even though the culprit was absent from the lineup. When given the instruction that the culprit might not be in the lineup, the rate dropped to 33% false identifications. The instruction appears to have decreased, but not eliminated, the tendency of witnesses to pick someone, even if the culprit is not present. They recommended that eyewitnesses should be explicitly told that: the suspect might not be present in the lineup; they should not feel they must make any identification; and, the administrator does not know who is suspected.

Steve D. Charman and Dr. Wells questioned the wisdom of using the instruction that the culprit’s appearance may have changed since the time of the crime.²⁴⁹ They said that no research supported this instruction when it was earlier incorporated into guidelines that were given to law enforcement agencies;²⁵⁰ it appears to be based on the assumption that it may reduce missed identifications when the culprit is present in the

²⁴⁷ Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 Law & Human Behav. 283 (1997).

²⁴⁸ *Id.* at 294.

²⁴⁹ Steve D. Charman & Gary L. Wells, *Eyewitness Lineups: Is the Appearance-Change Instruction a Good Idea?*, 31 Law & Human Behav. 3 (2007).

²⁵⁰ *Id.* at 4.

lineup.²⁵¹ Although various proposed lineup improvements have been directed at reducing false identifications, “[n]o system-variable intervention has yet shown that it can reliably increase the rate of accurate identifications (reduce miss rates) from culprit-present lineups.”²⁵² The appearance-change instruction increased false identifications while significantly decreasing identifications of culprits in target-present lineups; overall, while more identifications were made, accuracy did not increase.²⁵³ Study participants reported less confidence in their choices, and took more time to make their choices when they received the appearance-change instruction.²⁵⁴

Kenneth A. Deffenbacher and others tested the hypothesis that familiarity gained by mug shot exposure to a previously unfamiliar face would influence a witness to identify that person as the culprit at a subsequent lineup, thus making the identifications less reliable.²⁵⁵ Based on prior research the authors concluded that “[d]issociations between recognition and awareness of context are common.” The reported results were consistent with their hypothesis. The effect of increasing false identifications was significantly greater than the loss of correct identifications.

Drs. Charman and Wells studied to determine if witnesses could recall and identify a pre-identification instruction that the culprit may or may not be in the lineup.²⁵⁶ The authors found that 82.5% of witnesses who received the cautionary instruction were able to recognize the receipt of the instruction, and 84.6% could identify the specific instruction received.²⁵⁷ The authors further found that witnesses who received the cautionary instruction underestimated its influence compared to those witnesses who did not receive the instruction but who accurately estimated its influence.²⁵⁸

Recommendation:

A “blind” administrator (*i.e.*, one who does not know the identity of the suspect) should administer the lineup.

Research and reasoning:

In 1998, Dr. Wells and others recommended that that the person conducting the lineup should not be aware of which member of the lineup is suspected (double-blind administration).²⁵⁹ At the time, the authors were unaware of any studies indicating that

²⁵¹ *Id.* at 5.

²⁵² *Id.* at 9.

²⁵³ *Id.* at 17-18.

²⁵⁴ *Id.* at 19.

²⁵⁵ Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 *Law & Human Behav.* 287 (2006).

²⁵⁶ Steve D. Charman & Gary L. Wells, *Can Eyewitnesses Correct for External Influences on Their Lineup Identifications? The Actual/Counterfactual Assessment Paradigm*, 14 *J. Experimental Psychol.: Applied* 5, 15 (2008).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 16-17.

²⁵⁹ Wells et al., *supra* note 140, at 627-29.

lineup administrators influenced identifications by eyewitnesses in actual cases but cited a case in which “there seems to be no other explanation” for the redundant selection of different persons that the administrator suspected.²⁶⁰ This recommendation was based on observations in experiments of certain behaviors by administrators that may unintentionally encourage false identifications, including: subconscious facial expressions and other non-verbal cues; remarks that direct the witness’s attention to the suspect; and, comments of positive reinforcement, *e.g.*, “you got him,” after the identification that can falsely enhance witness confidence.²⁶¹

In a 2004 article, Ryann M. Haw and Ronald P. Fisher noted that there is considerable police resistance to blind administration of lineups, on several grounds, including the implication that lineup administrators cannot conduct a fair lineup, concerns that inexperienced persons may conduct the lineup and the feasibility of doing so in small police departments.²⁶² Researchers are reluctant to endorse sequential lineups without blind administration, as they fear it would create a situation more susceptible to intentional and unintentional manipulation.²⁶³ They proposed an alternative technique that minimizes the contact between the administrator and the eyewitness, so that the administrator has limited opportunities to convey his knowledge or unintentional behavior.²⁶⁴ In this study, photo lineups were used.²⁶⁵ To minimize contact between the administrator and the witness, the authors conducted the experiment as follows: the administrator played recorded lineup instructions for the witness, then gave the witness written instructions, the photo array, and a decision form.²⁶⁶ The administrator sat in a chair 3-5 feet to the side and slightly behind the witness, out of the witness’s direct view.

The lineup administrator remained in the room and could view the witness to ensure that he or she followed the proper procedure; however, the witness could not see the administrator directly while performing the identification task. If the witness violated the procedure or asked a question, the lineup administrator would tell the witness to review the written instructions and follow the procedure.²⁶⁷

This study found that for simultaneous lineups there were more false identifications when there was a high level of contact (30%) than when there was a low level of contact (3%), while there was no difference for sequential lineups, suggesting that false identifications in simultaneous lineups could be reduced by the use of a low contact format.²⁶⁸ In lineups that do not contain the culprit, 18% choose the “I do not know” response in sequential lineups compared to the 5% who do so in simultaneous

²⁶⁰ *Id.* at 628.

²⁶¹ *Id.*

²⁶² Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110-11 (2004).

²⁶³ *Id.* at 1106.

²⁶⁴ *Id.* at 1107.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1108.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1108-09.

lineups,²⁶⁹ reinforcing the theory that sequential lineups produce fewer false identifications. Consistent with Dr. Steblay and others' 2001 findings, there was no significant difference in the number of correct identifications in either format (sequential v. simultaneous) or form of contact (high v. low). However, there were more misses (failure to identify the culprit when present in the lineup) in low contact situations (18%) versus high contact situations (7%).²⁷⁰ Unlike the tradeoff between sequential and simultaneous lineups found in Dr. Steblay and others' research, it appears that low contact administration yields less "false identifications with no apparent influence on hits."²⁷¹

Amy Bradfield Douglass and others endorsed double-blind photospreads and recommended that different investigators be used for each eyewitness in multiple eyewitness situations.²⁷² They studied the effect of an eyewitness's confidence on a photospread administrator who subsequently conducts a lineup for a second witness to the same event. The authors cited research indicating that photospread administrator bias affects sequential procedures and not simultaneous ones. The experiment was designed so that the photospread administrator did not know the identity of the suspect. Photospread administrators transmitted identification cues to the second eyewitness when the first eyewitness displayed low confidence in selecting a photograph. The authors hypothesized that a photospread administrator may perceive the identification by a witness with low confidence as difficult, and then subconsciously try to "help" the second witness with the difficult task. A second experiment further supported that interpretation.

Recommendation:

Immediately after an identification is made, a statement of the witness's confidence in the identification should be obtained.

Recommendation:

Prior to obtaining a statement of the witness's confidence in the identification, post-identification feedback should not be provided to the witness.

Research and reasoning:

These are two interrelated points. The first is that a witness's personal assessment of confidence²⁷³ is often an incorrect measure of accuracy. The second is that if a witness is told that he selected the right person, this might inflate the witness's confidence by the time of trial and cause the witness to remember more of the event than he can accurately do so. This section focuses first on the research on the latter point. In the 1998

²⁶⁹ *Id.* at 1109.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 1110.

²⁷² Amy Bradfield Douglass et al., *A Problem With Double-Blind Photospread Procedures: Photospread Administrators Use One Eyewitness's Confidence to Influence the Identification of Another Eyewitness*, 29 *Law & Human Behav.* 543 (2005).

²⁷³ How certain he is that the identification is accurate.

recommendations by Dr. Wells and others, they concluded that eyewitness confidence could be artificially increased with positive feedback about the witness's identification or information about other eyewitnesses' identifications.²⁷⁴

Amy L. Bradfield and others investigated the correlation between eyewitness certainty and identification accuracy.²⁷⁵ They too recognized that other factors, not under the control of the justice system, affect the strength of the certainty-accuracy relation; however, they identified variables affecting the certainty-accuracy relation that are under the control of the justice system and can be addressed through that system.²⁷⁶ Prior studies have shown that post-identification feedback inflates retrospective certainty reports.²⁷⁷ They concluded "[c]onfirming feedback diminished the strength of the relation between retrospective certainty and accuracy by inflating the retrospective certainty of inaccurate witnesses but not the retrospective certainty of accurate witnesses".²⁷⁸ Confirming feedback resulted in witnesses reporting "having a better view of the culprit, paying more attention to the video, having a better basis for the identification, more easily making their identification, being more willing to testify, and having a clearer image of the culprit's face in their mind".²⁷⁹ The test witnesses also reported that they had a better ability to make out details of the culprit's face.²⁸⁰ Feedback did not significantly affect reports on how long the test witnesses took to make their identifications "or their general ability to recognize strangers seen on only one prior occasion."²⁸¹ In view of the results, the authors made two procedural recommendations: double blind testing, in which the person administering the lineup does not know which person is suspected, or using other techniques that keep the investigating officer from influencing the witness;²⁸² and collection of certainty reports immediately after the identification, including information regarding recollections of view and attention paid.²⁸³

Dr. Wells and others studied the effect on witness' confidence in their identifications of delaying post-identification feedback or the confidence assessment, in each case, by 48 hours.²⁸⁴ Neither significantly moderated the post-identification feedback effect.²⁸⁵ The authors cautioned that feedback must therefore be avoided at the time of the identification and that the eyewitness's confidence should be assessed at that time as well; otherwise, other factors could influence the eyewitness's confidence after the fact.²⁸⁶ Confirming feedback also lead witnesses "to recall their view as having been

²⁷⁴ Wells et al., *supra* note 140, at 624-26.

²⁷⁵ 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 (2002).

²⁷⁶ *Id.* at 112-13, 114.

²⁷⁷ *Id.* at 113.

²⁷⁸ *Id.* at 116.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 118.

²⁸³ *Id.* at 119.

²⁸⁴ Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 J. Experimental Psychol.: Applied 42 (2003).

²⁸⁵ *Id.* at 42, 49.

²⁸⁶ *Id.* at 50, 51-52.

better, . . . having paid more attention . . . , having been better able to make out details of the culprit's face," and several other stronger clarity of recall effects.²⁸⁷ "[C]onfirming feedback leads eyewitnesses to be more willing to testify and report that they have good abilities to recognize strangers."²⁸⁸ The authors concluded:

The confidence that eyewitnesses express in their identifications is a primary determinant of whether triers of fact will believe that the identification was accurate We observed very strong effects of postidentification feedback not only on eyewitness confidence but also other factors that are known to affect the perceived credibility of eyewitness identification testimony, such as how good the witness says his . . . view was of the culprit and how much attention they were paying at the time [W]e found no support for the contention that either delayed feedback or delayed measures moderates these very strong effects. Recommendations for double-blind lineup procedures and securing confidence statements at the time of the identification (prior to feedback) appear to be well-founded.²⁸⁹

Drs. Douglass and Steblay meta-analyzed 14 experimental tests on the effects of post-identification feedback, which included 2,477 participant-witnesses.²⁹⁰ They found that a simple confirming feedback statement caused witnesses to "inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general", and that this effect is consistent and robust. Retrospective certainty, opportunity to view the perpetrator and attention paid to the event were significantly inflated. Participants reported that they had a significantly better basis to identify, greater clarity of the perpetrator's image in mind, greater ease of identification, needing less time to identify, better memory for strangers' faces and greater trust in the memory of another witness with a similar experience. Accordingly, they recommended: no feedback to the eyewitness on his identification; using a blind lineup administrator; thoroughly recording the lineup process; and, obtaining eyewitness reports, including confidence reports, immediately after the identification.²⁹¹

Jeffrey S. Neuschatz and others examined whether the effect of post-identification feedback on confidence could be minimized.²⁹² The first method they considered to reduce the effect was to create suspicion on the part of the witness as to the lineup administrator's motives, in an attempt to motivate them to scrutinize the feedback rather than accept it at face value. Their experiment revealed that the inflation of certainty caused by feedback is eliminated or significantly reduced with the introduction of

²⁸⁷ *Id.* at 50.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 51.

²⁹⁰ Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 *Applied Cognitive Psychol.* 859 (2006).

²⁹¹ *Id.*

²⁹² Jeffrey S. Neuschatz et al., *The Mitigating Effects of Suspicion on Post-Identification Feedback and on Retrospective Eyewitness Memory*, 31 *Law & Human Behav.* 231 (2007).

suspicion, either immediately or after a one-week retention interval. The second method studied was the “confidence prophylactic effect,” in which a post-identification confidence assessment is made prior to receipt of any feedback. The authors found that the confidence assessment was effective when made immediately after the identification, but was not after an interval of one week.

Drs. Charman and Wells studied to determine if witnesses could recall and identify any post-identification feedback they received, and if they were capable of assessing its impact on their confidence in their identifications.²⁹³ The authors found that 80.8% of witnesses who received confirming feedback were able to recognize the receipt of feedback,¹⁷² and 90.3% could identify the specific feedback received.²⁹⁴ They also found that witnesses who received feedback accurately estimated its influence compared to witnesses who did not receive the feedback but overestimated its influence.²⁹⁵

Concerning post-event information, Drs. Ebbesen and Konečni wrote that there is no consistent theory to predict “under what circumstances witnesses” will misattribute the source of a memory.²⁹⁶ Dr. Ebbesen later argued that for post-event misleading information studies to be generalized for use in expert testimony, it must be determined whether there are motivational differences between laboratory witnesses and real-world witnesses.²⁹⁷ For example, in a laboratory study, a witness may make a “true” memory error or may make a strategic error, often privately recalling correctly but publicly responding with the answer the individual believes the experimenter is seeking.²⁹⁸ A real-world witness may be reluctant to testify out of fear of retribution and make such a strategic error.²⁹⁹ Additional factors that may affect the impact of post-event information are the credibility or perceived expertise of the source, the strength of the witness’s original memory, and the similarity of the content of the original information and the misleading information.³⁰⁰

Various researchers have observed that the correlation between witnesses’ confidence in their identifications and the accuracy thereof is weak, and that conclusions about a witness’s accuracy should not be based on how confident the witness appears. Dr. Wells and others reviewed a number of studies and surveys and concluded that “there is a substantial, cross-cultural belief that confidence predicts accuracy.”³⁰¹ Studies involving mock juries have also indicated that juries are more likely to believe an eyewitness has made a correct identification if the eyewitness expresses a high level of

²⁹³ Charman & Wells, *supra* note 256.

¹⁷² *Id.* at 10.

²⁹⁴ *Id.* at 11.

²⁹⁵ *Id.* at 16.

²⁹⁶ Ebbesen & Konečni, *supra* note 91, at 2, 13.

²⁹⁷ Ebbe B. Ebbesen, *Why We Cannot Generalize Conclusions from Source Misattribution (or Misleading Post-Event Information) Studies to Actual Crime Situations* (draft in progress Sept. 2001), www.psy.ucsd.edu/~eebbesen/Misleading.html.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Wells et al., *supra* note 140, at 620.

confidence in it.³⁰² For these reasons, the authors argued that understanding the correlation between confidence and accuracy is extremely important in preventing wrongful convictions.³⁰³ They cited studies suggesting “that witnesses who are highly confident are somewhat more likely to be correct as compared to witnesses who express little confidence.”³⁰⁴ In some of the studies they reviewed, “findings indicate that, when limited to witnesses who make positive identifications, confidence appears to be a modest predictor of accuracy, whereas, among witnesses who reject lineups, confidence appears to be very weakly related to accuracy.” Other studies showed a weak correlation between accuracy and confidence. The authors said that this topic is ideal for meta-analysis, which had recently been done.³⁰⁵

Dr. Wells and others recommended that “[a] clear statement should be taken from the eyewitness at the time of the identification and prior to any feedback as to his or her confidence that the identified person is the actual culprit.”³⁰⁶ They suggested that a witness who shows a higher level of confidence at trial than at the time of identification might have been influenced by factors other than memory.³⁰⁷ In his 2006 law review article, Dr. Wells reiterated his support for assessing confidence immediately after the identification, arguing that “[j]urors have a right to expect that an eyewitness’s expression of confidence in an identification is based purely on the eyewitness’s independent recollection.”³⁰⁸

Drs. Ebbesen and Konečni argued that as to the confidence-accuracy correlation or lack thereof, an individual’s overall strength of memory for people and faces may be a more significant indicator of accuracy than other situational factors, and that the witnesses chosen to testify are usually those expressing the most confidence.³⁰⁹ Factors such “as racial similarity, stress, duration” and other factors should be “examined separately for” both “confident and non-confident identification responses.”³¹⁰ Dr. Ebbesen expressed misgivings about the efforts of experts to generalize research regarding the confidence-accuracy correlation.³¹¹ He argued that the underlying theory and methodology of most memory research fails to accurately assess the confidence-accuracy correlation.³¹² In a real-life situation, a defendant’s position that the witness identified the wrong person represents the proposition that the witness was presented with a target-absent lineup and chose an innocent suspect.³¹³ Some research in

³⁰² *Id.* at 620-21.

³⁰³ *Id.* at 621.

³⁰⁴ *Id.* at 622.

³⁰⁵ *Id.* at 621.

³⁰⁶ *Id.* at 635.

³⁰⁷ *Id.*

³⁰⁸ Wells, *supra* note 239, at 631.

³⁰⁹ Ebbesen & Konečni, *supra* note 91, at 14.

³¹⁰ *Id.*

³¹¹ Ebbe B. Ebbesen, *Some Thoughts about Generalizing the Role that Confidence Plays in the Accuracy of Eyewitness Memory* (Nov. 3, 2000), <http://psy2.ucsd.edu/~ebbesen/confidence.htm>.

³¹² *Id.*

³¹³ *Id.*

the late 1990s indicated that the confidence-accuracy correlation for witnesses who have identified someone is stronger than that for a witness who chose no one, and that conclusions about the confidence-accuracy relationship should focus on choosers only.³¹⁴

Dr. Ebbesen further argued that many variables may affect a witness's level of confidence, which is not considered in some memory research, such as situational factors, witness motivation and information.³¹⁵ His primary complaint appeared to involve the methodologies used in memory research and the way the research has been generalized.³¹⁶ He postulated that in actual settings, police and prosecutors tend to use only the most confident witnesses.³¹⁷ He added that studies should examine the other purported factors affecting the reliability of eyewitness identifications to determine what effect they have on a confident witness's memory.

[I]t is a mistake to believe that the results of research that is currently being done on eyewitness memory and confidence can help jurors or experts improve their ability to tell accurate from inaccurate witnesses. Fortunately, this is not a major problem because for the huge majority of cases, decisions about guilt are made on the basis of the totality of the evidence against the defendant and not on the size of the correlation between confidence and accuracy.³¹⁸

D. Steven Lindsay and others examined investigators' assessments of witness accuracy, which may influence subsequent investigative efforts, and evaluated the correlation between witness confidence and accuracy using college students to play the roles of investigators and witnesses.³¹⁹ They found that good witnessing conditions can lead to higher confidence and more accuracy, especially if the identification is made shortly after the witness views the target. Good witnessing conditions yield significantly more accurate identifications and higher self-confidence assessments; investigators' confidence overall, as well as in the witness's accuracy is significantly higher in good witnessing conditions but not in poor conditions. The investigators were biased toward believing witnesses to be accurate, as the investigators identified 22% less inaccurate identifications compared to accurate identifications. Based on these results, the authors supported the practice of obtaining confidence assessments from witnesses immediately after the identification.

Dr. Wells and Olson stated that conditions have been "found in which eyewitness certainty might be more closely related to eyewitness identification accuracy than once thought, especially when external influences on eyewitness certainty are minimized"

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* "[T]he legal system is likely to ignore witnesses whose confidence is weak. Although we have no research that assesses the average cutoff point used by the legal system" *Id.*

³¹⁸ *Id.*

³¹⁹ D. Stephen Lindsay et al., *Witnessing-Condition Heterogeneity and Witnesses' Versus Investigators' Confidence in the Accuracy of Witnesses' Identification Decisions*, 24 *Law & Human Behav.* 685 (2000).

(e.g., eliminating reinforcing feedback).³²⁰ They noted “recent” (pre-2003) studies that correlated speedier identifications with greater accuracy; one study had shown that an identification made within 10-12 seconds is 90% accurate compared to 50% accuracy for those taking longer to identify.³²¹

With respect to the relationship between confidence and accuracy, Bruce W. Behrman and Regina E. Richards compared an archival study to a similar laboratory study in 2005.³²² For the archival study, the authors reviewed case files from the Sacramento City Police Department and several northern California counties.³²³ They reviewed studies that have shown false identifications to be associated with more deliberative, reflective processes and a greater degree of cognitive effort than accurate memories and that accurate memories tend to be more automatic, with less conscious effort. The witnesses were divided into two groups: those who made a spontaneous choice with little cognitive effort and those who selected a person only after a more reflective process of comparison and elimination. A total of 461 identification attempts were analyzed; all were single suspect lineups and all were initial identification procedures (*i.e.*, the witnesses had not previously been exposed to an identification procedure with the same suspect). Accurate identifications were made quickly and automatically with verbal confidence and without elimination strategies. No witnesses made quick, false identifications. Attempting to confirm the findings of the archival study, the authors structured the laboratory study to replicate the archival study as closely as possible. They found remarkable similarity between the two studies. In both cases, witnesses with high levels of certainty or who made quick decisions without eliminative processes were unlikely to select an innocent person from a lineup. Their study also found that 2.5% of the witnesses who made a choice with high confidence selected an innocent foil.³²⁴

Neil Brewer and Dr. Wells researched the effects of lineup instructions and foil similarity on the confidence-accuracy relationship.³²⁵ They found a positive correlation between high confidence identifications and accuracy for persons who make identifications when there are unbiased instructions³²⁶ and when the confidence level is assessed immediately after the identification. They cautioned that this positive correlation should not be applied in courtroom situations. “[I]dentification confidence expressed in the courtroom (and not previously recorded at the time of the identification)

³²⁰ Wells & Olson, *supra* note 106, at 291.

³²¹ *Id.* at 284.

³²² Bruce W. Behrman & Regina E. Richards, *Suspect/Foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis*, 29 Law & Human Behav. 279 (2005).

³²³ Some of these cases were previously studied by Dr. Behrman and Sherrie L. Davey in an archival study, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 Law & Human Behav. 475, 479 (2001).

³²⁴ These were initial identifications, with confidence assessments obtained immediately after the identification procedure.

³²⁵ Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity and Target-absent Base Rates*, 12 J. Experimental Psychol.: Applied 11 (2006).

³²⁶ The perpetrator may or may not be present. *Id.* at 14, 16.

should be ignored.”³²⁷ The authors suggested that this correlation might be of value to the police investigative process, in that “knowing that an unconfident identification from a particular witness has, in many conditions, a low probability of being accurate should raise serious doubts about the offender’s identity in the minds of the investigating police.”³²⁸

Recommendation:

The Commonwealth should fund field studies by various municipalities of simultaneous versus sequential lineup procedures.³²⁹

Research and reasoning:

There have been numerous calls to adopt blind, sequential lineups as the preferred method of conducting lineups, which the research generally supports as capable of reducing the number of false identifications. Few field studies of this have been conducted. The first major study, which occurred in Illinois, is surrounded by controversy. A few other field studies have reported successful use of sequential lineups, but many researchers agree that further field studies are needed.

A great deal of the debate surrounding the use of sequential³³⁰ versus simultaneous³³¹ lineups involves the causes, strength and authenticity of the sequential effect. For the most part, laboratory studies have found that sequential lineups can reduce the number of false identifications in lineups in which the culprit is present, with a small degree of loss of correct identifications. Efforts to reproduce that effect in the field have had mixed results. Part of the inconsistency of field results can be attributed to variations in the methodologies used, including a failure to apply a standard protocol for the lineup comparisons.

The theory of how witnesses view a lineup is important to determine how to structure a lineup that will result in the most correct identifications and the least false ones. Dr. Wells first proposed that witnesses viewing a simultaneous lineup may employ “relative judgment”³³² to determine who best resembles their memory of the culprit, thus leading to false identifications on the basis of who in the lineup looked most like the culprit.³³³ Proposing instead that signal detection theory best explains how false identifications occur, Dr. Ebbesen has disputed that theory. In his view, use of a sequential lineup causes a witness to experience a “criterion shift”, *i.e.*, because the witness is forced to view one lineup member at a time, the witness may use stricter criteria to determine if a particular person matches his memory of the culprit. For this

³²⁷ *Id.* at 25.

³²⁸ *Id.*

³²⁹ Alternatively, it could simply await the outcome of field studies elsewhere.

³³⁰ Showing the lineup to the witness one photograph or person at a time.

³³¹ Showing the full lineup to the witness all at once.

³³² Comparing lineup members to each other.

³³³ Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. Applied Soc. Psychol. 89 (1984).

reason, sequential presentation reduces the number of false identifications, but may also increase the number of times when the witness fails to identify a culprit who is present in the lineup.

Dr. Wells co-developed the sequential lineup procedure.³³⁴ In December 2001, he discounted the importance of the presentation issue:

I think that it is unfortunate that the sequential procedure has come to dominate so much of the discussion regarding lineup procedures. Most of my research and writing over the years has been addressed at problems with lineup procedures that are independent of the simultaneous versus sequential lineup issues. Regardless of whether one uses a simultaneous or sequential procedure, there are other important problems with lineups that have to be addressed. These other problems include: instructions to eyewitnesses, the selection of lineup fillers, how witness certainty is assessed, how to eliminate inadvertent influences from the lineup administrator, what records must be kept, and so on. . . . As for the sequential lineup itself, I recommend the sequential lineup when it is properly conducted (*e.g.*, using double-blind procedures). Overall, I believe that the scientific literature shows that the sequential lineup, although perhaps a conservative test, helps to make the identification evidence more reliable.³³⁵

In 1998, Dr. Wells and others supported the use of sequential lineups but considered it important that they be coupled with blind administration to reduce the risk of inadvertent cues leading an eyewitness to falsely identify an individual.³³⁶ Studies showed that sequential presentations are superior to simultaneous presentations in that “the sequential procedure produces a lower rate of mistaken identifications (in perpetrator-absent lineups) with little loss in the rate of accurate identifications (in perpetrator-present lineups).”³³⁷ Additionally, Dr. Wells cited the 2001 meta-analysis by Dr. Steblay and others in support of his position.³³⁸

Dr. Steblay and others meta-analyzed accuracy rates in sequential and simultaneous lineups.³³⁹ Her team analyzed 23 papers, which presented 30 tests that included 4,145 participants, in which an experimental study compared sequential to simultaneous lineups and provided a statistical test of lineup presentation and identification accuracy.³⁴⁰ The vast majority (93%) of the studies involved photo lineups,

³³⁴ Gary L. Wells, *You Asked About the Sequential Lineup: Could You Read This First?* (Dec. 2001), www.psychology.iastate.edu/faculty/gwells/Youaskedaboutsequential.htm.

³³⁵ *Id.*

³³⁶ Wells et al., *supra* note 140, at 640.

³³⁷ *Id.* at 639.

³³⁸ Wells, *supra* note 334.

³³⁹ Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 *Law & Human Behav.* 459 (2001).

³⁴⁰ *Id.*

of which 67% consisted of six photographs.³⁴¹ This study has been the cornerstone of the argument that sequential presentation is superior to simultaneous and has been instrumental in stimulating further research and writing on the subject.

This meta-analysis found that if a perpetrator is present in the lineup, simultaneous lineups are more likely to result in the perpetrator being correctly identified, but if the perpetrator was not present in the lineup, simultaneous lineups were more likely to produce a false identification.³⁴² In short, simultaneous lineups appear to capture more criminals, but are also more likely to falsely identify an innocent person because those with weaker memories can more easily guess via relative judgment for this method.³⁴³ However, moderator effects suggest that the extent of this quandary is insignificant because those effects reduce the relative advantage simultaneous lineups have in target-present lineups.³⁴⁴ “Under the most realistic simulations of crimes and police procedures, (live staged events, cautionary instructions, single perpetrators, adult witnesses asked to describe the perpetrator), the differences between the correct identification rates for simultaneous and sequential lineups are likely to be small or nonexistent.”³⁴⁵ They conceded that not enough research has been done for cases involving multiple perpetrators and suspects or child witnesses to determine if any procedure is superior for those cases.³⁴⁶

Specifically, in target-present lineups, this meta-analysis found that correct identifications were 15% more likely in simultaneous lineups, false rejections were 20% fewer in simultaneous lineups, and an incorrect choice of foil was not significantly different in the two lineup procedures.³⁴⁷ In target-absent lineups, correct rejections of the lineup are 23% more likely in sequential lineups, and false choices are also 23% less likely.³⁴⁸ When a suspect is included “in the lineup that closely matches the description of the perpetrator”, sequential lineups are 18% less likely to result in a false identification of that person as the perpetrator.³⁴⁹

With respect to a witness making any choice from a lineup in target-present lineups, 74% of witnesses identify someone in a simultaneous lineup, while 54% do so in a sequential lineup.³⁵⁰ In both types of lineups, choosers are correct approximately two-thirds of the time, and make a mistaken choice one-third of the time.³⁵¹ In target-absent

³⁴¹ *Id.* at 461.

³⁴² *Id.* at 464.

³⁴³ Gary L. Wells, *Does the Sequential Lineup Reduce Accurate Identifications in Addition to Reducing Mistaken Identifications? Yes, but . . .*, www.psychology.iastate.edu/faculty/gwells/SequentialNotesonlossofhits.htm.

³⁴⁴ Steblay et al., *supra* note 339, at 470.

³⁴⁵ *Id.* at 471.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 463.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 463-64.

³⁵⁰ *Id.* at 464.

³⁵¹ *Id.*

lineups, 51% of witnesses choose someone from a simultaneous lineup, while 28% do so from a sequential lineup.³⁵² This analysis seems to suggest that previous research had exaggerated the difference in effect between sequential and simultaneous lineups:

The more realistic the stimuli used in the research, the smaller the difference in correct identification rate produced by the simultaneous and sequential lineup procedures. As experimental conditions become more realistic, the results increasingly approach the pattern of results frequently attributed to lineup procedures: sequential lineups result in approximately the same rate of correct identification and significantly lower rates of false identification than simultaneous lineups.³⁵³

A potential means of defeating the use of relative judgments in viewing simultaneous lineups was suggested by Jennifer E. Dysart and R. C. L. Lindsay, who experimented to determine if asking witnesses certain questions prior to viewing the lineup would affect accuracy.³⁵⁴ Dr. Dysart had investigated the effects of delay on identification accuracy; her study showed that simultaneous lineups have a high correct rejection rate comparable to that of sequential lineups.³⁵⁵ Drs. Dysart and Lindsay experimented to determine how this result occurred. The authors concluded that the standard warning, “the culprit may or may not be present in the lineup,” coupled with a memory questionnaire asking about the clarity of the witness’s memory of the criminal’s face, the witness’s confidence level regarding his ability to identify the culprit in the lineup, and the witness’s confidence that he will be able to realize that the guilty person is not in the lineup if shown a lineup of all innocent people, “directs” witnesses to use an absolute judgment strategy in simultaneous lineups. This leads to decreased mistaken identifications equivalent to those found in sequential lineups.

Drs. Ebbesen and Flowe rejected the relative judgment model as the correct model for the behavior of eyewitnesses viewing a simultaneous lineup.³⁵⁶ They argued that witnesses may “set ‘absolute’ degree-of-match criteria in both sequential and simultaneous lineups”, and offered an alternative explanation for the findings that have been used to support the relative judgment theory.³⁵⁷ They stated that in real world settings, individual memory factors in witnesses (*e.g.*, how well the witnesses learned the culprit’s face and their confidence level) affect the criteria determining if a member of the lineup matches their memory of the culprit, and that such criteria is higher for sequential versus simultaneous lineups. Position in the lineup effects choice rates in sequential lineups. The authors’ simulation study indicated that both innocent suspects and culprits are less likely to be chosen if they are in later positions. The observation suggests that witnesses have strict criteria for selecting the first person present, which may loosen as

³⁵² *Id.*

³⁵³ *Id.* at 469-70.

³⁵⁴ Jennifer E. Dysart & R. C. L. Lindsay, *A Preidentification Questioning Effect: Serendipitously Increasing Correct Rejections*, 25 *Law & Human Behav.* 155 (2001).

³⁵⁵ A high, correct rejection rate translates to a low rate of mistaken identifications.

³⁵⁶ Ebbe B. Ebbesen & Heather D. Flowe, *Simultaneous v. Sequential Lineups: What Do We Really Know?*, <http://psy2.ucsd.edu/~ebbesen/SimSeq.htm>.

³⁵⁷ *Id.*

the lineup continues. If this theory is correct, the use of sequential lineups could result in a reduction in the number of guilty culprits identified, along with a decrease in false identifications. They suggested that much empirical work should be done to determine what judgment processes witnesses apply before policymakers can compare the accuracy of the two types of procedures.

Scott D. Gronlund attempted to determine if Dr. Wells and others or Drs. Ebbesen and Flowe had proposed the better theory to explain the decrease in false identifications attributed to sequential lineups.³⁵⁸ His findings supported the contention that a sequential lineup prompts witness to use an absolute decision strategy, as apposed to a relative judgment strategy in simultaneous lineups.³⁵⁹ Although his study (limited to testing memory for height) yielded a decrease in false alarms when using sequential lineups that was larger than the concomitant decrease in hit rate, he found the difference insignificant.³⁶⁰

Christian A. Meissner and others tested Dr. Wells's relative judgment and Drs. Ebbesen and Flowe's criterion-shift explanations to attempt to determine why sequential lineups result in less false identifications.³⁶¹ They concluded that while Dr. Wells's theory may well explain the decrease in false identifications found in the use of sequential lineups, Drs. Ebbesen and Flowe's conservative criterion shift could explain the increase in the number of "missed" identifications that also occur with sequential lineups.³⁶² They recommended implementing procedures that isolate the change in performance to false identifications only.³⁶³ One procedure they suggested is to instruct witnesses to positively identify a face only if they are 100% confident that it is the correct one.³⁶⁴ In their experiments, they found that this procedure resulted in improved diagnosticity³⁶⁵ of approximately 50% for both types of lineups.³⁶⁶

Otto H. MacLin and others assessed the accuracy of simultaneous versus sequential lineups using computerized lineup administration to compare the computer program against Dr. Steblay and others' 2001 meta-analysis.³⁶⁷ In their first experiment, the authors used a pencil and paper test to determine if the Dr. Steblay and others' pattern of results could be replicated.³⁶⁸ This experiment only partially replicated the patterns in

³⁵⁸ Scott D. Gronlund, *Sequential Lineups: Shift in Criterion or Decision Strategy?*, 89 J. Applied Psychol. 362-63 (2004).

³⁵⁹ *Id.* at 366-67.

³⁶⁰ *Id.* at 366.

³⁶¹ Christian A. Meissner et al., *Eyewitness Decisions in Simultaneous and Sequential Lineups: A Dual-process Signal Detection Theory Analysis*, 33 Memory & Cognition 783-84 (2005).

³⁶² *Id.* at 790-91.

³⁶³ *Id.* at 791.

³⁶⁴ *Id.*

³⁶⁵ The proportion of correct identifications divided by the proportion of false identifications. *Id.*

³⁶⁶ *Id.*

³⁶⁷ Otto H. MacLin et al., *PC_Eyewitness and the Sequential Superiority Effect: Computer-Based Lineup Administration*, 29 Law & Human Behav. 303 (2005).

³⁶⁸ *Id.* at 310.

the 2001 meta-analysis.³⁶⁹ Overall, sequential lineups resulted in fewer identifications.³⁷⁰ In lineups where the culprit was present, the authors found, contrary to the Steblay study, that simultaneous lineups did not produce a statistically significant advantage in correct identifications (40% to 33%).³⁷¹ Simultaneous lineups produced significantly more false identifications (43% to 16%);³⁷² sequential lineups produced significantly more false rejections of the lineup (missed identifications – 50% to 17%).³⁷³ Simultaneous target-absent lineups produced an overall choosing rate insignificantly higher than sequential lineups (63% to 40%),³⁷⁴ consistent with Dr. Steblay and others' study. In contrast to Dr. Steblay and others' study, sequential lineups resulted in 60% of the witnesses correctly rejecting the lineup, comparing insignificantly to 37% for the simultaneous lineups.³⁷⁵ False identifications and filler identifications were statistically similar, with simultaneous lineups producing 11% false identifications to 7% for sequential lineups and false filler identification rates of 52% to 33%.³⁷⁶

In their second experiment, the authors used the program, PC_Eyewitness, to test the two lineup procedures.³⁷⁷ The program yielded similar results to pencil and paper method in the first experiment for lineups that included the culprit.³⁷⁸ Simultaneous lineups insignificantly outperformed sequential lineups in correct identifications (47% to 27%); sequential lineups resulted in more missed identifications of the lineup (57% to 30%), again consistent with Dr. Steblay and others' meta-analysis.³⁷⁹ Fillers were chosen at a similar rate of 23% for simultaneous, 16% for sequential.³⁸⁰ For target-absent lineups, witnesses correctly rejected the lineup 77% of the time for sequential lineups, 50% of the time for simultaneous ones.³⁸¹ False identifications of a suspect were statistically equivalent (8% simultaneous versus 4% sequential).³⁸² Filler identifications significantly differed, 42% simultaneous versus 19% sequential.³⁸³ PC_Eyewitness only partially replicated the Steblay meta-analysis.³⁸⁴ Consistent with the meta-analysis, simultaneous lineups produced fewer false rejections of lineups containing the culprit; sequential lineups produced more correct rejections of lineups not containing the

³⁶⁹ *Id.* at 313.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 311.

³⁷² *Id.*

³⁷³ *Id.* at 311-12.

³⁷⁴ *Id.* at 312.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 313.

³⁷⁸ *Id.* at 314.

³⁷⁹ *Id.*

³⁸⁰ *Id.* Simultaneous lineups also produced a significant correlation between confidence and accuracy for target-present lineups. *Id.*

³⁸¹ *Id.*

³⁸² *Id.* at 315.

³⁸³ *Id.*

³⁸⁴ *Id.*

culprit.³⁸⁵ Simultaneous lineups produced more choosing than sequential did, although the overall choosing rate for both types of lineups was slightly lower when using PC_Eyewitness.

Dawn McQuiston-Surrett and others reviewed methods, data and theory in the testing of simultaneous versus sequential lineups, and challenged conclusions of the 2001 meta-analysis by Dr. Steblay and others.³⁸⁶

Many studies are reported with insufficient detail needed to judge the adequacy of the research design, new data show that the sequential superiority effect may vary as a function of study methodology, theoretical assumptions have not been adequately tested, and important comparisons that may rule out the ostensible superiority of the sequential lineup have not been studied.³⁸⁷

The team reviewed the studies used in the 2001 meta-analysis, broke down the overall correct decisions data, and concluded that the sequential lineups are superior to minimize false identifications of designated innocent suspects and increase correct lineup rejections when the perpetrator is absent from the lineup;³⁸⁸ when the perpetrator is present, simultaneous lineups produce more correct identifications and reduced false lineup rejections.³⁸⁹ In short, sequential lineups protect more innocent persons but simultaneous lineups catch more perpetrators. The authors questioned the use of unpublished studies by undergraduate researchers in the meta-analysis.³⁹⁰ The relatively small (30) number of studies reviewed in the meta-analysis and paucity of research in this area, should lead to caution in drawing conclusions.³⁹¹ There has been limited research into the claim that blind testing is an essential aspect of the sequential procedure.³⁹² These researchers echoed a concern expressed by several other authors that the use of unpublished studies in a meta-analysis would cause courts to reject the study as evidence on the basis that it was not subjected to peer review or publication.³⁹³

The authors pointed out the great variability in the construction of the lineups as well as the instructions used in the two types of lineups in the existing research; it is therefore difficult to determine what factors actually produce the sequential superiority

³⁸⁵ *Id.*

³⁸⁶ Dawn McQuiston-Surrett et al., *Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 Psychol., Pub. Pol’y & L. 137 (2006).

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 138.

³⁸⁹ *Id.* at 138-39.

³⁹⁰ *Id.* at 139.

³⁹¹ *Id.* at 140.

³⁹² *Id.* at 148.

³⁹³ *Id.* at 139. This remark is made in consideration of Fed. R. Evid. as interpreted by the U.S. Sup. Ct. in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U. S. 579 (1993). Among others things, proposed testimony must be appropriately validated. *Id.* at 590. Our Commonwealth’s applicable evidentiary rule on this is a little different, but the observation about the validation of the data could lead to the same or similar concern.

effect.³⁹⁴ “Counterbalancing” has a role in the relative strengths of simultaneous and sequential lineups.³⁹⁵ Placement order and position in the lineup sometimes produces misleading results.³⁹⁶ Counterbalancing is intended to prevent such position effects.³⁹⁷

The authors also questioned whether the relative and absolute judgment theories have been adequately tested.³⁹⁸ They suggest that a criterion-shift model may more accurately explain the sequential superiority effect: eyewitnesses may use relative judgment in both types of lineups, and the reduction in false identifications from sequential lineups may be the product of the witness imposing more stringent criteria on which to identify.³⁹⁹

Dr. Wells acknowledged relatively recent research that suggests an overall rate of lower identifications in sequential lineups but argued that there is no evidence to indicate that the sequential procedure produces a worse ratio of accurate to mistaken identifications.⁴⁰⁰

[I]n spite of some reduction in accurate identifications, the sequential appears to improve the *odds* that a suspect, if identified, is the actual culprit. This is consistent with the idea that the sequential procedure is more conservative than the simultaneous procedure. . . . Ultimately, policy makers will need to balance the chance that a guilty person might not be identified using the sequential lineup procedure against the odds that an innocent person will be identified using a simultaneous lineup.⁴⁰¹

Roy S. Malpass analyzed simultaneous versus sequential lineups, finding that simultaneous lineups were superior to sequential lineups under most conditions.⁴⁰²

The utility of simultaneous and sequential lineups is responsive to two factors external to their actual performance: the values that are placed on the various eyewitness identification outcomes and the a priori probability that the police have been able to place the actual criminal in the identification procedure. With no change in the actual performance of the two lineup procedures, there seem to be many circumstances in which simultaneous lineups have a utility advantage, as long as the probability that the criminal is in the lineup is better than .50.⁴⁰³

³⁹⁴ McQuiston-Surrett et al., *supra* note 386, at 149-50.

³⁹⁵ *Id.* at 148-49.

³⁹⁶ *Id.* This is apparently common knowledge among police officers, as a police representative on the subcomm. on investigation shared a rule of thumb to never place the suspect in the number one position, because no one ever picks the first picture or person in a lineup.

³⁹⁷ *Id.* at 148.

³⁹⁸ *Id.* at 158-60.

³⁹⁹ *Id.* at 159.

⁴⁰⁰ Wells, *supra* note 239, at 626.

⁴⁰¹ *Id.* at 626, 627-28.

⁴⁰² Roy S. Malpass, *A Policy Evaluation of Simultaneous and Sequential Lineups*, 12 Psychol., Pub. Pol’y & L. 394, 415 (2006).

⁴⁰³ *Id.*

Curt A. Carlson and others reported the results of their study on the sequential lineup advantage concluding that the sequential lineup advantage is only found in the false identification rate and then only when the lineup composition is “biased”⁴⁰⁴ or the suspect was one of the later photographs shown in a sequential lineup.⁴⁰⁵ They found no difference in false identification rates between simultaneous and sequential lineups when the lineup was “fair” and a lower rate of perpetrator identifications in some sequential lineups.

Experiences in Other Jurisdictions: Field Studies

Hennepin County, Minnesota

In the fall of 2003, the Attorney’s Office of Hennepin County, Minnesota adopted a new photographic lineup protocol, developed as part of a year-long pilot program to examine recommended eyewitness procedures in real police field investigations, testing the accuracy of blind sequential lineups.⁴⁰⁶ The pilot project involved four municipal police departments, suburban and urban, from four cities ranging in population from approximately 20,900 to 382,600.⁴⁰⁷ Only felony cases were included, involving 280 lineups from 117 cases, representing 206 eyewitnesses.⁴⁰⁸ Five principles were followed as part of the protocol:

- Six-member lineups that included one suspect and five fillers
- The cautionary instruction “may or may not be in the lineup”
- Confidence statements were obtained at the time of the identification and before any feedback
- The lineup administrator did not know who was suspected and the witness was so informed
- Sequential presentation⁴⁰⁹

⁴⁰⁴ E.g., the fillers are a poor match to the perpetrator’s description and the innocent suspect is a good match.

⁴⁰⁵ Curt A. Carlson et al., *Lineup Composition, Suspect Position, and the Sequential Lineup Advantage*, 14 J. Experimental Psychol.: Applied 118 (2008).

⁴⁰⁶ Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L. Pol’y & Ethics J. 381, 383 (2006).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 391.

⁴⁰⁹ *Id.* at 393.

Simultaneous lineups were not tested. Dr. Steblay analyzed and evaluated the results.⁴¹⁰

[The] blind sequential field tests produced suspect identification rates relatively comparable to those in prior laboratory and field tests. Repeated viewing of the lineup was associated with increased filler identifications (errors). The new procedures do not appear to have sacrificed jump-out identifications. . . . Confidence and suspect identifications were significantly related, particularly for jump-out identifications. For other categories of expressed confidence (even high), confidence and decision outcome were not significantly related. A positive outcome of the project was the low filler identification rate, which demonstrates increased protection for innocent suspects.⁴¹¹

Initially, the police chiefs were apprehensive⁴¹² but overcame reservations about blind administration of the sequential lineup procedure, including concerns about availability of personnel who aren't aware which one is suspected, recognition of chronic offenders as a suspect; disruption of the rapport between a victim and investigator, especially for a violent crime, and multiple witnesses.⁴¹³ The study found that these concerns were readily overcome "with minimal difficulty."⁴¹⁴ Witnesses understood and appreciated the purpose of the blind administration, personnel shortages were met by use of patrol officers, captains and sergeants, and by use of property crime investigators as administrators of lineups for crimes against persons and *vice versa*.⁴¹⁵ The concerns over multiple witnesses and repetitive offenders was addressed by the use of computer generated photo lineups.⁴¹⁶

Overall, police chiefs and investigators alike found the pilot project to be easier to implement and less work than anticipated. Implementation was extremely efficient. [From less than a week in one community to less than a month in the larger jurisdictions] Initial skepticism and unease faded and attitudes mellowed. . . .

The pilot project also involved minimal cost. From an administrative prospective, 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."

⁴¹⁰ *Id.* at 383.

⁴¹¹ *Id.* at 404.

⁴¹² *Id.* at 405, 406.

⁴¹³ *Id.* at 407.

⁴¹⁴ *Id.* at 408.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

Since the biggest hurdle in implementation was overcoming a general resistance to change, even fewer problems are expected the longer the protocol is used. New investigators will be trained in the new procedures, and will not be tied to the old methods.⁴¹⁷

Illinois Pilot Program on Sequential Double-Blind Identification Procedures

In 2003, Illinois enacted a law that mandated lineup procedures and photo spread procedures⁴¹⁸ as well as a pilot study on sequential lineup procedures.⁴¹⁹ The yearlong study involved three jurisdictions of differing size: Chicago, Joliet and Evanston.⁴²⁰ The Illinois State Police appointed Sheri H. Mecklenberg as Program Director; Dr. Malpass analyzed the data.⁴²¹ Dr. Ebbesen also consulted and analyzed the data independently.⁴²² Blind sequential lineups were compared to simultaneous lineup procedures used by the individual police departments.⁴²³ Filler identifications were treated as known false errors, and suspect identifications were considered accurate.⁴²⁴ The study showed an unexplained lower overall rate of filler identifications than research has predicted.⁴²⁵ The study found that the sequential double-blind method showed a higher rate of filler (false) identifications and a lower rate of suspect (accurate) identifications than the simultaneous method.⁴²⁶

Sequential lineups were “difficult and confusing to implement” in live lineups involving cases where there were multiple perpetrators and were discontinued mid-program.⁴²⁷ If witnesses requested second rounds, that can lead to a shift toward a relative judgment assessment.⁴²⁸ The police departments reported “concern” in finding blind administrators, resulting in delays in investigations that damaged investigator relationships with victims and witnesses.⁴²⁹ Contrary to results from other studies, the data showed no cross-race⁴³⁰ or weapons focus effects.⁴³¹

⁴¹⁷ *Id.* at 409-10.

⁴¹⁸ 725 Ill. Comp. Stat. 5/107A-5.

⁴¹⁹ *Id.* 5/107A-10.

⁴²⁰ Sheri H. Mecklenberg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* 24, <https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Legal%20Reports/Illinois%20Pilot%20Report%20on%20Eyewitness%20Identification%20Methods> (2006).

⁴²¹ *Id.* at 22.

⁴²² *Id.* at 23.

⁴²³ *Id.* at 25.

⁴²⁴ *Id.* at 29-31.

⁴²⁵ *Id.* at 42.

⁴²⁶ *Id.* at 45-46.

⁴²⁷ *Id.* at 51.

⁴²⁸ *Id.* at 53, n.52.

⁴²⁹ *Id.* at 57-59.

⁴³⁰ *Id.* at 39.

⁴³¹ *Id.* at 41-42.

The police departments under study determined which lineups would be administered as double-blind sequential lineups, based on three protocols: the selection had to be random and predetermined; the same officers would conduct both the simultaneous and sequential lineups; and, the selection of cases would be random in terms of crimes committed.⁴³² Two of the departments used their trained investigators to serve as blind administrators; Chicago obtained blind administrators from two divisions adjoining the area division in the study.⁴³³ The study used filler identifications, *i.e.*, known false identifications to compare the rate of identification errors.⁴³⁴ The rate of suspect identifications was used to measure correct identifications.⁴³⁵ Acknowledging that erroneous suspect identifications can lead to wrongful convictions, the study attempted to compare suspect picks between the two lineup methods, using the 15% differential found in the 2001 meta-analysis as a guide.⁴³⁶ The rate of “no picks” was measured, as was the number of sequential procedures in which the witness needed a second viewing of the lineup.⁴³⁷ The program protocols and forms, as well as post-study survey forms, were reviewed and approved by Drs. Malpass and Ebbesen.⁴³⁸ In addition to these two, Drs. Wells and Steblay examined the post-study survey forms.⁴³⁹

Dr. Malpass analyzed the data collected, and determined that the double blind sequential lineups produced fewer suspect identifications and a higher rate of filler identifications in two of the three jurisdictions studied.⁴⁴⁰ In the third, both lineup methods showed equivalent rates.⁴⁴¹ Looking at other factors, this analysis found evidence that: second viewings result in fewer suspect identifications, slightly more filler identifications and more no-picks;⁴⁴² the cross-race effect is not altered by the lineup method;⁴⁴³ and, live lineups result in slightly more correct identifications in simultaneous lineups than photo arrays produce.⁴⁴⁴ The number of suspects (one or two) per lineup had no effect on simultaneous lineups and a negative effect on sequential lineups.⁴⁴⁵ Identification rates were unaffected by delay, age of the witness, whether the witness was injured in the crime, whether there was violence involved, or the presence of a weapon.⁴⁴⁶ Mecklenberg suggested that the number of target-absent lineups presented in the field

⁴³² *Id.* at 25.

⁴³³ *Id.* at 28-29.

⁴³⁴ *Id.* at 29-30.

⁴³⁵ *Id.* at 30-31.

⁴³⁶ *Id.* at 31.

⁴³⁷ *Id.*

⁴³⁸ *Id.* at 32.

⁴³⁹ *Id.*; Gary L. Wells, Gary L. Wells’ Comments on the Mecklenberg Report, www.psychology.iastate.edu/~glwells/Illinois_Project_Wells_comments.pdf; Addendum to the Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures, <http://www.chicagopolice.org/Addendum%20to%20IP-Report.pdf> 4-5 n.1.

⁴⁴⁰ Mecklenberg, *supra* note 420, at 37-39.

⁴⁴¹ *Id.* at 39.

⁴⁴² *Id.* at 40.

⁴⁴³ *Id.* at 39.

⁴⁴⁴ *Id.* at 40.

⁴⁴⁵ *Id.* at 41.

⁴⁴⁶ *Id.* at 41-42.

study were reduced by current safeguards involving corroborating evidence and other standards for charging,⁴⁴⁷ and that the use of mandatory witness instructions may also lead witnesses to make more conservative identifications.

This report on the Illinois pilot program was immediately subject to commentary by researchers in support of and against its conclusions. Dr. Ebbesen and Kristin M. Finklea were among the first to comment.⁴⁴⁸ They looked for reasons why the field results differed from the laboratory results. They suggested that lineup construction could be a possible problem, in that laboratory studies typically present an equal number of target present and target absent lineups, but observed that researchers have not determined if this proportion accurately reflects the proportion found in actual lineups. The authors further explained that if guilty suspects are more frequently present in real world lineups, then the lower choosing rate of sequential lineups will have the effect of suppressing the hit rate more than the false alarm rate in such lineups. They also suggested that foil selection could have an effect. Addressing criticism of the Illinois study, they pointed out that the study was conducted to test double-blind sequential lineups against the current policy of using non-blind simultaneous lineups. “The primary conclusion researchers can make is that the sequential double-blind procedure, as tested in Illinois, is not superior to traditional simultaneous lineups.”⁴⁴⁹

Dr. Wells argued that the report could not be used to draw any “clear conclusions” because double-blind simultaneous procedures were never used and double-blind sequential procedures were always used.⁴⁵⁰ Lineup-administrator influence, which can suppress filler identifications and enhance suspect identifications, was not controlled in the simultaneous lineups. Dr. Ebbesen and Finklea had attempted to assess the lineup administrator influence effect by looking at suspect identification rates, on the basis of whether or not the witness had a prior relationship with the suspect.⁴⁵¹ They posited that administrator influence in simultaneous lineups would be strongest in those situations where the suspect and witness were strangers, and should not occur with blind, sequential lineups. On the contrary, the difference in choice rates between non-blind simultaneous and blind sequential photo lineups was greater for acquaintance choices (90.3% v. 76.3%) than for stranger choices (53.6% v. 43.8%).⁴⁵²

Dr. Wells added that filler identifications might appear higher in sequential lineups because blind administration of the lineup forces the administrator to more accurately record identifications, because the administrator does not know if the person is

⁴⁴⁷ *Id.* at 44.

⁴⁴⁸ Ebbe B. Ebbesen & Kristin M. Finklea, *In Response to the Illinois Pilot Program on Simultaneous v. Sequential Lineups*, http://www-psy.ucsd.edu/~cebbesen/Loyola_PILR_final.htm.

⁴⁴⁹ *Id.*

⁴⁵⁰ Gary L. Wells, *Gary L. Wells' Comments on the Mecklenberg Report*, www.psychology.iastate.edu/~glwells/Illinois_Project_Wells_comments.pdf. *Rep. to the Legis. of the State of Ill.: The Ill. Pilot Program on Sequential Double-Blind Identification Procedures*, *supra* note 420, is commonly referred to as the Mecklenberg Rep.

⁴⁵¹ Ebbesen & Finklea, *supra* note 448.

⁴⁵² *Id.*

a suspect or a filler.⁴⁵³ In simultaneous lineups, an administrator, who knows which one is suspected, may record a filler identification as non-identification or as a filler identification. The filler identification rates in the Illinois study were inconsistent with results found in other field studies, including the archival study involving Sacramento County and several other northern California counties,⁴⁵⁴ and two British studies.⁴⁵⁵

Dr. Ebbesen responded to concerns that the Illinois study was flawed.⁴⁵⁶ He argued that criticism of the failure to use a blind simultaneous lineup procedure is irrelevant because this evaluation was a comparison of the old method against the new proposal. Since proponents of blind sequential lineups have argued that both aspects (blind and sequential) are necessary to have the maximum effectiveness for the new procedure, both should be compared to the existing practice of non-blind simultaneous lineups. Other jurisdictions claiming to have successfully used the sequential lineup did not use control groups or randomized experimental design and thus base their conclusions of success on “vague subjective impressions.” He tested the administrator influence hypothesis against memory strength, social context (cross-racial identifications), witness confidence and witness status (victim or witness) and concluded that administrator influence in the simultaneous lineups do not explain the results of the Illinois report. The explanation for the results lay in the possibility that sequential presentation discourages witnesses from picking the best match to their memory “above a good enough criterion.” He also addressed the variability among sequential protocols.⁴⁵⁷ He concluded that much theoretical research is needed and more specificity in proposals is required.

Dr. Steblay commented, too, responding to criticism of the Hennepin County pilot project⁴⁵⁸ for which she analyzed the data.⁴⁵⁹ Most of the crimes in that pilot program involved crimes of very short duration in which the witness did not know the perpetrator, leading to slightly higher filler choice rates than situations where the witness had longer or multiple exposures to the perpetrators.⁴⁶⁰ The additional viewings of the lineup that were allowed in Hennepin County proved that filler rates decline if witnesses are held to a single viewing.⁴⁶¹ Looking at the Illinois data, she expressed concern regarding the non-blind aspect of the simultaneous lineups; the zero filler identifications found in two of the jurisdictions is surprising; and, the problem of variability in and lack of detailed protocols for the simultaneous procedure.⁴⁶² On this basis, she found the Illinois data

⁴⁵³ Wells, *supra* note 450.

⁴⁵⁴ Behrman & Davey, *supra* note 323.

⁴⁵⁵ Wells, *supra* note 450.

⁴⁵⁶ Ebbe B. Ebbesen, *Comments on IL Simultaneous v. Sequential Lineup Field Test*, <http://psy2.ucsd.edu/~eebbesen/SimSeqIL.htm> (2006).

⁴⁵⁷ *E.g.*: What information does a witness have about the lineup size prior to viewing it? What are witnesses told about what would happen after they choose a person? Will the witness be told in advance that they will be allowed to go through the lineup more than once? What will the witness be told about the disposition of photographs after the first viewing? How are suspects assigned position in the lineup?

⁴⁵⁸ Klobuchar et al., *supra* note 406.

⁴⁵⁹ Nancy Steblay, *Observations on the Illinois Lineup Data 1*, www.psychology.iastate.edu/~glwells/Steblay_Observations_on_the_Illinois_Data.pdf (2006).

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 3-4.

incomplete and confusing, and therefore insufficient to base a change in her previous position. “My inclination is to assume that the blind sequential has much to offer and to reject the notion that the status quo should be the ‘standard to beat,’ particularly given the demonstrated vulnerability to witness error of standard lineup procedures.”⁴⁶³

Wisconsin’s Office of Attorney General also responded to the Illinois study, arguing that “[s]cientific research demonstrates that double-blind administration is superior, and the results of the” Illinois “program do not suggest otherwise.”⁴⁶⁴ The higher suspect identification rates found in the simultaneous lineups was to be expected, due to administrator influence. The Illinois results “could be seen to reinforce the principle that double-blind procedures are necessary to ensure that eyewitnesses make identifications . . . because the memory of the perpetrator matches the suspect, not because of unintentional suggestion from lineup administrators.”⁴⁶⁵ The relatively higher rate of filler selections in the sequential lineups is probably the result of administrator influence directing simultaneous identifications away from fillers and to suspects.⁴⁶⁶ Whether witnesses pick suspects or fillers doesn’t necessarily mean the witnesses were accurate when they identified a suspect “because some of the suspects identified could potentially be actually innocent.”⁴⁶⁷ In other words, the Illinois report “would have counted every single one of the DNA exonerations as ‘correct’ identifications.”⁴⁶⁸ The Wisconsin Attorney General’s office concluded that the Illinois study failed to dislodge the scientific underpinnings for Wisconsin’s model policy.⁴⁶⁹

The National Association of Criminal Defense Lawyers published an article by Timothy P. O’Toole, who criticized the Illinois report by pointing out several flaws with the study.⁴⁷⁰ The failure to use blind administration in the simultaneous lineups, the assumption that selection of a police suspect was a correct identification, and the use of suspect identifications as a benchmark rewarded suggestive police procedures. Using suspect identifications as a benchmark created a great risk of inflating the perceived reliability of the most suggestive procedures instead of the most accurate ones. The fact that two jurisdictions reported no filler identifications was suspect, as it is contrary to published data on other non-blind lineups, which have a typical filler identification rate approaching 20%. Other field studies that consider selection of suspects as accurate identifications are ones using double-blind procedures so that the administrator does not know who the suspect is and can not influence a selection accordingly. Another indication that the data from Illinois may be unreliable is the fact that the data seemed to indicate witness procedures conducted 30 days after the incident were more accurate than

⁴⁶³ *Id.* at 6.

⁴⁶⁴ Bureau of Training & Standards for Crim. Just., Wis. Dep’t of Just., *Response to Chicago Report on Eyewitness Identification Procedures 2*, www.doj.state.wi.us/dles/tns/ILRptResponse.pdf (2006).

⁴⁶⁵ *Id.* at 3.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 4.

⁴⁶⁸ Timothy P. O’Toole, *What’s the Matter with Illinois?*, 30 *Champion* 18 (August 2006), available at <http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/03c451bfa6487584852571e300634d51?OpenDocument>.

⁴⁶⁹ Bureau of Training & Standards for Crim. Just., *supra* note 464, at 4.

⁴⁷⁰ O’Toole, *supra* note 468.

those conducted immediately after the incident, contrary to the findings of research and experience elsewhere. The article asserted that the study was conducted by the Chicago Police Department in secret, and that the department had adamantly opposed the use of sequential procedures and allowed that bias to dictate the study protocols.

In a series of commentaries published in *Law and Human Behavior*, experts in the field of eyewitness identifications offered their opinions of the Illinois study. In the introduction to the commentaries, Brian L. Cutler and Margaret Bull Kovera made some observations of the overall import of the various writers' comments as well as some of their concerns with the study.⁴⁷¹ They emphasized the need for additional field research on eyewitness procedures. With regard to the Illinois study in particular, they were concerned that the Mecklenberg Report was not peer-reviewed prior to publication, which may have addressed some of the alleged methodological flaws in the study.

Dr. Wells's comments focused on the methods, measures and interpretations of field experiments.⁴⁷² Much of the debate about improving eyewitness procedures revolves around the difference between laboratory settings and "real life" situations. Well-controlled field experiments with actual eyewitnesses could help resolve discrepancies about applying proposed improvements to the criminal justice system. The Illinois study should be viewed in light of what can be learned about how to better structure field studies in the future. A major flaw in the Illinois study was that the study compared non-blind simultaneous lineups with double-blind sequential lineups, and it was therefore impossible to tell if the results were the product of sequential v. simultaneous, or if they were due to the blind v. non-blind difference.⁴⁷³ He argued that suspect identification rates are not a useful measure of accuracy, because an identified suspect may or may not be guilty of the crime committed, and thus mistaken identifications can be inappropriately counted as if correct.

Dr. Wells examined whether filler identification rates reveal the best procedure. Lower filler rates would seem to indicate the better procedure but only if the compared procedures use the same constraints.⁴⁷⁴ For example, using fillers that match the description of the suspect in a lineup that is then compared to a lineup in which fillers do not match the description could lead to a higher filler rate for the lineups that match the description of the suspect. As noted earlier, filler selection based on the victim's description of the culprit is less likely to single out any particular person and can help avoid mistaken identifications.

Dr. Wells also addressed concerns about bias in non-blind procedures.⁴⁷⁵ Administrator influence, intentional or not, even to the extent of the witness's tacit assumption that the administrator knows who the suspect is, is believed to lead to

⁴⁷¹ Brian L. Cutler & Margaret Bull Kovera, *Introduction to Commentaries on the Illinois Pilot Study of Lineup Reforms*, 32 *Law & Human Behav.* 1 (2008).

⁴⁷² Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, *id.* at 6.

⁴⁷³ *Id.* at 7.

⁴⁷⁴ *Id.* at 7-8.

⁴⁷⁵ *Id.* at 8-9.

mistaken identifications.⁴⁷⁶ Non-blind procedures tend to suppress filler identification rates and influence eyewitness confidence. Additionally, he argued that non-blind administration might influence an eyewitness's confidence negatively if a filler identification is made; if the administrator knows that the witness has identified a filler, he or she may subconsciously cue the witness, thus weakening the witness's confidence to the point that the filler identification becomes so tentative as to not be counted as such.⁴⁷⁷ In an addendum to the Illinois report in response to criticism of the report based on the complete absence of filler identifications in Chicago and Evanston lineups, the author disclosed that some filler identifications were made in those jurisdictions but were not counted as such because of the tentativeness of the identifications.⁴⁷⁸

To improve field experiments, Dr. Wells suggested conducting all experiments using the double-blind method, randomly assigning a sequential or simultaneous procedure to cases, making the assignment after all other decisions regarding the lineup structure have been made and preserving tapes of the actual lineups for additional analysis.⁴⁷⁹ From the initial design of the experiment through the data analysis, field experiments should be a collaborative effort among scientists, police and prosecutors.⁴⁸⁰

A panel of seven experts from six universities discussed the central problem with conducting field studies of lineup procedures.⁴⁸¹ They noted that the Hennepin County study, which confirmed the laboratory studies and did not compare simultaneous to sequential procedures, has not been controversial, whereas the Illinois report, by contradicting laboratory results, and thus undermining efforts to implement proposed changes, has been.⁴⁸² While it seems clear that all involved agree further field studies are needed, the structure of those studies remains under dispute.⁴⁸³ The authors acknowledge that the intent of the Illinois study, to compare current practices to proposed practices would seem reasonable, but the study design made interpretation of the outcomes extremely difficult. "[I]t is critical to determine whether the seemingly better result from the simultaneous procedure is attributable to properties of the simultaneous procedure itself, or to the influence of the non-blind administrator."⁴⁸⁴ The authors noted that the zero filler rates found in Chicago and Evanston are evidence that administrator bias affected filler identification rates in those jurisdictions.⁴⁸⁵ They called for further carefully designed field studies because the results published in the Illinois report "do not inform everyday practice in a useful manner."⁴⁸⁶

⁴⁷⁶ *Id.* at 8.

⁴⁷⁷ *Id.* at 7-8.

⁴⁷⁸ Addendum to the Rep., *supra* note 439, at 8 n.3.

⁴⁷⁹ Wells, *supra* note 472, at 9-10.

⁴⁸⁰ *Id.* at 10.

⁴⁸¹ Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 *Law & Human Behav.* 3 (2008).

⁴⁸² *Id.* at 4.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 5.

⁴⁸⁶ *Id.*

Dr. Steblay agreed with the need for carefully constructed field studies that include double-blind testing, random assignment to experimental conditions, clear operational protocols for lineup construction and presentation, and documentation of the lineup experience.⁴⁸⁷ However, even with carefully designed field studies, the interpretation of those field studies may still face obstacles. High suspect identifications and low filler identifications, which normally would be interpreted as a successful lineup result, might mask problems such as poorly structured lineups, bias and other problems. Attempts to compare field study results across jurisdictions could fail if individual police departments within each study vary the protocols, such as merging existent practices with the protocols. Several aspects of field experiments must be held constant, including background factors, construction of the lineup, and conditions of the lineup procedure for the witness. No single field study could be used to evaluate lineup procedure, but the trends and patterns should be revealed as evidence from various studies accumulates. Although future laboratory and field tests may produce refinements in lineup practices, “laboratory research has already provided the empirical basis for better practice in collection of eyewitness evidence,” and the concerns in her commentary should not impede lineup reform efforts.

Stephan J. Ross and Dr. Malpass voiced concern that the recommendation by scientists to use the sequential method to prevent wrongful convictions may need to be rescinded because questions remain regarding the theoretical and empirical bases for the research and the utility and value of simultaneous versus sequential lineup.⁴⁸⁸ “While SEQ [sequential] advocates favor a particular family of lineup procedures, we favor a broader search for ways to confront identification errors--both failures to identify offenders and failures to reject identification of innocent suspects--that are theoretically well understood and empirically stable.”⁴⁸⁹

Drs. Ross and Malpass also voiced disappointment at the failure of research to test other aspects of the sequential lineup procedure in combination with the simultaneous procedure to determine whether they help lower false identifications or actually create the sequential effect even within a simultaneous lineup rather than the sequential lineup presentation itself.⁴⁹⁰ With respect to the Illinois study, they criticized the focus of many of the critics of the study on the blind/non-blind issue and its potential effect on filler identification rates.⁴⁹¹ Noting comments by Drs. Wells, Schacter, Ebbesen and Finklea on the potential for lineup administrator bias to direct identifications from fillers and toward suspects, they conclude “there is little evidence that the filler identification rate in simultaneous lineups is a product of administrator bias.”⁴⁹² The authors discussed alternative reasons for the lower filler identification rate when compared to other field studies and suggested that it may arise from poor monitoring of protocol compliance,

⁴⁸⁷ Nancy Kay Steblay, Commentary on “*Studying Eyewitness Investigations in the Field*”: A Look Forward, 32 Law & Human Behav. 11 (2008).

⁴⁸⁸ Stephen J. Ross & Roy S. Malpass, *Moving Forward: Response to “Studying Eyewitness Investigations in the Field”*, 32 Law & Human Behav. 16, 17 (2008).

⁴⁸⁹ *Id.* at 16.

⁴⁹⁰ *Id.* at 17.

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 18.

especially with regard to reporting.⁴⁹³ They proposed that policy formation and implementation should only occur after any academic debate is resolved by sound research.⁴⁹⁴

Drs. Ross and Malpass identified limitations to all field studies that diminish their utility, including lack of knowledge about the actual guilt or innocence of each suspect.⁴⁹⁵ Using suspect identifications as a proxy for accurate identifications ignores the possibility that the suspect may be innocent.⁴⁹⁶ They urged law enforcement and social scientists to work closely together to develop and implementing field studies on lineup accuracy.⁴⁹⁷ They proposed the following lineup procedure requisites: ensuring consistency in background variables; monitoring protocol compliance; training before implementing the study; allowing lineup quality assessment; allowing researchers access to case files to make independent estimates of guilt; and, improving reporting standards in case reports and final manuscripts.⁴⁹⁸

Mecklenberg, the program director for the Illinois study, and others characterized the Illinois data as “significant and valuable.”⁴⁹⁹ They noted that many previously conducted laboratory and field studies have involved confounds,⁵⁰⁰ and that the Illinois study produced valuable information comparing blind versus non-blind lineups. They argued that the study can be evaluated looking solely at the sequential lineup results to determine if the filler identification rates found in the study are acceptable,⁵⁰¹ and that it is presumptuous to assume that lineup administrator bias accounts for the variations in filler identification rates.⁵⁰² They claimed that the report offers information on other aspects of lineup procedures unrelated to the sequential/simultaneous debate, including cross-racial bias, identifications by victims versus witnesses and the effect of the use of a weapon or the threat of violence.⁵⁰³ They welcomed further field studies on the issues raised by the study.⁵⁰⁴

All of the writers supporting or decrying the Illinois study seem to agree field studies of sequential and simultaneous lineups should follow detailed protocols designed to compare the two procedures fairly.

⁴⁹³ *Id.* at 18-19.

⁴⁹⁴ *Id.* at 19.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 20.

⁴⁹⁸ *Id.*

⁴⁹⁹ Sheri H. Mecklenberg et al., *The Illinois Field Study: A Significant Contribution to Understanding Real World Eyewitness Identification Issues*, 32 *Law & Human Behav.* 22, 23 (2008).

⁵⁰⁰ E.g., varying lineup sizes, video v. photo arrays, lineup member dress, foil similarity, different lineup instructions and use of randomized and non-randomized lineup placement of suspects. *Id.*

⁵⁰¹ *Id.* at 24.

⁵⁰² *Id.* at 25.

⁵⁰³ *Id.* at 26.

⁵⁰⁴ *Id.*

Dr. MacLin and others summarized the current state of research on lineup issues:

Research has indicated that sequential lineups reduce false identifications when the actual perpetrator is absent from the lineup, a factor significant enough for policy makers in Wisconsin and New Jersey to adopt versions of the sequential procedure for their jurisdictions. However, the sequential lineup also appears to lower the rate of correct identifications. Researchers are actively working to uncover the mechanisms that underlie this effect. The U.S. Department of Justice (1999) provides guidelines for constructing both types of lineups.⁵⁰⁵

Ongoing Field Studies

There have been numerous calls for additional field studies to test lineup procedures to verify if the sequential superiority effect seen in some laboratory studies holds true in real-life situations. In 2007, National Institute of Justice (NIJ) funded Urban Institute to test the reliability of simultaneous and sequential, as well as blind and nonblind lineups in the field. The study will be guided by a NIJ-sponsored study group consisting of law enforcement officers, defense counsel, prosecutors, victim and witness advocates and other interested persons.⁵⁰⁶ Dallas County, Texas, was to begin participating in this study in January 2008, but funding for this project was lost due to delays in implementation. Instead, the Dallas department announced in January 2009 that it would implement blind sequential lineups without completing the study. Dallas County has seen 21 people exonerated by DNA testing since 2001.⁵⁰⁷ The pilot study was designed to examine 800 stranger-on-stranger robbery cases, which were to be divided into four groups of 200, to be tested by either sequential double-blind, sequential nonblind, simultaneous double-blind or simultaneous nonblind methods.

In 2006, The American Judicature Society's Center for Forensic Science and Public Policy met to develop field study protocols.⁵⁰⁸ In 2007, The JEHT Foundation granted \$700,000 to support Eyewitness Identification Field Studies sponsored by the American Judicature Society. Dr. Wells was to lead the 18-month national study, with the intent of conducting studies in four jurisdictions. Data has been collected from a study in Tucson and its summary analysis will probably be released later this year. Unfortunately, only part of the grant was received before the JEHT Foundation was forced to shut down, a victim of the Madoff Ponzi scheme. This study was built around computer-generated random assignment of lineup type and lineup position of the suspect and the project incorporates law enforcement training programs, protocol compliance monitoring, recording of identification sessions and improved reporting standards.

⁵⁰⁵ MacLin et al., *supra* note 178, at 7-8 (citations omitted).

⁵⁰⁶ Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ J. 8, (Oct. 2007), available at <http://www.ojp.usdoj.gov/nij/journals/258/police-lineups.html>.

⁵⁰⁷ Danny Robbins, *Dallas exonerees band together* (Feb. 17, 2011), [theeagle.com, http://www.theeagle.com/texas/Dallas-exonerees-band-together](http://www.theeagle.com/texas/Dallas-exonerees-band-together).

⁵⁰⁸ Am. Judicature Soc'y, Meetings / Events of the AJS Center for Forensic Science and Public Policy, www.ajs.org/wc/wc_meetings.asp (last visited Mar. 21, 2011).

Last year, NIJ solicited proposals to “conduct research on current eyewitness identification practices of police departments” and to “examine the impact of photo array policies and procedures on eyewitness identification outcomes in . . . police departments.”⁵⁰⁹ NIJ expected to have up to \$1,500,000 to fund two to four awards with awardees having up to three years to use the award.⁵¹⁰ The deadline to apply for a grant was June 14, 2010,⁵¹¹ but it doesn’t appear that any awards were made during fiscal year 2010 for the experimental part;⁵¹² however, Police Executive Research Forum was awarded \$323,966 for a national survey of eyewitness identification processes in law enforcement agencies.⁵¹³

Reasonable Basis Model

Recommendation and reasoning:

Dr. Wells has proposed a new recommendation regarding the use of lineups, *i.e.*, “a reasonable basis for suspecting a person should exist before placing that person (or his or her photo) into a lineup.”⁵¹⁴ He argued that doing so increases the likelihood that the suspect in the lineup is the actual culprit and can decrease the likelihood of a mistaken identification.⁵¹⁵

Show-Ups

Recommendation:

Showups should follow specific procedures to avoid biasing the eyewitness.

Research and reasoning:

It has long been recognized in law and research that showups done shortly after a crime may have great investigative use, but they are also offer an inherent risk of suggestiveness. The dilemma is to balance their appropriate use while reducing their inherent risk of suggestiveness.

⁵⁰⁹ Nat’l Inst. of Just., U.S. Dep’t of Just., *Solicitation: Research on Eyewitness Identification Policies and Procedures* 4, OMB No. 1121-0329, available at <http://www.ncjrs.gov/pdffiles1/nij/sl000904.pdf>.

⁵¹⁰ *Id.* at 5.

⁵¹¹ *Id.* at 4.

⁵¹² Nat’l Inst. of Just., U.S. Dep’t of Just., Fiscal Year 2010 Awards, <http://www.nij.gov/nij/awards/2010-table.htm>.

⁵¹³ Award Number 2010-IJ-CX-0032, *id.*

⁵¹⁴ Wells, *supra* note 239, at 635.

⁵¹⁵ *Id.* at 636.

Dr. Steblay and others meta-analyzed show-ups and lineups,⁵¹⁶ which was adapted into a presentation.⁵¹⁷ She found that the “correct identification rate was approximately equal for witnesses shown either a lineup or a show-up when the perpetrator was . . . present in the display. False identification rates in target-absent show-up and lineup presentations were also approximately equal.”⁵¹⁸ However, in the studies where an innocent suspect who closely matched the description of the perpetrator was included, false identification rates were 6% higher in show-ups.⁵¹⁹ She found that suggestibility was not a major factor in show-ups, and that witnesses appeared to be more cautious in their identifications during show-ups, which is consistent with the hypothesis that absolute judgment occurs when a witness is presented with one photograph.⁵²⁰ She cautioned, however, that these studies were conducted under laboratory conditions and included many best-practice features; in the field, show-ups may be more dangerous than the data indicated.⁵²¹

Rejecting claims that show-ups are extremely biased, Drs. Ebbesen and Konečni argued that studies have suggested that show-ups result in a lower probability of false alarms than lineups. They reasoned that a witness viewing a lineup may pick the person who most looks like the culprit while the witness experiencing a show-up makes a judgment as to whether or not the person is the culprit. Addressing a study cited by them, Dr. Wells and others countered that show-ups are more likely to yield false identifications because of their suggestiveness. The witness is shown someone known to be a suspect, and that may unintentionally heighten any confidence the witness has in the identification.

Experience in another jurisdiction:

Recently, the Dallas Police Department implemented a new show-up policy that limits when and how show-ups can be done. Police should take the witness to view the suspect, not return the suspect to the crime scene for identification. The witness should be cautioned that the suspect may or may not be the offender, and that the investigation will continue regardless of whether an identification is made. If there are multiple witnesses and one witness makes an identification from the show-up, no more witnesses should participate in the show-up. The policy requires supervision by a sergeant at the scene, who must obtain approval from the watch commander for a show-up. Documentation of the procedure is also required.⁵²²

⁵¹⁶ Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Human Behav. 523 (2003).

⁵¹⁷ Nancy K. Mehrkens Steblay, *Reforming Eyewitness Identification: Cautionary Lineup Instructions; Weighing the Advantages and Disadvantages of Showups versus Lineups*, 4 Cardozo Pub. L. Pol’y & Ethics J. 341 (2006).

⁵¹⁸ *Id.* at 351.

⁵¹⁹ *Id.*

⁵²⁰ *Id.* at 352.

⁵²¹ *Id.*

⁵²² Roll Call Training Bulletin #2008-27, Dall. Police Acad., Document Control #46-08 (Nov. 24, 2008).

Other Proposals to Prevent Eyewitness Misidentifications

Various other proposals have been made to avoid wrongly convicting someone based upon an eyewitness's misidentification. They include use of expert testimony and model jury instructions. These two proposals have been suggested because cross-examination can be inadequate to reveal a mistaken identification.⁵²³ Richard A. Wise and others have advocated a "tripartite solution," which combines procedural improvements with increased use of expert testimony and jury instructions.⁵²⁴ Some preliminary observations regarding the current status of jury instructions and expert testimony follow.

Jury Instructions

Regarding jury instructions in general, Pennsylvania's Supreme Court has rejected the notion that jury instructions as to the reliability of eyewitness identifications are necessary.

Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution--indeed, the cases say that "his [positive] testimony as to identity may be treated as the statement of a fact". For example, a positive, unqualified identification of defendant by one witness is sufficient for conviction even though half a dozen witnesses testify to an alibi.⁵²⁵

This belief in the infallibility of an eyewitness who testifies with certainty has been challenged by several of the DNA exoneration cases. The most well-known might be that of Ronald Cotton, who was convicted in North Carolina of raping Jennifer Thompson, a college student at the time of the attack. Ms. Thompson has since begun speaking publicly about the need for eyewitness identification reform. She has stated that during the rape she made a conscious effort to memorize her assailant's face, look for distinguishing marks and any other details that might assist her in identifying him. "I was absolutely, positively, without-a-doubt certain he was the man who raped me when I got on that witness stand and testified against him."⁵²⁶ However, Ronald Cotton was exonerated when another man was identified as the rapist through DNA testing.

⁵²³ Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L.Rev. 727, 774-82, 783 (2007).

⁵²⁴ Wise et al., *supra* note 136.

⁵²⁵ *Commonwealth v. Kloiber*, 106 A.2d 820, 826 (Pa. 1954) (citations omitted).

⁵²⁶ Mark Hansen, *Forensic Science: Scoping out eyewitness IDs*, 87 A.B.A.J. 89 (Apr. 2001), available at www.nersp.nerdc.ufl.edu/~malavet/evidence/notes/thompson_cotton.htm.

Expert Testimony

With respect to expert testimony, Pennsylvania currently does not admit expert testimony regarding eyewitness credibility because a jury's basic function is to decide credibility, and "[i]t has long been established that expert testimony is only admissible where formation of an opinion on a subject requires knowledge, information, or skill beyond that possessed by the ordinary juror."⁵²⁷ In general, admissibility of expert testimony in Pennsylvania is governed by an evidentiary rule, which states:

If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.⁵²⁸

Saul Kassin and his colleagues surveyed eyewitness experts in 1989 and again in 2000, to determine what eyewitness testimony research had reached "general acceptance in the particular field in which it belongs", under the *Frye* test,⁵²⁹ the applicable test for admissibility of expert testimony in several states, including Pennsylvania.⁵³⁰ While much of the research in that article refers to expert testimony on the reliability of eyewitness identifications, it is informative as to those areas of eyewitness identification research that the "experts" had determined are generally accepted by the scientific community. The 1989 report surveyed 63 experts and found that most of them agreed that research findings on the following areas were reliable: effects of exposed time, lineup instructions, the wording of questions, pre-event expectations, post-event information, and the accuracy-confidence correlation.

Some writers have advocated for the admissibility of expert testimony on the psychology of false identifications and false confessions. It is not the first choice of the experts that have spoken to the advisory committee. Dr. Wells has consistently argued that the researcher's approach is not to make juries more skeptical, but to make eyewitness identification evidence more reliable.⁵³¹ This distinction is important.

Dr. Wells has suggested that the need for much expert testimony regarding eyewitness identifications could be eliminated if investigative procedures can be improved so that they produce faultless identifications that are accurate and fair. Similarly, Dr. Kassin has suggested that the need for expert testimony regarding false

⁵²⁷ *Commonwealth v. Simmons*, 662 A.2d 621, 630-31 (Pa. 1995).

⁵²⁸ Pa. R. Evid. 702.

⁵²⁹ Saul M. Kassin et al., *On the 'General Acceptance' of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 406 (2001).

⁵³⁰ "Adoption of Pa.R.E. 702 does not alter Pennsylvania's adoption of the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires scientific evidence to have 'general acceptance' in the relevant scientific community." Pa. R. Evid. 702 Comment.

⁵³¹ Wells et al., *supra* note 140, at 603. "In 1996 . . . the American Psychology/Law Society . . . appointed a subcommittee to draft good-practice guidelines for . . . conducting lineups and photospreads for eyewitnesses to crimes." *Id.*

confessions could be reduced by video-recording custodial interrogations, thereby providing the best evidence of the voluntariness and reliability of a defendant's confession.

Proposals in this Report for Eyewitness Identification

The proposals relating to eyewitness identification were generated by the subcommittees on investigation and legal representation. The subcommittee on investigation proposes amending a rule of criminal procedure to require defense counsel in capital cases to be educated on evidence relating to eyewitness identification.⁵³² This rule⁵³³ already requires "training relevant to representation in capital cases" and eyewitness identification would be included with other specified areas.⁵³⁴

Both subcommittees considered the statutory proposal,⁵³⁵ but it was principally authored by the subcommittee on legal representation. If enacted, the administration of lineups and photo arrays would generally be conducted by a person who does not know either which one is suspected by investigators or which one is being viewed by the witness. There would be some exceptions to the general requirement, but instructions to the witness would still be required along with some other prescribed procedures. Each law enforcement agency would have to adopt a written protocol consistent with the statute, and a training program would be developed for officers and recruits.

These proposals were generated based upon the academic material reviewed along with experiences related by presenters and shared among the advisors.

Summary of Eyewitness Identification Proposals

A rule of criminal procedure should be amended to require defense counsel⁵³⁶ in capital cases to be educated on evidence relating to eyewitness identification.

A statute should require the administration lineups and photo arrays to be conducted by a person who does not know either which one is suspected by investigators or which one is being viewed by the witness.

⁵³² *Infra* p. 167.

⁵³³ Pa. R. Crim. P. 801.

⁵³⁴ *E.g.*, pleading & motion practice, pretrial investigation, jury selection, etc. *Id.*

⁵³⁵ *Infra* p. 172.

⁵³⁶ This rule mandates "educational and experiential criteria" for retained or appointed counsel "[i]n all cases in which the district attorney has filed a Notice of Aggravating Circumstances." Pa. R. Crim. P. 801. The educ. is approved by Pa. Continuing Legal Educ. Bd. so that prosecutors may attend courses focusing on capital litigation as well.

ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

False Confessions and other Incriminating Admissions are Substantial Causes of Wrongful Convictions

Other causes of wrongful convictions have been recurrently found, but convictions based partly or completely on false confession or other incriminating admissions have been shown to comprise a substantial percentage of the DNA exoneration cases in the United States. Of these 273 exonerations, Innocence Project lists 66 of them in which a false confession or other incriminating admission contributed to the conviction. This represents almost $\frac{1}{4}$ of these cases. Of the 11 exonerations from our Commonwealth, four are listed for a false confession or other incriminating admission as having contributed to the conviction. That number represents more than 36% for these Pennsylvania exonerations.⁵³⁷ “We need not be reminded of the countless situations where persons confess to crimes of which they are innocent”⁵³⁸

Causes of False Confessions

This section will review some of the literature from the last ten years that explains how false confessions occur. Training is uniformly recommended in all the areas studied by the advisory committee, including custodial interrogations. Other recommendations have ranged from the far-reaching call for abolition of *Miranda* warnings⁵³⁹ in their entirety, to suggestions that confessions should have independent corroborating evidence to support them, to a determination by the trier of fact that the confession meets minimal indicia of reliability before being ruled admissible. As with eyewitness identifications, Pennsylvania’s courts have been reluctant to admit expert testimony on false confessions, stating that the average juror is capable of assessing the veracity of a confession, and that the probative value of any testimony is outweighed by its potential prejudicial effect.⁵⁴⁰ While these other recommendations have zealous supporters and detractors, the principal

⁵³⁷ Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 1, 2011).

⁵³⁸ *Commonwealth v. Conklin*, 160 A.2d 566, 568 (Pa. 1960).

⁵³⁹ *Miranda v. Arizona*, 384 U.S. 436, 467-73, 478-79 (1966).

⁵⁴⁰ *Pennsylvania v. Robinson* (No. CP-03-CR-0000865-2005, Armstrong Cnty. Ct. of C.P., Apr. 3, 2009).

recommendation that is consistently put forth by individuals who believe that there is a problem with custodial interrogations and false confessions is to mandate electronic recording of custodial interrogations.⁵⁴¹

Saul M. Kassin has studied false confessions and written about them extensively.⁵⁴² At a 2008 joint conference of the subcommittees on investigation and legal representation, he gave a presentation on false confessions and the value of electronically recording interrogations. He stated that proven false confessions naturally sort themselves into three groups:

(1) Voluntary false confessions, without external pressure—these frequently occur in high profile cases, involving persons who are seeking attention or are delusional but most prevalently involve a confession made to protect the actual perpetrator.

(2) Compliant false confessions (the vast majority of cases) given by innocent people subject to interrogation—the person knew he was innocent but consciously decided to falsely confess under the stress of the interrogation to gain something such as release, end of interrogation or avoidance of penalty. Frequently, the person retracts the confession once the interrogation is concluded. In corporate security, persons will frequently confess to save their jobs. Suspects in these cases perform a cost-benefit analysis, balancing the pressure to confess against the inducement being offered and decide to “cut their losses” by confessing.

(3) Internalized false confessions, where an innocent person, subjected to certain suggestive techniques of interrogation, comes to believe that he actually committed the crime. False memories are created in these cases, sometimes by police tactics that manipulate the suspect’s perception or are simply deceptive, presenting seemingly objective evidence implicating the person. Frequently, the suspects report that they were confused at the time of the confession.

Acknowledging that false confessions occur, Dr. Kassin said two questions then arise: why does this happen and what are the risks? He has testified as an expert in about a dozen cases and has declined to do so in hundreds more. In reviewing these and other cases, three more questions arise: Why was this innocent person targeted for interrogation in the first place? What about the process of interrogation puts innocent people at risk? Why are false confessions so powerful, that they are instantly believed?

⁵⁴¹ E.g., Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 *Current Directions in Psychol. Sci.* 249, 252 (2008).

⁵⁴² E.g., Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 *Psychol. Sci. in the Pub. Int.* 33 (2004).

Dr. Kassin discussed the process and value of electronic recordings. He advocated recording beginning with the minute everyone enters the interview room, so that the entire process is captured, even pre-*Miranda* communications, as is done in District of Columbia. He noted that law enforcement draws a distinction between interviews (pre-*Miranda*) and interrogations (post-*Miranda*). Law enforcement training professionals will also differentiate between these two dialogues. He observed that The Reid Technique®⁵⁴³ is not the only modern method of police interrogation; at least a dozen others exist. The Reid Technique® is the most important and influential, and many of the other methods draw inspiration from it. This psychological approach to interrogation arose in the 1930s, and was first published by Fred E. Inbau and John E. Reid in 1962 as *Criminal Interrogation and Confessions*.⁵⁴⁴ Variations on The Reid Technique® are used loosely by both trained and untrained personnel.

The Reid Technique® is a nine-step process. The initial interview is a pre-interrogation conversation, intended neither to be confrontational nor to elicit a confession. It is designed to ask open-ended questions to give the interrogator clues from the suspect's behavior as to whether the suspect is truthful or lying. Verbal and nonverbal behavior is observed as part of a lie-detecting process.⁵⁴⁵ The Reid school claims that its training programs can teach an interrogator to be 80 to 85% accurate in detecting deception.⁵⁴⁶ Behavioral symptoms are analyzed by watching for eye contact, posture and position changes, as well as other behavioral cues. Dr. Kassin added that while it is relatively easy to recognize anxiety in a suspect, it does not follow that the cause of that anxiety is easily discernible. The Reid Technique® presumes that anxiety denotes lying.

Dr. Kassin asserted that scientific research regarding lie detection has taken place for over 50 years, and researchers concluded over a range of studies that people average 54% accuracy in recognizing lying. He added that odds are that any individual will accurately detect a lie 50% of the time, so that this accuracy level is barely statistically significant. Looking at various groups of people, a 1991 study by Paul Ekman and Maureen O'Sullivan found that college students were 53% accurate; psychiatrists, 58%; and, U.S. secret service agents, 64%.⁵⁴⁷

Dr. Kassin described a study in which he had some college students commit a mock crime.⁵⁴⁸ Other students were instructed to simply show up at the "crime scene," to not do anything but be picked up by the police for questioning. They were all instructed that their best interest was to completely maintain their innocence, as they would be subject to public arrest and custody if they could not convince the interrogator of their

⁵⁴³ John E. Reid & Assocs., <http://www.reid.com/>.

⁵⁴⁴ The 4th edition of this has been published with the additional authorship of Joseph P. Buckley III and Brian C. Jayne, <http://www.reid.com/store2/detail.html?sku=cic4th>.

⁵⁴⁵ Saul M. Kassin & Christina T. Fong, 'I'm Innocent!': *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 Law & Human Behav. 499, 500 (1999).

⁵⁴⁶ *Id.* at 505.

⁵⁴⁷ Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 Am. Psychologist 913, 916 (1991).

⁵⁴⁸ Shoplifting, vandalism, breaking into a building and setting off an alarm, and breaking into an e-mail account and reading someone's private e-mail. Kassin & Fong, *supra* note 545, at 502-03.

innocence. The students were then interrogated by a person who knew what crime he was investigating but had no information as to whether the suspect committed the crime. The study recruited a “naïve” group of untrained individuals to review the videotapes of these interrogations; a second group was trained according to The Reid Technique®,⁵⁴⁹ and the two groups were then tested to see if accuracy was improved by training. The results of the study showed that the trained people were significantly poorer at identifying deception.⁵⁵⁰ The trained people, however, were more confident in their ability to spot lying.⁵⁵¹ They also revealed that their confidence in their assessments was based on the training they received.⁵⁵² Dr. Kassir asserted that the behaviors asserted in the training manuals as indicative of lying are not diagnostic cues.⁵⁵³ For example, he claimed that across all studies worldwide, the correlation between eye contact and deception is zero.

Dr. Kassir argued that the pre-interrogation interview is important because, as a result of the behavioral analysis, the interviewer determines whether the suspect is lying or telling the truth and thus dictates whether an interrogation will occur. That presumption of guilt then dictates the psychological techniques used to elicit a confession from the suspect during the interrogation. He noted that studies have shown that most diagnostic visual cues can be manipulated by a good liar, and that simply listening to the interview without looking at the suspect can improve lie detection ability by 9%. He contended that liars hesitate before answering accusatory questions, speak rapidly to compensate for the hesitation, all the while increasing their pitch, and that these are better cues for lie detection. He recommended that interrogators shift their focus from anxiety to cognitive effort to determine deception. Another suggestion is to strategically withhold evidence until after the suspect tells his story, to then trap the person in their lies.

Dr. Kassir noted that the opening salvo in a Reid interrogation is always an accusation of guilt, called a positive confrontation.⁵⁵⁴ He explained that he and others surveyed police investigators to try to determine the components of a typical interrogation.⁵⁵⁵ The investigators were asked to estimate how often they used various interrogation techniques.⁵⁵⁶ The top four tactics were isolating the suspect from family and friends; interrogating in a small, private room; identifying contradictions in the suspect’s story; and, establishing rapport and gaining trust.⁵⁵⁷ He noted that these methods map onto The Reid Technique®. He pointed out that interrogations do not follow the step-by step process set out in The Reid Technique®, but follow a more fluid process. He reduced the nine steps of the Reid technique to three psychological processes:

⁵⁴⁹ *Id.* at 505.

⁵⁵⁰ *Id.* at 508.

⁵⁵¹ *Id.* at 509.

⁵⁵² *Id.* at 510.

⁵⁵³ *Id.* at 500-01.

⁵⁵⁴ “We know you did it, so don’t lie to us!”

⁵⁵⁵ Saul M. Kassir et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 *Law & Human Behav.* 381 (2007).

⁵⁵⁶ *Id.* at 387.

⁵⁵⁷ *Id.* at 388, 389.

(1) Custody and isolation. The interrogation room is designed to create an uncomfortable environment to motivate the suspect to escape via confession. The underlying psychology is to increase the suspect's anxiety associated with denial and decrease the suspect's anxiety associated with confession, so that confession becomes relatively more desirable.

(2) Confrontation. The interrogation begins with the accusation. The immediate next steps involve managing denials and overcoming objections. The U.S. Supreme Court has sanctioned the use of lying or bluffing about the evidence to suspects to induce confessions.

(3) Minimization. To normalize the crime, the interrogator will sympathize and be understanding. The interrogator will develop themes that will allow the suspect to develop moral justifications and face-saving excuses. Courts allow this technique. Although explicit promises of leniency are prohibited, Dr. Kassin stated that minimization contains an implicit promise of leniency.

Dr. Kassin queried the risks by these techniques on an innocent person. Time is an important risk factor. He reported that the vast majority of U.S. interrogations last from 30 minutes to an hour; 90% last less than two hours; and, 95% to 99% last less than four hours. Experts suggest that any interrogation exceeding six hours be considered legally coercive. In Richard A. Leo and Steven A. Drizin's study of proven false confession cases, the average interrogation lasted 16.3 hours for 44 cases in which the duration of interrogation could be determined or was reported.⁵⁵⁸ Dr. Kassin asserted that psychological studies have proven that stress, fatigue and sleep-deprivation cause a person to become more focused on immediate benefits and consequences (e.g., ending the interrogation) rather than long-term consequences (e.g., potential imprisonment resulting from the confession).

A second factor he discussed was the presentation of false evidence. False confession studies have shown that people confess because they feel trapped by the evidence. The U.S. Supreme Court sanctioned the use of an outright lie in 1969 and has not revisited the issue.⁵⁵⁹ Dr. Kassin indicated that false evidence is not ubiquitously used in interrogations; studies have shown that it is used 10% to 30% of the time on average but is found in almost all proven false confessions cases. In his and Jennifer T. Perillo's recent study, he found a "bluff effect," when told that a record existed that could

⁵⁵⁸ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 946-47 (2004).

⁵⁵⁹ "The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances,' and, on the facts of this case we can find no error in the admission of petitioner's confession." *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (citation omitted).

be checked to verify the subject's actions (but had not yet been so checked), innocent persons would falsely confess out of compliance with the interrogator in the expectation that the evidence would prove their innocence.⁵⁶⁰

Dr. Kassin explained that some basic principles of human behavior have been revealed by thousands of studies of human behavior across groups of people of varying age and sex in various venues over a 100 year period. He said a general law of human behavior is that misinformation can substantially alter a person's visual perception, emotional state, personal memories and medical outcomes,⁵⁶¹ and generally give the individual an altered view of reality. He said that lie detectors and polygraphs can be useful, but that polygraphs are frequently used to leverage confessions and can induce false confessions because a suspect is presented with what is considered incontrovertible scientific evidence of guilt.

Dr. Kassin defended his deception studies as inspired by real-life false confession cases in which confessions were induced by police misinforming the suspect about evidence from the crime. Cases and laboratory studies taken together show that lies can contribute to false confessions.⁵⁶² Other risks factors include youth and inexperience, and intellectual or other mental deficiencies.⁵⁶³ People who are highly dependent, suggestible, delusional, have an anxiety disorder or who are in grief or shock are also at risk.⁵⁶⁴ Anyone who is extremely vulnerable to manipulation is also at risk.

Recent research has revealed that the individual's own innocence is a risk factor.⁵⁶⁵ Dr. Kassin mentioned that innocent suspects waived their *Miranda* rights at a much higher rate than people who have criminal records.⁵⁶⁶ Studies have shown that: the suspect's own innocence predisposes him to place himself in an interrogation situation;⁵⁶⁷ innocent suspects are more open and forthcoming; they agree to polygraphs; and, they agree to searches of their homes and vehicles. He opined that substantial lies by investigators can cause major problems; he had previously believed that the harmless bluff technique would snag the offender but not the innocent. His belief regarding bluffs has been proven wrong in that several exonerees indicated they interpreted the bluff as a promise of future exoneration making it easier for them to confess and terminate the interrogation. The confession rate was substantially increased during his study to test this theory, but further study is needed on this point.

⁵⁶⁰ Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, Law & Human Behav. (published online Aug. 24, 2010), available at [http://web.williams.edu/Psychology/Faculty/Kassin/files/Perillo%20&%20Kassin%20\(in%20press\)%20-%20LHB%20bluff%20studies.pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Perillo%20&%20Kassin%20(in%20press)%20-%20LHB%20bluff%20studies.pdf).

⁵⁶¹ The placebo effect.

⁵⁶² Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Human Behav. 3, 17-18 (2010).

⁵⁶³ *Id.* at 19-21.

⁵⁶⁴ *Id.* at 21-22.

⁵⁶⁵ Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 Am. Psychologist 215 (2005).

⁵⁶⁶ *Id.* at 218-19.

⁵⁶⁷ Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 Law & Human Behav. 211, 218 (2004).

A third question discussed by Dr. Kassin was why people always believe a false confession. For his purposes, he defined a false confession as the full narrative statement rather than just the initial admission. In an experiment with a group of prisoners, he asked them to confess to the crime that resulted in their incarceration. He then asked them to confess to a made-up crime. The confessions were all videotaped. The tapes were shown to lay people, who recognized false confessions 54% of the time. Detectives had a lower recognition rate, which Dr. Kassin attributed to their tendency to assume confessions are true. In a second experiment with the tapes, when told that half the confessions were false and half were true, the detectives' rate increased into the 50% range. He added that all the test subjects recognized false confessions at a 10% higher rate when they only listened to and did not view the tapes.

To determine why false confessions are so credible, Dr. Kassin analyzed the content of known false ones. Many of the narratives have a high level of specific detail and frequently touch on motive, which frequently track the "themes" developed by interrogators using The Reid Technique®. Apologies, expressions of remorse and promises to never do it again are frequently found in both false and true confessions, making it harder for judges and juries to differentiate between the two types. Dr. Kassin found that this is partially due to the fact that they are privy only to the final recorded narrative confession (either in writing or on tape), and do not observe the entire interrogation process that developed that confession.

Dr. Kassin reviewed the Barry Laughman case, a Pennsylvania DNA exoneree.⁵⁶⁸ He argued that Laughman was a very vulnerable individual having a verbal IQ in the 70s and a severe anxiety disorder with a very low tolerance for stress. His confession was unrecorded, in that one officer questioned Laughman while a second officer wrote down the responses. One of the officers then read the entire exchange on tape, and Laughman was simply asked to affirm the statement. This process denied the judge and jury the ability to assess the confession; they were unable to evaluate his demeanor, willingness and vocal inflections. He noted that the confession contained extreme details of the crime as well as his motivation for the rape and murder. He physically reenacted part of the crime. He expressed shame and remorse; at trial, the trooper described Laughman's demeanor during the interrogation.

Dr. Kassin added that false written statements will frequently contain corrections by the suspect. Deliberately including mistakes in the written false confession is a Reid Technique® that is intended to create an illusion of guilt and shore up the credibility of the confession.

Dr. Kassin detailed an experiment in which study participants witnessed a robbery and identified a culprit. They were then told that someone else had confessed to the crime. Roughly 60% of the witnesses changed their identification, and their confidence levels in those identifications were increased. Confessions have a way of tainting every

⁵⁶⁸ *Infra* p. 240.

other aspect of an investigation. He cited another study in which 17% of latent fingerprint analysts changed their analysis when told that someone other than the person they had originally identified had confessed.

Dr. Kassin commented on the value of videotaping custodial interrogations. There is much variability in the extent of videotaping; he distinguished between videotaping a confession and videotaping an entire interrogation. Using *Miranda* warnings as a starting point can also create some ambiguity.

Dr. Kassin related that mandatory video recording of interrogations began in United Kingdom of Great Britain and Northern Ireland in 1986. The current policy and practice has greatly limited the interrogation techniques that may be used, but the false confession rate has not changed. District of Columbia and almost 20 states now mandate recordings, while numerous other jurisdictions voluntarily record.⁵⁶⁹ Among other presumptive benefits, cameras might deter the use of highly coercive tactics. Recording should also prevent baseless claims of abuse or coercion and can provide a full and accurate memory of the transaction. Recording will also improve fact-finding accuracy of judges and juries. In a preliminary study he conducted to measure this effect, mock juries revealed that when seeing the entire taped interrogation, they were more likely to believe it was coercive than when they only saw tape of the summary confession. In reviewing the tapes, their determination of guilt or innocence was based in part on the conclusion that the suspect seemed to know things that an innocent person would not be expected to know.

Dr. Kassin remarked that, over time, detectives who have recorded like it. John E. Reid and Associates, which initially opposed recordings, now offers a book on how to videotape confessions and interrogations.⁵⁷⁰ There are questions about the effect of the presence of the camera on the suspects, and Dr. Kassin would like to test the effect in a fully randomized field study. However, he believes that the presence of a camera would have minimal effect as other studies have shown that people habituate very quickly the presence of a video camera or tape recorder. At least one advisor with relevant experience indicated that the presence of a camera on suspects has more than minimal effects.

Dr. Kassin stated that videotaping can address all the concerns that are raised about confessions:

- Was the suspect's admission voluntary or coerced?
- Did the suspect follow the admission with a narrative statement of his own or was it prompted?
- If so, were the details accurate or erroneous?

⁵⁶⁹ *Infra* p. 269.

⁵⁷⁰ David M. Buckley & Brian C. Jayne, *Electronic Recording of Interrogations* (2005), available at <http://www.reid.com/store2/detail.html?sku=eri>.

- If accurate, were the details derived from first-hand knowledge, or was the suspect tainted by other information (either advertently or inadvertently)?
- Did the suspect lead the police to information that they did not already know or provide other new corroborating evidence of their confession?

Dr. Kassin and others suggested either an overall modification of the concept of interrogation from “confrontational” to “investigative” or specific reforms to certain at-risk factors inherent in interrogations.⁵⁷¹ As to the former, they reviewed efforts made in Great Britain, New Zealand and Norway to shift the intent of interrogation from a guilt-presumptive, confession-seeking exchange to an investigative interview focused on fact-finding.⁵⁷² They reported that recent laboratory research in this area has shown that it can reduce the number of false confessions without decreasing the rate of true confessions, but that additional research is needed.⁵⁷³ As to the latter reforms, they suggest that detention and interrogation have time limits or at least guidelines with breaks for rest and meals.⁵⁷⁴ While not urging an outright ban on the use of false evidence and lying by police, they also recommend that some types of false evidence be prohibited against certain suspects, to be evaluated on a case by case basis by the judge.⁵⁷⁵ Permitting only moral and psychological minimization (“confession is good for the soul” type exchanges with suspects), while prohibiting legal minimization (implicit promises of leniency, or offering legal justifications for the crime) was also recommended.⁵⁷⁶ They also recommended specific protections for juveniles and persons with cognitive impairments of psychological disorders, including requiring the presence of an attorney at all questioning, and special training for investigators in interrogation techniques and their effect on vulnerable populations.⁵⁷⁷

While expressing full support for the concept of videotaping, G. Daniel Lassiter cautioned that the mere existence of the tape does not guarantee that judges and juries viewing the tape will necessarily be able to differentiate false from true confessions, but that more widespread knowledge of the causes of false confessions may increase their value.⁵⁷⁸ Christian A. Meissner and others further urged researchers to “develop alternative, evidence-based approaches that improve the diagnostic value of confession evidence.”⁵⁷⁹ They also recommend that researchers reach out to the law enforcement community to test and evaluate new interrogation methods.⁵⁸⁰

⁵⁷¹ Kassin et al., *supra* note 562, at 27-30.

⁵⁷² *Id.* at 27-28.

⁵⁷³ *Id.* at 28.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* at 28-29.

⁵⁷⁶ *Id.* at 29-30.

⁵⁷⁷ *Id.* at 30-31.

⁵⁷⁸ G. Daniel Lassiter, *Videotaped Interrogations and Confessions: What’s Obvious in Hindsight May Not Be in Foresight*, 34 *Law & Human Behav.* 41 (2010).

⁵⁷⁹ Christian A. Meissner et al., *The Need for a Positive Psychological Approach and Collaborative Effort for Improving Practice in the Interrogation Room*, 34 *Law & Human Behav.* 43, 44 (2010).

⁵⁸⁰ *Id.*

Interrogation Practices and Techniques

Dr. Leo has written that as a partial response to the 1966 U.S. Supreme Court ruling in *Arizona v. Miranda*, police interrogation techniques have shifted from the overt, physical intimidation portrayed in the gangster movies of the first half of the 20th century (e.g., the use of rubber hoses and bright lights) to very subtle psychological manipulation and deception of suspects in the interrogation rooms of today.⁵⁸¹ Dr. Leo said “In general, contemporary American police interrogations resemble confidence games to the extent that they involve the systematic use of deception, manipulation, and the betrayal of trust in the process of eliciting a suspect’s confession.”⁵⁸² Suspects also may deceive and manipulate to convince investigators of either their innocence or the futility of trying to prove their guilt, but the level of sophistication of suspects is so far below that of police investigators that the suspect’s manipulative skills are no match for a seasoned detective’s powers of persuasion.⁵⁸³ He described “[t]he essence of a confidence game” as “the exchange of trust for hope.”⁵⁸⁴

Dr. Leo conducted one of the first field studies of custodial interrogations in which he observed, either personally or via videotapes, 182 police interrogations of custodial suspects in 3 jurisdictions, a major urban area (pop. 372,242) and two smaller metropolitan areas (pop. 121,064 and 116,148).⁵⁸⁵ He observed only felony cases,⁵⁸⁶ but was unable to obtain a random sample. The bulk of the crimes reviewed were robbery (42.86%).⁵⁸⁷ Overall the suspects were young (66% under the age of 30), poor (87% from lower or working class backgrounds), non-white (more than 85% from minorities) males (90%).⁵⁸⁸ Almost 90% of the suspects had prior criminal records,⁵⁸⁹ and 78% of them waived their Miranda rights.⁵⁹⁰ The two interrogation techniques used most often (88% and 85% of the time) were to appeal to the suspect’s self-interest and to confront the suspect with existing evidence of guilt.⁵⁹¹ Other techniques, used from 43% of the time to 22% of the time, are, in descending order of use:

- Undermine the suspect’s confidence in denial of guilt
- Identify contradictions in the suspect’s story
- Use of behavioral analysis questions

⁵⁸¹ Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 Law & Soc’y Rev. 259 (1996).

⁵⁸² *Id.* at 261.

⁵⁸³ *Id.* at 262.

⁵⁸⁴ *Id.* at 264.

⁵⁸⁵ Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 268 n.13-15 (1996).

⁵⁸⁶ *Id.* at 274.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 273-74.

⁵⁸⁹ *Id.* at 275.

⁵⁹⁰ *Id.* at 276.

⁵⁹¹ *Id.* at 278.

- Appeal to the importance of cooperation
- Offer moral justifications/psychological excuses
- Confront the suspect with false evidence of guilt
- Use praise or flattery
- Appeal to the detective's expertise/authority
- Appeal to the suspect's conscience
- Minimize the moral seriousness of the offense⁵⁹²

He also found that approximately 71% of the interrogations lasted one hour or less, while a little more than 8% lasted over than two hours.⁵⁹³ More than $\frac{3}{4}$ of the interrogations yielded some incriminating information, which includes full confessions in almost $\frac{1}{4}$ of the cases.⁵⁹⁴

The only variable Dr. Leo found that significantly affected the suspect's likelihood to waive *Miranda* was whether the suspect had a prior criminal record.⁵⁹⁵ "The more experience a suspect has with the criminal justice system, the more likely he is to take advantage of his *Miranda* rights to terminate questioning and seek counsel."⁵⁹⁶ He also found that the only variables significantly related to the likelihood of a successful interrogation (yielding some incriminating information) are the number of interrogation tactics used and the length of the interrogation.⁵⁹⁷

Dr. Leo described the interrogation process in four steps, which he labeled "qualifying" the suspect, "cultivating" the suspect, "conning" the suspect and "cooling out" the suspect.⁵⁹⁸ Qualifying the suspect occurs before the suspect is taken into custody in the form of personal and situational profiling.⁵⁹⁹ A detective determines the likelihood of the suspect's guilt, the "righteousness" of the victim and the seriousness of the case, all of which contribute to how much effort a detective will devote to attempt to elicit incriminating admissions from a suspect.⁶⁰⁰ Once the interrogation begins, the detective

⁵⁹² *Id.*

⁵⁹³ *Id.* at 279.

⁵⁹⁴ *Id.* at 280-81.

⁵⁹⁵ *Id.* at 286.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* at 292.

⁵⁹⁸ Leo, *supra* note 581, at 266-84.

⁵⁹⁹ *Id.* at 267.

⁶⁰⁰ *Id.* at 267-68.

qualifies the suspect on a secondary level—his personality and vulnerability to manipulation.⁶⁰¹ He cited the Behavioral Analysis Interview developed by Reid & Associates as a means by which police attempt to determine deceptiveness in suspects.⁶⁰²

As part of cultivating the suspect, police attempt to establish rapport with the suspect to create a psychological dependence on the detective by the suspect so that the suspect will waive his constitutional rights and speak with the detective without an attorney present. Dr. Leo described this part of the interrogation as one of psychological manipulation, intended to elicit “truth-telling,” as in the truth as the detective believes it to be. His interpretation of conning the suspect is the detective’s exploitation of the suspect’s trust and ignorance to elicit a confession in exchange for implied promises of leniency from the judge and jury, “good” recommendations to the district attorney and other efforts to minimize the potential charges and punishment faced by the suspect.⁶⁰³

Dr. Leo described the “cooling out” of the suspect as positive reinforcement and morale building intended to convince the suspect to take responsibility for his actions and to believe that confessing to the police was his best course of action.⁶⁰⁴

Using the results of his field study, Dr. Leo discussed the impact of *Miranda* on police attitudes, behavior and culture and recommended mandatory videotaping of custodial interrogations in all felony cases.⁶⁰⁵ He reviewed the evolution of interrogation and confession law in the United States, noting that “[t]he initial rationale underlying the voluntariness standard was that overbearing police methods created too high a risk of false confession and were not likely to yield factually reliable information from the

⁶⁰¹ *Id.* at 269.

⁶⁰² *Id.* The Behavioral Analysis Interview consists of approximately 15 hypothetical questions posed to the suspect to evoke behavioral responses that are believed to assist the police officer in determining the truthfulness of the suspect’s responses and identify behavioral markers for deception. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 672-73 (1996). Reid & Associates’ training seminars teach that deceptive responses to four or more of the questions indicates that the interviewer to treat the suspect as guilty. *Id.* at 673. After this preliminary interview, the interrogation follows a nine-step method, outlined as follows:

- Step 1—Accuse the suspect of the crime
- Step 2—Develop psychological “themes” that morally excuse or justify the suspect’s behavior
- Step 3—Weaken and suppress the suspect’s denials
- Step 4—Overcome the suspect’s emotional, factual or moral objections to the interviewer’s assertions
- Step 5—Retain the attention of the suspect (primarily through physical gestures)
- Step 6—Shorten and embellish the themes presented in Step 2, focusing on one compelling moral theme
- Step 7—Present the suspect with an alternative question consisting of a good choice and a bad choice to account for the commission of the activity, and encourage the suspect to select the good choice
- Step 8—Enjoin the suspect to orally reveal details of the offense
- Step 9—Convert the suspect’s oral statements into a written confession of guilt

Id. at 673-74.

⁶⁰³ Leo, *supra* note 581, at 276-77.

⁶⁰⁴ *Id.* at 282-83.

⁶⁰⁵ Leo, *supra* note 602, at 681-92.

accused.”⁶⁰⁶ He further noted that the voluntariness test for admissibility developed into “the touchstone of due process in confession cases as the Supreme Court sought to strike an appropriate balance between protecting the rights of the criminally accused and allowing police to employ effective interrogation methods.”⁶⁰⁷ He added

As we have seen, . . . *Miranda* displaced the case-by-case approach of the voluntariness test by requiring the reading of standard warnings prior to custodial police questioning. By providing police with a clear rule that allows for mechanical compliance and by providing courts with an objective standard with which to judge the admissibility of confession evidence, the Warren Court effectively formalized American custodial police questioning procedures. As we have also seen, American police have generally complied with the letter of the *Miranda* requirements, typically reading to custodial suspects their *Miranda* rights from standard cards or advisement forms prior to any questioning. Despite this standardization of police interrogation practices, however, the *Miranda* formula did not entirely remove the pre-interrogation discretion of police officers and detectives. Consequently, the *Miranda* waiver is not always automatically obtained but often becomes an act of consent negotiated as police detectives employ subtle psychological strategies to predispose a suspect toward voluntarily waiving his or her *Miranda* warnings.⁶⁰⁸

The psychological manipulations discussed by Dr. Leo include conditioning and positively reinforcing the suspect, de-emphasizing the potential importance of the suspect’s *Miranda* rights, and persuasion.⁶⁰⁹

[F]irst, *Miranda* has exercised a civilizing influence on police interrogation behavior, and in so doing has professionalized police practices; second, *Miranda* has transformed the culture and discourse of police detecting; third, *Miranda* has increased popular awareness of constitutional rights, and; fourth, *Miranda* has inspired police to develop more specialized, more sophisticated and seemingly more effective interrogation techniques with which to elicit inculpatory statements.⁶¹⁰

However, Dr. Leo concluded that *Miranda* fails to address the problems of conflicting statements from police and suspects in court, false allegations of police misconduct, police perjury, false confessions and determining the voluntariness of confessions.⁶¹¹ “[M]andatory videotaping represents the most adequate solution to all of these problems.”⁶¹²

⁶⁰⁶ *Id.* at 625.

⁶⁰⁷ *Id.* at 626.

⁶⁰⁸ *Id.* at 659-60 (footnotes omitted).

⁶⁰⁹ *Id.* at 660-65.

⁶¹⁰ *Id.*, at 668.

⁶¹¹ *Id.* at 681.

⁶¹² *Id.*

Dr. Leo and Richard J. Ofshe examined 60 cases of “police-induced” false confessions, in an attempt to discern the effect of an untrue admission on various actors in the criminal justice system when there is no corroborating evidence to support the confession.⁶¹³ The cases studied all shared the following characteristics: no physical or significant and credible evidence of guilt; the state’s evidence consisted of little or no more than the suspect’s admission; and, the suspect’s factual innocence was supported by a variable amount of evidence, including exculpatory evidence from the confession.⁶¹⁴ The 60 cases were subdivided into three categories: 34 proven false confessions (based on dispositive independent evidence), 18 highly probable false confessions (based on overwhelming evidence that led to the conclusion that innocence was beyond a reasonable doubt), and 8 probable false confessions (based the lack of physical or other significant, credible evidence that led to the conclusion of innocence by a preponderance of the evidence).⁶¹⁵

Among the proven false confessions, Drs. Leo and Ofshe identified: “four sub-types of false confessions: the suspect confessed to a crime that did not happen; the evidence objectively demonstrates that the defendant could not possibly have committed the crime; the true perpetrator was identified and his guilt established; or the defendant was exonerated by scientific evidence.”⁶¹⁶

Drs. Leo and Ofshe categorized the outcomes of the cases they studied by four types. False confessions that do not lead to a conviction (52%) resulted from the police or prosecutor changing their minds after further reflection, confessions by the true perpetrator, prosecutorial intervention, judicial suppression and jury acquittals.⁶¹⁷ False confessions that lead to wrongful conviction and imprisonment comprised 48% of the cases reviewed.⁶¹⁸ If a false confessor went to trial (as opposed to accepting a plea bargain), he faced a 73% chance of a guilty verdict.⁶¹⁹

Drs. Leo and Ofshe concluded their review with the following recommendations to prevent wrongful convictions:

- Police should be “trained to seek independence evidence of guilt and internal corroboration for every confession before making an arrest”
- Prosecutors should require admissions to “be corroborated by the details of” the “post-admission narrative before” prosecuting

⁶¹³ Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 433-35 (1998).

⁶¹⁴ *Id.* at 436.

⁶¹⁵ *Id.* at 436-37.

⁶¹⁶ *Id.* at 449.

⁶¹⁷ *Id.* at 473-77.

⁶¹⁸ *Id.* at 477-78.

⁶¹⁹ *Id.* at 481-83.

- Courts should require “minimal indicia of reliability before admitting” a confession evidence
- Legislators should “mandate the recording of interrogations in their entirety”⁶²⁰

Drs. Drizin and Leo’s study of “proven interrogation-induced false confessions” discussed the central role of modern police interrogation techniques in producing false confessions:

The purpose of interrogation is not to determine whether a suspect is guilty; rather, police are trained to interrogate only those suspects whose guilt they presume or believe they have already established. The purpose of interrogation, therefore, is not to investigate or evaluate a suspect’s alibi or denials. Nor is the purpose of interrogation necessarily to elicit or determine the truth. Rather, the singular purpose of American police interrogation is to elicit incriminating statements and admission—ideally a full confession . . . to assist the State in its prosecution of the defendant.⁶²¹

Police persuade innocent persons to falsely confess by convincing them that the evidence implicates them in such a manner as to make their claims of innocence unbelievable and that their best recourse is to cooperate in an effort minimize any potential punishment or that the evidence is so strong that the person must have committed the crime, but for reasons such as drug or alcohol abuse, they are unable to remember doing so.⁶²² Additionally, juveniles and those with intellectual impairments are also more likely to be “persuaded” to falsely confess.⁶²³ The authors studied 125 “proven” false confessions, which were split into four categories: those in which no crime occurred; those in which the confessor was physically unable to commit the crime; those in which the true perpetrator of the crime was found; and those in which DNA or other scientific evidence dispositively established the confessor’s innocence.⁶²⁴ It is impossible to quantitatively determine the extent of interrogation-induced false confessions because data is not collected on the number of interrogations or false confessions and the high hurdle of proving the falsity of a confession.⁶²⁵

Of the 125 “proven” false confessions examined by Drs. Drizin and Leo, approximately 1/3rd were made by juveniles, with over half of the confessors under the age of 25, and 93% of the confessors were men.⁶²⁶ Geographically, almost ¾ of false confessions occurred in the South and Midwest, with more than a fifth of the cases

⁶²⁰ *Id.* at 495-96.

⁶²¹ Drizin & Leo, *supra* note 558, at 910 (citations omitted).

⁶²² *Id.* at 912-13, 916.

⁶²³ *Id.* at 916.

⁶²⁴ *Id.* at 922-24.

⁶²⁵ *Id.* at 928.

⁶²⁶ *Id.* at 941-42.

arising in Illinois (and over half of those in City of Chicago).⁶²⁷ Murder cases accounted for 81% of false confessions;⁶²⁸ and, “[m]ore than 80% . . . were interrogated for more than six hours.”⁶²⁹ Of the cases studied, 35% resulted in conviction and incarceration.⁶³⁰

Drs. Drizin and Leo recommended electronic recording of custodial interrogations in their entirety for several reasons: taping “creates an objective, comprehensive and reviewable record”; taping will deter police misconduct, improve the quality of interrogation practices and increase police ability to distinguish guilt from innocence; and, taping enables criminal justice officials to monitor the quality of police interrogations and the reliability of confessions.⁶³¹ Additionally, the authors recommended greater education and training in false confessions for police, prosecutors and the judiciary.⁶³²

Marvin Zalman and Brad W. Smith surveyed 144 municipal police departments in cities or municipal areas with populations greater than 150,000; almost 69% of the departments responded. The authors found that most police executives pragmatically comply with *Miranda*, deferring to its legality and legitimacy. Most of the persons surveyed disagreed with the supposition that current police interrogation techniques contribute to false confessions, and “support for videotaping exists but is not overwhelming.”⁶³³

Gisli H. Gudjonsson and others studied Icelandic college students to determine if certain personal experiences made individuals more susceptible to false confessions. The study participants were all students who self-reported falsely confessing during a police interview at some point in their lives. The authors found that individuals who reported experiencing a number of very adverse life events⁶³⁴ were more likely to report having falsely confessed. They concluded that one possible interpretation of the results is that negative life events and chronic strain make a person more likely to falsely confess during custody and police interrogation.⁶³⁵

Dr. Meissner and others have identified three primary factors associated with false confessions: investigative biases, psychologically-coercive interrogation techniques and psychological vulnerabilities of the suspect. Because of these factors, the authors recommended best practices for police investigations. Interrogations should be “transparent” via videotape to include all interactions between suspect and investigator

⁶²⁷ *Id.* at 943.

⁶²⁸ *Id.* at 944-45.

⁶²⁹ *Id.* at 946. This percentage is for the interrogations whose duration was “reported or could be determined.” *Id.*

⁶³⁰ *Id.* at 949.

⁶³¹ *Id.* at 994.

⁶³² *Id.* at 997, 1002.

⁶³³ Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. Crim. L. & Criminology 873 (2007).

⁶³⁴ E.g., abuse, drug use, death of an immediate family member.

⁶³⁵ Gisli H. Gudjonsson et al., *Custodial Interrogation: What Are the Background Factors Associated with Claims of False Confession to Police?*, 18 J. Forensic Psychiatry & Psychol. 266 (2007).

and should be focused equally on both parties. Investigators should evaluate suspects to determine the existence of any vulnerabilities, such as age, mental ability or psychological state that may put the person at risk. Persons under the influence of drugs or alcohol or suffering withdrawal symptoms should not be interviewed until normal cognitive functioning has returned. Finally, the suspect's statement should be compared to the other known evidence and facts in the case to determine its consistency. To avoid contamination of the suspect's statement, investigators are advised to withhold case details from the media and to not share details with the suspect during the interrogation.⁶³⁶

Brandon L. Garrett studied the transcripts of false confessions in 38 DNA exonerations.⁶³⁷ Looking at the characteristics of these false confessions, almost all had "specific details about how the crime occurred" that he concludes was the result of accidental or deliberate contamination of the interrogation.⁶³⁸ "A complete interrogation record enables meaningful reliability review and could help to prevent the problem of confession contamination."⁶³⁹ He also recommended interrogation reforms, such as using a detective unfamiliar with the case to initially interrogate and modifying psychological techniques when faced with vulnerable populations.⁶⁴⁰ With respect to vulnerable persons, he further suggested that extra protections be afforded such as formal time limits for interrogations or automatic retention of an attorney before beginning any interrogation.⁶⁴¹

Dr. Leo has identified the processes that drive a suspect to make a false confession.

There are three sequential errors, which occur during a police-elicited false confession, that lead to a wrongful conviction. Investigators first misclassify an innocent person as guilty; they next subject him to a guilt-presumptive, accusatory interrogation that invariably involves lies about evidence and often the repeated use of implicit and explicit promises and threats as well. Once they have elicited a false admission, they pressure the suspect to provide a postadmission narrative that they jointly shape, often supplying the innocent suspect with the (public and nonpublic) facts of the crime. These have been referred to as the misclassification error, the coercion error, and the contamination error.⁶⁴²

⁶³⁶ Christian A. Meissner et al., *False Confessions*, in *Applied Criminal Psychology: A Guide to Forensic Behavioral Sciences* 191 (Richard N. Kocsis ed., 2009)

⁶³⁷ Brandon L. Garrett, *The Substance of False Confessions*, 62 *Stan. L. Rev.* 1051, 1062 (2010).

⁶³⁸ *Id.* at 1066.

⁶³⁹ *Id.* at 1113.

⁶⁴⁰ *Id.* at 1116. Juveniles and mentally disabled individuals are "populations vulnerable to suggestion and coercion." *Id.*

⁶⁴¹ *Id.* at 1116-17.

⁶⁴² Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 *J. Am. Acad. Psychiatry & L.* 332, 333-34 (2009).

Inability to accurately detect deception can cause police to focus on an innocent suspect. “Tunnel vision” resultant from police attention and resources focused on that misidentified suspect can then lead to “coerced” confessions that seem reliable because they contain detailed information of the crime, which deliberately or inadvertently has been revealed to the suspect during the course of the interrogation. These errors are discussed in detail below.

Detecting Deception

Much of modern police interrogation relies on psychological manipulation and interpretation. The behavioral analysis aspects of The Reid Technique® are used by investigators to determine the veracity of an individual during the interview process. Looking at verbal and nonverbal cues to deception, an interrogator determines guilt or innocence; and, if guilt is determined, he then proceeds to psychologically manipulate the individual to confess. However, there continues to be much debate as to two aspects of this process: the constancy of deception cues across all interviewees⁶⁴³ and the allegedly enhanced ability of interrogators to detect deception. Even as research continues to show that detection of deception is rarely better than chance, the reliability and sources of deception cues continues to be studied.

Dr. Kassin and Christina Fong tested whether people can distinguish between truthful and false denials made during a criminal interrogation to determine if training in the use of verbal and nonverbal cues can increase the ability to tell true from false statements.⁶⁴⁴ Volunteers were divided into two groups. The “guilty” were instructed to commit a mock crime, and the “innocent” were to engage in an innocent activity at the same location as the mock crime. Each participant was “arrested” and submitted to a blind interrogation geared toward eliciting a confession, which was videotaped. A second group of people was divided into two sections; one section received one hour of training in The Reid Technique®, half of which was devoted to detecting deceptive behavior and the other section received no training. A survey of the mock suspects showed that most of the suspects believed that both the interrogator and others viewing the interrogation would accurately assess their guilt or innocence. They found that the untrained observers were 10% more accurate in judging truth versus deception than the trained observers. Both groups were more confident in their ability to detect deception before viewing the tapes than after, although the trained observers showed less of a difference than the untrained. They concluded that the trained observers, using The Reid Technique®, were less successful at judging deception than the untrained observers, partly because the nonverbal behaviors indicating deception as taught by The Reid Technique® can just as readily simply indicate anxiety due to the interrogation and not due to deception.

⁶⁴³ *I.e.*, does eye aversion always signal deception or does it also result from situational stress unrelated to deception?

⁶⁴⁴ Kassin & Fong, *supra* note 545.

Dr. Kassin and others tested whether police investigators were better than lay people at recognizing a false confession.⁶⁴⁵ A group of college students was compared to a group of police investigators in an experiment that had the subjects listening to audiotapes and viewing videotapes of prison inmates offering “true” confessions to the crimes that resulted in their incarceration, and “false” confessions to each others’ crimes.⁶⁴⁶ The study revealed that the students were more accurate in their judgments, but the police were more confident.⁶⁴⁷ The authors also looked at the years of experience and amount of specialized training police had received in detecting deception.⁶⁴⁸ They found that neither of these elements improved accuracy and may be responsible for a bias toward presuming guilt.⁶⁴⁹ They also confirmed previous studies that had found subjects to be more accurate when listen to an audio recording than viewing a visual recording.⁶⁵⁰ When the subjects were informed that one-half of the confessions were true and one-half false (correcting for a perceived bias that in real life, investigators are more likely to encounter predominately true confessions) accuracy rates were approximately equal (around 50%), but investigators still expressed more confidence in their assessments.

A 2005 study attempted to determine if behavioral cues to deception increase as the incriminating potential of the subject matter of an interrogation increases.⁶⁵¹ One difficulty in assessing deception cues was distinguishing them from manifestations of stressful truth-telling. The authors reviewed videotaped interviews with convicted criminals where strong corroborating evidence existed to confirm whether statements were true or false. Compared to prior experimental research, the authors did not find many of the correlations between verbal and nonverbal cues and deception that have previously been identified. Instead, they determined that the cues were related to incriminating potential.⁶⁵²

A 2007 British study attempted to determine if interview technique affected the ability to detect deception. The method of interview⁶⁵³ used did not affect accuracy of police officers in predicting the truthfulness or mendacity of the suspect, which, like previous studies, was slightly more than chance. However, the accusatory interview method resulted in more false accusations of truth tellers, and those accusations were highly confident. The authors concluded that the accusatory style of interviews was dangerous, in that the interviewer that is highly confident in the deceitfulness of the suspect is more likely to attempt to obtain a confession, which could produce a false one.⁶⁵⁴

⁶⁴⁵ Saul M. Kassin et al., “*I’d Know a False Confession if I Saw One*”: A Comparative Study of College Students and Police Investigators, 29 Law & Human Behav. 211, 213 (2005).

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.* at 216.

⁶⁴⁸ *Id.* at 222.

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.*

⁶⁵¹ Martha Davis et al., *Behavioral Cues to Deception vs. Topic Incriminating Potential in Criminal Confessions*, 29 Law & Human Behav. 683 (2005).

⁶⁵² *Id.* at 701.

⁶⁵³ Accusatory, information gathering or behavior analysis.

⁶⁵⁴ Aldert Vrij et al., *Cues to Deception and Ability to Detect Lies as a Function of Police Interview Styles*, 31 Law & Human Behav. 499 (2007).

Christopher Slobogin has written about the legitimacy of the use of deception by police during interrogations. He reviewed various studies on the effect of deception in producing confessions and has proposed that deception be permissible when:

(1) it takes place in the window between arrest and formal charging; (2) it is necessary (i.e., non-deceptive techniques have failed); (3) it is not coercive (i.e., avoids undermining the rights to silence and counsel and would not be considered impermissibly coercive if true); and (4) it does not take advantage of vulnerable populations (i.e., suspects who are young, have mental retardation, or have been subjected to prolonged interrogation).⁶⁵⁵

Presumption of Guilt – “Tunnel Vision”

Interrogative techniques that are geared toward detecting deception and eliciting a confession are all predicated upon the notion that the suspect is guilty and the interrogator’s obligation is to ferret out proof of that guilt. Protestations of innocence are assumed to be devious behavior on the part of the guilty suspect attempting to avoid incarceration.

Tunnel vision has been described as a process that

leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable. Properly understood, tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference.⁶⁵⁶

Keith A. Findley and Michael S. Scott detailed various cognitive biases that contribute to tunnel vision, including confirmation bias (where evidence is sought that supports the persons underlying hypothesis) that results in persons both seeking and recalling information in a biased manner.⁶⁵⁷ They reviewed studies that have found a belief persistence tendency, whereby once a hypothesis (e.g., the suspect is the perpetrator) is drawn, it is extremely difficult to convince a person to reconsider or

⁶⁵⁵ Christopher Slobogin, *Lying and Confessing*, 39 Tex. Tech L. Rev. 1275 (2007).

⁶⁵⁶ Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292.

⁶⁵⁷ *Id.* at 309, 312.

change that hypothesis.⁶⁵⁸ The authors also discussed “hindsight” bias in which a person reanalyzes an event, emphasizing evidence that supports the desired outcome and minimizing evidence that is inconsistent so that the outcome appears more likely than any other.⁶⁵⁹

Findley and Scott also argued that the nature of the adversarial system itself contributes to tunnel vision.⁶⁶⁰ Institutional pressures to solve cases quickly, the volume of reported crimes and the need to meet performance measurement standards can all affect police officers.⁶⁶¹ Prosecutors are subject to public pressures to prosecute and convict perceived offenders and institutional and cultural pressures within their offices to maintain high conviction rates.⁶⁶² From an ethical standpoint, a prosecutor must believe in the guilt of the person being tried and may have received biased or incomplete information regarding the evidence of guilt due to investigative errors on the part of police.⁶⁶³ Defense counsel are encouraged to arrange plea bargains in the interests of expediting procedures, so that they fail to fully investigate client claims of innocence.⁶⁶⁴

The authors argued that tunnel vision is not only encouraged, but prescribed as part of the criminal justice system.⁶⁶⁵ The Reid Technique® is cited as an example of how interrogators are trained to assume guilt and to discount or discredit alternative suspects or evidence.⁶⁶⁶ Rules of evidence at trial that limit the defense from proposing alternative suspects, appellate court deference to trial courts on questions of fact, findings of “harmless error” on appeal and doctrines like the *Brady* rule that shift the burden of proving the significance of evidence to the defense all contribute to tunnel vision.⁶⁶⁷ Additionally, they stated that restrictive post-conviction review procedures further bolster institutionalized tunnel vision.⁶⁶⁸

The authors suggested that “improving procedures for handling eyewitness identifications, greater safeguards against unreliable jailhouse snitch testimony, electronic recording of interrogations, and better oversight of crime laboratories” will all help to correct the problem of tunnel vision.⁶⁶⁹ In jurisdictions that electronically record interrogations, its incumbent transparency has modified interrogative techniques, so that “[i]nstead of cutting off denials and pressuring suspects to confess, the new approach permits the suspect to keep talking and responding to cordial but challenging questions until the suspect’s own statements either convince the observer of innocence, or trap the suspect in a web of lies.”⁶⁷⁰

⁶⁵⁸ *Id.* at 314-15.

⁶⁵⁹ *Id.* at 316-22.

⁶⁶⁰ *Id.* at 322-23.

⁶⁶¹ *Id.* at 323-27.

⁶⁶² *Id.* at 327-28.

⁶⁶³ *Id.* at 329-31.

⁶⁶⁴ *Id.* at 331.

⁶⁶⁵ *Id.* at 333.

⁶⁶⁶ *Id.* at 333-40.

⁶⁶⁷ *Id.* at 342-52.

⁶⁶⁸ *Id.* at 353.

⁶⁶⁹ *Id.* at 375.

⁶⁷⁰ *Id.* at 392.

Investigator bias has been found to be a major contributor to false confessions and has been studied at length. Drs. Meissner and Kassin found that training and experience in detecting deception led investigators to inaccurately presuppose that suspects were guilty based on verbal and nonverbal behavioral cues.⁶⁷¹ Their study involved 44 North American law enforcement investigators with an average of 13.7 years of law enforcement experience, 68% of whom had received “formal professional training in interviewing, interrogation, and” deception detection.⁶⁷² Although they were more confident in their judgments than the students were, the trained and experienced investigators were more likely to judge “suspects” as deceitful but were no better at discriminating between deceit and truth.⁶⁷³ “In short, the pivotal decision investigators must make regarding whether to further interrogate a suspect may be based on prejudgments of guilt, confidently made, but frequently in error.”⁶⁷⁴

Dr. Kassin and others have further explored the effect that an investigator’s presumption of guilt has on the behavior of both the investigator and the suspect.⁶⁷⁵ In an experiment, “guilty” and “innocent” groups of suspects were interrogated by mock interrogators. Both groups of suspects were instructed to deny guilt at all times and would be rewarded after the interrogation if the interrogator judged them to be innocent.⁶⁷⁶ Interrogators were instructed to secure a confession and accurately determine guilt or innocence.⁶⁷⁷ One group entered the interrogations with the expectation that 80% of the suspects were guilty, while the other group were told only 20% were guilty.⁶⁷⁸ The group of investigators who were expecting to interview predominantly guilty suspects chose more guilt-presumptive questions.⁶⁷⁹ Interrogative techniques (high v. low coerciveness) were unaffected by presumptions of guilt, although more techniques were used overall in the interrogation of innocent suspects than guilty ones.⁶⁸⁰ Post interrogation self-reports indicated that interrogators saw themselves as trying harder to get a confession and exerting more pressure when the suspect was actually innocent, although it did not ultimately affect their judgment of guilt or innocence. The presumption of guilt led neutral observers to determine that suspects in those circumstances were more defensive, suggesting that “behavioral confirmation is a risk that is incurred when the police presume guilt as a bias of interrogation.”⁶⁸¹

Tunnel vision is a major contributing factor in false confessions that result in wrongful convictions. A teenager in New York, Jeffrey Deskovic, falsely confessed to raping and murdering a classmate and is an example of tunnel vision run rampant. Based

⁶⁷¹ Christian A. Meissner & Saul M. Kassin, “He’s Guilty!”: Investigator Bias in Judgments of Truth and Deception, 26 Law & Human Behav. 469 (2002).

⁶⁷² *Id.* at 474.

⁶⁷³ *Id.* at 476, 478.

⁶⁷⁴ *Id.* at 478.

⁶⁷⁵ Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 Law & Human Behav. 187-203 (2003).

⁶⁷⁶ *Id.* at 192.

⁶⁷⁷ *Id.* at 191.

⁶⁷⁸ *Id.*

⁶⁷⁹ *Id.* at 197-98.

⁶⁸⁰ *Id.* at 197.

⁶⁸¹ *Id.* at 200.

on an ultimately inaccurate profile, police and prosecutors focused on Deskovic to the exclusion of any other suspects. They used heavy-handed (albeit legal), mostly unrecorded interrogative methods to elicit a confession and constructed alternative theories to explain away scientific evidence, including a DNA analysis that conclusively excluded Deskovic as the rapist.⁶⁸² A report commissioned by the district attorney analyzed his case to determine “what went wrong” and suggested several ways to avoid similar mistakes in the future.⁶⁸³ Police, the prosecution and defense counsel made multiple errors,⁶⁸⁴ and the report made several suggestions for change.⁶⁸⁵ For purposes of this discussion, their endorsement of videotaping entire interrogations is most important.⁶⁸⁶

Dr. Leo and Deborah Davis recently reviewed the case of the Norfolk Four, a group of sailors convicted of the rape and murder of another sailor’s wife in 1997.⁶⁸⁷ The four sailors were convicted even though DNA testing excluded each as the rapist.⁶⁸⁸ The authors examined “seven psychological processes linking false confessions to wrongful convictions and failures of post-conviction relief.”⁶⁸⁹ The seven processes are:

- Biasing effects of the confession itself, which tend to make police, prosecutors, judges, juries and even defense counsel disbelieve claims of innocence and false confession based on the belief that no one would falsely confess to a crime he did not commit. Particularly damning is the incorporation of “misleading specialized knowledge” in the confession. While a guilty party will have knowledge of the crime known only to himself and the police, an innocent person may acquire specific knowledge of the crime during the course of the interrogation when police show a suspect crime scene photos or mention details of the crime during efforts to elicit a confession. Incorporated into a false confession, this type of knowledge inflates the credibility of the confession and makes later renunciations and denials by the suspect unbelievable. The authors argue that recording interrogations can help identify the source of the “inside” information offered in a confession.⁶⁹⁰
- Tunnel vision and confirmation bias were also found to contribute to wrongful convictions, beginning with the decision that an individual is guilty. This decision, if based on erroneous assumptions, profiles of likely perpetrators or “gut” hunches that lead to a particular suspect being misclassified as guilty.

⁶⁸² Judge (ret.) Leslie Crocker Snyder et al., *Rep. on the Conviction of Jeffrey Deskovic* 2, 3, 5-6, 7-24 (2007).

⁶⁸³ *Id.* at 5.

⁶⁸⁴ *Id.* at 5-29.

⁶⁸⁵ *Id.* at 31-35.

⁶⁸⁶ *Id.* at 32-34.

⁶⁸⁷ Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J. Psychiatry & L. 9 (2010).

⁶⁸⁸ Two of whom pled guilty to avoid the death penalty; the other two were convicted by juries. *Id.* at 18.

⁶⁸⁹ *Id.* at 9.

⁶⁹⁰ *Id.* at 19-29.

Tunnel vision is viewed by these authors as affecting not only police and prosecutors but also defense counsel, who may also erroneously assume the suspect is guilty and focus on obtaining the minimal sentence or avoiding the death penalty rather than maintaining the defendant's innocence. Confirmation biases broadly refer to selectively seeking, producing and interpreting evidence that support existent beliefs while rejecting evidence to the contrary.⁶⁹¹

- Motivational biases are also considered a major factor. The primary goal of investigators should be accuracy, but personal, institutional and external sources of pressure push investigators to quickly and efficiently solve crimes by identifying a perpetrator and obtaining a confession to facilitate a conviction.⁶⁹²
- Escalating commitment and the roles of self-protection and self-justification also come into play, which can lead to refusals to recognize mistakes, even when faced with exculpatory evidence.⁶⁹³
- Suspects under interrogation may experience strong emotions, which can motivate them to confess to escape lengthy interrogations, impair their thinking and cause them to be more susceptible to influence. Strong emotions on the part of investigators hoping to solve a heinous crime may further promote a narrowing of focus and concentration on a particular suspect.⁶⁹⁴
- Institutional influences on decisions and production of evidence also lead to wrongful convictions based on false confessions. Financial consideration may make pursuit and collection of additional evidence less desirable when a confession has already been obtained. Case loads of investigators and attorneys can also impact their allocation of resources.⁶⁹⁵
- Inadequate context for evaluation of evidence and inadequate or misleading relevant knowledge and beliefs also create problems. Some do not know the contributing factors to false confessions or misunderstand that an otherwise rational person may falsely confess for various reasons. Other beliefs regarding signs of deception and guilt can cause interrogators to confuse anxiety with deception. Faith in and reliance on some psychological interrogation methods that have been implicated in false confessions also play a prominent role in the conversion of a false confession into a wrongful conviction.⁶⁹⁶

⁶⁹¹ *Id.* at 29-34.

⁶⁹² *Id.* at 34-36.

⁶⁹³ *Id.* at 36-38.

⁶⁹⁴ *Id.* at 38-41.

⁶⁹⁵ *Id.* at 41-42.

⁶⁹⁶ *Id.* at 42-46.

- Inadequate context for evaluation of evidence and the progressive constriction of relevant information is the final process set forth. In the absence of taping, evidence of the interrogation itself is selectively filtered. Because of the early focus on one suspect/confessor, other suspects are ignored, and evidence inconsistent with the confession, which might have proven exculpatory, is neglected.⁶⁹⁷

“The key to preventing confession-based miscarriages of justice is therefore to better understand why some false confessions lead to wrongful convictions and others do not.”⁶⁹⁸

Best Practices Recommendation

All law enforcement agencies should electronically record custodial interrogations. Exceptions should be provided for special circumstances that render recordation impractical.

There is almost unanimous accord in the literature on the subject of false confessions that electronic recording of custodial interrogations is the best evidence by which to judge the validity of a confession. Calls have been made at least since the 1930s for some form of neutral, contemporaneous recording of interrogations.⁶⁹⁹

Including decreases in suppression motions alleging police and prosecutorial misconduct and increases in guilty pleas, numerous benefits have been touted for electronic recording of custodial interrogations.

[R]ecording protects officers from claims of misconduct, and practically eliminate motions to suppress based on alleged police use of overbearing, unlawful tactics; remove the need for testimony about what was said and done during interviews; allow officers to concentrate on the suspects’ responses without the distraction of note taking; permit fellow officers to view interviews by remote hookup and make suggestions to those conducting the interview; disclose previously overlooked clues and leads during later viewings; protect suspects who are innocent; make strong, often invincible cases against guilty suspects who confess or make guilty admissions by act or conduct; increase guilty pleas; serve as a training tool

⁶⁹⁷ *Id.* at 46-49.

⁶⁹⁸ *Id.* at 50.

⁶⁹⁹ Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 Drake L. Rev. (2004) 619, 621-23.

for the officers conducting interviews, as well as for officers aspiring to become detectives; and provide protection against civil damage awards based on police misconduct.⁷⁰⁰

Slobogin has offered several constitutional grounds for mandating electronic recording of custodial interrogations.⁷⁰¹ On due process grounds, he argued that the court can not assess voluntariness⁷⁰² without being able to review the interrogation.⁷⁰³ As a Fifth Amendment protection, he argued that there must be evidence that the police gave warnings, the suspect understood them and knowingly waived his constitutional rights against self-incrimination.⁷⁰⁴ From a Sixth Amendment perspective, he argued that the right of confrontation is violated when interrogations are unrecorded.⁷⁰⁵ He additionally argued that recording should not be waivable by the suspect.⁷⁰⁶ Dr. Drizin and Reich have suggested that mandatory recording of police interrogations can prevent false confessions,⁷⁰⁷ increase the effective administration of justice⁷⁰⁸ and improve relations between the police and the public.⁷⁰⁹

Concerns have been expressed about the effect of videotaping confessions, however. Dr. Lassiter and others have suggested that videotaping in which the camera focuses solely on the suspect creates a camera perspective bias⁷¹⁰ that could result in jurors and judges more likely to determine that a confession was voluntary. Their studies revealed that such a bias does not occur when the focus is equally distributed between suspect and interrogator. They also found that an interrogator-focus camera may be the best perspective to allow judges and jurors to accurately assess reliability. However, the authors suggested that an interrogator-only focus prevents any observation of the suspect. Ideally, they would prefer two cameras to be used, one focused on the suspect and one on the interrogator, but if that is not feasible, they recommend a single camera equally focused on both parties. In a subsequent study, Dr. Lassiter and other colleagues tested judges and law enforcement officers to see if their relative experience and expertise could

⁷⁰⁰ Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 Golden Gate U. L. Rev. 175, 178-79 (2006).

⁷⁰¹ Christopher Slobogin, *Toward Taping*, 1 Ohio State J. Crim. L. 309 (2003).

⁷⁰² *Id.* at 312-14.

⁷⁰³ *Id.* at 317-18.

⁷⁰⁴ *Id.* at 319-20.

⁷⁰⁵ *Id.* at 320-21.

⁷⁰⁶ *Id.* at 321.

⁷⁰⁷ Drizin & Reich, *supra* note 699, at 622-24.

⁷⁰⁸ *Id.* at 624-28.

⁷⁰⁹ *Id.* at 628.

⁷¹⁰ G. Daniel Lassiter et al., *Videotaped Confessions: Panacea or Pandora's Box?*, 28 Law & Pol'y 192 (2006).

help counter the camera perspective bias previously detected.⁷¹¹ They concluded that it did not, and that jurisdictions that mandate videotaping should also mandate that an equal-focus camera perspective should be the standard.⁷¹²

In addition to other justifications for electronic recording of interrogations, the primary benefit believed to flow from the practice is the prevention of false confessions. In reviewing cases in which individuals have been exonerated on the basis of DNA evidence, false confessions have been found to contribute to the problem of wrongful convictions. The Innocence Project has found that “[i]n about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright false confessions or pled guilty.”⁷¹³ Reasons for false confessions vary and can include duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, actual infliction of harm, the threat of a harsh sentence and misunderstanding the situation.⁷¹⁴

Much has been written about the power of confessions. Many researchers and analysts claim that because police, judges, juries and the general public all tend to believe that an individual will not admit against his own interest, they assume that confessions must necessarily be true. That assumption creates a tremendous hurdle for the innocent person, who, for any number of reasons, falsely confesses and then attempts to retract it.

Implementation Models

Model Bill for Electronic Recording of Custodial Interrogations

Originally published by Northwestern University School of Law, this model bill would require electronic recording of all interviews that occur in a place of detention, involving a law enforcement officer’s questioning that is likely to elicit incriminating responses, beginning with the advice of the suspect’s constitutional rights and ending at the conclusion of the interview.⁷¹⁵ Applicable crimes would be defined by the jurisdiction adopting the model.⁷¹⁶ Exceptions for equipment malfunction, human error, and certain types of non-interrogative questioning would be excused from the recording requirement, but failure to record would result in the statement’s presumptive

⁷¹¹ G. Daniel Lassiter et al., *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 Psychol. Science 224-25 (2007). Subsequent studies have confirmed the camera perspective bias. E.g., Lezlee J. Ware et al., *Camera Perspective Bias in Videotaped Confessions: Evidence That Visual Attention Is a Mediator*, 14 J. Experimental Psychol.: Applied 192 (2008).

⁷¹² Lassiter et al., *supra* note 711, at 225.

⁷¹³ Innocence Project, *Understand the Causes*, www.innocenceproject.org/understand/False-Confessions.php (last visited Mar. 28, 2011).

⁷¹⁴ *Id.*

⁷¹⁵ Sullivan, *supra* note 700, at 188.

⁷¹⁶ *Id.*

inadmissibility.⁷¹⁷ Thomas P. Sullivan and Andrew W. Vail have since revised the model to replace the presumption of inadmissibility with cautionary jury instructions instead.⁷¹⁸ Based upon updated surveys, Sullivan and Vail have determined that the threat of inadmissibility is not needed to ensure compliance with recording requirements due to the enthusiastic reception they have seen for the process by police departments recording interviews.⁷¹⁹ Responding to strong concerns of law enforcement about the potential for excluding testimony of unrecorded interviews, the model has been revised to permit admission of all interviews, with the jury given an instruction as to the greater value of recorded interrogations.⁷²⁰

National District Attorneys Association

“The National District Attorneys Association” Policy on Electronic Recording of Statements “opposes the exclusion of otherwise truthful and reliable statements by suspects and witnesses simply because the statement was not electronically recorded.”⁷²¹

American Bar Association

American Bar Association policy recommended that all law enforcement agencies “videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers or other places where suspects are held for questioning” and urged enactment of laws or promulgation of procedural rules to require this recording.⁷²² Where videotaping is impractical, it recommends making an audiotape of the interrogation in its entirety.⁷²³

The National Conference of Commissioners on Uniform State Laws

In 2010, The National Conference of Commissioners on Uniform State Laws approved and recommended Uniform Electronic Recordation of Custodial Interrogations Act for enactment in all the states.⁷²⁴ The uniform act requires custodial interrogations to be recorded electronically in their entirety but leaves it up to the enacting jurisdiction which specific or class of crimes to apply this mandate.⁷²⁵ It forbids recording private

⁷¹⁷ *Id.* at 189.

⁷¹⁸ Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials’ Failure to Record Custodial Interview as Required by Law*, 99 J. Crim. L. & Criminology 215 (2009).

⁷¹⁹ *Id.* at 220-22.

⁷²⁰ *Id.* at 222-23.

⁷²¹ Nat’l Dist. Att’ys Ass’n, Policy on Electronic Recording of Statements, http://www.ndaa.org/pdf/ndaa_policy_electronic_recording_of_statements.pdf (2004).

⁷²² Am. Bar Ass’n Crim. Just. Section, *Achieving Justice: Freeing the Innocent, Convicting the Guilty* 11 (2006).

⁷²³ *Id.*

⁷²⁴ Nat’l Conf. of Commissioners on Unif. State Laws, Unif. Elec. Recordation of Custodial Interrogations Act, available at <http://www.law.upenn.edu/bll/archives/ulc/erci/2010final.htm>.

⁷²⁵ *Id.* § 3.

communications between an individual and his counsel but does not require permission to record the interrogation.⁷²⁶ There are a half-dozen exceptions to the recording requirement; these are uncontroversial exceptions such as the one for equipment failure despite its reasonable maintenance.⁷²⁷ A court could still admit an unrecorded statement that was required to be recorded, but the defense could get the court to give a cautionary instruction.⁷²⁸ Law enforcement agencies would need to comply with rules to implement this act.⁷²⁹ Some jurisdictions mandate these recordings via statute, others mandate them judicially and still others have voluntarily recorded via executive policy.⁷³⁰ The uniform act is intended to resolve “differences found around the nation” in a fair and professional way.⁷³¹ The uniform act

promotes accuracy and the truth finding process. Electronic recordation of custodial interrogations will benefit law enforcement agencies, improving their ability to prove cases while lowering overall costs of investigation and litigation. Systemic recordation will also improve accuracy and fairness to the accused and the state, protect constitutional rights, and most importantly increase public confidence in the justice system.⁷³²

The uniform act purports to enhance the quality of investigations and increase efficiency in the criminal justice system.⁷³³

Judicial Rulings

Rulings by state supreme courts on electronic recording of custodial interrogations are of three varieties: non-recorded statements are declared inadmissible, a cautionary jury instruction is given if a recording was not made or the court may recommend use of electronic recordings as the best evidence of an interrogation.

Alaska

Alaska’s Supreme Court has ruled that an unexcused failure to entirely electronically record a custodial interrogation conducted in a place of detention violates a

⁷²⁶ *Id.* § 4.

⁷²⁷ *Id.* §§ 5-10.

⁷²⁸ *Id.* § 13.

⁷²⁹ *Id.* § 15.

⁷³⁰ Nat’l Conf. of Commissioners on Unif. State Laws, Elec. Recordation of Custodial Interrogations Summary, available at [http://www.uniformlaws.org/ActSummary.aspx?title=Electronic Recordation of Custodial Interrogations](http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Recordation%20of%20Custodial%20Interrogations).

⁷³¹ *Id.*

⁷³² *Id.*

⁷³³ Nat’l Conf. of Commissioners on Unif. State Laws, Why States Should Adopt UERCIA, available at [http://www.uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UERCIA](http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UERCIA).

suspect's right to due process under the Alaska Constitution and any statement thus obtained is generally inadmissible.⁷³⁴ “[O]nly part of the questioning” and a full recording would “entail minimal cost and effort” that would be offset by the resources consumed in resolving the disputes that arose over the events that occurred during the interrogations.

The only real reason advanced by police for their frequent failure to electronically record an entire interrogation is their claim that recordings tend to have a ‘chilling effect’ on a suspect’s willingness to talk. Given the fact that an accused has a constitutional right to remain silent, . . . and that he must be clearly warned of that right prior to any custodial interrogation, this argument is not persuasive.⁷³⁵

Indiana

Under Rules of Court, an unrecorded statement made during a custodial interrogation for a felony criminal prosecution is inadmissible unless it is electronically recorded completely and continuously. It applies to custodial interrogations conducted in a place of detention and the recording must be audio-video. This is a fairly detailed rule and includes a number of the exceptions found in legislative mandates discussed further below. A substantial exigency is one of the exceptions to this rule so that circumstances making it infeasible to record a custodial interrogation as otherwise required or circumstances preventing its preservation and availability at trial could allow admission of an unrecorded statement.⁷³⁶

Iowa

The Iowa Supreme Court encouraged electronic recording, especially videotaping, of custodial interrogations.⁷³⁷ In this particular case involving a minor suspect, the videotape allowed the court to conclude that the appellant validly waived his *Miranda* rights and that his confession was knowing, voluntary and intelligent.⁷³⁸ The videotape also displayed no indication of improper threats or promises by the interrogating officer.⁷³⁹

⁷³⁴ *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985)

⁷³⁵ *Id.*

⁷³⁶ Ind. R. Evid. 617.

⁷³⁷ *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006).

⁷³⁸ *Id.*

⁷³⁹ *Id.*

Massachusetts

Rather than mandate recording interrogations as a prerequisite to admit a defendant's statement, Massachusetts will admit it but considers

it only fair to point out to the jury that the party with the burden of proof has, for whatever reason, decided not to preserve evidence of that interrogation in a more reliable form, and . . . they may consider that fact as part of their assessment of the less reliable form of evidence that the Commonwealth has opted to present.⁷⁴⁰

The Massachusetts Supreme Judicial Court ruled that

the admission into evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant . . . to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution.

. . . .

As is all too often the case, the lack of any recording has resulted in the expenditure of significant judicial resources . . . , all in an attempt to reconstruct what transpired during several hours of interrogation conducted in 1998 and to perform an analysis of the constitutional ramifications of that incomplete reconstruction. We will never know whether, if able to hear . . . the entirety of the interrogation, the impact of the officers' trickery and implied offers of leniency might have appeared in context sufficiently attenuated to permit the conclusion that DiGiambattista's confession was nevertheless voluntary. 'Given the fine line between proper and improper interrogation techniques, the ability to reproduce the exact statements made during an interrogation is of the utmost benefit.' . . . [F]ailure to preserve evidence of the interrogation in a thorough and reliable form can comprise a basis for concluding that voluntariness and a valid waiver have not been established beyond a reasonable doubt.

. . . .

Where . . . interrogating officers have chosen *not* to preserve an accurate and complete recording of the interrogation, that fact alone justifies skepticism of the officers' version of events, above and beyond the customary bases for impeachment of such testimony. We believe that a defendant whose interrogation has not been reliably preserved by means of a complete electronic recording should be entitled . . . to a cautionary instruction concerning the use of such evidence.⁷⁴¹

⁷⁴⁰ *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 534-35 (Mass. 2004).

⁷⁴¹ *Id.* at 518, 529, 533 (citation omitted).

The court cited other jurisdictions that also were reluctant to mandate recording interrogations all the while acknowledging that recording interrogations would deter police misconduct, reduce contested motions to suppress, allow more accurate resolutions of those suppression motions and give the fact finder a more complete version of the statement or confession.⁷⁴² The court did not think much of the objection that suspects will refuse to talk or confess if they are recorded because that “is itself inherently contrary to our requirement of a knowing and voluntary waiver of the right to remain silent.”⁷⁴³ The financial cost to record is insignificant because the equipment cost “is minimal, and that cost is dwarfed by comparison to the costs of having officers spend countless hours testifying at hearings and trials in an attempt to reconstruct the details of unrecorded interrogations.”⁷⁴⁴ Because this is a condition to admit evidence into court, it does not regulate law enforcement activity in violation of separation of powers.⁷⁴⁵ In a footnote, the court noted that the prosecutor would not need to introduce the entire recorded interrogation to avoid the cautionary instruction because the instruction relates more to the preservation rather than the introduction of the evidence.⁷⁴⁶ Ordinary evidentiary rules could exclude portions of it, but the defendant would have the entire recording should an issue of completeness or reliability about the testimony relating to interrogation arise.⁷⁴⁷

Minnesota

The Minnesota Supreme Court held

that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded . . . at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.⁷⁴⁸

This rule applied prospectively,⁷⁴⁹ and the court was apparently persuaded that recording provides a more accurate record of the interrogation as well as reduces disputes over the validity of Miranda warnings and the voluntariness of the waiver of those rights.⁷⁵⁰ “In addition, an accurate record makes it possible for a defendant to challenge

⁷⁴² *Id.* at 530.

⁷⁴³ *Id.* at 531.

⁷⁴⁴ *Id.* at n.21.

⁷⁴⁵ *Id.* at 531.

⁷⁴⁶ *Id.* at 533 n.23.

⁷⁴⁷ *Id.*

⁷⁴⁸ *State v. Scales*, 518 N.W.2d 587, 592 (1994), *aff’d*, 620 N.W.2d 706 (Minn. 2001).

⁷⁴⁹ *Id.*, 518 N.W.2d at 593.

⁷⁵⁰ *Id.* at 591.

misleading or false testimony and . . . protects the state against meritless claims. . . . A recording requirement also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement.”⁷⁵¹

New Hampshire

New Hampshire’s Supreme Court decided to “steer a narrow course between Alaska and Minnesota.”⁷⁵² Alaska would suppress the evidence from an unexcused failure to record as a due process violation and Minnesota would suppress an unrecorded or incompletely recorded interrogation based upon the court’s supervisory authority. Like Minnesota, New Hampshire’s Supreme Court ruling is based upon its supervisory authority but would suppress the recorded evidence from incompletely recorded interrogations and allow alternative forms of evidence from the interrogation:

To avoid the inequity inherent in admitting into evidence the selective recording of a post-*Miranda* interrogation, we establish the following rule: . . . to admit . . . the taped recording of an interrogation, which occurs after *Miranda* rights are given, the recording must be complete. . . . [I]mmediately following the valid waiver of a defendant’s *Miranda* rights, a tape recorded interrogation will not be admitted . . . unless the statement is recorded in its entirety. . . . [W]here the incomplete recording of an interrogation results in the exclusion of the tape recording itself, evidence gathered during the interrogation may still be admitted in alternative forms . . . admission of the incomplete recording of the defendant’s interrogation is not permissible.⁷⁵³

New Jersey

By rule of court, New Jersey mandates recording all custodial interrogations conducted at a place of detention when the person being interrogated is charged with murder, aggravated sexual assault, aggravated arson, any crime involving the use or possession of a firearm and a number of other specified crimes as well as conspiracy and attempt to commit them.⁷⁵⁴ The mandate to record does not apply if it is unfeasible to record, the interrogation was outside of the state and for five other standard exceptions

⁷⁵¹ *Id.*

⁷⁵² *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001). Subsequent to establishment of this rule, the erroneous admission of a partially recorded interrogation was found to be harmless because “the alternative evidence of the defendant’s guilt is of an overwhelming nature . . . and there was no evidence the defendant made exculpatory or otherwise inconsistent statements during the unrecorded portion.” *State v. Dupont*, 816 A.2d 954, 958-60 (N.H. 2003).

⁷⁵³ *Barnett*, 789 A.2d at 632-33.

⁷⁵⁴ N.J. R. Crim. P. 3.17(a).

that are used elsewhere.⁷⁵⁵ If no recording is made, the lack of recording is a factor considered in determining its admissibility and, if used, a cautionary instruction is given upon request of the defendant.⁷⁵⁶

Legislative Mandates

Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Texas, Wisconsin and the District of Columbia, have legislatively addressed recording of custodial interrogations.⁷⁵⁷ Most are limited to custodial interrogations in a place of detention. Most begin the taping with the *Miranda* warnings. Illinois, Maryland, Missouri, Oregon and Wisconsin specifically state that the consent of the person to be interrogated is not required. Where the crimes to be covered are specified, the requirement is almost exclusively limited to investigations for felonies and violent crimes; Illinois and North Carolina further limit the application to homicide investigations.

Numerous exceptions are granted, including equipment failure, operator failure, suspect refusal to be recorded, spontaneous outbursts and responses to routine booking questions. Out-of-state interrogations are not typically required to have been recorded. Other exigent circumstances are also exceptions to the recording mandate.

Consequences for failure to record vary greatly. In some instances, no consequences are specified; Ohio specifically declares that failure to record does “not provide a basis to exclude or suppress the statement”, nor does it create private cause of action against a law enforcement officer.⁷⁵⁸ Other consequences include automatic inadmissibility, a rebuttable presumption of inadmissibility, a cautionary jury instruction, withholding state funding and a rebuttable presumption of involuntariness. Most require recordings to be retained until all appeals are exhausted and until the statute of limitations on any underlying offenses has run.

Texas does not statutorily mandate recording the custodial interrogation but requires that any oral or sign language statements resultant from a custodial interrogation be electronically recorded to be admitted against the accused in a criminal proceeding.⁷⁵⁹

⁷⁵⁵ *Id.* 3.17(b).

⁷⁵⁶ *Id.* 3.17(d), (e).

⁷⁵⁷ *Infra* p. 270.

⁷⁵⁸ Ohio Rev. Code § 2933.81. Law enforcement agencies also may not penalize officers who fail to record as statutorily required. *Id.*

⁷⁵⁹ Tex. Code Crim. Proc. art. 38.22, § 3.

Executive Policy

New York

New York's is a statewide set of voluntary guidelines adopted by a group of law enforcement entities.⁷⁶⁰ The general guideline is to electronically record

a custodial interrogation of someone suspected of committing a qualifying offense. . . . The recording equipment should be turned on prior to the subject being placed within the interview room and should only be turned off after the subject has left the room after the interrogation is completed. All discussions in the interview room, including any pre-interrogation discussions, even if they occur before the reading of Miranda Warnings, must be included in the recording. . . . Any custodial interrogation must be preceded by the reading of Miranda Warnings. This does not preclude pre-interrogation discussions with the subject before Miranda Warnings are read and the actual interrogation commences. In qualifying cases where the interrogation is to be recorded, all conversations that occur inside the interview room must be recorded, including pre-interrogation discussions and the administration of the Miranda Warnings.⁷⁶¹

Utah

Utah's Office of the Attorney General has established a policy mandating that custodial interrogations held in a place of detention, and beginning with the *Miranda* warnings, be recorded. The usual legislative exemptions and records retention found in other states apply, and no consequences for failure to record are established.

Police Experiences

Sullivan has studied the merits of electronically recording custodial interrogations for years. At a 2008 joint meeting of the subcommittees on investigations and legal representation, he presented the value of electronically recording interrogations.

⁷⁶⁰ N.Y. Dist. Att'ys Ass'n, N.Y.C. Police Dep't, N.Y. Div. of Crim. Just. Servs., N.Y. Ass'n of Chiefs of Police, N.Y. Police & N.Y. Sheriffs' Ass'n.

⁷⁶¹ N.Y. Dist. Att'ys Ass'n., N.Y. State Guidelines for Recording Custodial Interrogations of Suspects 2, 5, 6, available at <http://daasny.org/most%20recent%20Video%20Recording%20Interrogation%20Procedures%20-%20Custodial%20-%20FINAL%20-12-8-10.pdf>.

Sullivan described his legal background, highlighting his service as co-chairman for the Illinois Commission on Capital Punishment, which led to his interest in recording custodial interrogations. Rather than determine the desirability of this punishment, the commission studied how to make the punishment fairer. It recommended electronically recording “all questioning of homicide suspects in custody in police facilities.”⁷⁶² When legislation was introduced in 2003 to mandate recording of custodial interrogations in Illinois homicide cases, law enforcement vigorously opposed it.⁷⁶³ Because he had expected that law enforcement would welcome this reform as a useful tool, he decided to survey law enforcement agencies that voluntarily record custodial interrogations to evaluate their experiences.⁷⁶⁴ His research revealed that most departments that voluntarily recorded interrogations did so without written guidelines or regulations.⁷⁶⁵ Recording is usually at the discretion of the officer in charge.⁷⁶⁶ Recordings are made from *Miranda* warnings to the conclusion of the interrogation.⁷⁶⁷ Most departments record only for serious felonies.⁷⁶⁸ Audio and audiovisual recordings are made; and, even when not required to do so, police officers usually inform suspects that they are being recorded.⁷⁶⁹

Recording helps prevent disputes about police misconduct, their treatment of suspects and the completeness of statements made by the person being questioned.⁷⁷⁰ “[D]efense motions to suppress statements and confessions” are dramatically reduced.⁷⁷¹ Recording further allows the police “to focus on the suspect” and not copious note-taking.⁷⁷² Reviewing recordings allow police to identify inconsistencies and other incriminating behaviors,⁷⁷³ and can also be used to train and self-evaluate.⁷⁷⁴ Prosecutors benefit from increased numbers of guilty pleas and greater negotiating power at sentencing.⁷⁷⁵

⁷⁶² Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations* 2 (2004), available at www.law.northwestern.edu/wrongfulconvictions/Causes/CustodialInterrogations.htm.

⁷⁶³ The commission’s recommendation was enacted by making unrecorded statements presumptively inadmissible. 725 Ill. Comp. Stat. 5/103-2.1.

⁷⁶⁴ Sullivan, *supra* note 762, at 2-3.

⁷⁶⁵ *Id.* at 4.

⁷⁶⁶ *Id.* at 5.

⁷⁶⁷ *Id.* “We did not include departments that conduct unrecorded interviews followed by recorded confessions.” *Id.*

⁷⁶⁸ *Id.*

⁷⁶⁹ *Id.*

⁷⁷⁰ *Id.* at 6.

⁷⁷¹ *Id.* at 8.

⁷⁷² *Id.* at 10.

⁷⁷³ *Id.*

⁷⁷⁴ *Id.* at 18.

⁷⁷⁵ *Id.* at 12.

Legislative and Judicial Studies; Pilot Programs

Arkansas

Rather than require recording itself, Arkansas's Supreme Court stated "that the criminal justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration."⁷⁷⁶

California Commission on the Fair Administration of Justice

Concluding its study and finally reporting in 2008, the commission called for statutorily mandating recording of custodial interrogations as a means to prevent wrongful convictions based on false confessions.⁷⁷⁷ To date, legislation has not been enacted in California to do so.

Connecticut

Since mid-2008, the Connecticut State Police Eastern and Western District Major Crime Squads and four municipal police departments have been conducting a pilot program initiated by the Connecticut Division of Criminal Justice to video-record interrogations in serious felony cases.⁷⁷⁸ As of March 2010, 587 interviews had been conducted, all at stationary locations; over 60% had been done covertly.⁷⁷⁹ While the division has reported favorable police support and strong initial indications of success, it has testified in opposition to a legislative mandate for electronic recording of custodial interrogations on the basis of the need for additional study through the pilot program.⁷⁸⁰ Despite noting "benefits to be realized by a recording requirement" for custodial interrogations, Connecticut's Supreme Court declined to require recording under its supervisory powers noting that the requirement is not constitutionally mandated.⁷⁸¹ "[W]e find persuasive the reasoning of courts that have determined that, where a recording requirement is not mandated by the state constitution, the legislature is better suited to decide whether to establish a recording policy."⁷⁸²

⁷⁷⁶ *Clark v. State*, 287 S.W.3d 567, 576 (Ark. 2008).

⁷⁷⁷ Cal. Comm'n on the Fair Admin. of Just., *supra* note 4, at 12, 38-41.

⁷⁷⁸ Conn. Div. of Crim. Just., Testimony in Opposition to: S.B. 230 (RAISED) An Act Concerning the Videotaping of Custodial Interrogations, before Conn. Gen. Assem. J. Comm. on Judiciary, Mar. 10, 2010, available at <http://www.cga.ct.gov/2010/JUDdata/Tmy/2010SB-00230-R000310-Chief%20State's%20Attorney-Kevin%20Kane-TMY.PDF>.

⁷⁷⁹ *Id.*

⁷⁸⁰ *Id.*

⁷⁸¹ *State v. Lockhart*, 4 A.3d 1176, 1180 (Conn. 2010).

⁷⁸² *Id.* at 1191.

New York

New York City's Police Department "will be starting two pilot programs, one in Brooklyn and one in the Bronx, where detectives will video record the interrogations of arrested suspects in felony assault cases."⁷⁸³ New York's Police Commissioner announced in February 2010 that it would begin a pilot program to videotape custodial interrogations in felony-level investigations. The Long Island suburban counties of Nassau and Suffolk announced that they would begin videotaping police interrogations in 2008.⁷⁸⁴ "As of Fall 2010, pilot projects have been funded and are on-going in Schenectady, Broome, Greene, Westchester, and Franklin counties."⁷⁸⁵

Vermont

Act 60 of 2007 established the Eyewitness Identification and Custodial Interrogation Study Committee, which submitted its report to the Vermont House and Senate Committee on Judiciary in December 2007. The committee recommended that custodial interrogations in felony cases should be audio and video recorded, but at a minimum, audio-taped.

Other Jurisdictions

Sullivan and Vail's surveys have discovered over 600 "police and sheriff departments that electronically record . . . the entirety of most of their stationhouse interviews in serious felony investigations."⁷⁸⁶ Some of the larger metropolitan areas include Atlanta, Boston, Dallas, Denver, Detroit (beginning in 2006),⁷⁸⁷ Las Vegas, Nashville, Prince George's County (Md.), Richmond and Salt Lake City.

Other Proposals to Prevent False Confessions

Various other proposals have been made to avoid false confessions. They include: admitting expert testimony on the causes of false confessions; restricting police

⁷⁸³ Press Release, N.Y. Dist. Att'ys Ass'n, New York State Law Enforcement Agencies Endorse Video Recording of Interrogations, Statewide Guidelines to Ensure Integrity of the Practice (Dec. 14, 2010), available at <http://daasny.org/>. In 2011, the state Div. of Crim. Just. Servs. granted \$400,000 to supplement the purchase and installation of equipment by jurisdictions within the state. *Id.*

⁷⁸⁴ *Newsday*, Long Island, NY (Feb. 11, 2008) A.26.

⁷⁸⁵ N.Y. Bar Ass'n, Current Legal Issues Affecting the Profession 30 (2011), available at <http://www.nysba.org/Content/NavigationMenu/AboutNYSBA/CurrentLegalIssues2008/CLI2011.pdf>.

⁷⁸⁶ Thomas P. Sullivan et al., *The Case for Recording Police Interrogations*, Litigation (Spring 2008).

⁷⁸⁷ Jeremy W. Peters, *Wrongful Conviction Prompts Detroit Police to Videotape Certain Interrogations*, N.Y. Times, Apr. 11, 2006, at A14.

interrogative techniques; urging courts to require minimal indicia of reliability before admitting a confession into evidence; and, abolishing or modifying the use of *Miranda* warnings.

Admission of Expert Testimony

Expert testimony is sometimes offered to explain how a suspect was induced to falsely confess or how the suspect fits the profile of someone likely to falsely confess.⁷⁸⁸ Testimony on false confessions has been rejected by various courts for several reasons, including that the conclusions from research on the topic have not been generally accepted in the scientific community, expert opinions on the topic are not scientifically reliable, testimony would not assist the trier-of-fact in understanding the issue and the subject is not beyond the ability of jurors to comprehend.⁷⁸⁹ When admitted, it has been to the extent that the testimony dealt with false confessions in general and not to the reliability of a specific defendant's confession. Expert testimony on false confessions has been admitted at some trials in Pennsylvania. One trial court permitted expert testimony generally about false confessions but not to the specificities of the case being tried.⁷⁹⁰ The defendant unsuccessfully appealed the ruling that forbade expert testimony about the specificities of his case; because his argument was underdeveloped in his appellate brief, the superior court considered this issue to be waived.⁷⁹¹ In another case, expert psychiatric testimony was admitted at trial that alcohol-induced amnesia made a confession inaccurate, but this same expert was forbidden to testify about a hypnotic interview that generated a substantially different version.⁷⁹² Aside from the psychiatrist's proffered testimony about the hypnotic statements, the videotape of the hypnotic interview was not admitted either because hypnotic evidence is deemed too unreliable to be proper scientific evidence.⁷⁹³

Restrict Interrogative Techniques

Laurie Magid has written that the voluntariness standard used to determine the reliability of a confession (based on the assumption that coerced statements are unreliable) as used by the U.S. Supreme Court sufficiently limits current interrogative practices.⁷⁹⁴ She rejected other theories used to justify curtailing interrogation practices, such as the sporting theory of equality between interrogator and suspect, equal protection of suspects (*i.e.*, all suspects should be equally aware of their rights), development of trust by the suspect for the interrogator, preservation of the suspect's dignity and the

⁷⁸⁸ Peter Quintieri & Kenneth J. Weiss, *Admissibility of False-Confession Testimony: Know Thy Standard*, 33 J. Am. Acad. Psychiatry L. 535 (2005).

⁷⁸⁹ *Id.* at 535-37.

⁷⁹⁰ *Commonwealth v. Cornelius*, 856 A.2d 62, 77 (Pa. Super. Ct. 2004).

⁷⁹¹ *Id.*

⁷⁹² *Commonwealth v. Reed*, 583 A.2d 459, 466 (Pa. Super. Ct. 1990).

⁷⁹³ *Id.* at 468-69.

⁷⁹⁴ Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 Mich. L. Rev. 1168, 1178 (2001).

morality of lying to a suspect, and concerns that lying during interrogations can lead to lying in other areas, such as the courtroom, as unsound.⁷⁹⁵ She further argued that claims as to the proliferation of psychologically-induced false confessions are unsupported by empirical data.⁷⁹⁶ False-confession research has only shown that some techniques are more likely than others to result in false confessions, and that some people, primarily juveniles and the mentally impaired, are more likely to falsely confess; no research has shown a rate of occurrence to justify limitations.⁷⁹⁷ At the time this was published, she asserted that there was a lack of credible evidence of a serious problem that needed to “be addressed by substantially limiting police efforts to obtain confessions.”⁷⁹⁸ She further maintained that the methods used to determine the innocence of false confessors, outside the DNA arena, are subjective and unreliable.⁷⁹⁹

Additionally, Magid contended that deception is useful and necessary in some cases to obtain a confession and subsequent conviction.⁸⁰⁰ She concluded that the risk of losing confessions and convictions of guilty persons far outweighs the risk of the few anecdotal cases of false confessions found in the pre-2000 literature.⁸⁰¹ Because some concerns about false confessions could be addressed by videotaping them, this is preferable to limiting interrogative techniques.⁸⁰²

Promote Reliability over Voluntariness

Boaz Sangero has recommended a requirement for strong corroboration linking the defendant to the crime to meet

⁷⁹⁵ *Id.* at 1179-85.

⁷⁹⁶ *Id.* at 1190-91.

⁷⁹⁷ *Id.* at 1191-92.

⁷⁹⁸ *Id.* at 1195.

⁷⁹⁹ *Id.* at 1195-97.

⁸⁰⁰ *Id.* at 1205-06.

⁸⁰¹ *Id.* at 1206-07.

⁸⁰² *Id.* at 1210. The author is persuaded that reliability is and should remain the primary reason to limit interrogative techniques with fewer and narrower reasons relating to those violating due process of law. *Id.* at 1208-09. Unimpressed by anecdotal accounts of false confessions up to the time of publication, the author called for “statistically sound, empirical research to determine if there truly is a widespread problem with police-induced false confessions” before drastically limiting deceptive techniques to interrogate. *Id.* at 1210. It is true that anecdotes do not establish frequency, but it is unrealistic to compare the number of false to true confessions as the author suggests. *Id.* at 1201-03. The author concedes that DNA evidence unequivocally establishes innocence and accepts convictions overturned on the grounds of innocence as clearly established innocence, but considers actual innocence to be certain “in only a small fraction of the cases . . . used to illustrate . . . wrongful convictions in general and false confessions in particular.” *Id.* at 1195-96. This might be an unremarkable position except that the author discounts this consideration as a reason why it is impossible to simply compare the number of false to true confessions. *Id.* at 1204. The author thinks that studying a random sample of false confession cases can establish the frequency of their occurrence, but this disregards her own remarks in the immediately preceding footnote when she approvingly uses the assertion of “most other researchers” to say the frequency of wrongful convictions is “either elusive or unknowable” when she refutes an estimate of the number of wrongful convictions from an earlier study. *Id.* at 1195 n.122, 1194 n.121.

two central objectives: the first is to eliminate the fear of a false confession (even when voluntary) and the second is to direct police investigators not to limit themselves to the interrogation of a suspect and the attempt to extract a confession, but rather to use sophisticated investigative techniques and to make an assiduous effort to locate objective, tangible evidence extrinsic to the suspect.⁸⁰³

“[A]s long as investigations focus on the interrogees themselves” instead of gathering other evidence, “the greater risk that . . . false confessions will continue to be elicited.”⁸⁰⁴ Dr. Sangero suggests that the burden of proof of the voluntariness of a confession should be “beyond a reasonable doubt” rather than “by a preponderance of the evidence.”⁸⁰⁵ He further argues against the use of detention to conduct interrogations and suggests that to the extent detention is necessary, the suspect should be made comfortable and not inconvenienced.⁸⁰⁶ “Documentation of the interrogation . . . is very important. . . . [D]ocumentation provides . . . a much more reliable tool . . . of evaluating the confession, regarding both the pressure exerted on the interrogee as well as the need to distinguish between information that was obtained from the suspect himself and information that was fed to him.”⁸⁰⁷ While he strongly supported the video documentation of interrogations, Sangero opined that it alone is insufficient to prevent false confessions and stressed the need for extrinsic, objective tangible evidence of the suspect’s guilt.⁸⁰⁸ Rather than determining the truth or falsity of a confession, this documentation “can only rule out certain negative factors regarding the circumstances in which the confession was made.”⁸⁰⁹

Eugene R. Milhizer has recently written on the admissibility of confession evidence and criticized the reliance on the voluntariness standard as expressed in *Miranda* and similar cases.⁸¹⁰ He recommended a return to a reliability standard through the use of a new rule of evidence.⁸¹¹ Under this proposed new rule, a judge would determine whether the suspect made a knowing and intelligent waiver of his Fifth Amendment rights under *Miranda*, then whether that the confession was produced by coercive governmental conduct under *Connelly*, and, finally, whether the confession was reliable enough to be admitted on its merits.⁸¹² Milhizer further argues against a systematic preference for recorded confessions on the grounds that they may affect the perceived reliability of a confession—that suspects and police may manipulate the process and that candor by suspects may be suppressed.⁸¹³

⁸⁰³ Boaz Sangero, *Miranda is Not Enough: A New Justification of Demanding “Strong Corroboration” to a Confession*, 28 Cardozo L. Rev. 2791, 2803 (2007).

⁸⁰⁴ *Id.* at 2817.

⁸⁰⁵ *Id.* at 2808-09.

⁸⁰⁶ *Id.* at 2816.

⁸⁰⁷ *Id.* at 2826. Documentation means audiovisual or at least audio. *Id.*

⁸⁰⁸ *Id.* at 2827-28.

⁸⁰⁹ *Id.*

⁸¹⁰ Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 Temp. L. Rev. 1, 28 (2008).

⁸¹¹ *Id.* at 47.

⁸¹² *Id.* at 56.

⁸¹³ *Id.* at 63-64.

Drs. Leo and Ofshe proposed a test to determine the reliability of an uncontaminated confession by analyzing the fit between the description of the crime given in the confession and the facts of the crime itself.⁸¹⁴ Does the confession reveal guilty knowledge and is it corroborated by objective evidence? Details of the criminal act itself are important, but also descriptions of minutiae, such as the color of the wall paint, can be used to test if the suspect has actual knowledge or is just guessing. Three indicia of reliability were identified by them to determine the reliability of a confession:

Does the statement (1) lead to the discovery of evidence unknown to the police? . . . (2) include identification of highly unusual elements of the crime that have not been made public? . . . (3) include an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly?⁸¹⁵

To properly analyze the fit between the confession and the crime itself, an electronic record of the entire interrogation must be available to be reviewed.⁸¹⁶

More recently, Dr. Leo and others proposed new reliability tests to be used by judges to evaluate interrogations and confessions.⁸¹⁷ For recorded interrogations and confessions, the 1998 Leo-Oshe test that asks the three questions above would apply with the defendant bearing the burden of production on the issue of reliability and a standard of admissibility by a preponderance of the evidence.⁸¹⁸ For unrecorded interrogations and confessions to be admitted, the prosecution would first have to clearly and convincingly demonstrate that recording was not feasible through no fault of law enforcement.⁸¹⁹ Additionally, the three factors in the standard Leo-Oshe test would be analyzed and the prosecutors would be required to produce evidence “previously unknown to them” tying the suspect to the crime, knowledge of which arose from the suspect’s unrecorded interrogation.”⁸²⁰

Abolish or Modify Miranda

Paul G. Cassell rejected calls to prohibit police from falsifying evidence and exaggerating the strength of evidence, as well as suggestions that special interrogation rules apply to ill-defined groups of “vulnerable” suspects. He argued that these types of police and court procedures run the risk of increasing the number of “lost confessions,” *i.e.*, true confessions that are not made because police interrogation methods are constrained. In turn, these lost confessions affect innocent persons who might have been exonerated through a confession by the real perpetrator and future victims of criminals

⁸¹⁴ Leo & Ofshe, *supra* note 613, at 438-40.

⁸¹⁵ *Id.* at 438-39.

⁸¹⁶ *Id.* at 494-95.

⁸¹⁷ Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, Wis. L. Rev. 479, 530-34 (2006).

⁸¹⁸ *Id.* at 530-31. The prosecution would still have the burden of persuasion. *Id.* at 531.

⁸¹⁹ *Id.* at 532.

⁸²⁰ *Id.* at 532-33.

who have escaped prosecution. The ideal public policy reform reduces false confessions while increasing truthful confessions. He argued that the *Miranda* decision has had the opposite effect. He contended that innocent people are more trusting of police, and almost invariably waive their *Miranda* rights because they either believe that invoking those rights is tantamount to an admission of guilt or they do not need the protection because of their innocence. He claimed that *Miranda* is most beneficial to career criminals, who are more likely to invoke those rights and less likely to confess. A further danger cited by Cassell is that “*Miranda* has shifted the focus of the courts away from the reliability of the methods used to obtain confessions and towards technical procedural questions about warnings and waivers.”⁸²¹ He also argued that defense counsel have shifted their focus from a factual investigation of the alleged criminal conduct of the defendant to procedural litigation over *Miranda* compliance by investigators.

Cassell recommended modifying the *Miranda* warnings and procedures and requiring videotapes of police interrogations. Specifically, he advocated eliminating the need for police to obtain an affirmative waiver of *Miranda* rights and the requirement that all questioning be halted after the suspect has requested legal representation. He stated, “[V]ideotaping provides an excellent protection for false confessors, by allowing judges and juries to see when police have led an innocent person to admit to a crime he did not commit.” He argued that innocent people are usually the ones who waive *Miranda* rights, while career criminals manipulate the rules to their advantage so that *Miranda* has a limited effect. He further argued that *Miranda* has harmed police ability to obtain truthful confessions from actual perpetrators, putting both potential victims and innocent suspects at risk.⁸²²

Drs. Leo and Ofshe denounced Cassell’s supposition that *Miranda* harms innocent suspects, arguing that his theory is “unsupported by any evidence, [and] it also flies in the face of reason.”⁸²³ With respect to Cassell’s recommendation that *Miranda* procedures be loosened to garner more truthful confessions, they argued that doing so would more likely increase false confessions by innocent suspects. In his article, Cassell claimed to be able to estimate the occurrence of wrongful convictions. Drs. Leo and Ofshe insisted that Cassell’s efforts were based on speculation, and that quantification is neither possible nor necessary. They stated that because interrogations are not typically recorded in their entirety, it is impossible to determine the validity of confessions statements or the truth of what occur in the interrogation room with any certainty. Further, information on the number of interrogations nationally, and the number of truthful or false confessions they produce is unavailable. Additionally, they suggested that most false confessions are undiscovered. Drs. Leo and Ofshe

reject not only Cassell’s assertion that reasonable quantification is presently possible, but also his insistence that this is somehow necessary

⁸²¹ Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. Crim. L. & Criminology 497, 544 (1998).

⁸²² *Id.* at 503.

⁸²³ Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. Crim. L. & Criminology 557, 558 (1998).

to make considered public policy decisions about the regulation of interrogation methods. It is well established that psychologically-induced false confessions occur frequently enough to warrant the concern of criminal justice officials, legislators and the general public.⁸²⁴

Cassell suggested that false confessions are extremely rare. He further suggested that they are outweighed by the number of “lost” confessions that do not occur due to the dampening effect of *Miranda*.⁸²⁵ Cassell reviewed nine of the “proven” false confession cases cited by Drs. Leo and Ofshe, and declared that the defendant was factually guilty in each case.⁸²⁶ Cassell argued that the problem of false confessions is concentrated among persons “with serious mental problems”, and that “even those who are guilty of crimes will frequently give a confession that is inconsistent with the” evidence.⁸²⁷ As to potential preventive messages, he rejected the use of expert testimony on confessions on the grounds that there is no clear empirical, scientific foundation for such testimony.⁸²⁸ He also rejected the recommendation that defendants’ post-admission narratives be analyzed against the known facts of the case.⁸²⁹

Lawrence Rosenthal has argued that the holding in *Miranda* was intended to ensure that a suspect knowingly and intelligently waived his Fifth Amendment right against compelled self-incrimination before being subject to custodial interrogation and nothing more.⁸³⁰ He further posited that any attempts under the Due Process clause to regulate post-waiver custodial interrogations are constitutionally unjustifiable.⁸³¹ These include efforts to regulate police conduct during interrogations, videotaping of interrogations, and stricter judicial review of reliability and voluntariness of statements.⁸³²

Proposals in this Report for Electronic Recording of Custodial Interrogations

The proposals relating to electronic recording custodial interrogations were generated by the subcommittees on investigation and legal representation. The subcommittee on investigation proposes amending a rule of criminal procedure to require

⁸²⁴ *Id.* at 561.

⁸²⁵ Paul G. Cassell, *The Guilty and the ‘Innocent’: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 Harv. J.L. & Pub. Pol’y 523, 526-33 (1999).

⁸²⁶ *Id.* at 536-67. One of these confessions was videotaped; in another case, the initial police interview was audiotaped. In a third case, the defendant repeated his confession in a recorded interview after his conviction.

⁸²⁷ *Id.* at 569.

⁸²⁸ *Id.* at 577-79.

⁸²⁹ *Id.* at 579-89.

⁸³⁰ Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 Chap. L. Rev. 579, 586-603 (2007).

⁸³¹ *Id.* at 603-20.

⁸³² *Id.*

defense counsel in capital cases to be educated on evidence relating to confessions.⁸³³ This rule⁸³⁴ already requires “training relevant to representation in capital cases” and confessions would be included with other specified areas.⁸³⁵

Both subcommittees considered the statutory proposal,⁸³⁶ but it was principally authored by the subcommittee on legal representation. If enacted, custodial interrogations would generally be required to be recorded whenever the *Miranda* warning is mandated. A wiretap exception would allow police to surreptitiously record the same interrogations that they are required to record. In other words, police may but need not obtain permission to record. If no recording was made as required by the proposed statute, the statement could still be admitted, but the court would instruct the jury about the statutory requirement that was disobeyed.

These proposals were generated based upon the academic material reviewed along with experiences related by presenters and shared among the advisors themselves.

Summary of Electronic Recording of Custodial Interrogations Proposals

A rule of criminal procedure should be amended to require defense counsel⁸³⁷ in capital cases to be educated on evidence relating to confessions.

A statute should require custodial interrogations to be electronically recorded with a coextensive wiretap exception for law enforcement.

⁸³³ *Infra* p. 167.

⁸³⁴ Pa. R. Crim. P. 801.

⁸³⁵ *E.g.*, pleading & motion practice, pretrial investigation, jury selection, etc. *Id.*

⁸³⁶ *Infra* p. 169.

⁸³⁷ This rule mandates “educational and experiential criteria” for retained or appointed counsel “[i]n all cases in which the district attorney has filed a Notice of Aggravating Circumstances.” Pa. R. Crim. P. 801. The educ. is approved by Pa. Continuing Legal Educ. Bd. so that prosecutors may attend courses focusing on capital litigation as well.

POSTCONVICTION RELIEF

Even when earnest and continuing efforts are made to eliminate wrongful convictions, the possibility that they will recur remains as well as the possibility that previously unidentified causes of wrongful convictions will be recognized. Most of Pennsylvania's 11 DNA exonerees would have been exonerated postconviction rather than on direct appeal, and this is also typical for the 273 DNA exonerees nationally. The response to wrongful convictions includes correcting these erroneous convictions when they can be identified. "[T]he sole means of obtaining collateral relief" for a criminal conviction when the convict either did not commit the crime or is serving an illegal sentence is via our Post Conviction Relief Act.⁸³⁸ For these reasons, the subcommittee on legal representation considered Pennsylvania's current law⁸³⁹ and offered some revisions to improve and update it.

Almost all the recommended revisions to our Post Conviction Relief Act relate to postconviction DNA testing. Currently, a motion for postconviction DNA testing is limited to convicts who are serving a term of imprisonment or awaiting execution.⁸⁴⁰ The proposed amendment would allow anyone convicted of a crime to file for postconviction DNA testing. In other words, the motion for relief would no longer be restricted to those serving a term of imprisonment or awaiting execution so that those civilly committed or on probation or parole or even those required to register as sex offenders could still petition for the test.

The proposed section to statutorily allow an indigent convict to request appointment of counsel to prepare a petition to test DNA postconviction is similar to the *status quo*.⁸⁴¹ However, the proposal would extend the time to file a petition for postconviction relief under one of the exceptions. The time to file under a statutory exception would be the same as the time to file is ordinarily⁸⁴² and there would no time

⁸³⁸ 42 Pa.C.S. § 9542. This act does not limit remedies at trial or on direct appeal but "encompasses all other common law and statutory remedies for the same purpose" so that the exclusive way to pursue these available remedies is statutorily. *Id.*

⁸³⁹ *Id.* §§ 9541-9546.

⁸⁴⁰ *Id.* § 9543.1(a)(1).

⁸⁴¹ Indigent defendants get appointed counsel for the initial petition for postconviction relief; for a subsequent petition for postconviction relief, indigent defendants get appointed counsel when evidentiary hearings are required and "whenever the interests of justice require". Pa. R. Crim. P. 904.

⁸⁴² Under an exception, this would extend the time to petition postconviction from 60 days to one year making it the same period that it already is otherwise. 42 Pa.C.S. § 9545(b).

limitation to petition to test DNA postconviction.⁸⁴³ Because DNA tests can be dispositive in these cases, any time limit for postconviction relief after receiving favorable test results does not serve justice, especially one so artificially truncated as the current 60-day period. A 60-day time limit can be unrealistic for many incarcerated convicts who lack resources⁸⁴⁴ to timely petition. It is critical to liberalize the timeliness requirements for these limited exceptions because if an appellant does not satisfy the time requirements in our Post Conviction Relief Act, the judiciary has no jurisdiction to entertain the petition.⁸⁴⁵ This means that even a strong, *prima facie* showing that demonstrates a genuine miscarriage of justice occurred will not be judicially considered if the petition is untimely filed.⁸⁴⁶ It is unjust to allow one to move for postconviction DNA testing anytime and then effectively tell a prisoner exonerated by that test that he has only 60 days after those favorable results to petition for postconviction relief or he will never get out of jail, especially when the prisoner is unlikely to want further delay.

The proposed section specifying the right to file a petition for DNA testing postconviction is intended to clarify the current law by permitting a convicted individual who has confessed to a crime to obtain this testing postconviction. “[A] confession . . . is not a *per se* bar . . . to a convicted individual establishing a *prima facie* case that DNA testing would establish actual innocence of the crime for which he . . . was convicted, even if the voluntariness of that confession has been fully and finally litigated.”⁸⁴⁷ The proposed section would also make this right unwaivable.

Some assert that allowing DNA testing on collateral attack to support a claim of actual innocence is an incentive to litigate because a new trial might be granted, which is not necessarily a determination of actual innocence.⁸⁴⁸ Collateral attacks have been also characterized as “the litigation incentive at work” by advocates for defendants and

⁸⁴³ Other than while serving a term of imprisonment or awaiting execution after being convicted, there are no time limits to move for DNA testing postconviction; however, there are timeliness requirements for postconviction relief based those test results. *Id.* § 9543.1(a)(1), (f)(1). Because action should not be separate from logic, the proposal would allow postconviction relief anytime based upon favorable test results.

⁸⁴⁴ Inmates are paid 19-51¢/hour so that most do not earn enough during one hour of work to purchase the minimal postage to send a letter via first-class mail (if the letter weighs one ounce or less). E-mail from John G. Peslis to J. State Gov’t Comm’n (July 18, 2011, 13:00 EST) (on file with J. State Gov’t Comm’n). Postage costs 44¢-\$1.04 to send a letter in a regularly sized envelope via first class (dependent on weight, up to 3½ ounces). Postage for large envelopes sent first class costs 88¢-\$3.28 (dependent on weight, up to 13 ounces). U.S. Postal Serv., First-Class Mail Prices, <http://www.usps.com/prices/first-class-mail-prices.htm> (last visited July 1, 2011).

⁸⁴⁵ *Commonwealth v. Fahy*, 737 A.2d 214, 220 (Pa. 1999).

⁸⁴⁶ *Id.* at 223.

⁸⁴⁷ *Commonwealth v. Wright*, 14 A.3d 798, 817 (Pa. 2011).

⁸⁴⁸ This includes Chief Justice Castille. *Id.* at 819 (concurring). This concurring opinion mentions three examples from our Commw. in the same paragraph that says, “I am wary . . . of accepting at face value characterizations of cases as representing determinations of ‘actual innocence’ or ‘exoneration’ when no such judicial finding has been made.” *Id.* The three Pa. exonerations specified involved four sexual attack victims (two of whom were murdered). The DNA testing later dispositively exonerated all three convicts of at least the sexual attacks, so that they seem to be actually innocent of these crimes regardless of wariness to accept determinations of actual innocence in other cases.

others.⁸⁴⁹ If so, there has been no flood of litigation seeking DNA testing postconviction.⁸⁵⁰ In any event, the proposal includes provisions to prevent a convict from besieging the judiciary with an endless stream of repetitive petitions to test DNA postconviction. A court can summarily dismiss a frivolous petition or successive petitions failing to allege either new grounds for relief or that more probative results could be obtained from advanced DNA technology.

There is no centralized database to track this litigation nationally, but efforts were made to obtain this information in 2006 and 2007.⁸⁵¹ Sources in eight states identified a range of no known petitions to test DNA postconviction in one state with a small population⁸⁵² to a stream of one or two/month in our most populous state.⁸⁵³ (Another state had hundreds, but that one had a deadline to apply.)⁸⁵⁴ Attorneys typically vet these before petitioning a court, and many of these prisoners seek assistance from an attorney.⁸⁵⁵ No state has seriously claimed that postconviction DNA testing has caused a significant problem for its judiciary.

In 2008, prosecutors on the advisory committee were asked about postconviction DNA testing petitions filed in their districts during the most recent year. The district attorney's office for a middle-sized district could only remember one petition being filed and thought that it might be useful for Administrative Office of Pennsylvania Courts to collect this data. Similarly, the district attorney's office for a large-sized district could only remember one petition being filed. (Incidentally, both of these petitions were pursued based upon ineffective assistance of counsel⁸⁵⁶ rather than on the postconviction DNA testing statute.⁸⁵⁷) The district attorney's office for a small-sized district did not have any petition filed in its district and supposed that the number statewide would be "very low."

To the extent that the proposed statutory amendment would liberalize the right to petition for DNA testing, this largely comports with a recent judicial ruling on "a convicted state prisoner seeking DNA testing on crime-scene evidence" via a civil rights action under 42 U.S.C. § 1983.⁸⁵⁸ In this case, a state court of criminal appeals denied motions by the prisoner seeking postconviction DNA testing under a state statute of

⁸⁴⁹ *Id.*

⁸⁵⁰ E-mail from Rebecca Brown, Senior Pol'y Advocate for State Affairs, Innocence Project, to J. State Gov't Comm'n (Jan. 14, 2011) (on file with J. State Gov't Comm'n).

⁸⁵¹ *Id.*

⁸⁵² Wyo., *id.*

⁸⁵³ Cal., *id.* This state peaked at about 20/month earlier in the decade but became much fewer than that. *Id.*

⁸⁵⁴ Ohio, *id.*

⁸⁵⁵ *Id.*

⁸⁵⁶ 42 Pa.C.S. § 9543(a)(2)(ii).

⁸⁵⁷ *Id.* § 9543.1.

⁸⁵⁸ *Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (U.S. 2011). The statute authorizes civil actions for the deprivation of constitutional and statutory rights. The year before this ruling, U.S. Ct. of Appeals for the 3d Cir., which is the one with jurisdiction for our Commw., also ruled that a claim under this statute can be used "to request access to evidence for postconviction DNA testing." *Grier v. Klem*, 591 F.3d 672, 679 (3d Cir. 2010).

untested biological evidence.⁸⁵⁹ United States Courts of Appeals in at least three circuits had already allowed this and there was no “litigation flood or even rainfall” in those circuits.⁸⁶⁰ United States Supreme Court sided with these circuits to allow these civil rights actions by convicted state prisoners to seek DNA testing in federal court actions in every circuit.⁸⁶¹

Two sections are proposed to explicitly authorize comparisons with our State DNA Data Base. These amendments reflect current statutory policy to use DNA data banks to exclude individuals subject to criminal investigation and prosecution as well as to deter recidivist acts.⁸⁶² If the wrong person was convicted, recidivist acts by the right person will not be deterred.

To the extent that the proposed statutory amendments are rewrites to incorporate and clarify judicial rulings, this is within the orthodoxy of the *status quo*. The postconviction “DNA testing statute . . . should be regarded as a remedial statute and interpreted liberally in favor of the . . . citizens who were intended to directly benefit therefrom, namely, those wrongly convicted of a crime.”⁸⁶³ The proposal would allow adjudication of any petition to test DNA postconviction “if the interests of justice so require.”

Summary of Proposed Amendments to the Postconviction DNA Testing Law⁸⁶⁴

The time to petition for relief based upon a statutorily specified exception to the regular time should be extended from 60 days to one year.

The statute should be amended to eliminate:

- 1) a time-based requirement to obtain postconviction relief based upon a DNA test if the test could exonerate the petitioner; and
- 2) imprisonment as a prerequisite to petition for DNA testing postconviction.

⁸⁵⁹ *Skinner*, 131 S.Ct. at 1295. This case is distinguished from the earlier U.S. Sup. Ct. ruling that there is no substantive due process right to DNA access under the circumstances of the earlier case in which a state statutorily provided postconviction relief for newly discovered evidence but had not yet enacted its postconviction DNA testing statute. *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2322 (U.S. 2009).

⁸⁶⁰ *Skinner*, 131 S.Ct. at 1299.

⁸⁶¹ *Id.* at 1300. To clarify, the ruling did not order the DNA testing, it just allowed the state convict's suit seeking this testing to proceed in federal court and be decided on its merits.

⁸⁶² 44 Pa.C.S. § 2302(1).

⁸⁶³ *Commonwealth v. Conway*, 14 A.3d 101, 113 (Pa. Super. Ct. 2011).

⁸⁶⁴ *Infra* pp. 180-93.

The statute should be amended to clarify:

- 1) the right to petition for DNA testing postconviction; and
- 2) that DNA test results can be compared to profiles in the State DNA Data Base pre- and postconviction.

The statute should be amended to allow courts to summarily dismiss frivolous and repetitive, successive petitions while authorizing them to adjudicate any petition to test DNA postconviction if required in the interests of justice.

LEGAL REPRESENTATION

Representation of Indigent Defendants

Because another advisory committee of the Joint State Government Commission is considering adequacy of legal representation for indigent defendants under Senate Resolution No. 42,⁸⁶⁵ this advisory committee did not consider this important issue at length.

Without detailing the results of the other study, some of its expected findings can be described here. Pennsylvania is the only state that does not contribute any funds to its indigent defense system. Our Commonwealth also has no statewide body to oversee its indigent defense system. Consequently, the quality of representation varies greatly dependent on the county where the offense is tried. An entirely county-based system creates a potentially destructive dependence on the county executive and the court of common pleas of the particular county that may cause the system to deteriorate due to understaffing, high caseload, low professional and support pay, and real or perceived pressure to sacrifice the clients' interests for fear of incurring retaliation.⁸⁶⁶ At least in some counties, caseloads are so high that it is virtually impossible for defenders to render competent and ethically adequate representation to all clients. Because there is no centralized office, essential data is not collected, professional training is inadequately provided and performance standards may not be formulated and implemented. In these and other ways, Pennsylvania's indigent defense system falls short of the standards for an effective system as set forth in American Bar Association's *Ten Principles of an Effective Public Defense System*.⁸⁶⁷

The subcommittee on legal representation urges enactment of the following recommendations of the Supreme Court Committee on Racial and Gender Bias in the Justice System relating to the public defender program: "Establish an independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards. . . . Appropriate funding for indigent

⁸⁶⁵ Sess. of 2007.

⁸⁶⁶ Of 273 DNA exonerations nationally, Innocence Project lists 13 of them in which bad lawyering contributed to the conviction. This represents approximately 5% of these cases. Of the 11 exonerations from our Commw., none is listed for bad lawyering as having contributed to the conviction. Innocence Project., Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 1, 2011). The project cautions, "Contributing causes are selected examples and do not represent a comprehensive listing."

⁸⁶⁷ Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., Final Rep. 163-97 (2003). See also Am. Bar Ass'n, *Ten Principles of a Public Defense Delivery System*, (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards.”⁸⁶⁸ The subcommittee emphasizes the importance of adequate funding as a critical concern for both the defense and the prosecution in their respective roles.

To enable young attorneys to consider starting or continuing a career as a prosecutor or public defender, the subcommittee urges consideration of establishing an educational loan forgiveness program for lawyers who take such public service jobs after law school.

It is anticipated that the recommendations coming out of the other study⁸⁶⁹ will be consistent with the recommendations of the Supreme Court Committee on Racial and Gender Bias as set forth above and will include draft legislation to implement those recommendations along with other suggestions for improving Pennsylvania’s indigent defense system. In view of the other study, the subcommittee makes no further recommendations relating to indigent defense.

Governmental Misconduct

Duties of the Prosecutor

Prosecutors perform a unique function within the criminal justice system. Like all other lawyers, prosecutors are advocates who are expected to zealously advocate their cases. The advisory committee recognizes that a felony prosecution is “not a dinner party, or writing an essay, or painting a picture, or doing embroidery; it cannot be so refined, so leisurely and gentle, so temperate, kind, courteous, restrained, and magnanimous.”⁸⁷⁰ Criminal prosecution is intended to preserve public order by determining when stern punishment is justified for serious offenses against the standards of conduct that a civilized society imposes. Accordingly, the measures adopted to reduce the incidence of wrongful convictions must avoid undue restrictions that would so inhibit the effectiveness of prosecutors as to unacceptably impede the deterrent and retributive effect of criminal sanctions.

At the same time, the prosecutor has special responsibilities to ensure that prosecution serves the ends of justice:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

⁸⁶⁸ Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., *supra* note 867, at 193.

⁸⁶⁹ S. Res. No. 42 (Sess. of 2007).

⁸⁷⁰ Apologies to Mao Zedong. PoemHunter.com, Quotations from Mao Zedong, <http://www.poemhunter.com/quotations/famous.asp?people=Mao+Zedong> (last visited July 9, 2011).

therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.⁸⁷¹

The demands of serving simultaneously as minister of justice and zealous advocate create something of an ethical tightrope act. Most prosecutors deal with these imperatives skillfully and conscientiously. But there can be devastating consequences when they do not.

The Innocence Project has identified the following types of misconduct by police or prosecutors as contributing to wrongful convictions: deliberate suggestiveness in identification procedures; withholding of evidence from the defense; deliberate mishandling, mistreatment, or destruction of evidence; coercion of false confessions; and, the use of unreliable government informants or snitches.⁸⁷² Governmental misconduct was a contributing factor in 46 of the first 273 DNA exonerations nationally.⁸⁷³ This represents approximately 17% of those cases. In view of the growing number of documented instances of wrongful convictions due in part to prosecutorial misconduct and the intense public attention to those cases, public confidence in the criminal justice system can only be preserved if effective measures are taken to address misconduct by prosecutors and law enforcement personnel.

The most serious and prevalent kinds of prosecutorial misconduct are subornation of perjury, knowing presentation of false testimony and failure to disclose exculpatory evidence to the defense.⁸⁷⁴ Under the Due Process Clause, prosecutors must disclose exculpatory material to the defense, including evidence relating to a witness's credibility.⁸⁷⁵ Failure to disclose such evidence⁸⁷⁶ is the single most common form of prosecutorial misconduct. As will be discussed below, the use of unreliable testimony from informants in custody also recurrently causes wrongful convictions and

⁸⁷¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

⁸⁷² Innocence Project, Understand the Causes, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited July 9, 2011). In other contexts, the term, snitch, implies a person who informs on another about a matter that is none of the informer's business, which is considered objectionable whether or not the what the informer says is true, as when a pupil snitches on a classmate. In the criminal justice context, the term can imply that the informer is or might be conveying false information.

⁸⁷³ Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 1, 2011). Of the 11 DNA exonerations from our Commw., four are listed for governmental misconduct having contributed to the conviction. This number represents approximately 36% of these Pa. cases.

⁸⁷⁴ Spero T. Lappas, Remarks at the Meeting of the subcomm. on legal representation (July 7, 2008).

⁸⁷⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

⁸⁷⁶ This is referred to as a *Brady* violation.

inappropriate capital convictions. “Other forms include courtroom misconduct, mishandling of physical evidence, threatening or badgering witnesses, using false or misleading evidence, and improper behavior during grand jury proceedings.”⁸⁷⁷

Because they present evidence gathered by law enforcement investigators in court, prosecutors are responsible for the misconduct of investigators as well as themselves and are required to ensure that professional standards are systematically maintained. Obviously, the culpability of prosecutors for improper investigative practices is greater when the prosecutors are aware of them, but prosecutors are responsible for managing the practices of investigators so that the latter avoid unprofessional conduct.

American Bar Association has recommended adoption of internal policies that promote ethical conduct and the creation of professional guidelines that include a statement of those expectations regarding professional ethics.⁸⁷⁸ Only a small number of prosecutorial offices have internal documents that afford guidance on expected ethical conduct.⁸⁷⁹ Prosecutorial offices should implement such guidelines and include them in a publicly accessible manual.⁸⁸⁰

Along with tightening and enforcement of standards, attention must be paid to the underlying causes of some prosecutorial and investigatory misconduct. Some prosecutorial offices suffer from inadequate resources and understaffing, and efforts should be made to address these problems. If higher standards are to be implemented successfully, provision must be made for better training and supervision.

Professor Peter A. Joy argued that “prosecutorial misconduct results from three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct.”⁸⁸¹ He suggested the implementation of graduated discipline each time there is a finding by a trial judge or appellate court of prosecutorial misconduct, along with disciplinary actions by the bar.⁸⁸² A system should be established to review allegations of prosecutorial misconduct, investigate them, and recommend discipline where appropriate.⁸⁸³ An alternative is to rely more on internal regulation and discipline through the creation of a body within the prosecutor’s office that would provide it “with the ability to engage in hindsight analysis of what went wrong in individual cases to strengthen future ethical prosecutions, but is

⁸⁷⁷ The Just. Project, *Improving Prosecutorial Accountability: A Policy Review 2* (2009).

⁸⁷⁸ Am. Bar Ass’n, ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-1.5 & 3-2.5 (3d. 1993).

⁸⁷⁹ Peter A. Joy, *The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399, 421 n.123 (2006).

⁸⁸⁰ *Id.* at 422.

⁸⁸¹ *Id.* at 400.

⁸⁸² *Id.* at 425-26.

⁸⁸³ *Id.* at 426.

not subject to pressure by groups outside of the prosecutorial community.”⁸⁸⁴ Currently, prosecutors seldom face professional discipline for misconduct.⁸⁸⁵ Nor do errant prosecutors face serious sanctions in particular appellate cases; courts have a strong tendency to view such misconduct as harmless error and rarely reverse convictions on that ground.⁸⁸⁶

Prosecutors on the subcommittee on legal representation cautioned that no hard data exists on the incidence of misconduct. In their view, the management of prosecutorial offices, supplemented by formal professional discipline, is sufficient to control misconduct. For the defense and academic members (who regularly represent criminal defendants on appeal), prosecutorial misconduct, especially withholding exculpatory evidence, occurs frequently enough to be cause for concern. Both sides agree that prosecutors are rarely subject to formal professional discipline. Prosecutors argue that this is because such misconduct rarely occurs; other members attribute it to the laxity of the current regime of professional discipline.

Current Standards

To balance the competing imperatives that regulate the prosecutorial function, a variety of standards have been formulated. In Pennsylvania, the most authoritative and binding of these is Rule 3.8 of the Pennsylvania Rules of Professional Conduct (Pa. Rules of Prof'l Conduct R. 3.8):

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law

⁸⁸⁴ Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 Fordham L. Rev. 1413, 1451-52 (2007).

⁸⁸⁵ Joy, *supra* note 879, at 424-25.

⁸⁸⁶ *Id.*; Raeder, *supra* note 884, at 1424-25, 1433-34.

enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6^[887] or this Rule.

Following an amendment to a Model Rule of Professional Conduct by the American Bar Association, the Pennsylvania Bar Association has recommended two changes in Rule 3.8 that would expand the prosecutor's duty with respect to evidence of innocence. Under these measures, "when a prosecutor knows of 'new, credible and material' evidence creating a reasonable likelihood that a convicted defendant did not commit the offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority; and (2) if the conviction was obtained in the prosecutor's jurisdiction, (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and (B) undertake further

⁸⁸⁷ Rule 3.6. Trial Publicity.

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of the matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

investigation, or make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.” Where the prosecutor becomes aware of “‘clear and convincing’ evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.”⁸⁸⁸ These changes were endorsed by the Pennsylvania Bar Association on December 4, 2009. On May 15, 2010, the Disciplinary Board of the Pennsylvania Supreme Court published a notice that it is considering recommending the Court to adopt these changes; the notice set forth the proposed changes to Pa. Rules of Prof’l Conduct R. 3.8 and called for interested persons to submit written comments by July 2, 2010.⁸⁸⁹ These proposals have not been adopted as of this writing. The subcommittee recommends that our Supreme Court adopt these amendments.

A key provision for implementing the duties of the legal profession is the self-reporting requirements of Pa. Rules of Prof’l Conduct R. 8.3(a): “A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”

Recommendations

The subcommittee on legal representation proposes the following recommendations relating to prosecutorial practice.

1. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof’l Conduct R. 3.8 (relating to special responsibilities of a prosecutor), prosecutorial offices throughout the Commonwealth are called upon to implement internal policies that encourage ethical conduct, implement and enforce internal discipline when ethical standards are violated, and develop other mechanisms to provide internal oversight with the objective of ensuring, to the fullest possible extent, the integrity of investigations, evidence development, and trial and postconviction practices.

American Bar Association suggests that standards governing the prosecutorial function should be adopted and implemented. These mandate that each prosecutor’s office adopt a “prosecutor’s handbook” that contains “a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures in the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of criminal law.”⁸⁹⁰ These standards “should be

⁸⁸⁸ Pa. Bar Ass’n Legal Ethics & Prof’l Responsibility Comm., “Resolution to Amend Rule 3.8 of the Pennsylvania Rules of Professional Conduct Regarding Special Responsibilities of a Prosecutor” (Harrisburg: PBA, n.d. [2009]).

⁸⁸⁹ 40 Pa. Bulletin 2516 (2010).

⁸⁹⁰ Am. Bar Ass’n, *supra* note 878, at 3-2.5.

available to the public, except for subject matters declared ‘confidential’ when it is reasonably believed that public access to their contents would adversely affect the prosecution function.”⁸⁹¹

National District Attorneys Association similarly recommends: “Each prosecutor’s office should develop written and/or electronically retrievable statements of policies and procedures that guide the exercise of prosecutorial discretion and that assist in the performance of those who work in the prosecutor’s office.”⁸⁹² Except for confidential material, the written policy “should be accessible to the public.”⁸⁹³

Each prosecutor’s office should form a separate division to handle postconviction matters. This measure would centralize procedural and substantive knowledge about these types of claims. The lawyers could become experts in this area and be better equipped to assess the merits of these petitions. It would also encourage defense attorneys to discuss their claims informally with the prosecution at the outset instead of simply filing a motion as an opening salvo. Defense attorneys would know the appropriate lawyers to contact, and the prosecutors in the postconviction division would be more amenable to meeting with defense counsel in advance of formal proceedings. Early consultation may assist both sides to dispose of postconviction claims more fairly and expeditiously. Postconviction units in Office of the Attorney General could be an efficient alternative to placing them in county prosecutorial offices and minimize resentment by creating greater distance between trial and postconviction prosecutors.

Changing the performance measures by which individual prosecutors are judged to take account of factors other than conviction rates, such as decisions not to prosecute, would diminish the influence of conviction psychology within the institutional culture of prosecutors’ offices. For instance, a prosecutor’s decision to turn over biological evidence for DNA testing without futile litigation should be lauded within the office and considered favorably for promotion purposes where the testing ultimately exonerates the inmate. The choice to work with the defense saves time and may avoid the possibility of a flogging by the media.

2. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof’l Conduct R. 8.3 (relating to reporting professional misconduct), prosecutorial offices throughout the Commonwealth are called upon to adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

⁸⁹¹ *Id.*

⁸⁹² Nat’l Dist. Att’ys Ass’n, Nat’l Prosecution Standards 1-5.4 (3d ed.).

⁸⁹³ *Id.* at 1-5.4 Commentary.

Prosecutors' offices should be required to implement a system of graduated discipline each time there is a finding by a trial judge or appellate court of prosecutorial misconduct. Professional disciplinary authorities should implement a system to review reported instances of prosecutorial misconduct and appropriately investigate or recommend discipline.

3. Pennsylvania Supreme Court is urged to adopt proposed amendments to Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.

These amendments⁸⁹⁴ would require prosecutors to disclose new, credible and material evidence that make it reasonably likely that a convict did not commit the offense. If the conviction occurred within his jurisdiction, the defendant and the court would be notified. The prosecutor would need to investigate further and remedy the conviction if the evidence is clear and convincing.

These amendments are necessary to ensure that prosecutors will respond constructively to evidence of wrongful convictions and to require prosecutors to remedy wrongful convictions despite having to admit an official mistake.

Jailhouse Witnesses

A recurrent cause of wrongful convictions is the testimony of witnesses who testify against a defendant in exchange for a promised or implicit reward. Informant or jailhouse testimony was a contributing factor in 32 of the first 273 DNA exonerations nationally.⁸⁹⁵ This number represents 12% of those convictions. Two classic examples of this pattern are the accomplice who "turns state's evidence" against a fellow perpetrator in exchange for a lighter sentence and the jailhouse informant who falsely testifies that the defendant admitted the crime to him while they were both imprisoned. An accomplice or jailhouse informant who is under suspicion or in custody for one or more serious offenses offers to testify for the advantages his testimony will afford, such as a monetary reward, a reduced sentence or better treatment in prison.

[C]ommentators have recognized that despite rules of disclosure and trial safeguards, there is an inherently high risk that cooperating witnesses will testify falsely and will be believed by juries, thus resulting in convictions of the innocent. Prepped at length and in secret, skilled at lying, armed with important facts that may have been inadvertently (or deliberately) fed to them by the prosecution, cooperators often appear highly confident and

⁸⁹⁴ Model Rules of Prof'l Conduct R. 3.8(g), (h).

⁸⁹⁵ Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 1, 2011). Of the 11 DNA exonerations from our Commw., four are listed for informant or jailhouse testimony having contributed to the conviction. This number represents approximately 36% of these Pa. cases.

credible on the witness stand. Because the cooperator's testimony is developed in secret and without documentation, his polished, incriminating account is largely unassailable on cross-examination. Lacking any knowledge of what transpired between the prosecutor and the cooperating witness during pretrial proffer sessions and interviews, defense counsel has little basis from which to cross-examine the cooperator about the process by which the government developed the cooperator's testimony. Thus, a jury may not learn whether the cooperating witness made inconsistent statements over the course of the interview process, whether the prosecution inadvertently (or deliberately) fed information to the witness that made the witness's testimony appear more credible and confident than it otherwise would have appeared, or whether the prosecution made any unrecorded threat or inducement to the cooperator that may have motivated the witness to testify. For many reasons, prosecutors, during their pretrial preparation of cooperating witnesses, either fail to identify these instances when they occur or decide that the evidence that comes to light during the pretrial interviews is not sufficiently exculpatory or impeaching to warrant disclosure.⁸⁹⁶

Jailhouse informants especially have been identified as a key contributing cause of wrongful convictions:

Often, statements from people with incentives to testify – particularly incentives that are not disclosed to the jury – are the central evidence in convicting an innocent person.

People have been wrongfully convicted in cases in which snitches:

- Have been paid to testify
- Have testified in exchange for their release from prison.
- Have testified in multiple distinct cases that they have evidence of guilt, through overhearing a confession or witnessing the crime.

DNA exonerations have shown that snitches lie on the stand. . . . Testifying falsely in exchange for an incentive — either money or a sentence reduction — is often the last resort for a desperate inmate. For someone who is not in prison already, but who wants to avoid being charged with a crime, providing snitch testimony may be the only option.

In some cases, snitches or informants come forward voluntarily, often seeking deals or special treatment. But sometimes law enforcement officials seek out snitches and give them extensive background on cases — essentially feeding them the information they need to provide false testimony.

⁸⁹⁶ Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257, 260-61 (2005) (footnotes omitted).

Snitches continue to testify in courtrooms around the country today. In some cases without biological evidence, the snitch testimony is the only evidence of guilt.⁸⁹⁷

Up to 2004, informant testimony was the most prevalent contributing factor in wrongful convictions nationally in capital cases.⁸⁹⁸ Informant testimony is also often used to establish aggravating circumstances that may justify imposition of the death penalty.⁸⁹⁹ Because of questionable motives of such witnesses and their obvious motives to fabricate, prosecutors should avoid reliance on jailhouse informants, and a case that relies primarily or exclusively on such testimony is considered weak.

Disclosure and Pretrial Hearing

The defense can request a pretrial hearing on the admissibility of a particular witness on the grounds that his testimony is so unreliable that the judge should exclude it. Based on the evidence presented at that hearing, the trial judge can then determine whether the informant testimony is reliable enough to bring before the jury. The necessity for the hearing depends in part on whether the judge considers cross-examination a sufficient safeguard against perjurious informant testimony. Reliability can be better determined if the prosecution fully discloses the circumstances of the proffered testimony. The subcommittee on legal representation proposes requiring a preliminary hearing in capital cases; in other cases, granting the pretrial hearing should be left to the sound discretion of the trial court.

After considering the Illinois statute relating to informant testimony,⁹⁰⁰ the subcommittee proposes similar legislation for our Commonwealth. This proposal would require the prosecution to fully disclose the informant testimony and requires a preliminary hearing in capital cases, subject to waiver by the defense.⁹⁰¹

Jury Instruction

The subcommittee on legal representation also proposes usage of a cautionary jury instruction for the testimony of a jailhouse informant.⁹⁰²

⁸⁹⁷ Innocence Project, Understand the Causes, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited June 23, 2011).

⁸⁹⁸ Ctr. on Wrongful Convictions, Nw. U. Sch. of L., *The Snitch System: How Snitch Testimony sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2004-05), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf>.

⁸⁹⁹ Cal. Comm'n on the Fair Admin. of Just., *supra* note 4, at 45.

⁹⁰⁰ 725 Ill. Comp. Stat. § 5/115-21.

⁹⁰¹ *Infra* p. 178.

⁹⁰² *Id.*

Other Recommendations

Law enforcement agencies are called upon to adopt the following practices:

1. Where possible, a jailhouse informant should be wired so that the suspect's confession to him can be recorded.
2. The informant's statement should be electronically recorded.⁹⁰³

A variety of other measures have been proposed to deal with the testimony of jailhouse informants, but the subcommittee on legal representation did not specifically consider them. These other measures include requiring approval by a senior district attorney of any use of informant testimony, training of prosecutors and defense attorneys, corroboration of the testimony by independent evidence, and maintaining a central record of all contact between law enforcement personnel and in-custody informants.⁹⁰⁴

In a well-known book on wrongful convictions, veteran defense attorneys Barry Scheck and Peter Neufeld advocate that:

- a vetting committee of senior prosecutors approve use of testimony from jailhouse informants
- trial courts apply a presumption of unreliability that the prosecutor must overcome before the jury may hear such testimony
- all deals with jailhouse witnesses be written and all communications with them by police or prosecutors be videotaped or audiotaped.⁹⁰⁵

⁹⁰³ An argument in favor of mandating this practice appears in Roberts, *supra* note 896, at 289-94. These recommendations are also supported by Ctr. on Wrongful Convictions, Nw. U. Sch. of L. Ctr. on Wrongful Convictions, *supra* note 898, at 15.

⁹⁰⁴ Cal. Comm'n on the Fair Admin. of Just., *supra* note 4, at 47-50.

⁹⁰⁵ Barry Scheck et al., *Actual Innocence* 256-57 (2000).

Summary of Proposals

Indigent Defense Services⁹⁰⁶

Defense services for indigency should be standardized throughout our Commonwealth.

Rather than the counties, our Commonwealth should fund defense services for indigency and compensation for these attorneys should be adequate and substantially uniform.

Informant Testimony⁹⁰⁷

Judges should caution a jury when testimony from a jailhouse informant is presented.

Law enforcement should electronically record the informant's statement and try to electronically record the incriminating statement made to a jailhouse informant.

A statute should:

- 1) mandate timely disclosure of certain information to the defense when the prosecution seeks to introduce testimony from an informant that the accused incriminated himself and the evidence from the informant was obtained while investigating a felony; and
- 2) require a hearing in any capital case before admitting testimony from an informant that the accused incriminated himself.

Prosecutorial Practice⁹⁰⁸

Prosecutorial offices should:

- 1) implement internal policies that encourage ethical conduct;
- 2) implement and enforce internal discipline when ethical standards are violated;

⁹⁰⁶ These recommendations originated from Final Rep. of the Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys. 163-97 (2003). These recommendations were intentionally underdeveloped by this advisory committee because S. Res. No. 42 (Sess. of 2007) established a task force with an advisory committee to "study the existing system for providing services to indigent criminal defendants." The report for this other resolution will be published approximately the same time as this report is being published and is exclusively on this topic. *Infra* p. 176.

⁹⁰⁷ *Infra* p. 178.

⁹⁰⁸ *Infra* p. 177.

- 3) develop other mechanisms to provide internal oversight to ensure, to the fullest possible extent, the integrity of investigations, evidence development, and trial and postconviction practices; and,
- 4) adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

Pennsylvania Supreme Court should adopt proposed amendments to Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.⁹⁰⁹

⁹⁰⁹ These amendments were endorsed by Pa. Bar. Ass'n.

Wrongfully convicted individuals have suffered severe harm as a consequence of their imprisonment: they have lost their jobs and their good reputations, were unable to earn income while incarcerated, have often expended large amounts of money on legal services, have been deprived of liberty, sometimes for years, and have suffered detrimental psychological consequences. Yet under existing law, most of the individuals who are freed after being found innocent of the crimes for which they were convicted are unable to obtain any compensation from government or other sources for the losses they sustained.⁹¹⁰

The subcommittee on redress examined issues relevant to providing redress to those found to have been wrongfully convicted in Pennsylvania. Specifically, the subcommittee settled on the following three main areas for its consideration: (1) financially compensating those who have been wrongfully convicted; (2) providing transitional services for those released from prison after a wrongful conviction; and, (3) establishing a commission to review cases of those found to be wrongfully convicted, so that the Commonwealth can learn from errors made in those cases to prevent them from recurring. Four of the 11 individuals exonerated via postconviction DNA testing in Pennsylvania have been compensated.⁹¹¹ This number represents approximately 36% of those convictions. For the other DNA exonerees nationally, 176 of the remaining 262 have been compensated.⁹¹² This number represents more than two-thirds of the rest.

In regard to the matter of compensating an individual who has been wrongfully convicted, the subcommittee found that most jurisdictions⁹¹³ statutorily provide for compensation of varying amounts with varying eligibility for this payment. Similarly, a handful of states have either established commissions to review cases of wrongful convictions or are considering establishing such entities. These bodies vary considerably in their organization, duties and powers. Some transitional services are provided by our Commonwealth to individuals who have been convicted and subsequently released from prison. These same services are not typically provided to those who were wrongfully convicted and then released because there is generally little or no lead time before a court orders release, and there is no time for the Department of Corrections to prepare itself or the individual for release. Plus, these exonerees are typically no longer under state

⁹¹⁰ Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. Ann. Surv. Am. L. 97, 100 (2004).

⁹¹¹ Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 1, 2011).

⁹¹² *Id.*

⁹¹³ 29.

supervision. The subcommittee decided it was a matter of fairness that a wrongfully convicted individual should receive as much assistance as a released individual who had been properly convicted of his crimes, and the subcommittee advocates extending these or similar services to exonerees.

The subcommittee advances proposals consistent with principles of basic fairness and practices within our Commonwealth or elsewhere in the nation. However, not all members of the subcommittee agreed with its proposals. Those objections are set forth in a broad statement of opposition at the conclusion of this narrative. It's true that there are civil remedies for wrongful imprisonment, but only when it was caused by a civil rights violation, an intentional tort or malicious prosecution. Many of the wrongful convictions did not result from misconduct by prosecutors and police (and they have immunity for some misconduct). When this statutory or common law tortious conduct is absent, there is no civil remedy. Nonetheless, these wrongful convictions represent an injustice that call for relief. If justice and consequence should not be separate, neither should injustice and consequence.

Statutory Compensation

To compensate individuals who were wrongfully convicted, the subcommittee proposes the enactment of legislation⁹¹⁴ drawn from a number of sources within and outside of the Commonwealth, with modifications made by the subcommittee on redress. The subcommittee recommends that the Commonwealth statutorily compensate any person who is released from prison on the grounds that he was wrongfully convicted and has had his actual innocence established. Actual innocence could be established judicially or by the executive via a pardon for innocence.⁹¹⁵

The exoneree or his surviving heirs could claim compensation by filing for it in Commonwealth Court. The Commonwealth Court is proposed as the judicial forum for these matters because of the court's position as a court of appeals and because it is not typically involved in matters of criminal law. The subcommittee reasons that this is essential and would best assure absolute neutrality in such cases. The subcommittee recommends that the district attorney from the prosecuting district be charged with the decision as to whether to oppose the claim of compensation. This law will have a fiscal impact; thus, adequate funding would be required.

The subcommittee reviewed the current levels of compensation statutorily provided by more than half of the other states and settled on a floor of \$50,000 per each year of incarceration. Based on several statutory factors, the total amount of any actual

⁹¹⁴ *Infra* p. 193.

⁹¹⁵ “[T]he historic remedy for preventing miscarriages of justice where judicial process has been exhausted” is clemency. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). An exoneree would not be barred from this statutory compensation dependent upon the relief mechanism that established his actual innocence.

award would be determined by Commonwealth Court on a case-by-case basis. In addition to cash, an award of damages could include reasonable attorney's fees, compensation for child support payments, healthcare and reintegrative services, among other forms of compensation. The award of damages is intended to be conclusive and completely bar any further action by the claimant against the Commonwealth for the same subject matter. The proposal also would extend to automatic expungement of the criminal record and an amendment of current law to eliminate sovereign immunity as an obstacle to this claim.

Office of Attorney General characterizes the proposal as “not properly grounded in the law. Compensation should be forthcoming only upon a finding of wrongdoing.”⁹¹⁶ As a matter of statutory law, it is well grounded because most other jurisdictions have statutes very comparable to this proposal. The absence of such a statute places our Commonwealth in the minority of jurisdictions. If it is characterized as “not properly grounded in the law” because it does not codify the common law, that is an irrelevant observation because the General Assembly is not restricted to codifying the common law. To date, 75 enactments have occurred during this General Assembly and none appear to be codifications of the common law. Two were enacted to specifically change common law doctrines. “Where the Legislature expressly provides a comprehensive legislative scheme, these provisions supersede the prior common law principles.”⁹¹⁷

Status Quo

42 U.S.C. § 1983

Federal law authorizes a civil action for a deprivation of a constitutional or federal statutory right, but it is totally inadequate in assuring that the wrongfully convicted are compensated. To prevail on this statutory claim, the claimant must prove official misconduct that led to a constitutional violation at the time of the conviction.⁹¹⁸ Even when a district attorney concedes a constitutional violation, he will not be liable for it unless he was deliberately indifferent.⁹¹⁹ For this reason, U. S. Supreme Court recently invalidated an award to an exoneree who spent 18 years in prison, 14 of them on death row.⁹²⁰ Another U.S. Supreme Court ruling extended the absolute immunity of witnesses from damages liability for their testimony to governmental officials testifying about performing their official duties in an unsuccessful claim under this law against a police officer for giving perjured testimony at the claimant's criminal trial.⁹²¹

⁹¹⁶ *Infra* p. 155.

⁹¹⁷ *Sternlicht v. Sternlicht*, 876 A.2d 904, 912 (Pa. 2005).

⁹¹⁸ The claim requires deprivation of a federal right by a person acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

⁹¹⁹ *Connick v. Thompson*, 131 S.Ct. 1350, 1358 (U.S. 2011).

⁹²⁰ *Id.* at 1355-56.

⁹²¹ *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).

A recent U.S. Supreme Court ruling also applied absolute immunity under this law for a claim “that a prosecutor’s management of a trial-related information system is responsible for a constitutional error at” a “particular trial”.⁹²² In this particular case, an exoneree was imprisoned for 24 years before being released; the prosecution had failed to provide the defense potential impeachment information about critical testimony from a jailhouse informant.⁹²³ It seems unfair to deny compensation to an exoneree under these circumstances. “[S]ometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits;”⁹²⁴ the subcommittee’s proposal would provide a route to obtain that compensation.

Malicious Prosecution

This originated as a common law tort applicable to both civil and criminal proceedings. Our Commonwealth has statutorily based this cause of action for an underlying civil proceeding⁹²⁵ but has not yet done so for an underlying criminal proceeding so that the latter claim remains one at common law. A common law claim for malicious prosecution in criminal proceedings lies where the defendant (in the civil claim) initiated a criminal proceeding against the plaintiff (who was the defendant in the criminal prosecution) *sans* probable cause with malice and the proceedings terminated in the criminal defendant’s favor.⁹²⁶

So long as a mistaken accuser’s belief was reasonable, prosecutorial discretion immunizes the accuser from liability. If a prosecutor reasonably relies upon third party information and actually believes there is probable cause to prosecute, there is a probable cause defense even if the probable cause was mistaken.⁹²⁷ Malice is established if the prosecution was for an improper, extraneous purpose and can be inferred from an absence of probable cause; however, if there is probable cause to prosecute, malice is immaterial. An acquittal or other termination in the defendant’s favor does not present a *prima facie* case of malicious prosecution.⁹²⁸

In 1952, our Supreme Court accorded our Attorney General absolute privilege, or immunity, from civil suit for an official act within his jurisdiction.⁹²⁹ In 1971, our Superior Court recognized district attorneys to be high public officials and extended this immunity to them for acting within the scope of their official duties.⁹³⁰ More recently,

⁹²² *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 864 (U.S. 2009).

⁹²³ *Id.* at 859.

⁹²⁴ *Id.* at 864.

⁹²⁵ 42 Pa.C.S. §§ 8351-8355.

⁹²⁶ *Walker v. North Wales Borough*, 395 F.Supp.2d 219, 231 (E.D.Pa. 2005) (citations omitted).

⁹²⁷ *Mitchell v. Logan*, 33 A. 554, 555 (Pa. 1896).

⁹²⁸ *Neczypor v. Jacobs*, 169 A.2d 528, 530-31 (Pa. 1961) (citations omitted).

⁹²⁹ *Matson v. Margiotti*, 88 A.2d 892, 205 (Pa. 1952).

⁹³⁰ *McCormick v. Specter*, 275 A.2d 688, 689 (Pa. Super. Ct. 1971).

our Supreme Court immunized assistant district attorneys from suit for actions taken in their official capacity.⁹³¹ This immunity means that a malicious prosecution claim would no longer lie against a prosecutor.

Conviction Integrity

The subcommittee on redress recommends the establishment of a commission to (1) review subsequent cases of wrongful conviction to determine why these convictions recurred; (2) recommend ways to prevent similar occurrences in the future; and, (3) study developments and reforms to maintain the integrity of convictions. The subcommittee felt strongly that the commission should be as non-political in its composition as possible. It should be composed of representatives from the law enforcement community, the judiciary, and members appointed by the Governor and the leaders of both parties in the General Assembly. The commission should be adequately funded and staffed, as well as housed in a manner that ensures its neutrality and impartiality to the greatest degree possible. To ensure that the commission can protect the confidentiality of the individuals involved in the cases under its review, the subcommittee recommends exempting it under the open meetings law.

The only reliable way to correct any flawed system is to study cases of failure to understand what went wrong and then propose remedies and reforms to prevent reoccurrence. . . . [E]xonerations, as is evident in exonerations nationally, reveal recurring factors that are present in wrongful convictions. . . . There is no reason why the criminal justice system should not do what industry . . . and the transportation sector does when there is a major accident or failure: launch a thorough investigation, including the procurement of all relevant evidence and testimony to identify precisely how an innocent person came to be convicted of a crime. The conviction of an innocent person is the justice system's equivalent of factory catastrophe, a plane crash or the bombardment of the wrong target. It deserves to be investigated fully⁹³²

Contrary to Office of Attorney General's opposition to this proposal, it is not an "avenue of appellate procedure" and does not "identify those who are actually innocent."⁹³³ This commission would not inquire about a case until *after* the Board of Pardons or a court released "a person based upon a finding of actual innocence"⁹³⁴ Then, it would attempt to determine what caused the wrongful conviction so that it is a retrospective

⁹³¹ *Durham v. McElynn*, 772 A.2d 68, 69 (Pa. 2001).

⁹³² N.Y. Bar Ass'n Task Force on Wrongful Convictions, Final Rep. 102 (2009)

⁹³³ *Infra* p. 155.

⁹³⁴ *Infra* p. 199.

inquiry. It would also review reforms adopted elsewhere and then report to legislative committees. In a sense, the commission would carry on some of the work of this advisory committee.

Transitional Services

People released from prisons through exonerations need a range of immediate and well-coordinated services to ensure a smooth transition from prison to life outside of prison. Needs after release are immediate, but it averages close to three years to get compensated by the other states.⁹³⁵ To re-establish themselves in society, released prisoners require money, housing, jobs, mental and physical healthcare, education, vocational training, transportation and identification documents, among other possible needs.

Generally, those who are released from prison after the determination that they were wrongfully convicted are released suddenly by court order. There is no individual or entity charged with assisting the individual to re-establish himself within society. This can lead to homelessness, health problems and a general inability to overcome the disadvantages of spending time in prison. The subcommittee recommends establishing and adequately funding a program to be administered by the Pennsylvania Commission on Crime and Delinquency (PCCD), or other appropriate public entity, to contract with private providers in the Commonwealth for needed services to those who have been released after a wrongful conviction. Assuming PCCD is assigned this role, it would be charged with responsibility for the proper functioning of the program, including ensuring the immediate availability of services to those individuals in need and fiscal oversight.

The role of the private providers would be to provide and coordinate services on behalf of the released individuals who had been wrongfully convicted. Their duties would include assisting the recently released individual to maximize available federal and private funding and services to ensure that he can meet basic life needs for an adequate period of time to re-establish himself in the community. The providers would assess the needs of each client individually and provide counseling and other required services as long as necessary to allow the client to get back on his feet.

⁹³⁵ Innocence Project, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation* 17-18, available at http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf.

*Summary of Proposals*⁹³⁶

A statute should:

- 1) allow a claim for damages to be paid by the Commonwealth to those who have been wrongfully convicted and imprisoned if their actual innocence is established; and
- 2) enable automatic expungement of the criminal history record for those found eligible by Commonwealth Court.

A statutorily created commission should convene to periodically review:

- 1) reforms adopted by other jurisdictions to ensure the integrity of their convictions; and
- 2) any additional wrongful convictions in Pennsylvania based upon actual innocence after the exoneration to determine their causes and how to avoid their recurrence.

Transitional services similar to those provided to correctly convicted individuals upon their release should be extended to individuals who have been wrongly convicted but are no longer under correctional supervision.

Position of the Office of Attorney General in Regard to the Recommendations of the Subcommittee on Redress

“The Subcommittee should not recommend or create a new civil action for ‘wrongfully convicted’ persons. The law provides civil remedies for wrongful imprisonment, wrongful prosecution, malicious prosecution, misuse of office, etc. Persons who are actually innocent may seek redress using existing remedies.

The Subcommittee’s proposed statutes are not properly grounded in the law. Compensation should be forthcoming only upon a finding of wrongdoing. The proposed statute does not require such a finding.⁹³⁷

The OAG is opposed to the creation of an Innocence Commission. We should not create a new avenue of appellate procedure. After conviction at trial, we have the appellate process, the Post-Conviction Relief Act process, and federal *habeas corpus*. Those processes are sufficient to identify those who are actually innocent.”

⁹³⁶ *Infra* p. 193.

⁹³⁷ The common law elements of malicious prosecution are: (1) a criminal prosecution, (2) a favorable outcome to the Defendant, who is now the Plaintiff, (3) the prosecution was initiated without probable cause, and (4) the prosecution was initiated with malice. The proposed statute eliminates the third and fourth elements.

A few years ago, United States Attorney General funded National Academy of Sciences to create an independent forensic science committee to identify the needs of the forensic science community, recommend ways to maximize the use of forensic techniques and disseminate guidelines “to help ensure quality and consistency in the use of forensic technologies and techniques to solve crimes . . . and protect the public.”⁹³⁸ This entailed a broader consideration of forensic science than the subcommittee on science pursued under Senate Resolution No. 381 and those resultant recommendations were correspondingly more comprehensive. Nonetheless, a few of those national recommendations deserve mention here before the subcommittee’s considerations and proposals are mentioned.

Among other recommendations, the National Academy of Sciences independent forensic science committee recommended:⁹³⁹

- An independent, federally funded National Institute of Forensic Science
- Standardized terminology to report on and testify about results of forensic science investigations
- Research on accuracy, reliability and validity of forensic science disciplines
- A federally funded incentive to remove public forensic laboratories from administrative control of law enforcement and prosecutors
- Research on human observer bias and sources of human error in forensic examinations
- Federal funding and collaboration to advance measurement, validation, reliability, information sharing, proficiency testing and protocols for forensic examinations, methods and practices
- Mandatory accreditation of laboratories and individual certification of forensic science professionals

⁹³⁸ Nat’l Research Council of the Nat’l Academies, *Strengthening Forensic Science in the United States: A Path Forward* S-1 (2009).

⁹³⁹ Id. at S-14 to -20.

- Routine quality assurance and control procedures to ensure accuracy of forensic analyses
- A national code of ethics for all forensic science disciplines
- Graduate education programs in multidisciplinary fields critical to forensic science practice

National District Attorneys Association opposes the creation of National Institute of Forensic Science and removal of public forensic laboratories from administrative control of law enforcement and prosecutors.⁹⁴⁰ It considers accreditation of these laboratories as promoting “the integrity of a scientific testing or examination process, while removal and independence of laboratories is extremely costly and ineffective in improving reliability of the testing process.”⁹⁴¹ The association seems to endorse the remaining recommendations.⁹⁴²

After the report was published by National Academy of Science, American Academy of Forensic Science supported those recommendations and particularly emphasized and endorsed the following principles:

1. All forensic science disciplines must have a strong scientific foundation.
2. All forensic science laboratories should be accredited.
3. All forensic scientists should be certified.
4. Forensic science terminology should be standardized.
5. Forensic scientists should be assiduously held to Codes of Ethics.
6. Existing forensic science professional entities should participate in governmental oversight of the field.
7. Attorneys and judges who work with forensic scientists and forensic science evidence should have a strong awareness and knowledge of the scientific method and forensic science disciplines.⁹⁴³

⁹⁴⁰ Nat’l Dist. Att’ys Ass’n, Resolution in Support of Efforts to Strengthen Forensic Science in the U.S. (adopted 2010), available at http://www.ndaa.org/pdf/NDAA_strengthen_forensic_science_resolution_4_10.pdf.

⁹⁴¹ *Id.*

⁹⁴² *Id.*

⁹⁴³ Am. Acad. of Forensic Scis., *AAFS Position Statement in Response to the NAS Report*, Acad. News 4 (Nov. 2009).

The subcommittee on science largely focused its deliberations on three key areas of interest:

- The proper preservation of biological evidence
- Accreditation of forensic laboratories and independent oversight of these labs
- Suitable training of attorneys, judges and others to better familiarize them with forensic science

An overall theme of these three topics might be standardization. The subcommittee ended up considering a subset of the issues that the independent, national committee considered but the proposals from both are largely complementary rather than discordant. The subcommittee tailored its consideration and deliberations to the current practices in our Commonwealth. To do this, it consulted experts who were not on the advisory committee and surveyed district attorneys and judges.

A recurrent cause of wrongful convictions is invalid or improper science, which was a contributing factor in 125 of the first 273 DNA exonerations nationally.⁹⁴⁴ This number represents approximately 46% of those convictions. Proper accreditation can help prevent this as a contributing cause as can suitable training for judges and attorneys, many of whom do not have a scientific background. Plus, properly preserved evidence can allow for correction of erroneous convictions based upon invalid science. This has happened to some individuals who had been wrongly convicted based upon microscopic hair analysis, which turned out to be Sesame Street Science.⁹⁴⁵ Mitochondrial DNA analysis has illustrated inherent limitations in microscopic hair comparisons.⁹⁴⁶ There is “no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA”⁹⁴⁷ despite the admission of hair evidence in trials for over a century.⁹⁴⁸

⁹⁴⁴ Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (last visited Aug. 9, 2011). Of the 11 DNA exonerations from our Commw., three are listed for invalid or improper science having contributed to the conviction. This number represents approximately 27% of these Pa. cases.

⁹⁴⁵ “[A] forensic analyst compares a known sample to a questioned sample and makes a highly subjective determination that the two samples originated from the same source.” This is an unscientific version of a Sesame Street match game: visually comparing items and declaring that one of these is not like the other. Jessica D. Gabel & Margaret D. Wilkinson, “Good” Science Gone Bad: *How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 Hastings L.J. 1001, 1002 n.11 (2008).

⁹⁴⁶ Nat’l Research Council of the Nat’l Academies, *supra* note 938, at 5-25.

⁹⁴⁷ *Id.* at 5-26.

⁹⁴⁸ Paul C. Giannelli, *Microscopic Hair Analysis: A Cautionary Tale*, Working Paper 1 (2010) (citations omitted).

Accreditation and Oversight of Forensic Laboratories

The subcommittee on science proposes statutorily requiring that governmentally operated laboratories be accredited by a nationally recognized accrediting board for the forensic tests that they perform.⁹⁴⁹ This would cover state and municipal laboratories but not federally operated ones. By not specifying which nationally recognized accrediting board from whom to obtain accreditation, it could also avoid duplicative accreditation for those laboratories already suitably accredited. The proposal relies on existent nationally recognized accrediting boards that accredit many laboratories rather than create a bureau in an existent Commonwealth department to do the same thing.⁹⁵⁰ In addition to the subcommittee, both American Academy of Forensic Science and the independent forensic science committee of National Academy of Sciences advocate accreditation of forensic laboratories. At least five jurisdictions mandate accreditation of these laboratories.⁹⁵¹

Philadelphia Police Department's Forensic Services Bureau is accredited to examine controlled substances, trace-chemistry flammables, biology, crime scene and firearms.⁹⁵² It is also accredited for these analytical techniques: chemical screening tests, genetic analysis, electrophoresis, chromatography, spectroscopy, physical examination, microscopy and general laboratory procedures.⁹⁵³ Allegheny County Office of the Medical Examiner's Forensic Laboratory is accredited in the disciplines of controlled substances, toxicology, trace evidence, biology, firearms/toolmarks and latent prints.⁹⁵⁴ Pennsylvania State Police is accredited in the disciplines of controlled substances, toxicology, biology, firearms/toolmarks, questioned documents, trace evidence, digital & multimedia evidence and latent prints.⁹⁵⁵ This accreditation means that these governmentally operated laboratories are compliant in the accredited disciplines and techniques with the proposed legislation from the subcommittee.

A former director of one of these laboratories told the subcommittee that accreditation:

- Immeasurably improves processes and testing analysis

⁹⁴⁹ *Infra* p. 202.

⁹⁵⁰ Some juriss. license or approve laboratories through an exec. dep't, *e.g.*, Md. & Tex. A comm'n in N.Y. accredits its labs but applies the standards from nationally recognized accrediting bds.

⁹⁵¹ Haw. & Tex. mandate accreditation of both pub. and private labs, which is what is recommended by Nat'l Research Council of the Nat'l Academies, *supra* note 938. Md., N.Y. & Okla. mandate accreditation of pub. labs (governmental labs excluding the fed. gov't), which is what was proposed by the subcomm.

⁹⁵² Phila. Police Dep't Forensic Sci. Bureau Scope of Accreditation, *available at* http://forquality.org/uploads/Philly_ScopeFinal.pdf (last visited Aug. 17, 2011).

⁹⁵³ *Id.*

⁹⁵⁴ The Am. Soc'y of Crime Laboratory Dirs. Laboratory Accreditation Bd., Certificate of Accreditation, *available at* <http://www.ascl-d-lab.org/cert/cert351.pdf> (last visited Aug. 17, 2011).

⁹⁵⁵ *Id.*, *available at* <http://www.ascl-d-lab.org/cert/cert247.pdf>, <http://www.ascl-d-lab.org/cert/cert248.pdf>, <http://www.ascl-d-lab.org/cert/cert249.pdf> & <http://www.ascl-d-lab.org/cert/cert250.pdf>, <http://www.ascl-d-lab.org/cert/cert251.pdf> (last visited Aug. 17, 2011).

- Provides a comfort level of results
- Has a tremendous effect on increasing the quality of work
- Initially stretches resources but, once in place, everybody realizes the advantages

Since our Commonwealth's principal, publicly operated forensic laboratories are already accredited, the proposal to mandate accreditation would only impact any smaller publicly operated forensic laboratories.

The subcommittee did not propose to mandate accreditation for privately operated laboratories primarily because it did not have enough data to determine how many privately operated laboratories offer which forensic services within our Commonwealth, and some thought that extending the mandate to privately operated laboratories might limit defendants' ability to offer scientific evidence. Evidence tested by an unaccredited laboratory might still be reliable if it is validated in house, protocols are followed and there is an external peer review. Of course, some notable privately operated laboratories within our Commonwealth are accredited and the subcommittee consulted experts from these laboratories, one of whom was also a member of this subcommittee. Those who would have preferred that the recommendation to mandate accreditation apply to both publicly and privately operated laboratories (as Texas does) wanted to avoid dual standards.

Nationally, approximately 80% of publicly funded forensic crime laboratories are accredited, almost all by American Society of Crime Laboratory Directors/Laboratory Accreditation Board.⁹⁵⁶ More than 90% of the state-operated laboratories are accredited and more than 60% of the ones serving counties and other municipalities are.⁹⁵⁷ Laboratory accreditation and individual certification reduces the application of pseudoscientific protocols as they are disclosed to the accrediting boards. "While accreditation is not a promise of perfection, it has enforced professional accountability and transparency that has benefited all stakeholders of forensic science for over 25 years. There is simply no reason to believe that it won't do the same in the years to come."⁹⁵⁸

Forensic science helps to determine if a specific object or person is implicated in a crime. Experience reveals that errors have occurred in the collection, processing and analysis of evidence; some of those errors have contributed to wrongful convictions here and elsewhere. Establishing uniform procedures to collect, process and analyze evidence, establishing uniform peer review of work product as well as hiring standards and regular proficiency testing of individual technicians would go a long way toward reducing factors that lead to inaccurate results and considerably improve the ability to audit those results.

⁹⁵⁶ Bureau of Just. Statistics, U.S. Dep't of Just., Bulletin: Census of Publicly Funded Crime Laboratories, 2005 3 (2008).

⁹⁵⁷ *Id.* The census for 2009 has not yet been published.

⁹⁵⁸ John M. Collins & Jay Jarvis, *The Wrongful Conviction of Forensic Science*, Forensic Sci. & Pol'y Mgmt.: An Int'l J. 17, 28 (2009).

If it does not yet meet that minimum acceptable level, accreditation would require each laboratory to improve its operation. Although larger governmentally operated laboratories in our Commonwealth are already accredited (or are becoming accredited), the subcommittee proposal phases in the accreditation requirement over a period of seven years with technical peer review systems and proficiency testing programs required earlier. This should allow adequate time to accomplish all of this, adding any smaller governmentally operated laboratories that are not yet accredited.

In conjunction with accreditation, the subcommittee proposes creating a forensic advisory board to advise on the delivery of forensic laboratory service by state and municipal laboratories.⁹⁵⁹ This board would also investigate reported professional negligence and misconduct in publicly operated forensic laboratories and ensure corrective actions. It would promulgate some standards to preserve biological evidence and offer continuing education on forensic science and its application to crimes to those involved in criminal justice that could benefit from this education.

The exonerations conclusively demonstrate, however, that when forensic evidence is misunderstood, misapplied or mishandled, it is just as capable of producing an erroneous result. Judges, prosecutors and defense attorneys cannot discharge their responsibility unless they are fully conversant with the nuances and emerging technologies in the forensic evidence fields. Sustained and focused training is essential.⁹⁶⁰

In some ways, the proposed board combines advice with supervisory and regulatory or investigatory functions. At least nine other jurisdictions have or had boards to provide one or more of these functions.⁹⁶¹

In recent years, National Institute of Justice⁹⁶² solicited applicants for funding “to States and units of local government to help and improve the timeliness of forensic science and medical examiner services.”⁹⁶³ Among other qualifications for eligibility, applicants must certify “that any forensic laboratory system . . . that will receive any portion of the grant amount . . . uses generally accepted laboratory practices and procedures established by accrediting organizations or appropriate certifying bodies.”⁹⁶⁴ Applicants must also certify that “a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system . . . in the State

⁹⁵⁹ *Infra* p. 202. Some advisors continue to advocate that private ass’ns appoint members to the bd. instead of the governor. Their repeated preference is unconstitutional; “[t]he power to appoint persons to conduct governmental functions cannot be delegated to private organizations.” *Hetherington v. McHale*, 329 A.2d 250, 251 (Pa. 1974).

⁹⁶⁰ N.Y. Bar Ass’n Task Force on Wrongful Convictions, *supra* note 932, at 101.

⁹⁶¹ Cal., Ill., Ind., Mass., Minn., R.I., Tex., Va. & Wash.

⁹⁶² An agency of U.S. Dep’t of Just. & a component of Office of Just. Programs.

⁹⁶³ Nat’l Inst. of Just., U.S. Dep’t of Just., Solicitation: Paul Coverdell Forensic Science Improvement Grants Program 3 (OMB No. 1121-0329).

⁹⁶⁴ *Id.* at 4.

that will receive a portion of the grant amount.”⁹⁶⁵ The funding can be used for personnel, computerization, laboratory equipment, supplies, accreditation, education, training, certification, facilities and administrative expenses.⁹⁶⁶ Our Commonwealth has received funding from this program in the past; evidently, the state is eligible; however, not all units of local government that have forensic laboratory systems are eligible. The proposals from the subcommittee relating to accreditation and oversight could expand eligibility within our Commonwealth for funding from this program.

The National Academy of Sciences independent forensic science committee recommended that all public forensic laboratories and facilities be removed from administrative control of law enforcement agencies and prosecutors’ offices.⁹⁶⁷

The best science is conducted in a scientific setting as opposed to a law enforcement setting. Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.⁹⁶⁸

The rest of this recommendation is for federal funding to state and local jurisdictions as an incentive to create this administrative independence.⁹⁶⁹ While laudable, the subcommittee did not regard administrative independence to be a realistic objective in the near term. The regulatory and supervisory authority vested in the forensic advisory board might serve as a suitable substitute for independent administration, especially since these laboratories would be accredited.

Preservation of Evidence

After postconviction access to DNA testing, the most common statutory reform of the types considered for this report is a requirement to preserve evidence. Including our Commonwealth, almost every jurisdiction statutorily provides postconviction access to DNA. Excluding our Commonwealth, most jurisdictions statutorily require that some evidence be preserved for prescribed periods. Almost all of these jurisdictions are required to preserve biological evidence and material that can be tested for DNA. This statutory mandate is in more than 70% of our jurisdictions, so that Pennsylvania really lags most of the rest of the country by having not adopted this requirement itself. Postconviction access to DNA testing becomes moot if the evidence is not preserved.

⁹⁶⁵ *Id.*

⁹⁶⁶ *Id.* at 9-11.

⁹⁶⁷ Nat’l Research Council of the Nat’l Academies, *supra* note 938, at S-17.

⁹⁶⁸ *Id.*

⁹⁶⁹ *Id.*

In cases where crucial evidence is not preserved, is preserved but is later lost, or where it is never properly analyzed, a wrongful conviction may never be uncovered. . . . Recent experience has demonstrated that evolving technology makes possible exclusions and inclusions that were not feasible years ago. . . . The loss or destruction of forensic evidence renders later testing impossible. . . . Plainly there is a need for reform in this area.⁹⁷⁰

In recent years, National Institute of Justice⁹⁷¹ solicited applicants for funding “to receive funding to help defray the costs associated with postconviction DNA testing in cases that involve violent felony offenses . . . in which actual innocence might be demonstrated. Funds could be used to review such postconviction cases and to locate and analyze biological evidence associated with these cases.”⁹⁷² To be eligible, our Office of Attorney General would need to certify that our state law provides postconviction DNA testing “in a manner intended to ensure a reasonable process for resolving claims of actual innocence.”⁹⁷³ Our Office of Attorney General could certify this requirement for eligibility but would not be able to certify the remaining requirement for eligibility: a state law “[p]reserves biological evidence secured in relation to the investigation or prosecution of a State offense of murder or forcible rape . . . in a manner to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence.”⁹⁷⁴ The “DNA analysis conducted using this funding . . . must be performed by a laboratory . . . that is accredited and that undergoes external audits”⁹⁷⁵ The funding can be used for supplies, overtime, consultant and contractor services, computer equipment, and salary and benefits of additional employees.⁹⁷⁶

The subcommittee on science surveyed our Commonwealth’s judicial districts during its deliberation. Almost half of the judicial districts responded with more than four-fifths of the respondents saying there are no written policies to guide the preservation of biological evidence of crime between the conviction and filing of a petition to test DNA postconviction. A little over a quarter of the respondents cited premature destruction of evidence as significantly problematic. If enacted, the subcommittee’s proposal would require both preservation of this evidence and written policies to guide the mandated preservation. Originally, the subcommittee would not have required evidence be preserved if the defendant knowingly and voluntarily waived the right to test it in a court proceeding; however, this was inconsistent with the legal representation subcommittee’s proposed Pennsylvania Postconviction DNA Testing Act. That proposal would make these waivers ineffective even if they are in a plea agreement. The preservation requirement and the postconviction access go together so that these two proposals must be consistent.

⁹⁷⁰ N.Y. Bar Ass’n Task Force on Wrongful Convictions, *supra* note 932, at 90, 97, 98.

⁹⁷¹ An agency of U.S. Dep’t of Just. & a component of Office of Just. Programs.

⁹⁷² Nat’l Inst. of Just., U.S. Dep’t of Just., Solicitation: Postconviction DNA Testing Assistance Program 3 (NIJ-2011-2813).

⁹⁷³ *Id.*

⁹⁷⁴ *Id.* at 4.

⁹⁷⁵ *Id.*

⁹⁷⁶ *Id.* at 5-6.

*Training*⁹⁷⁷

Education and training in the forensic science disciplines serve at least three purposes. First, educational programs prepare the next generation of forensic practitioners. . . . Second, forensic science practitioners require continuing professional development and training. . . . Third, there is a need to educate the users of forensic science analyses, especially those in the legal community. Judges, lawyers, and law students can benefit from a greater understanding of the scientific bases underlying the forensic science disciplines and how the underlying scientific validity of techniques affects the interpretation of findings.⁹⁷⁸

The proposed authority for the forensic advisory board's training focuses on the second and third purposes of education and training. For forensic scientists,

training is needed to stay up to date in theoretical and practical issues Everyone in a laboratory needs orientation in such topics as the criminal justice system, the legal system, ethics, professional organizations, the basic philosophy of forensic science, overview of disciplines of forensic science, quality control (e.g., good laboratory practice), effective expert testimony, and safety. . . . Continuing education is critical for all personnel working in crime laboratories as well as for those in other forensic science disciplines⁹⁷⁹

The board would be authorized to coordinate, offer and collect a fee for this training and continuing education.

Users of forensic science analyses need "to understand increasingly complex scientific evidence."⁹⁸⁰ The board would also be authorized to coordinate, offer and collect a fee for this training and continuing education of judges and lawyers.

The forensic science community needs to educate those who use their services and therefore needs to understand the services and their terminology. . . . Lawyers and judges often have insufficient training and background in scientific methods, and they often fail to fully comprehend the approaches employed by different forensic science disciplines and the strengths and vulnerabilities of forensic science evidence offered during trials.⁹⁸¹

⁹⁷⁷ *Infra* p. 206.

⁹⁷⁸ Nat'l Research Council of the Nat'l Academies, *supra* note 938, at 8-1, 8-2.

⁹⁷⁹ *Id.* at 8-12, 8-13.

⁹⁸⁰ *Id.* at 8-14.

⁹⁸¹ *Id.* at 8-13, 8-16, 8-17.

*Summary of Proposals*⁹⁸²

A statute should:

- 1) require accreditation of forensic laboratories operated by the Commonwealth and its municipalities;
- 2) generally require the preservation of biological evidence relating to a criminal offense; and
- 3) criminalize the intentional destruction of biological evidence that is statutorily required to be preserved.

A statutorily created forensic advisory board should be established to:

- 1) advise the Commonwealth on the configuration of forensic laboratories and the delivery of their services to state and local government;
- 2) offer continuing education relating to forensic science to investigators, attorneys, scientists and others⁹⁸³ involved in criminal justice; and
- 3) timely investigate allegations of professional negligence and misconduct affecting the integrity of forensic analyses.

⁹⁸² *Infra* p. 202.

⁹⁸³ Emergency room physicians, sexual assault nurse examiners, med. examiners, coroners, clerks of ct., ct. reporters, etc.

Training Attorneys Relating to Eyewitness Identification and Confessions

Recommended Rule Change to require defense counsel in capital cases be educated on evidence relating to eyewitness identifications and confessions:

Rule 801.⁹⁸⁵ Qualifications for Defense Counsel in Capital Cases

In all cases in which the district attorney has filed a Notice of Aggravating Circumstances pursuant to Rule 802, before an attorney may participate in the case either as retained or appointed counsel, the attorney must meet the educational and experiential criteria set forth in this rule.

(1) EXPERIENCE: Counsel shall

- (a) be a member in good standing of the Bar of this Commonwealth;
- (b) be an active trial practitioner with a minimum of 5 years criminal litigation experience; and
- (c) have served as lead or co-counsel in a minimum of 8 significant cases that were given to the jury for deliberations. If representation is to be only in an appellate court, prior appellate or post-conviction representation in a minimum of 8 significant cases shall satisfy this requirement. A “significant case” for purposes of this rule is one that charges murder, manslaughter, vehicular homicide, or a felony for which the maximum penalty is 10 or more years.

(2) EDUCATION:

- (a) During the 3-year period immediately preceding the appointment or entry of appearance, counsel shall have completed a minimum of 18 hours of training relevant to representation in capital cases, as approved by the Pennsylvania Continuing Legal Education Board.

⁹⁸⁴ These proposals were developed by the subcomms.; comments of advisors criticizing the proposals appear in appendix J, *infra* p. 309.

⁹⁸⁵ Pa. R. Crim. P. 801. This rule mandates “educational and experiential criteria” for retained or appointed counsel “[i]n all cases in which the district attorney has filed a Notice of Aggravating Circumstances.” Pa. R. Crim. P. 801. The education is approved by Pa. Continuing Legal Educ. Bd. so that prosecutors may attend courses focusing on capital litigation as well.

(b) Training in capital cases shall include, but not be limited to, training in the following areas:

- (i) relevant state, federal, and international law;
- (ii) pleading and motion practice;
- (iii) pretrial investigation, preparation, strategy, and theory regarding guilt and penalty phases;
- (iv) jury selection;
- (v) trial preparation and presentation;
- (vi) presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
- (vii) presentation and rebuttal of evidence related to eyewitness identification evidence;
- (viii) presentation and rebuttal of evidence related to confessions;
- (ix) ethical considerations particular to capital defense representation;
- (x) preservation of the record and issues for post-conviction review;
- (xi) post-conviction litigation in state and federal courts;
- (xii) unique issues relating to those charged with capital offenses when under the age of 18;
- (xiii) counsel's relationship with the client and family.

(c) The Pennsylvania Continuing Legal Education Board shall maintain and make available a list of attorneys who satisfy the educational requirements set forth in this rule.

Taping of Interrogations – Electronic Recording Statute

AN ACT

Amending Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for recording of custodial interrogations.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 44 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:

CHAPTER 83 INVESTIGATION

Subchapter

A. Recording of Interrogations

SUBCHAPTER A RECORDING OF INTERROGATIONS

Sec.

8301. Definitions.

8302. Recording requirement.

8303. Applicability.

8304. Wiretap exception to recording.

8305. Sanctions.

8306. Handling and preservation of electronic recordings.

§ 8301. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Custodial interrogation.” An interview in which a question, statement or other conduct is reasonably likely to elicit an incriminating response and occurs while the individual interviewed is in custody.

“Custody.” A state of affairs in which the individual who is interviewed by a law enforcement officer is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes his freedom of action or movement is restricted.

“Electronic recording.” An audiovisual or audio recording of a statement.

“Interview.” A conversation between a law enforcement officer and another individual that takes place in the course of a criminal investigation.

“Law enforcement agency.” A government entity whose responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

“Law enforcement officer.” An officer or other employee of a law enforcement agency whose personal responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

“Statement.” An oral, written, sign language or nonverbal communication that takes place during a custodial interrogation.

§ 8302. Recording requirement.

An electronic recording must be made of any custodial interrogation relating to the investigation of the following offenses:

(1) An offense under 18 Pa.C.S. Ch. 25 (relating to criminal homicide).

(2) An offense classified as a felony under 18 Pa.C.S. Ch. 31 (relating to sexual offenses).

(3) An offense under 18 Pa.C.S. Ch 37 (relating to robbery).

(4) An offense classified as a felony under 18 Pa.C.S. § 3301 (relating to arson and related offenses).

(5) An attempt under 18 Pa.C.S. § 901 (relating to criminal attempt) or conspiracy under 18 Pa.C.S. § 903 (relating to criminal conspiracy) to commit an offense referred to in paragraph (1), (2), (3) or (4).

§ 8303. Applicability.

(a) Exceptions.—Section 8302 (relating to recording requirement) does not apply if the court finds all of the following:

(1) That the statement is admissible as evidence.

(2) That the statement is proven by a preponderance of the evidence to have been made voluntarily and to be reliable.

(3) That a law enforcement officer made a contemporaneous record of the reason for not making an electronic recording of the statement, or it was proven by a preponderance of the evidence that it was not feasible to make such a record. The reason provided must be consistent with paragraph (4).

(4) That it is proven by a preponderance of the evidence that one or more of the following circumstances existed at the time of the custodial interrogation:

(i) The statement was made spontaneously and was not made in response to a question.

(ii) The statement was made spontaneously in the course of the routine intake processing of the individual.

(iii) The law enforcement officer in good faith failed to make an electronic recording of the custodial interrogation because the officer inadvertently failed to operate the recording equipment properly, or without the officer’s knowledge, the recording equipment malfunctioned or stopped operating.

(iv) The custodial interrogation took place in another jurisdiction and was conducted by an official of that jurisdiction in compliance with the law of that jurisdiction.

(v) The law enforcement officers conducting or contemporaneously observing the custodial interrogation reasonably believed that the making of an electronic recording would jeopardize the safety of the individual, a law enforcement officer, a confidential informant or another individual.

(vi) The law enforcement officers conducting or contemporaneously observing the custodial interrogation reasonably believed that the crime for which the individual was subjected to custodial interrogation was not among those listed in section 8302.

(vii) Exigent circumstances existed which prevented or made infeasible the making of an electronic recording of the custodial interrogation.

(viii) Before the custodial interrogation, the individual to be interrogated indicated that he would participate only if the custodial interrogation were not electronically recorded and, if feasible, the agreement to participate without recording were electronically recorded.

(b) Exclusions.—Section 8302 does not apply to a statement if any of the following apply:

(1) The statement is offered as evidence solely to impeach or rebut the testimony of the individual interrogated and not as substantive evidence.

(2) The custodial interrogation takes place before a grand jury or court of record.

§ 8304. Wiretap exception to recording.

Notwithstanding 18 Pa.C.S. Ch. 57 (relating to wiretapping and electronic surveillance), a law enforcement officer engaged in custodial interrogation under section 8302 (relating to recording requirement) may record that custodial interrogation without consent or knowledge of that individual being held or interrogated. A law enforcement officer may nevertheless obtain an individual's consent to recording or inform that individual that the custodial interrogation will be recorded.

Comment: The wiretap exception is coextensive with the recording requirement. If the parties consent, interviews and interrogations that precede custody may also be recorded.

§ 8305. Sanctions.

Except as provided in section 8303 (relating to applicability), if the statement is obtained in violation of this subchapter and is otherwise admissible, the trial court shall instruct the jury that a State statute required the recording of the statement to ensure a more reliable determination at trial as to the circumstances and substance of any statement made by the defendant, that the police failed to abide by the terms of the statute and therefore no recording is available for the jury and that the jury may take into account the failure to record the statement in determining what weight to give the statement.

§ 8306. Handling and preservation of electronic recordings.

(a) Handling—The law enforcement agency shall clearly identify and catalogue all electronic recordings.

(b) Preservation.—

(1) If a juvenile or criminal proceeding is brought against a person interrogated in an electronically recorded custodial interrogation, law enforcement personnel shall preserve the electronic recording until all appeals, postconviction and habeas corpus proceedings by the individual interrogated are concluded or the time within which such proceedings must be brought has expired.

(2) If a juvenile or criminal proceeding is not brought against an individual interrogated in an electronically recorded custodial interrogation, law enforcement personnel shall preserve the electronic recording until all applicable Federal and State statutes of limitations bar prosecution of the individual.

Section 2. This act shall take effect in one year.

Eyewitness Identification – Eyewitness Identification Improvement Act

AN ACT

Amending Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for eyewitness identifications.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Chapter 83 of Title 44 of the Pennsylvania Consolidated Statutes is amended by subchapter to read:

SUBCHAPTER B
EYEWITNESS IDENTIFICATIONS

Sec.

8311. Short title of subchapter

8312. Legislative purpose.

8313. Definitions.

8314. Eyewitness identification procedures.

8315. Trial practice.

8316. Dissemination of identification procedures.

§ 8311. Short title of subchapter.

This subchapter shall be known and may be cited as the Eyewitness Identification Improvement Act.

§ 8312. Legislative purpose.

The purpose of this subchapter is to help solve crime, convict the guilty and protect the innocent in criminal proceedings by improving procedures for eyewitness identification of suspected perpetrators while ensuring that police can promptly, safely and effectively investigate crimes.

§ 8313. Definitions.

The following definitions when used in this subchapter shall have the meanings given to them by this section unless the context clearly indicates otherwise:

“Administrator.” The individual who conducts a live or photo lineup.

“Blind lineup.” A lineup where either of the following occurs:

(1) In the case of a live or photo lineup, the administrator does not know the identity of the suspect.

(2) In the case of a photo lineup in which the administrator knows the identity of the suspect, the administrator does not know which photograph the eyewitness is viewing at any given time.

“Eyewitness.” An individual who observes another individual at or near the scene of a criminal offense.

“Filler.” An individual who is not suspected of an offense and is included in an identification procedure.

“Identification procedure.” An investigative procedure in which a law enforcement official requests an eyewitness to attempt to identify an individual who perpetrated a criminal offense. The term includes a live lineup, a photo lineup or a show-up.

“Law enforcement agency.” A governmental entity whose responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

“Law enforcement officer.” An officer or other employee of a law enforcement agency whose personal responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

“Live lineup.” An identification procedure in which several individuals, including the suspect and fillers, are displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

“Photo lineup.” An identification procedure in which an array of photographs, comprising a photograph of the suspect and photographs of fillers, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

“Show-up.” An identification procedure in which an eyewitness is presented with a suspect for the purpose of determining whether the eyewitness identifies the individual as the perpetrator.

“Suspect.” The individual believed by law enforcement investigators to be the possible perpetrator of the crime.

§ 8314. Eyewitness identification procedures.

(a) General rule.—An eyewitness identification procedure conducted by a law enforcement agency must comply with this section.

(b) Description of the perpetrator.—Except as provided in subsection (h)(1), the eyewitness's description of the perpetrator and the circumstances under which the eyewitness observed the perpetrator, in the eyewitness's own words, shall be obtained and documented immediately prior to a live or photo lineup, unless such a description was recorded or otherwise documented by law enforcement personnel before the commencement of the identification procedure.

(c) Blind lineup administration.—Subject to the exceptions in this subsection, a blind lineup shall be conducted. If the lineup is not blind, the administrator shall state in writing the reason that a blind lineup was not used. A blind lineup need not be conducted if any of the following apply:

(1) A blind lineup is not practicable under the circumstances. The administrator shall state in writing the reasons that a blind lineup is not practicable.

(2) The law enforcement agency employs a single lineup administrator who conducts all of its lineups, counsel for the suspect is present at the lineup, and the identification procedure complies with subsections (d), (e), (f), (g), (i) and (j).

(3) The law enforcement agency audiovisually records the identification process and that identification procedure complies with subsections (d), (e), (f), (g), (i) and (j).

(d) Preliminary instructions.—Prior to a live or photo lineup, the administrator shall apprise the eyewitness of all of the following:

(1) That the perpetrator may or may not be among the individuals presented in the identification procedure.

(2) That the eyewitness should not feel compelled to make an identification.

(3) That the investigation will continue whether or not an identification is made.

(4) That if an identification is made, the administrator will ask the eyewitness to state, in his own words, how certain he is of the identification.

(e) Contact among eyewitnesses.—If more than one eyewitness views a live or photo lineup in a session, the administrator shall not permit the eyewitnesses to communicate with each other until all identification procedures in the session have been completed. Reasonable efforts shall be made so that an eyewitness does not see or hear the identification or nonidentification made by any other witness.

(f) Lineup composition.—The administrator shall conduct the lineup such that:

(1) Only one suspect is included in a live or photo lineup.

(2) In a live lineup, the following apply:

(i) All lineup participants are out of view of the eyewitness prior to the identification procedure.

(ii) At least five fillers are used.

(iii) Any identifying actions, such as speech, gestures or movements, are performed by all lineup participants.

(3) In a photo lineup, the following apply:

(i) The photograph of the suspect is placed in a different position in the lineup for each eyewitness.

(ii) At least five fillers are used.

(g) Comment after lineup.—An administrator or law enforcement officer may not comment or otherwise indicate whether an identification has identified a suspect.

(h) Show-ups—The following apply to show-ups:

(1) When practicable and when safe for the witness and law enforcement officers, the person conducting the show-up shall obtain the eyewitness's description of the perpetrator and shall record or otherwise document the description before commencing the show-up. If compliance with this paragraph is not practicable or safe, the person conducting the show-up shall state in writing the reasons for the failure to comply.

(2) When practicable and when safe for the witness and the law enforcement officers, the person conducting the show-up shall apprise the eyewitness of all of the following before commencing the show-up:

(i) That the perpetrator may or may not be the individual presented to the eyewitness.

(ii) That the eyewitness should not feel compelled to make an identification.

(iii) That the investigation will continue whether or not an identification is made.

(iv) That if an identification is made, the administrator will ask the eyewitness to state, in his own words, how certain he is of the identification.

(3) When performing a show-up, law enforcement personnel shall take reasonable measures to preclude the eyewitness from drawing inferences prejudicial to the suspect, including the following:

(i) Refraining from suggesting through statements or nonverbal conduct that the suspect is or may be the perpetrator of the crime.

(ii) When practicable and when safe for the witness and the law enforcement officers, removing handcuffs from the suspect and having the show-up take place at some distance from a squad car.

(4) If there are multiple eyewitnesses to a criminal offense under investigation, police shall make reasonable efforts to prevent an eyewitness from seeing or hearing the identification or nonidentification made by any other witness.

(5) If an eyewitness is requested to make an identification of more than one suspect at a show-up, the suspects shall be separated and the person conducting the show-up shall perform a separate show-up for each suspect when practicable and when safe for the witness and the law enforcement officers.

(i) Confidence statement.—If an eyewitness identifies an individual as the perpetrator at an identification procedure, the administrator shall immediately request a statement from the eyewitness, in the eyewitness's own words, as to the eyewitness's confidence level that the individual he identified is the perpetrator. The eyewitness must not be permitted to see or hear any information concerning the identified individual until after the administrator obtains the eyewitness's confidence statement.

(j) Record.—The administrator shall make a record of the identification procedure. The record must include all identification and nonidentification results obtained during the identification procedure as well as any confidence statement.

Comment: These identification procedures allow lineups to be presented simultaneously and sequentially.

§ 8315. Trial practice.

(a) Suppression.—The trial court may consider evidence of failure to comply with this subchapter in adjudicating a motion to suppress an eyewitness identification.

(b) Misidentification—Evidence of failure to comply with this subchapter may be admitted at trial in support of a claim of eyewitness misidentification.

(c) Jury instruction.—

(1) If sufficient evidence of failure to comply with this subchapter is presented at trial, the trial court shall instruct the jury that it may consider the evidence of noncompliance as a reason to view the identification evidence with caution.

(2) At the request of either party, the trial court may instruct the jury as to the requirements of this subchapter and how compliance or failure to comply with those requirements may affect the reliability of the identification.

§ 8316. Dissemination of identification procedures.

(a) Training.—The Pennsylvania State Police and the Municipal Police Officers' Education and Training Commission shall develop and conduct a training program for law enforcement officers and recruits regarding the method of conducting identification procedures under this subchapter and the scientific findings supporting the methods prescribed by this subchapter.

(b) Adoption of procedures.—Each law enforcement agency shall adopt a written protocol for eyewitness identification procedures consistent with this subchapter.

Section 2. This act shall take effect in 120 days.

Adequacy of Legal Representation

While recognizing their importance, the subcommittee did not consider in detail the issues relating to the adequacy of the current legal representation of indigent defendants because another advisory committee of the Joint State Government Commission is currently considering that topic pursuant to Senate Resolution No. 42.⁹⁸⁶

At the same time, the subcommittee urges enactment of the following recommendations issued in 2003 by the Supreme Court Committee on Racial and Gender Bias in the Justice System relating to the public defender program:

⁹⁸⁶ Sess. of 2007.

Establish an independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards.

Appropriate funding for indigent defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards.⁹⁸⁷

It is anticipated that the recommendations from the Senate Resolution No. 42 study will be consistent with the two immediately above. The subcommittee wishes to emphasize that adequate funding is a critical concern for both the defense and the prosecution in their respective roles.

To enable young attorneys to consider starting or continuing a career as a prosecutor or public defender, an educational loan forgiveness program should be established for lawyers who take such public service jobs after law school.

Prosecutorial Practice

1. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof'l Conduct R. 3.8 (relating to special responsibility of a prosecutor), prosecutorial offices throughout the Commonwealth are urged to implement internal policies that encourage ethical conduct, implement and enforce internal discipline when ethical standards are violated, and develop other mechanisms to provide internal oversight with the objective of ensuring, to the fullest possible extent, the integrity of investigations, evidence development, and trial and post conviction practices.

2. In addition to the ethical obligations which prosecutors are bound by, as encompassed in their oath of office and pursuant to their obligations under Pa. Rules of Prof'l Conduct R. 8.3 (relating to reporting professional misconduct), prosecutorial offices throughout the Commonwealth are urged to adopt clear guidelines and appropriate sanctions in instances where purposeful or otherwise egregious prosecutorial misconduct is discovered or revealed.

3. Pennsylvania Supreme Court is urged to adopt proposed amendments to Pa. Rules of Prof'l Conduct R. 3.8, relating to evidence of wrongful conviction.⁹⁸⁸

⁹⁸⁷ Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., *supra* note 867. The work of this comm. has been continued by the Interbranch Comm'n for Gender, Racial & Ethnic Fairness.

⁹⁸⁸ These amendments are endorsed by Pa. Bar Ass'n.

Informant Testimony

Jury Instruction

Judges should use a cautionary jury instruction similar to the following for the testimony of a jailhouse informant:

(1) When a Commonwealth witness is a jailhouse or prisoner informant his testimony has to be judged by special precautionary rules. Experience shows that a prisoner informant may testify falsely in the hope of obtaining favorable treatment, or for some corrupt or wicked motive. On the other hand, a prisoner informant may be a perfectly truthful witness. The special rules that I shall give you are meant to help you distinguish between truthful and false informant testimony.

(2) These are the special rules that apply to informant testimony:

First, you should review the motives or reasons for the informant giving testimony in this case.

Second, you should examine the testimony of an informant closely and accept it only with care and caution.

Third, you should consider whether the testimony of an informant is supported, in whole or in part, by other evidence. Accomplice testimony is more dependable if supported by independent evidence. However, even if there is no independent supporting evidence you may still find the defendant guilty solely on the basis of an informant's testimony if, after using the special rules I just told you about, you are satisfied beyond a reasonable doubt that the informant testified truthfully and the defendant is guilty.

Statute Relating to Informant Testimony

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for informant testimony.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 42 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 5919.1. Informant testimony.

(a) Disclosures.—In any case in which the prosecution attempts to introduce evidence of incriminating statements made by the accused to an informant or overheard by an informant, the prosecution shall timely disclose all of the following to the defense:

- (1) The intention of the prosecution to introduce the testimony of an informant.
- (2) The complete criminal history of an informant.
- (3) Any deal, promise, inducement or benefit which the offering party has made or will make to the informant.
- (4) The substance of the testimony to be given by the informant, including all statements made by the accused and heard by the informant.
- (5) The time and place of each statement, the time and place of its disclosure to law enforcement officials and the names of all persons who were present when the statement was made.
- (6) Whether, at any time, the informant recanted his testimony and, if so, the time and place of the recantation, the nature of the recantation and the names of the persons who were present at the recantation.
- (7) Other cases in which the informant testified and whether the informant received any promise, inducement or benefit in exchange for or after that testimony.
- (8) Any other information relevant to the credibility of the informant.

(b) Hearing.—In any capital case in which the prosecution attempts to introduce testimony of incriminating statements made by the accused to an informant or overheard by an informant, the court shall conduct a hearing before the introduction of the testimony to determine whether the testimony is reliable. If the prosecution fails to show by a preponderance of the evidence that the statement is reliable, the court may not allow the testimony to be heard at trial. At this hearing, the court shall consider the factors enumerated in subsection (a) as well as any other factors relating to reliability. A hearing under this subsection is not required if the defendant waives the right to the hearing or if an electronic recording was made of the statement of the accused.

(c) Applicability.—This section applies to informant evidence obtained in the course of the investigation of a felony.

(d) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

“Electronic recording.” An audio or audiovisual recording of a statement.

“Informant.” An individual whom the prosecution offers as a witness to testify about admissions of an accused that were made to or overheard by the informant while both the informant and the accused were incarcerated in a penal institution.

Section 2. This act shall take effect in 60 days.

Other Proposals Relating to Informants

The advisory committee calls upon law enforcement agencies to adopt the following practices:

1. Where possible, a jailhouse informant should be wired so that the suspect's confession to him can be recorded.
2. The informant's statement should be electronically recorded.

Postconviction Relief

Pennsylvania Postconviction DNA Testing Act and Preservation of Evidence

AN ACT

Amending Titles 18 (Crimes and Offenses), 42 (Judiciary and Judicial Procedure) and 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for tampering with biological evidence; further providing for controlled substance forfeiture; providing for preservation of biological evidence; repealing provisions relating to postconviction DNA testing; further providing for jurisdiction and proceedings; and providing for postconviction DNA testing.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 18 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 5113. Tampering with biological evidence.

A person commits a misdemeanor of the first degree if he knowingly and intentionally destroys, alters or tampers with biological evidence that is required to be preserved under 42 Pa.C.S. § 9502 (relating to preservation of biological evidence) with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding.

Section 2. Section 6801(f) and (h) of Title 42 are amended to read:

§ 6801. Controlled substances forfeiture.

* * *

(f) Use of cash or proceeds of property.--Cash or proceeds of forfeited property transferred to the custody of the district attorney pursuant to subsection (e) shall be placed in the operating fund of the county in which the district attorney is elected. The

appropriate county authority shall immediately release from the operating fund, without restriction, a [like amount] portion for the use of the district attorney enforcing the provisions of The Controlled Substance, Drug, Device and Cosmetic Act while retaining an adequate balance to preserve biological evidence as required by section 9502 (relating to preservation of biological evidence). The entity having budgetary control shall not anticipate future forfeitures or proceeds therefrom in adoption and approval of the budget for the district attorney.

* * *

(h) Authorization to utilize property.--The district attorney and the Attorney General shall utilize forfeited property or proceeds thereof for the purpose of enforcing the provisions of The Controlled Substance, Drug, Device and Cosmetic Act, 18 Pa.C.S. (relating to crimes and offenses) and 75 Pa.C.S. (relating to vehicles). In appropriate cases, the district attorney and the Attorney General may designate proceeds from forfeited property to be utilized by community-based drug and crime-fighting programs and for relocation and protection of witnesses in criminal cases.

* * *

Section 3. Title 42 is amended by adding a section to read:

§ 9502. Preservation of biological evidence.

(a) General rule.--Notwithstanding any other provision of law, the prosecuting jurisdiction or its designee shall preserve biological evidence that was secured in the investigation or prosecution of a criminal offense, if criminal proceedings are pending or if a defendant is under a sentence of imprisonment for that offense. Prosecuting jurisdictions may act jointly to comply with this section.

(b) Applicability.--Subsection (a) shall not apply if:

(1) a court has denied a request or motion for DNA testing of the biological evidence by the defendant under Ch. 95 Subch. E (relating to postconviction DNA testing), and no appeal is pending;

(2) after a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction, the defendant, his counsel of record and the public defender is notified that the biological evidence may be destroyed and the defendant does not file a motion under Ch. 95 Subch. E within one year of receipt of the notice; or

(3) the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impractical and:

(i) the prosecuting jurisdiction or its designee takes reasonable measures to remove and preserve portions of the material evidence sufficient to permit future DNA testing; or

(ii) the biological evidence has already been subjected to DNA testing under Ch. 95 Subch. E and the results included the defendant as the source of the evidence.

(c) Other preservation requirement.--Biological evidence required to be preserved by this section shall be preserved under reasonable conditions designed to preserve the integrity of the evidence and the testing process, which must be consistent with applicable standards promulgated by a nationally recognized accrediting board and

approved by the Forensic Advisory Board. Nothing in this section preempts or supersedes any statute, regulation, court order, or other provision of law that may require evidence, including biological evidence, to be preserved.

(d) Regulations.--Not later than 180 days after the date of this section's enactment, the prosecuting jurisdiction shall promulgate rules or regulations to implement and enforce this section, including appropriate disciplinary sanctions to ensure compliance.

(e) Fee.--Unless the court finds that undue hardship would result, a fee of \$125 shall automatically be assessed on a person convicted or adjudicated delinquent for a criminal offense requiring preservation of biological evidence under this section. All proceeds derived from this fee shall be transmitted to the prosecuting jurisdiction. This fee is in addition to any other fees imposed by statutory authority and the fee shall be assessed per capita rather than per criminal offense or amount of biological evidence. This fee shall be collected in accordance with section 9728 (relating to collection of restitution, reparation, fees, costs, fines and penalties). Subsection (a) applies regardless whether a fee under this subsection is assessed and collected. If the conviction or adjudication of delinquency is reversed or vacated or if the sentence is vacated, the prosecuting jurisdiction shall promptly refund the fee.

(f) Definition.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Biological evidence." The contents of a sexual assault examination kit, and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other biological material that was collected as part of the criminal investigation that may be probative of the perpetrator's identity or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, e.g., on a slide or swab or in a test tube, or is present on other evidence, including clothing, ligatures, bedding or other household material, drinking cups or cigarettes.

"Criminal offense." An act that can be prosecuted under any of the following provisions of 18 Pa.C.S. (relating to crimes and offenses):

Chapter 25 (relating to criminal homicide).

Chapter 27 (relating to assault).

Chapter 29 (relating to kidnapping).

Chapter 31 (relating to sexual offenses).

Chapter 37 (relating to robbery).

"Prosecuting jurisdiction." The county where the criminal offense occurred.

Section 4. Section 9543.1 of Title 42 of the Pennsylvania Consolidated Statutes is repealed:

[§ 9543.1. Postconviction DNA testing.

(a) Motion.--

(1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.

(2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion. If the evidence was discovered prior to the applicant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in existence at the time of the trial or the applicant's counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency.

(b) Notice to the Commonwealth.--

(1) Upon receipt of a motion under subsection (a), the court shall notify the Commonwealth and shall afford the Commonwealth an opportunity to respond to the motion.

(2) Upon receipt of a motion under subsection (a) or notice of the motion, as applicable, the Commonwealth and the court shall take the steps reasonably necessary to ensure that any remaining biological material in the possession of the Commonwealth or the court is preserved pending the completion of the proceedings under this section.

(c) Requirements.--In any motion under subsection (a), under penalty of perjury, the applicant shall:

(1) (i) specify the evidence to be tested;

(ii) state that the applicant consents to provide samples of bodily fluid for use in the DNA testing; and

(iii) acknowledge that the applicant understands that, if the motion is granted, any data obtained from any DNA samples or test results may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(2) (i) assert the applicant's actual innocence of the offense for which the applicant was convicted; and

(ii) in a capital case:

(A) assert the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) (relating to sentencing procedure for murder of the first degree) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(B) assert that the outcome of the DNA testing would establish a mitigating circumstance under section 9711(e)(7) if that mitigating circumstance was presented to the sentencing judge or jury and facts as to that issue were in dispute at the sentencing hearing.

(3) present a prima facie case demonstrating that the:

(i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(A) the applicant's actual innocence of the offense for which the applicant was convicted;

(B) in a capital case, the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(C) in a capital case, a mitigating circumstance under section 9711(e)(7) under the circumstances set forth in subsection (c)(1)(iv).

(d) Order.--

(1) Except as provided in paragraph (2), the court shall order the testing requested in a motion under subsection (a) under reasonable conditions designed to preserve the integrity of the evidence and the testing process upon a determination, after review of the record of the applicant's trial, that the:

(i) requirements of subsection (c) have been met;

(ii) evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect; and

(iii) motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.

(2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that:

(i) would establish the applicant's actual innocence of the offense for which the applicant was convicted;

(ii) in a capital case, would establish the applicant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance under section 9711(d) if the applicant's exoneration of the conduct would result in vacating a sentence of death; or

(iii) in a capital case, would establish a mitigating circumstance under section 9711(e)(7) under the circumstances set forth in subsection (c)(1)(iv).

(e) Testing procedures.--

(1) Any DNA testing ordered under this section shall be conducted by:

(i) a laboratory mutually selected by the Commonwealth and the applicant;

(ii) if the Commonwealth and the applicant are unable to agree on a laboratory, a laboratory selected by the court that ordered the testing; or

(iii) if the applicant is indigent, the testing shall be conducted by the Pennsylvania State Police or, at the Pennsylvania State Police's sole discretion, by a laboratory designated by the Pennsylvania State Police.

(2) The costs of any testing ordered under this section shall be paid:

(i) by the applicant; or

(ii) in the case of an applicant who is indigent, by the Commonwealth of Pennsylvania.

(3) Testing conducted by the Pennsylvania State Police shall be carried out in accordance with the protocols and procedures established by the Pennsylvania State Police.

(f) Posttesting procedures.--

(1) After the DNA testing conducted under this section has been completed, the applicant may, pursuant to section 9545(b)(2) (relating to jurisdiction and

proceedings), during the 60-day period beginning on the date on which the applicant is notified of the test results, petition to the court for postconviction relief pursuant to section 9543(a)(2)(vi) (relating to eligibility for relief).

(2) Upon receipt of a petition filed under paragraph (1), the court shall consider the petition along with any answer filed by the Commonwealth and shall conduct a hearing thereon.

(3) In any hearing on a petition for postconviction relief filed under paragraph (1), the court shall determine whether the exculpatory evidence resulting from the DNA testing conducted under this section would have changed the outcome of the trial as required by section 9543(a)(2)(vi).

(g) Effect of motion.--The filing of a motion for forensic DNA testing pursuant to subsection (a) shall have the following effect:

(1) The filing of the motion shall constitute the applicant's consent to provide samples of bodily fluid for use in the DNA testing.

(2) The data from any DNA samples or test results obtained as a result of the motion may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(h) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Applicant." The individual who files a motion under subsection (a).

"DNA." Deoxyribonucleic acid.]

Section 5. Section 9545(b) of Title 42 is amended to read:

§ 9545. Jurisdiction and proceedings.

* * *

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within [60 days] one year of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review.

(4) For purposes of this subchapter, “government officials” shall not include defense counsel, whether appointed or retained.

(5) This subsection does not apply to a petition filed under Subchapter E (relating to postconviction DNA testing).

* * *

Section 6. Chapter 95 of Title 42 is amended by adding a subchapter to read:

SUBCHAPTER E
POSTCONVICTION DNA TESTING

Sec.

9581. Short title of subchapter.

9582. Definitions.

9583. Right to file petition for DNA testing.

9584. Form of petition.

9585. Filing, docketing and effect of petition.

9586. Counsel for indigent petitioners.

9587. Dismissal or acceptance for adjudication.

9588. Proceedings on petition.

9589. Comparisons with CODIS data.

9590. Discovery.

9591. Testing procedures.

9592. Appeal.

9593. Procedure after test results.

§ 9581. Short title of subchapter.

This subchapter shall be known and may be cited as the Pennsylvania Postconviction DNA Testing Act.

Comment: The relationship between this subchapter and subchapter B (postconviction relief) is generally governed by 1 Pa.C.S. § 1933 (particular controls general), with this subchapter considered the particular provision where both it and subchapter B apply.

§ 9582. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given in this section unless the context clearly indicates otherwise:

“Biological evidence.” The contents of a sexual assault examination kit and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other biological material that was collected as part of the criminal investigation that may be probative of the perpetrator’s identity or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies

whether that material is catalogued separately, e.g., on a slide or swab or in a test tube, or is present on other evidence, including clothing, ligatures, bedding or other household material, drinking cups or cigarettes.

“CODIS.” The Federal Combined DNA Index System.

“DNA testing.” Postconviction forensic DNA testing under this subchapter.

“State DNA Data Base.” The State DNA Data Base established under 44 Pa.C.S. § 2312 (relating to State DNA Data Base).

“Successive petition.” A petition for DNA testing filed by a petitioner who has previously filed a petition for DNA testing.

§ 9583. Right to file petition for DNA testing.

Notwithstanding any other provision of law governing postconviction relief, an individual convicted of a crime may file a petition for DNA testing under this subchapter. A waiver of the right to file a petition for DNA testing is not effective, whether the purported waiver is made by itself, as part of an agreement resulting in a plea of guilty or nolo contendere, or in any other manner.

Comment: Individuals eligible for testing under this section may include any of the following, as well as any others to whom this section applies: (1) individuals currently incarcerated, civilly committed, on parole or probation, or subject to registration as a sex offender; (2) individuals convicted on a plea of not guilty, guilty or nolo contendere; (3) individuals who have provided a confession or admission related to the crime, either before or after conviction; or (4) individuals who have finished serving their sentences.

§ 9584. Form of petition.

(a) Contents of petition.—The petition for DNA testing must be made under oath by the petitioner and must include the following:

(1) A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how it was originally obtained.

(2) A statement that the evidence was not previously tested for DNA or a statement that subsequent scientific developments in DNA testing techniques would likely produce a definitive result establishing that the petitioner is not the person who committed the crime.

(3) A statement that the petitioner is innocent of a crime for which the petitioner was sentenced.

(4) In a successive petition, the person’s certification that he has not filed a previous petition on similar grounds, and a statement of the reason for the petitioner’s failure to raise the current grounds in the previous petition.

(5) A statement describing how the requested DNA testing will exonerate the defendant of the crime or will mitigate the sentence received by the petitioner for the crime.

(6) The petitioner's consent to provide samples of bodily fluid for use in the DNA testing.

(7) The petitioner's consent that the data from any DNA samples or test results obtained as a result of the petition may be entered into law enforcement databases, used in the investigation of other crimes or used as evidence against the petitioner in other cases.

(b) Form—If the Supreme Court promulgates an official form for a petition for DNA testing, the Department of Corrections shall make the form available to prisoners.

§ 9585. Filing, docketing and effect of petition.

(a) Filing.—A request for DNA testing may be filed at any time following sentencing, and shall be by written petition and be filed with the clerk of courts of the judicial district in which the sentence was imposed.

(b) Notice to the Commonwealth.—A copy of the petition shall be served on the attorney for the Commonwealth. The Commonwealth may respond in accordance with the Pennsylvania Rules of Criminal Procedure.

(c) Court rules.—Except as otherwise provided in this subchapter, the Pennsylvania Rules of Criminal Procedure apply to a petition for DNA testing, and the petition shall be considered a petition for postconviction collateral relief under those rules.

(d) Effect of filing petition.—

(1) The filing of a petition for forensic DNA testing constitutes the petitioner's consent to provide samples of bodily fluid for use in the DNA testing.

(2) The filing of the petition also constitutes the consent of the petitioner that the data from any DNA samples or test results obtained as a result of the petition may be entered into law enforcement databases, used in the investigation of other crimes or used as evidence against the petitioner in other cases.

(3) The court shall ensure that the petitioner has filed the petition with knowledge of paragraphs (1) and (2) and has knowingly and intelligently consented to their provisions. Averments in the petition as provided under section 9584(a)(6) and (7) (relating to form of petition), or a written representation that the petitioner has filed the petition with knowledge of paragraphs (1) and (2) and has knowingly and intelligently consented to their provisions, filed of record and signed by petitioner or counsel for the petitioner, is sufficient to establish consent under this paragraph.

(e) Inventory.—Upon receipt of a petition for DNA testing, the Commonwealth shall promptly prepare an inventory of the evidence related to the case and serve a copy of the inventory to the prosecution, the petitioner, the petitioner's attorney and the court.

Comment: The rules relating to postconviction collateral proceedings are set forth in chapter 9 of the Pennsylvania Rules of Criminal Procedure.

§ 9586. Counsel for indigent petitioners.

(a) Request for counsel.—An indigent, convicted individual may request appointment of counsel to prepare a petition for DNA testing by sending a written request

to the court. The request shall include the individual's statement that he was not the perpetrator of the crime and that DNA testing is relevant to his assertion of innocence. The request also shall include the individual's statement as to whether he previously has had counsel appointed under this section. If any of the information required by this subsection is missing from the request, the court shall return the request to the convicted individual and advise him that the matter cannot be considered without the missing information or, if the Supreme Court has promulgated a form for a request for appointment of counsel to prepare a petition for DNA testing, the court may send him that form.

(b) Appointment of counsel.—Upon a finding that the individual is indigent:

(1) If counsel has not previously been appointed under this subsection, the court shall appoint counsel to investigate and, if appropriate, to file a petition for DNA testing and to represent the individual solely for the purpose of obtaining the testing.

(2) If counsel has been previously appointed under this section, the court may appoint counsel to perform the duties described in paragraph (1).

§ 9587. Dismissal or acceptance for adjudication.

(a) General rule.—Unless subsection (c) applies, the court shall dismiss the petition on its own motion without requiring the state to respond to the petition if either of the following apply:

(1) The petition is frivolous.

(2) In the case of a successive petition, the petition fails to meet the requirements of subsection (b).

(b) Successive petitions.—The court shall hear a successive petition if the petition alleges substantially new or different grounds for relief, including factual, scientific or legal arguments not previously presented, or the availability of more advanced DNA technology that provides a reasonable probability of more probative results.

(c) Interests of justice.—The court may adjudicate any petition under this subchapter if the interests of justice so require.

§ 9588. Proceedings on petition.

(a) Criteria for relief.—Unless the court dismisses the petition under section 9587 (relating to dismissal or acceptance for adjudication), the court shall promptly conduct a hearing on the petition. The court shall grant the DNA testing requested by the petition if it finds all of the following:

(1) The petitioner has demonstrated a reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing, under this subchapter or under previously applicable law, at the time of the original prosecution.

(2) The evidence to be tested was secured in relation to the offense underlying the challenged conviction and one of the following applies:

(i) The evidence was not previously subjected to DNA testing under this subchapter or under previously applicable law.

(ii) Although previously subjected to DNA testing under this subchapter or under previously applicable law, the evidence can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results.

(3) At least one item of evidence that the petitioner seeks to have tested is in existence.

(4) The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the results of the DNA testing can establish the integrity of the evidence. Evidence that has been in the custody of law enforcement, other government officials or a public or private hospital shall be presumed to satisfy this paragraph, absent specific evidence of material tampering, replacement or alteration.

(5) The petition is made to demonstrate factual innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

(b) Other orders.—The court may make such other orders as may be appropriate in connection with proceedings under this subchapter, either on its own initiative or on motion of any party to the proceedings.

Comment: For relief under subsection (a), a “reasonable probability” is a probability great enough to reasonably justify an order that the biological material be tested. Following the analysis in *Strickland v. Washington*, 466 U.S. 668, 691-96 (1984), a reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. The showing required of the defendant is less than proof by a preponderance of the evidence that the previous outcome was erroneous. *Id.* at 693-94.

Where the petitioner is imprisoned under multiple charges, he may qualify for testing if testing would exonerate him of at least one charge, and the failure of conviction of that charge would have caused him to receive a shorter total sentence.

Subsection (b) applies whether or not the order is specifically mentioned in this subchapter.

§ 9589. Comparisons with CODIS data.

For purposes of supporting a petition under this subchapter, a petitioner may request and the court may order a law enforcement entity that has access to CODIS or the State DNA Data Base to submit the DNA profile obtained from probative biological material from crime scene evidence to those databases to determine whether that profile matches a profile of a known individual or a profile from an unsolved crime. The DNA profile submitted to the databases must comply with the Federal Bureau of Investigation’s requirements for the uploading of crime scene profiles to CODIS.

§ 9590. Discovery.

(a) Court orders.--At any time after a petition has been filed under this subchapter, the court may order the Commonwealth to do any or all of the following:

(1) Locate and provide the petitioner with any reports, notes, logs or other documents relating to items of physical evidence collected in connection with the case, or otherwise assist the petitioner in locating items of biological evidence that the Commonwealth contends have been lost or destroyed.

(2) Take reasonable measures to locate biological evidence that may be in the custody of the Commonwealth.

(3) Assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility.

(4) Produce laboratory reports prepared in connection with the DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing under this subchapter or previously applicable law.

(b) Previous testing.--If the prosecution or the petitioner previously conducted DNA testing or other testing of biological evidence without knowledge of the other party, that testing shall be revealed in the petition for testing or the response.

(c) Reports and data.--If the court orders new DNA testing, the court shall order the production of any laboratory reports prepared in connection with the DNA testing. The court may also order production of the underlying data or other laboratory documents.

(d) Results.--The results of the DNA testing shall be disclosed to the prosecution, the petitioner and the court.

§ 9591. Testing procedures.

(a) Court supervision.--The court may order any or all of the following:

(1) The preservation of some portion of the sample for replication of the test.

(2) Additional DNA testing, if the results of the initial testing are inconclusive or additional scientific analysis of the results is otherwise required.

(3) The collection and DNA testing of additional reference samples for comparison purposes.

(b) Selection of laboratory.--DNA testing shall be conducted by a laboratory mutually selected by the Commonwealth and the petitioner. If the Commonwealth and the petitioner are unable to agree on a laboratory, the testing shall be conducted by a laboratory selected by the court. If the petitioner is indigent, the testing shall be conducted by the Pennsylvania State Police or, at the Pennsylvania State Police's sole discretion, by a laboratory designated by the Pennsylvania State Police. A laboratory selected under this subsection must be accredited.

(c) Costs.--The costs of DNA testing shall be paid by the petitioner, or in the case of an indigent petitioner, by the Commonwealth.

(d) Testing by the Pennsylvania State Police.--DNA testing conducted by the Pennsylvania State Police shall be carried out in accordance with the protocols and procedures established by the Pennsylvania State Police and approved by ASCLD/LAB.

(e) Confidentiality.--DNA profile information from biological samples taken from any individual under this subchapter is exempt from any law requiring disclosure of information to the public.

(f) Definition.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Accredited.” Accredited by ASCLD/LAB.

“ASCLD/LAB.” The Laboratory Accreditation Board of the American Society of Crime Laboratory Directors.

§ 9592. Appeal.

The petitioner may appeal a decision denying DNA testing under the Pennsylvania Rules of Appellate Procedure.

§ 9593. Procedure after test results.

(a) Results favorable to petitioner.--If the results of DNA testing are favorable to the petitioner, the court shall conduct a hearing to determine the appropriate relief to be granted. Based on the results of the testing and any evidence or other matter presented at the hearing, the court shall thereafter enter any order that serves the interests of justice. An order under this subsection may:

(1) Set aside or vacate the petitioner’s judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency.

(2) Grant the petitioner a new trial or fact-finding hearing.

(3) Grant the petitioner a new sentencing hearing, commitment hearing or dispositional hearing.

(4) Discharge the petitioner from custody.

(5) Specify the disposition of any evidence that remains after the completion of the testing.

(6) Grant the petitioner additional discovery on matters related to DNA test results or the conviction or sentence under attack, including documents pertaining to the original criminal investigation or the identities of other suspects.

(7) Direct the Commonwealth to place any unidentified DNA profile obtained from DNA testing into CODIS or the State DNA Data Base.

(b) Results unfavorable to petitioner.--If the results of the tests are not favorable to the petitioner, the court shall dismiss the petition and may make any further orders that are appropriate. An order under this section may:

(1) Direct that the Pennsylvania Board of Probation and Parole be notified of the test results.

(2) Direct that the petitioner’s DNA profile be added to the Commonwealth’s convicted offender database.

Section 4. Title 44 is amended by adding a section to read:

§ 2319.1. Comparisons with CODIS data.

For purposes of obtaining exculpatory evidence prior to trial or supporting an application for executive clemency, a court may order that a law enforcement entity that has access to CODIS or the State DNA Data Base to submit the DNA profile obtained

from probative biological material from crime scene evidence to determine whether that profile matches a profile of a known individual or a profile from an unsolved crime. The DNA profile submitted to the data bases must comply with the Federal Bureau of Investigation's requirements for the uploading of crime scene profiles to CODIS.

Section 8. This act shall take effect in 120 days.

Redress for Wrongful Convictions

Expungement and Compensation

AN ACT

Amending Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for expungement, for sovereign immunity and for exceptions to sovereign immunity; and providing for wrongful conviction and imprisonment.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 9122(a) of Title 18 of the Pennsylvania Consolidated Statutes is amended to read:

§ 9122. Expungement.

(a) Specific proceedings.--Criminal history record information shall be expunged in a specific criminal proceeding when:

(1) no disposition has been received or, upon request for criminal history record information, no disposition has been recorded in the repository within 18 months after the date of arrest and the court of proper jurisdiction certifies to the director of the repository that no disposition is available and no action is pending. Expungement shall not occur until the certification from the court is received and the director of the repository authorizes such expungement;

(2) a court order requires that such nonconviction data be expunged; [or]

(3) a person 21 years of age or older who has been convicted of a violation of section 6308 (relating to purchase, consumption, possession or transportation of liquor or malt or brewed beverages) petitions the court of common pleas in the county where the conviction occurred seeking expungement and the person has satisfied all terms and conditions of the sentence imposed for the violation, including any suspension of operating privileges imposed pursuant to section 6310.4 (relating to restriction of operating privileges). Upon review of the

petition, the court shall order the expungement of all criminal history record information and all administrative records of the Department of Transportation relating to said conviction[.]; or

(4) an individual:

(i) is found by the Commonwealth Court under 42 Pa. C.S. Ch. 85 Subch. D (relating to claims for wrongful conviction and imprisonment) to have been wrongfully convicted and imprisoned;

(ii) has agreed to a favorable written settlement for a civil claim relating to a wrongful conviction and imprisonment; or

(iii) has obtained a civil judgment that establishes wrongful conviction and imprisonment.

* * *

Section 2. Sections 8521(a) and 8522(b) of Title 42 are amended to read:

§ 8521. Sovereign immunity generally.

(a) General rule.--Except as otherwise provided in this subchapter and Subchapter D (relating to claims for wrongful conviction and imprisonment), no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa.C.S. section 2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.

* * *

§ 8522. Exceptions to sovereign immunity.

* * *

(b) Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

* * *

(10) Wrongful conviction and imprisonment.--Wrongful conviction and imprisonment for which claims may be brought under Subchapter D (relating to claims for wrongful conviction and imprisonment).

Section 3. Chapter 85 of Title 42 is amended by adding a subchapter to read:

SUBCHAPTER D

CLAIMS FOR WRONGFUL CONVICTION AND IMPRISONMENT

Sec.

8581. Eligibility.

8582. Statement of claim and basis of award.

8583. Commonwealth Court.

8584. Presentation of claim.

8585. Damages.

8586. Report and order.

8587. Notice.

8588. Statute of limitations.

§ 8581. Eligibility.

Any person convicted and subsequently imprisoned for one or more crimes that the person did not commit and who has been released from prison and is not subject to retrial, or the heirs of such person if the person is deceased, may present a claim for damages against the Commonwealth. Other than credit for time served, a claimant is not entitled to compensation under this subchapter for any portion of a sentence spent incarcerated during which the claimant was also serving a consecutive or concurrent sentence for another crime to which this subchapter does not apply. The acceptance by the claimant of any judicial award, compromise or settlement shall be in writing and shall, except when procured by fraud, be final and conclusive on the claimant and completely bar any further action by the claimant against the Commonwealth for the same subject matter.

§ 8582. Statement of claim and basis of award.

(a) Evidence of claim.--To present a claim for wrongful conviction and imprisonment, the claimant must establish that:

(1) He has been convicted of one or more crimes and subsequently sentenced to a term of imprisonment and has served all or any part of the sentence.

(2) His actual innocence has been established by:

(i) being pardoned by the Governor for the crime or crimes for which he was sentenced, and which are the basis for the claim, on the grounds that the crime or crimes were either not committed at all or, if committed, were not committed by the defendant;

(ii) having the judgment of conviction of the claimant reversed or vacated and the accusatory instrument dismissed if the judgment of conviction was reversed or vacated or the accusatory instrument was dismissed on grounds consistent with innocence; or

(iii) if a new trial was ordered, either being found not guilty at the new trial or not being retried and the accusatory instrument dismissed.

(b) Basis of award.--To obtain a judgment in the claimant's favor, the claimant must demonstrate that:

(1) The claimant was convicted of one or more crimes and subsequently sentenced to a term of imprisonment and has served all or any part of the sentence.

(2) By clear and convincing evidence his actual innocence has been established under subsection (a)(2).

§ 8583. Commonwealth Court.

Proceedings before the court shall be governed by rules established by the court, which shall emphasize, to the greatest extent possible, informality of proceedings. No claimant shall be required to be represented or accompanied by an attorney.

§. 8584. Presentation of claim.

All claims of wrongful conviction and imprisonment shall be presented to and heard by the Commonwealth Court. Upon presentation of a claim under section 8582

(relating to statement of claim and basis of award), the court shall fix a time and place to hear the claim. At least 15 days prior to the time fixed for the hearing, the court shall mail notice thereof to the claimant and to the district attorney in the district where the claimant was prosecuted for the crimes which serve as the basis for this claim. The district attorney may offer evidence and argue in opposition to the claim for damages. If the claimant was prosecuted by the Office of Attorney General, then that office, rather than the district attorney, must be notified that it may oppose the claim under this section.

§ 8585. Damages.

If the Commonwealth Court finds that the claimant was wrongfully convicted and imprisoned, it may award damages as follows:

(1) A minimum of \$50,000 for each year of incarceration, as adjusted annually to account for inflation from the effective date of this section, and prorated for partial years served.

(2) In a lump sum or as an annuity as chosen by the claimant.

(3) Compensation for any reasonable reintegrative services and mental and physical health care costs incurred by the claimant for the time period between his release from incarceration and the date of his award.

(4) Reasonable attorney fees calculated at 10% of the damage award plus expenses. Exclusive of expenses, these fees may not exceed \$75,000, as adjusted annually to account for inflation from the effective date of this section, unless the court approves an additional amount for good cause. These fees may not be deducted from the compensation due the claimant nor may his counsel receive additional fees from the client for this matter.

(5) Compensation to those entitled to child-support payments owed by the claimant that became due, and interest on child-support arrearages that accrued during the time claimant served in prison but were not paid. Such compensation is to be provided out of the total cash award to claimant under paragraph (1).

(6) In any case for which compensation is authorized by this subchapter, the payment of compensation may be:

(i) to or for the benefit of the claimant; or

(ii) in the case of death of the claimant, to or for the benefit of any one or more of the heirs at law of the claimant who at the time of the claimant's demise were dependent upon the claimant for support.

(7) To decide damages, the Commonwealth Court shall consider all circumstances surrounding the claim, including, but not limited to, the length of the claimant's wrongful incarceration, any injuries the claimant sustained while incarcerated, any other need for financial aid and any other relevant matters. Insofar as practical, the Commonwealth Court shall formulate standards for uniform application in recommending compensation.

(8) The damage award is not subject to any cap applicable to private parties in civil lawsuits.

(9) The damage award may not be offset by any expenses incurred by the Commonwealth or any political subdivision of the Commonwealth, including, but not limited to, expenses incurred to secure the claimant's custody or to feed,

clothe or provide medical services for the claimant, nor may the court offset the value of any services or reduction in fees for services or the value thereof to be provided to the claimant that may be awarded to the claimant under this section.

(10) The award of damages shall include reimbursement for any statutorily mandated and court-assessed costs, fines, restitution and fees to the extent that they have been collected.

(11) A decision of the Commonwealth Court on behalf of the claimant shall result in the automatic expungement of the criminal history record of the claimant as it relates to the crimes that form the basis of this claim. As part of its decision, the court shall specifically direct the Pennsylvania State Police and the prosecuting district attorney of the original crimes that form the basis of this claim to expunge the record consistent with this paragraph. Accordingly, the court shall forward a copy of its decision to the Pennsylvania State Police and to the prosecuting district attorney.

(12) The damage award is not subject to any Commonwealth taxes.

§ 8586. Report and order.

The Commonwealth Court shall issue a ruling and order and provide the State Treasurer a statement of the total compensation due and owing to the claimant from the Commonwealth.

§ 8587. Notice.

(a) Court.--A court granting judicial relief as described in section 8582(a) (relating to statement of claim and basis of award) shall provide a copy of this subchapter to the individual seeking such relief at the time the court determines that the claimant's claim is likely to succeed. The individual shall be required to acknowledge his receipt of a copy of this subchapter in writing on a form established by the Supreme Court. The acknowledgment shall be entered on the docket by the court and shall be admissible in any proceeding filed by a claimant under this subchapter.

(b) Board of Pardons.--Upon the issuance of a full pardon on or after the effective date of this subchapter, the Board of Pardons shall provide a copy of this subchapter to an individual when pardoned as described in section 8582(a). The individual shall be required to acknowledge his receipt of a copy of this subchapter in writing on a form established by the board, which shall be retained on file by the board as part of its official records and shall be admissible in any proceeding filed by a claimant under this subchapter.

(c) Failure to provide notice.--In the event a claimant granted judicial relief or a full pardon on or after the effective date of this subchapter shows he did not properly receive a copy of the information required by this section, the claimant shall receive a one-year extension on the two-year time limit provided in section 8588 (relating to statute of limitations).

(d) Notice by Supreme Court.--The Supreme Court shall make reasonable attempts to notify all persons who were granted judicial relief as described in section 8582(a), prior to the enactment of this subchapter, of their rights under this subchapter.

§ 8588. Statute of limitations.

An action for compensation brought by a wrongfully convicted person under this subchapter shall be commenced within two years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions described in section 8582 (relating to statement of claim and basis of award). Any action by the Commonwealth challenging or appealing the grant of judicial relief tolls the two-year period. Persons convicted, incarcerated and released from custody prior to the effective date of this subchapter shall commence an action under this subchapter within five years of the effective date.

Section 5. This act shall take effect in 180 days.

Transitional Services

Transitional services similar to those provided to correctly convicted individuals upon their release should be extended to those individuals who have been wrongly convicted but are no longer under correctional supervision.

Subsequent Reviews of Wrongful Convictions

AN ACT

Establishing the Pennsylvania Commission on Conviction Integrity; and imposing powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Pennsylvania Commission on Conviction Integrity Act.

Section 2. Purpose.

This act provides a mechanism for investigating cases in this Commonwealth in which an innocent person is found to have been wrongly convicted and for recommending procedures to prevent similar recurrences. Existing practices and changes in the criminal justice system nationally that could be adopted to minimize the occurrence of wrongful convictions in this Commonwealth will be monitored and reported. This act is intended to improve the quality, efficiencies and resources of law enforcement in the execution of their duties.

Section 3. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Commission.” The Pennsylvania Commission on Conviction Integrity.

Section 4. Establishment.

There is established the Pennsylvania Commission on Conviction Integrity.

Section 5. Duties and responsibilities.

Whenever the Board of Pardons or a court releases a person based upon a finding of actual innocence, the commission shall conduct an inquiry into the causes of the wrongful conviction. In addition, the commission shall annually review conviction integrity reforms introduced by statute, rule, or best practices and report its findings on these matters to the Judiciary Committee of the Senate and the Judiciary Committee of the House of Representatives.

Section 6. Subpoena power and ability to administer oaths.

The chairman of the commission may issue subpoenas for the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under formal investigation by the commission. The commission may administer oaths or affirmations and examine and receive evidence.

Section 7. Privilege and confidentiality.

In the interest of improving the quality of the criminal justice system and eliminating wrongful convictions in this Commonwealth, the deliberations, work and findings of the commission, as it relates to the examination of specific instances of wrongful conviction, shall be privileged and confidential. The proceedings and records of the commission shall be held in confidence and may not be subject to discovery or introduction into evidence in any action arising out of the matters that are the subject of evaluation and review of the commission, and no person who was in attendance at a meeting of the commission shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the commission or as to any findings, recommendations, evaluations, opinions or other actions of the commission or of any members thereof. Information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action solely because they were presented during proceedings of the commission, nor should any person who testifies before the commission who is a member of the commission be prevented from testifying as to matters within his knowledge, but such person cannot be asked about his testimony before the commission or opinions formed by him as a result of commission hearings.

Section 8. Membership.

The commission shall consist of the following members:

- (1) The Attorney General, ex officio, or a designee.
- (2) The Chief Justice of the Pennsylvania Supreme Court, ex officio, or a designee.
- (3) A member of the Commonwealth's Forensic Science Advisory Board appointed by the chairperson of the board.
- (4) A member appointed by the President pro tempore of the Senate.

- (5) A member appointed by the Minority Leader of the Senate.
- (6) A member appointed by the Speaker of the House of Representatives.
- (7) A member appointed by the Minority Leader of the House of Representatives.
- (8) An at-large member appointed by the Governor.

Any appointment to the commission shall be made no later than 60 days after the effective date of this act.

Section 9. Terms of membership.

The Attorney General or his designee, the Chief Justice of the Pennsylvania Supreme Court or his designee, and the member of the Commonwealth's Forensic Science Advisory Board appointed by the chairperson of the board shall each serve on the commission as long as they continue to serve in the qualifying position specified in section 8. The member appointed by the President pro tempore of the Senate and the member appointed by the Minority Leader of the House of Representatives shall each serve an initial term of two years. The member appointed by the Minority Leader of the Senate and the member appointed by the Speaker of the House of Representatives shall each serve an initial term of three years. The at-large appointee of the Governor shall serve an initial term of four years. Members may not be re-appointed to the Commission more than one time. If any member fails to complete his term, the appointing authority for that member shall, as soon as possible, appoint a replacement to complete that member's term. These appointees may also be reappointed only one time. Except in the case of members who serve ex officio, once all initial terms have expired, all subsequent appointees shall serve for a term of four years.

Section 10. Election and term of chairperson.

The commission shall elect a chairperson from its membership by majority vote. If the vote for a chairperson results in a tie, repeat balloting shall occur until a chairperson is elected by a vote of the majority of the members of the commission. The elected member shall serve as chairperson for a period of two years after which another election for chairperson shall be held. A member may only serve as chairperson for a maximum of two consecutive terms. Any vacancy in the position of chairperson shall be filled as soon as possible by the election of another member by majority vote.

Section 11. Compensation and quorum.

Other than for reimbursement of reasonable expenses actually incurred to attend the meetings of the commission, there shall be no compensation for serving as a member of the commission. A majority of the members shall constitute a quorum, and a vote of the majority of the members present shall be sufficient for all actions.

Section 12. Funding.

An appropriation shall be included annually in the General Appropriation Act to pay the expenses of the members of the commission as constituted by this act and for the office space and salary of a director, clerical and other hires and incidental expenses deemed necessary for performing the functions required by this act.

Section 13. Effective date.

This act shall take effect in 180 days.

AN ACT

Amending Title 65 (Public Officers) of the Pennsylvania Consolidated Statutes, further providing for exceptions to open meetings.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 707 of Title 65 of the Pennsylvania Consolidated Statutes is amended by adding a subsection to read:

§ 707. Exceptions to open meetings.

* * *

(d) Meetings of the Pennsylvania Commission on Conviction Integrity.--
Meetings of the Pennsylvania Commission on Conviction Integrity shall not be open to the public.

Section 2. This act shall take effect in 60 days.

AN ACT

Amending the act of February 14, 2008 (P.L.6, No.3), entitled “An act providing for access to public information, for a designated open-records officer in each Commonwealth agency, local agency, judicial agency and legislative agency, for procedure, for appeal of agency determination, for judicial review and for the Office of Open Records; imposing penalties; providing for reporting by State-related institutions; requiring the posting of certain State contract information on the Internet; and making related repeals,” further providing for exceptions for public records.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 708(b) of the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law is amended by adding a paragraph to read:

Section 708. Exceptions for public records.

* * *

(b) Exceptions.--Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

* * *

(31) A privileged or confidential record of the Pennsylvania Commission on Conviction Integrity.

* * *

Section 2. This act shall take effect in 60 days.

Accreditation and Oversight of Forensic Laboratories

AN ACT

Amending Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes, providing for public laboratories; establishing the Forensic Advisory Board; and providing for powers and duties of the board.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 44 of the Pennsylvania Consolidated Statutes is amended by adding a part to read:

PART V
FORENSIC LABORATORIES

Chapter

- 91. Preliminary Provisions (Reserved)
- 93. Accreditation
- 95. Oversight

CHAPTER 91
PRELIMINARY PROVISIONS
(RESERVED)
CHAPTER 93
ACCREDITATION

Subchapter

- A. Public Laboratories
- B. (Reserved)

SUBCHAPTER A
PUBLIC LABORATORIES

Sec.

- 9301. Definitions.
- 9302. Technical peer review system.
- 9303. Proficiency testing program.
- 9304. Accreditation.
- 9305. External investigation.

§ 9301. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Forensic laboratory.” A laboratory operated by the Commonwealth or a municipality whose experts perform forensic tests and provide opinion testimony in a court of law.

“Forensic test.” A medical, chemical, toxicological, ballistic or other expert examination or test performed on physical evidence, including DNA evidence, to determine the association of evidence to a crime.

“Nationally recognized accreditation standards.” Standards adopted by the American Society of Crime Laboratory Directors Laboratory Accreditation Board, the American Board of Forensic Toxicology or a similar board that covers a forensic test or examination done by a forensic investigator or scientist.

“Physical evidence.” A tangible object or substance relating to a crime.

“Proficiency testing program.” A program whereby the competency of analysis and the quality of performance of a laboratory is evaluated by external testing.

“Technical peer review system.” A system whereby the casework by an employee of a forensic laboratory is reviewed for administrative and technical correctness by a qualified administrator or peer or both.

§ 9302. Technical peer review system.

All forensic laboratories shall have a technical peer review system sufficient to meet or exceed nationally recognized accreditation standards.

§ 9303. Proficiency testing program.

All forensic laboratories shall have a proficiency testing program sufficient to meet or exceed nationally recognized accreditation standards.

§ 9304. Accreditation.

(a) General rule.--All forensic laboratories shall be accredited by a nationally recognized accrediting board for the forensic tests performed by the forensic laboratory.

(b) Exception.—A forensic laboratory may be exempt from the accreditation required by subsection (a) if independent accreditation by a nationally recognized accrediting board is unavailable or inappropriate for the forensic laboratory or the applicable forensic test.

§ 9305. External investigation.

The Commonwealth and municipalities with forensic laboratories shall have a governmental entity with an appropriate process in place to independently, externally investigate allegations of serious negligence or misconduct committed by employees or contractors of the forensic laboratory that substantially affect the integrity of forensic results.

SUBCHAPTER B
(RESERVED)
CHAPTER 95
OVERSIGHT

Subchapter

A. Advisory Board

B. (Reserved)

SUBCHAPTER A
ADVISORY BOARD

Sec.

9501. Establishment.

9502. Powers and duties.

9503. Cooperation.

9504. Report.

9505. Investigations.

§ 9501. Establishment.

(a) Membership.--There is hereby established a Forensic Advisory Board, which shall consist of:

(1) The director of Pennsylvania State Police's Bureau of Forensic Services, ex officio.

(2) A forensic scientist employed by the Pennsylvania State Police's Bureau of Forensic Services.

(3) Two forensic scientists employed by accredited, privately operated forensic laboratories.

(4) A director of a forensic laboratory operated by a municipality.

(5) The Attorney General, ex officio.

(6) A full-time, sworn chief of police.

(7) A district attorney.

(8) A public defender.

(9) A criminal defense attorney who is not a public defender.

(10) A judge from a court of common pleas.

(11) A criminal justice or forensic science faculty member from the Pennsylvania State System of Higher Education.

(12) A board-certified forensic pathologist who is a coroner or medical examiner.

(b) Terms.—The members under subsection (a)(1) and (5) shall serve ex officio. The member under subsection (a)(2) shall serve at the pleasure of the director of Pennsylvania State Police's Bureau of Forensic Services. All other members shall serve a term of three years, except the members initially appointed under subsection (a)(7), (9) and (12), whose initial term shall be one year and the members initially appointed under

subsection (a)(8) and (11) and one of those appointed under subsection (a)(3), whose initial term shall be two years. Vacancies shall be filled by the appointing authority for the remainder of the vacated term.

(c) Appointments.—The member under subsection (a)(2) shall be appointed by the director of Pennsylvania State Police’s Bureau of Forensic Services. The ex officio members may designate a substitute to serve on the Forensic Advisory Board. The member appointed under subsection (a)(4) may designate a subordinate who is a forensic scientist to substitute for and serve on the Forensic Advisory Board. The chief justice shall appoint the member under subsection (a)(10). All other members shall be appointed by the Governor. Members may be reappointed. The board may annually select a chairman and vice chairman, who shall be selected from the members under subsection (a)(3), (10), (11) and (12).

(d) Quorum.—Seven members of the Forensic Advisory Board constitute a quorum.

§ 9502. Powers and duties.

(a) Recommendations.--The Forensic Advisory Board shall review and make recommendations as to how best to configure, fund and improve the delivery of State and municipal forensic laboratory services. To the extent feasible, the review and recommendations shall include, but are not limited to, addressing the following issues:

(1) If the existing mix of Commonwealth and municipal forensic laboratories is the most effective and efficient means to meet current and projected needs.

(2) Whether publicly operated forensic laboratories should be consolidated. If consolidation occurs, who should have oversight of forensic laboratories.

(3) Whether all publicly operated forensic laboratories should provide similar services or if certain services should be centralized.

(4) Consideration of how other states manage and oversee their forensic laboratories.

(5) With respect to staff and training, consideration of the following:

(i) How to address recruiting and retention of forensic laboratory staff.

(ii) Whether educational and training opportunities are adequate to meet projected staffing requirements of publicly operated forensic laboratories.

(iii) Whether continuing education is available to ensure that forensic science personnel are up-to-date in their fields of expertise.

(iv) If forensic laboratory personnel should be certified, and if so, the appropriate certifier.

(v) Whether continuing education available to the bar and judiciary adequately serves the needs of the criminal justice system.

(6) With respect to funding, consideration of the following:

(i) Whether the current method of funding publicly operated forensic laboratories is predictable, stable and adequate to meet future growth demands and to provide accurate and timely testing results.

(ii) The adequacy of salary structures at publicly operated forensic laboratories to attract and retain competent analysts and examiners.

(iii) Whether publicly operated forensic laboratories are appropriately maximizing their opportunities to receive grants and other supplements.

(7) With respect to performance standards and equipment, consideration of the following:

(i) Whether workload demands at publicly operated forensic laboratories are being prioritized properly to deal with backlogs and whether there are important workload issues not being addressed.

(ii) If existing publicly operated forensic laboratories have the necessary capabilities, staffing and equipment.

(iii) Whether publicly operated forensic laboratories are compliant with Chapter 93 (relating to accreditation).

(b) Reporting System.--The Forensic Advisory Board shall develop and implement a reporting system through which a publicly operated forensic laboratory reports professional negligence and misconduct.

(c) Standards.--The Forensic Advisory Board shall promulgate standards it approves under 42 Pa.C.S. section 9502(c) (relating to preservation of biological evidence).

(d) Training.—The Forensic Advisory Board may coordinate, offer and collect a fee to train or otherwise provide continuing education relating to forensic science and its applications to criminal investigators, crime scene investigators, prosecutors, defense attorneys, judges, forensic nurses, coroners, medical examiners, forensic scientists and others involved in criminal justice who would benefit from these educational opportunities.

§ 9503. Cooperation.

Forensic laboratories operated by the Commonwealth and municipalities shall cooperate with and assist the Forensic Advisory Board. Administrative support for the Forensic Advisory Board shall be provided by the Governor's Office.

§ 9504. Report.

The Forensic Advisory Board shall periodically report its recommendations and basis for its recommendations as well as the results of any investigations to the investigated entity or party, the Governor and General Assembly. The recommendations shall be made publicly accessible.

§ 9505. Investigations.

(a) Professional negligence; misconduct.--For an investigation under section 9305 (relating to external investigation), the Forensic Advisory Board shall timely investigate any allegation reported under section 9502(b) (relating to powers and duties) and may investigate other allegations of professional negligence or misconduct that would substantially affect the integrity of the results of forensic analyses.

(b) Costs.--Any costs incurred by the board shall be borne by the laboratory, facility or entity being investigated.

(c) Assistance.--If necessary, the board may contract with a qualified person or ask any publicly employed forensic scientist to assist the board in fulfilling its duties under this section. In obtaining assistance under this subsection, the board may neither ask nor accept assistance from a forensic scientist employed by a publicly operated forensic laboratory that is the subject of the investigation.

(d) Recusal.--Any member of the board associated with a publicly operated forensic laboratory that is the subject of an investigation under this section must recuse himself from any deliberation and action the board might take in the matter.

(e) Duties.--The board shall:

(1) Prepare a written report that identifies and describes all methods and procedures used to discover the alleged actions, whether the allegations are founded and any corrective actions taken or suggested.

(2) Conduct retrospective examinations of other forensic analyses to determine if a pattern of negligence or misconduct exists and to perform follow-up examinations to make certain any and all corrective actions were properly implemented.

(3) Ensure compliance with established retention and preservation of evidence regulations.

SUBCHAPTER B (RESERVED)

Section 2. This act shall take effect as follows:

- (1) The addition of 44 Pa.C.S. § 9302 shall take effect in three years.
- (2) The addition of 44 Pa.C.S. § 9303 shall take effect in five years.
- (3) The addition of 44 Pa.C.S. § 9304 shall take effect in seven years.
- (4) The addition of 44 Pa.C.S. § 9305 shall take effect in two years.
- (5) The remainder of this act shall take effect immediately.

COST IMPLICATIONS⁹⁸⁹

*Training Attorneys Relating to Eyewitness Identification and Confessions*⁹⁹⁰

This proposal would amend Pa. R. Crim. P. 801 to add training on eyewitness identification and confession evidence to the training that is required for capital cases. This additional training does not increase the amount of education that is already required during a three-year period, which must be approved by Pennsylvania Continuing Legal Education Board. This proposal increases the topics to be covered from nine to 11. It neither increases the number of hours of requisite training nor adds an extra approval because Pennsylvania Continuing Legal Education Board must already approve these training courses. **There is no additional cost to add these topics for this proposal.**

*Taping of Interrogations – Electronic Recording Statute*⁹⁹¹

This proposal would require recording custodial interrogations for investigations of criminal homicide, felonious sexual offenses, robbery and felonious arson and related offenses, so that it adds no cost to the investigation of all other crimes. If exigencies make the recording of custodial interrogations for these four serious felonies infeasible, those custodial interrogations are not required to be recorded. Presumably, this would largely limit the applicability of the mandate to custodial interrogations at fixed locations.

The retail price of digital voice recorders ranges from \$29.99 to \$249.99.⁹⁹² The retail price of DVD-R ranges from \$10.49/10-pack to \$35.99/100-pack.⁹⁹³ The retail

⁹⁸⁹ Cost implications were prepared by staff shortly before publication and not shared with the comm. prior to publication but were shared with the subcomm. chairs.

⁹⁹⁰ *Supra* p. 167.

⁹⁹¹ *Supra* p. 169.

⁹⁹² Best Buy, available at <http://www.bestbuy.com/site/Office-Electronics/Recorders/abcat0805003.c?id=abcat0805003> (last visited Aug. 18, 2011).

⁹⁹³ *Id.*, available at http://www.bestbuy.com/site/TV-Video-Accessories/Blank-Media/abcat0107009.c?id=abcat0107009&&initialize=false&sp=-bestsellingsort+skuid&nrp=15&usc=abcat0100000&prids=&cp=1&qp=crootcategoryid%23%23-1%23%23-1%7E%7Eq70726f63657373696e6774696d653a3e313930302d30312d3031%7E%7Ecabcat0100000%23%230%23%23u8%7E%7Ecabcat0107000%23%230%23%23bt%7E%7Ecabcat0107003%23%230%23%23bi%7E%7Encabcat0107009%23%230%23%239&_requestid=182446 (last visited Aug. 18, 2011).

price of flash memory camcorders range from \$39.99 to \$1,499.99.⁹⁹⁴ The retail price of secure digital memory cards range from \$6.99 to \$149.99.⁹⁹⁵ The retail price of USB flash drives range from \$6.99 to \$179.99.⁹⁹⁶ The retail price of DVD players range from \$34.99 to \$599.99.⁹⁹⁷ The retail price of external desktop storage devices range from \$69.99 to \$1,799.99.⁹⁹⁸

Presumably, larger police departments that record interrogations already have some or all of this equipment. If the proposal is enacted, custodial interrogations would be required for the offenses covered by the statute. Departments that investigate many of those four types of offenses would have to record more than departments that investigate fewer of those four types of offenses. **If a department does not have any of this equipment, it would require approximately \$2,150 to purchase equipment to be able to record routinely.** The following remarks suggest that recording interrogations essentially pays for itself.

Concerns about the cost of recording are also unfounded. Many small departments use inexpensive audio recording equipment. Many larger departments use video cameras, often concealed. Some have spent substantial sums for purchase, installation, and training. None has said the expense was unjustified or excessive. They realize there are larger savings in officers' time in preparing written reports, preparing to testify, and testifying about what happened during unrecorded interviews, as well as saving the time of prosecutors and judges. Recordings usually eliminate time-consuming motions to suppress or disputes at trial about whether *Miranda* warnings were given, improper tactics were used, or what was said by suspects. Guilty pleas rather than costly trials often result from recorded confessions and admissions, which preclude appeals and post-conviction litigation, resulting in savings in both state and federal trial and appellate courts. Gone also is the threat of civil litigation and judgments based on allegations of coercive tactics, failure to give warnings, and false testimony as to what occurred, as well as wrongful convictions of innocent defendants.

⁹⁹⁴ *Id.*, available at <http://www.bestbuy.com/site/Camcorders/cfcacat186400050003.c?id=pcmcat186400050003> (last visited Aug. 19, 2011).

⁹⁹⁵ *Id.*, available at <http://www.bestbuy.com/site/olstemplatemapper.jsp?id=pcat17080&type=page&qp=q70726f63657373696e6774696d653a3e313930302d30312d3031~cabcat0400000%23%230%23%23196~cabcat0404000%23%230%23%232y~cpcmcacat225800050009%23%230%23%231~ncabcat0404004%23%230%23%231j&list=y&npr=15&usc=abcat0400000&sc=abCameraCamcorderSP> (last visited Aug. 19, 2011).

⁹⁹⁶ *Id.*, available at <http://www.bestbuy.com/site/Camera-Memory-Cards-USB-Drives/USB-Flash-Drives/abcat0504010.c?id=abcat0504010> (last visited Aug. 19, 2011).

⁹⁹⁷ *Id.*, available at <http://www.bestbuy.com/site/Blu-ray-DVD-Players/DVD-Players/abcat0102005.c?id=abcat0102005> (last visited Aug. 19, 2011).

⁹⁹⁸ *Id.*, available at <http://www.bestbuy.com/site/Hard-Drives/Desktop-External-Hard-Drives/pcmcat186100050005.c?id=pcmcat186100050005> (last visited Aug. 19, 2011).

We have heard a concern about the costs of transcripts and storage (although new technology has substantially reduced storage costs), and who should bear these costs—the police or the prosecutors? But these costs are not deemed to be a reason to stop recording because of the far greater savings that result to the public treasury, and the increased efficiency and accuracy in law enforcement.⁹⁹⁹

Eyewitness Identification – Eyewitness Identification Improvement Act¹⁰⁰⁰

This proposal is not expected to require any additional cost. Some documentation of the eyewitness identification procedures is required. Presumably, police already memorialize eyewitness identifications for both investigative and evidentiary reasons and this proposal does not materially change that. The proposal generally requires that the administration of lineups and photo arrays be conducted by a person who does not know either which one is suspected by investigators or which one is being viewed by the witness.

The cost-free way to do this is to have personnel who are not investigating the crime administer the eyewitness identification. If the police department is too thinly staffed to always have unbiased administrators, it can have reciprocal agreements with neighboring departments to share personnel to administer these procedures. **If that alternative is unacceptable,** an investigator who knows which one is suspected could still administer the procedure by placing photo arrays in folders so that he does not know which picture the eyewitness is viewing at any particular time. **The retail price of file folders range from \$9.99 for a box of 50 to \$39.99 for a box of 250.**¹⁰⁰¹

Police must already be trained to investigate crimes and identify suspects. **The training programs required by the proposal can be incorporated into existent training programs for no additional cost.**

⁹⁹⁹ Sullivan et al., *supra* note 786.

¹⁰⁰⁰ *Supra* p. 172.

¹⁰⁰¹ Staples, available at [http://www.staples.com/100-Recycled-File-Folders/cat_CL141402#filterList=\[6154.6156.6157.6158\]](http://www.staples.com/100-Recycled-File-Folders/cat_CL141402#filterList=[6154.6156.6157.6158]) (last visited Aug. 29, 2011).

*Adequacy of Legal Representation*¹⁰⁰²

While recognizing their importance, the subcommittee did not consider in detail the issues relating to the adequacy of the legal representation of indigent defendants because another advisory committee of the Joint State Government Commission is currently considering that topic pursuant to Senate Resolution No. 42.¹⁰⁰³

At the same time, the subcommittee recommends:

An independent Indigent Defense Commission to oversee services throughout the Commonwealth and to promulgate uniform, effective minimum standards.¹⁰⁰⁴

Appropriate funding for indigent defense services from Commonwealth funds and adopt adequate uniform attorney compensation standards.¹⁰⁰⁵

An educational loan forgiveness program for lawyers who take public service jobs as prosecutors and public defenders after law school.

It is anticipated that the recommendations from the Senate Resolution No. 42 study will be consistent with at least the first two immediately above. The subcommittee wishes to emphasize that adequate funding is a critical concern for both the defense and the prosecution in their respective roles. Any cost implications can be estimated after the report for Senate Resolution No. 42 is published; however, **these proposals would require a significant expenditure.**

*Prosecutorial Practice*¹⁰⁰⁶

The proposals for prosecutors to have internal policies to assure compliance with ethical and professional responsibilities **should cost nothing**. Presumably, some district attorneys already have these internal policies and adequately supervise subordinates. **Similarly, the proposed amendment to a rule of professional conduct** is simply a formal, explicitly worded rule for something prosecutors should already be doing. Essentially, it requires them to remedy wrongful convictions, which they should be doing now in their roles as ministers of justice. If this is already done, it **would cost**

¹⁰⁰² *Supra* p. 176.

¹⁰⁰³ Sess. of 2007.

¹⁰⁰⁴ Pa. Sup. Ct. Comm. on Racial & Gender Bias in the Just. Sys., *supra* note 867. The work of this comm. has been continued by the Interbranch Comm'n for Gender, Racial & Ethnic Fairness.

¹⁰⁰⁵ *Id.*

¹⁰⁰⁶ *Supra* p. 177.

nothing more; if this represents a true change of professional practice, there will be increased cost, as additional investigations and proceedings on ostensibly closed cases will be required.

*Informant Witnesses*¹⁰⁰⁷

Jury Instruction

The recommended cautionary jury instruction for the testimony of a jailhouse informant would cost nothing. **There would be no additional cost for a judge to instruct a jury to consider potential motives of an informant, carefully consider the informant's testimony and apply the reasonable doubt standard.**

Statute Relating to Informant Testimony

This proposal would require a prosecutor to timely disclose certain information to the defense before evidence of an incriminating statement is attempted to be offered via an informant. This is **a statutory version of existent prosecutorial obligations** so that part of the proposal **should cost nothing more**. If this informant testimony is offered for a capital case, a hearing on its reliability would be required before its admission. **This hearing would add a cost, the amount of which would depend upon how elaborate and extensive the hearing would be.** This capital case hearing would not be required if the defendant waives it or if there is an electronic recording of the incriminating statement.

Other Proposals Relating to Informants

There would be a small, additional cost if law enforcement agencies wired jailhouse informants or otherwise electronically recorded the informant if this is not already done.

¹⁰⁰⁷ *Supra* p. 178.

*Postconviction Relief*¹⁰⁰⁸

Preservation of Evidence

Part of this proposal is to criminalize knowingly and intentionally destroying or tampering with biological evidence that is statutorily required to be preserved but only if this was done to prevent its use as evidence or to prevent its testing. This proposal is similar to other, existent crimes of destroying evidence¹⁰⁰⁹ and destroying a thing received by the government.¹⁰¹⁰ Judging from the number of reported appellate opinions, neither of these other, existent crimes seems to be prosecuted much and neither directly cover the proposed new crime.¹⁰¹¹ One of these other, existent crimes covers concealing another to hinder his prosecution so that some of these cases do not deal with destroyed evidence; the other one covers destroying a thing received by the government. Considering the few prosecutions under the current law and the scienter requirement in the proposed law, **this additional crime is unlikely to cost the Commonwealth any significant amount.**

The proposal to require the preservation of biological evidence could entail a significant cost for prosecuting jurisdictions that do not preserve it now. This proposal is limited to five categories of crime.¹⁰¹² The proposal includes ways to reduce the cost of preservation and two funding sources. The evidence would no longer need to be retained while a defendant is imprisoned if the prisoner does not move for postconviction DNA testing within a year of being notified that the biological evidence may be destroyed. **To offset the costs** expected to be incurred by the requirement to preserve this biological evidence, proceeds from property forfeited under The Controlled Substance, Drug, Device and Cosmetic Act could be used. Additionally, a fee of \$125 would automatically be assessed per convict if biological evidence relating to the criminal conviction is required to be preserved. This fee would only be excused only upon a judicial finding of undue hardship.

Postconviction DNA Testing

It is unclear how much the proposed postconviction DNA testing amendments would financially impact our Commonwealth. The amendments expand eligibility for the testing because it would no longer be limited to those who are imprisoned. Most of the other amendments relating to postconviction DNA testing are

¹⁰⁰⁸ *Supra* p. 180.

¹⁰⁰⁹ 18 Pa.C.S. § 5105(a)(3).

¹⁰¹⁰ *Id.* § 4911(a)(3).

¹⁰¹¹ If one remains unconvinced that this proposed new crime is redundant to these other crimes, then this additional crime could not cost the Commonwealth any additional amount because an accused could then be convicted of only one of these crimes. However, relying on the adequacy of these preexistent crimes is not an option because penal provisions are strictly construed. 1 Pa.C.S. § 1928(b)(1). Grading of the crime further distinguishes the newly proposed crime from the two, existent ones.

¹⁰¹² Criminal homicide, assault, kidnapping, sexual offenses & robbery.

ones that clarify the existent law as interpreted by judicial rulings. For example, an admission will not automatically bar postconviction DNA testing. Our Commonwealth would pay for the test if the petitioner is indigent. Both of these examples are in the proposed amendments but do not change current law. The additional costs under these amendments would mostly depend upon how many petitioners who are not imprisoned obtain this test and how many of those are indigent.

In recent years, National Institute of Justice¹⁰¹³ solicited applicants for funding “to receive funding to help defray the costs associated with postconviction DNA testing in cases that involve violent felony offenses . . . in which actual innocence might be demonstrated. Funds could be used to review such postconviction cases and to locate and analyze biological evidence associated with these cases.”¹⁰¹⁴ To be eligible, our Office of Attorney General would need to certify that our state law provides postconviction DNA testing “in a manner intended to ensure a reasonable process for resolving claims of actual innocence.”¹⁰¹⁵ Office of Attorney General could certify this requirement; unless the recommendation to statutorily require preservation of evidence is enacted, Office of Attorney General could not certify the remaining requirement for eligibility: a state law “[p]reserves biological evidence secured in relation to the investigation or prosecution of a State offense of murder or forcible rape . . . in a manner to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence.”¹⁰¹⁶ The “DNA analysis conducted using this funding . . . must be performed by a laboratory . . . that is accredited and that undergoes external audits”¹⁰¹⁷ The funding can be used for supplies, overtime, consultant and contractor services, computer equipment, and salary and benefits of additional employees.¹⁰¹⁸ These grants could subsidize postconviction DNA testing if the preservation of evidence proposal is enacted and funding is continued.

*Redress for Wrongful Convictions*¹⁰¹⁹

Expungement

The proposal to expunge criminal history record information of exonerees should cost almost nothing. The last time this statutory section was amended,¹⁰²⁰ Pennsylvania State Police calculated that each employee in its expungement unit processed “about 3,000 expungements per year.” Although the proposal would increase the number of eligible exonerees beyond the 11 who were exonerated by postconviction

¹⁰¹³ An agency of U.S. Dep’t of Just. & a component of Office of Just. Programs.

¹⁰¹⁴ Nat’l Inst. of Just., *supra* note 972, at 3.

¹⁰¹⁵ *Id.*

¹⁰¹⁶ *Id.* at 4.

¹⁰¹⁷ *Id.*

¹⁰¹⁸ *Id.* at 5-6.

¹⁰¹⁹ *Supra* p. 193.

¹⁰²⁰ 2008.

DNA testing during a 19-year period,¹⁰²¹ there is no expectation that anywhere near 3,000 expungements per year would occur resultant from the proposed expanded eligibility. Consequently, Pennsylvania State Police would not need to add staff to do this nor would it need to obtain additional office equipment and space to do this.

Compensation

The proposal would provide a minimum of \$50,000 for each year of incarceration to those who are subsequently exonerated because their actual innocence was established. The intention is compensate those who are not compensated through a common law state action or a federal civil rights action. Four of the 11 postconviction DNA exonerees in our Commonwealth have been compensated when their civil rights claims were settled. If the proposal is enacted, they could receive compensation for a cumulative total of approximately 68 years. **If this calculation is reasonably accurate, the minimum obligation under this proposed statute would total \$3,400,000.** The proposal would allow the claimant to choose to be paid in a lump sum or by annuity. If the proposal were amended to allow the court rather than the claimant to choose the lump sum or annuity, the immediate cost to our Commonwealth could be reduced.¹⁰²² The postconviction DNA exonerations of the seven who have not been paid occurred over a 19-year period. The cost to pay them a total of \$3,400,000 over that 19-year period averages \$178,947.37 per year.

Transitional Services

The proposal to provide transitional services similar to those provided to correctly convicted individuals upon their release to those individuals who have been wrongly convicted but are no longer under correctional supervision is unlikely to cost much. More exonerees than those who were exonerated by postconviction DNA testing¹⁰²³ could qualify for these extended transitional services, but the number is expected to be small.

¹⁰²¹ 1991-2000, *infra* p. 234.

¹⁰²² A fair compromise between moderating immediate Commonwealth liability and protecting a potentially spendthrift claimant might be an amendment to let the court decide whether the payment is in a lump sum or by annuity if the recipient is reasonably expected to live 10 or more years and the award is a large amount. Looking at the seven Pa. exonerees, this possible amendment would certainly affect two of them who were imprisoned for a long time and would not affect two others who were imprisoned for short periods. It might or might not affect the remaining three, who were imprisoned for intermediate periods.

¹⁰²³ 1991-2000, *infra* p. 234.

Pennsylvania Commission on Conviction Integrity

This proposal would establish a commission to retrospectively inquire into the causes of a wrongful conviction after someone is exonerated based upon a finding of actual innocence. The commission would also annually review and report conviction integrity reforms or best practices.

The appointed commissioners would be unpaid but would be reimbursed for reasonable expenses actually incurred. The proposal authorizes paid staff to serve the commission. It is not clear that this would require full-time, permanent staff. Because they exempt the commission from statutory requirements, **the proposed amendments to the open records and public meetings statutes that relate to this commission would cost our Commonwealth nothing.**

Since the number and frequency of exonerations is inherently unpredictable and sporadic, there would be no reason to permanently retain staff for inquiries into the causes of subsequent wrongful convictions. Temporary staff could be hired for those inquiries when the need arises.

Aside from any inquiries into wrongful convictions, the annual report could be prepared at a modest expense. There is no reason to think that the commission would require permanent, full-time staff to assist it in preparing this report. A small, stipend could be paid to a law school professor and a student to assist him researching conviction integrity reforms for the commission. The law school could also host the commission's conference or the conference could be by phone. Instead of renting office space and renting or buying office equipment and supplies, the law school could be reimbursed for any reasonable expenses actually incurred to support the commission. This inexpensive way of operating would still cost our Commonwealth a small amount. **If pursued in this manner, our Commonwealth can realistically be expected to spend \$20,000-40,000 annually on this plus the cost of any inquiries into the causes of wrongful convictions.**

*Accreditation of Forensic Laboratories*¹⁰²⁴

This proposal is unlikely to cost our Commonwealth much if any additional funding. The proposal applies to forensic laboratories operated by the Commonwealth or a municipality. The laboratories operated by Pennsylvania State Police, City of Philadelphia police and County of Allegheny are already accredited. This proposed requirement would only cost a municipality that operates an unaccredited forensic laboratory whose experts perform forensic tests and provide opinion testimony in court. Except for one municipality that uses its own laboratory exclusively, every district attorney responding to a survey by the subcommittee on science indicated that it uses Pennsylvania State Police for forensic laboratory services. The only additional cost that

¹⁰²⁴ *Supra* p. 202.

our Commonwealth might incur would be from the indirect result of a municipality with an unaccredited forensic laboratory that would increase its reliance on Pennsylvania State Police for forensic services rather than obtain accreditation. Laboratories must periodically be reaccredited, and there is an expense to accomplish this. Therefore, there would be a continuing expense for that.

In recent years, National Institute of Justice¹⁰²⁵ solicited applicants for funding “to States and units of local government to help and improve the timeliness of forensic science and medical examiner services.”¹⁰²⁶ Among other qualifications for eligibility, applicants must certify “that any forensic laboratory system . . . that will receive any portion of the grant amount . . . uses generally accepted laboratory practices and procedures established by accrediting organizations or appropriate certifying bodies.”¹⁰²⁷ Applicants must also certify that “a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system . . . in the State that will receive a portion of the grant amount.”¹⁰²⁸ The funding can be used for personnel, computerization, laboratory equipment, supplies, accreditation, education, training, certification, facilities and administrative expenses.¹⁰²⁹ Our Commonwealth has received funding from this program in the past. Evidently, the state is eligible; however, not all units of local government that have forensic laboratory systems are eligible. The proposals from the subcommittee relating to accreditation and oversight could expand eligibility within our Commonwealth should funding continue from this program.

*Forensic Advisory Board*¹⁰³⁰

This proposed board would require some funding, but its operational costs could be offset somewhat. **The costs that it would incur to periodically report its recommendations to the Governor and General Assembly would vary depending upon how frequently it needs to convene, but a realistic estimate would be at least \$10,000-20,000 annually.** Administrative support for the board would be through the Governor’s office. Cost of the training that it provides can be recouped by a fee that the board would be authorized to collect. If a laboratory is investigated by the board, the cost of investigation is to be borne by the laboratory. Any other costs associated with this board would depend on how active it is and any ancillary costs to develop and maintain its reporting system and standards.

¹⁰²⁵ An agency of U.S. Dep’t of Just. & a component of Office of Just. Programs.

¹⁰²⁶ Nat’l Inst. of Just., *supra* note 963, at 3.

¹⁰²⁷ *Id.* at 4.

¹⁰²⁸ *Id.*

¹⁰²⁹ *Id.* at 9-11.

¹⁰³⁰ *Supra* p. 204.

REFORMS ELSEWHERE

Appendices B through I contain eight tables identifying relevant reforms throughout the nation.¹⁰³¹

Appendix B lists the 11 **individuals who have been exonerated** via postconviction DNA testing in Pennsylvania.¹⁰³² They were sentenced to periods of incarceration ranging from nine years to life, and the death sentence was imposed in one of these cases. Their actual periods of imprisonment ranged from three to 21 years, with the average period of incarceration being over 12½ years. Four have been compensated for their wrongful convictions. In only two cases have the real perpetrators been found. Consistent with our research, eyewitness misidentification and false confessions/admissions were factors in more than 80% and close to 40% of the cases, respectively. Other factors included unvalidated or improper forensic science, government misconduct and the use of jailhouse informants.

Aside from briefly discussing each of the 11 postconviction DNA exonerees in our Commonwealth, this appendix lists some other nonDNA exonerations. Randomly selected from the middle of the last century, a sample of pardons based on innocence are noted. These remind the reader that exonerations can be both judicial and by executive clemency. They also show that exonerations based on innocence predate the recent, highly publicized DNA exonerations.

Appendix C¹⁰³³ is a **master table of citations** which compiles the statutory citations¹⁰³⁴ for each state in the substantive topic areas covered by the remaining six tables.

Appendix D¹⁰³⁵ lists **jurisdictions adopting eyewitness identification reforms** and summarizes those reforms. While there are individual municipalities in other states that have adopted eyewitness identification reforms in some form, 15 states have adopted statewide policies or procedures. Four states¹⁰³⁶ have enacted statutes directing law enforcement agencies to produce written procedures for the conduct of eyewitness identifications. Use of pre-lineup instructions to witnesses to minimize pressure to make a positive identification if the witness is uncertain has been adopted in eight states.¹⁰³⁷

¹⁰³¹ *Infra* pp. 233-308.

¹⁰³² *Infra* p. 233.

¹⁰³³ *Infra* p. 255.

¹⁰³⁴ Almost all the citations are to statutes, but some are to resolutions and at least one is a rule of evidence.

¹⁰³⁵ *Infra* p. 263.

¹⁰³⁶ Md., Tex., Va. & Wis.

¹⁰³⁷ Fla., Ga., Ill., Md., N.J., N.C., Ohio & W.Va.

Directives to obtain confidence statements from witnesses immediately following an identification (and before any confirmatory statements may be made) are found in five of those states.¹⁰³⁸ Blind or double-blind lineup administration is found in nine states,¹⁰³⁹ and is coupled with a preference for sequential lineups in four states.¹⁰⁴⁰ At least two other states have either studied or considered simultaneous versus sequential lineups.¹⁰⁴¹ New Jersey also uses a jury instruction regarding the reliability of eyewitness identifications. Aside from the entries in Appendix D, these reforms are discussed with some more individual detail in the part relating to eyewitness identification.¹⁰⁴²

Appendix E¹⁰⁴³ lists jurisdictions that have addressed the issue of recording custodial interrogations and details the adopted requirements. While individual municipalities in all 50 states have adopted some type of recording requirement, 21 states and the District of Columbia have adopted statewide (or district-wide) electronic recording provisions. Utah's rule is the result of an Attorney General Policy and New York's is a statewide set of voluntary guidelines adopted by a group of law enforcement entities,¹⁰⁴⁴ while seven states' rules are judicially mandated via appellate decisions or rules of court.¹⁰⁴⁵ The remaining 12 jurisdictions have legislatively mandated electronic recording of custodial interrogations.¹⁰⁴⁶ The majority of states limit the requirement to interrogations that occur in a place of detention (15), and most states (12) record a custodial interrogation from the time the suspect is given his/her Miranda warnings until the conclusion of the interrogation,¹⁰⁴⁷ although four states also treat those situations in which a reasonable person would consider himself in custody as a custodial interrogation subject to the recording requirement.¹⁰⁴⁸ Six states do not require the consent of the suspect to the recordation.¹⁰⁴⁹ Fourteen states limit this requirement to major felonies or violent crimes, but among those, two apply the requirement to homicides only.¹⁰⁵⁰ The most common exceptions to the recording requirement are: equipment failure (11), suspects refusing to speak on tape (14), spontaneous statements not made in response to a question (10), responses to questions routinely asked during processing or booking (10), out of state interrogations (10) and interrogators unaware or do not reasonably believe that a crime has been committed that qualifies for recording (9). The most common consequence for failure to record is that the court will caution the jury (7). Among the

¹⁰³⁸ Fla., Ga., N.C., Ohio & R.I.

¹⁰³⁹ Ct., Fla., Ga., Ill., N.J., N.C., Ohio, R.I. & Tex.

¹⁰⁴⁰ N.J., N.C., R.I. & Vt.

¹⁰⁴¹ Ill. & Va. The results of the Ill. study are discussed *supra* pp. .

¹⁰⁴² *Supra* p. 39.

¹⁰⁴³ *Infra* p. 269.

¹⁰⁴⁴ N.Y. Dist. Att'ys Ass'n, N.Y.C. Police Dep't, N.Y. Div. of Crim. Just. Servs., N.Y. Ass'n of Chiefs of Police, N.Y. Police & N.Y. Sheriffs' Ass'n.

¹⁰⁴⁵ Alaska, Ind., Iowa, Mass., Minn., N.H. & N.J. (Iowa & N.H. aren't really mandates.)

¹⁰⁴⁶ D.C., Ill., Me., Md., Mo., Mont., Neb., N.M., N.C., Ohio, Tex. & Wis.

¹⁰⁴⁷ Of these, Tex. really only requires a statement resultant from a custodial interrogation be recorded rather than require recording the interrogation itself; Wis. requires custodial recordings of juveniles at places of detention. The N.Y. guidelines to record custodial interrogations directs the recording to begin before the subject enters the room so that discussion pre-Miranda is recorded.

¹⁰⁴⁸ Ind., N.Y., Ohio & Wis.

¹⁰⁴⁹ Ill., Md., Mo., N.Y., Or. & Wis.

¹⁰⁵⁰ Ill. & N.C.

seven states that address records retention, six of them require the recording to be kept until all appeals have been exhausted and the statute of limitations for the underlying offense has run;¹⁰⁵¹ the seventh state¹⁰⁵² mandates that records be kept for one year after all appeals are exhausted.

Appendix F¹⁰⁵³ lists jurisdictions that statutorily provide for DNA testing postconviction. The federal government, the District of Columbia and 49 states make some provision for post-conviction DNA testing. Massachusetts has several bills before its legislature this session to add that commonwealth to the list. At least 45 jurisdictions can allow testing if the evidence in question was not tested before. Some of these jurisdictions condition excusing a failure to test previously with prior unavailability of the technology¹⁰⁵⁴ or recognition of newer, more probative testing methods¹⁰⁵⁵ as common examples of these acceptable excuses to allow testing postconviction. A number of jurisdictions require either the evidence to be new or the test results be able to produce new, material evidence.¹⁰⁵⁶ Sixteen jurisdictions require that the test results would establish actual innocence.¹⁰⁵⁷ Three jurisdictions can authorize testing if it is in the interests of justice.¹⁰⁵⁸

There must be a reasonable possibility that the test will produce exculpatory evidence or a reasonable probability that the defendant would have received a more favorable outcome for postconviction DNA testing in at least 29 jurisdictions. In 26 jurisdictions, identity of the perpetrator was or should've been at issue.¹⁰⁵⁹ A guilty plea can but will not necessarily preclude postconviction testing in two states¹⁰⁶⁰ and will preclude postconviction testing in a third.¹⁰⁶¹ At least seven states allow applications until the end of the current term of imprisonment,¹⁰⁶² which Colorado extends to include any period of parole. At least 20 jurisdictions specify in their statutes that there is no time limitation.¹⁰⁶³ A number of other 14 jurisdictions do not specify any time limitations in these statutes.¹⁰⁶⁴ Ohio prohibits posthumous applications. If a person pled guilty or *nolo contendere* in South Carolina, the period is reduced from during incarceration to the first seven years from sentencing. Vermont has a variable period

¹⁰⁵¹ Ill., Mont., Ohio, Or., Tex. & Utah.

¹⁰⁵² N.C.

¹⁰⁵³ *Infra* p. 275.

¹⁰⁵⁴ E.g., Del., Ga., Idaho, Me., Mich., Minn., Pa. & Tex.

¹⁰⁵⁵ E.g., Alaska, Ariz., Cal., D.C., Ill., Kan., Mont., Neb., N.H., N.J., N.C., S.C., S.D., Vt., W.Va., Wis., Wyo. & U.S.

¹⁰⁵⁶ E.g., Ark., Del., Ill., Minn., Neb., N.J., N.D., Okla., S.C., Utah, Wash., Wyo. & U.S.

¹⁰⁵⁷ Ala., Ark., Colo., Del., D.C., Idaho, Ill., La., Minn., N.D., Or., Pa., S.D., Utah, Va. & Wyo.

¹⁰⁵⁸ Alaska, Haw. & Tex.

¹⁰⁵⁹ Ala., Alaska, Ark., Cal., Del., Fla., Ga., Haw., Idaho, Ill., Iowa, Me., Mich., Minn., Mo., Mont., N.J., N.M., N.D., Ohio, Or., Pa., S.D., Tex., W.Va. & U.S.

¹⁰⁶⁰ Alaska & Wyo.

¹⁰⁶¹ Ohio.

¹⁰⁶² Cal., Conn., Mo., Mont., S.C., S.D. & Colo., which extends to the end of parole.

¹⁰⁶³ Ariz., D.C., Fla., Haw., Kan., Ky., Miss., Neb., N.H., N.J. N.Y., N.D., Ok., R.I., Tenn., Utah, Va., Wash., W.Va. & Wis.

¹⁰⁶⁴ E.g., Ga., Ill., Ind., Iowa, Md., Nev., N.M., Or., Tex. & Wyo.

with no limitation for 14 felonies and within 30 months after final conviction for other felonies unless there is good cause or the parties consent to a longer time.

Four states restrict postconviction DNA testing to those convicted of a capital offense.¹⁰⁶⁵ At least 18 jurisdictions allow postconviction DNA testing for those convicted of felonies and at least 15 jurisdictions allow it for those convicted of a criminal offense. Some jurisdictions further restrict to subsets of felonies and criminal offenses; *e.g.*, D.C.'s postconviction DNA testing eligibility is for crimes of violence while Kansas limits eligibility to those convicted of murder or rape and South Carolina specifies 24 offenses. Two states allow postconviction testing for those in custody pursuant to a court judgment¹⁰⁶⁶ and at least 11 jurisdictions specify that eligibility is limited to those imprisoned. Persons acquitted on grounds of mental or physical disease, or by reason of insanity can request postconviction testing in Hawaii and Wisconsin. Several states extend eligibility beyond incarceration to include parole, probation or a community control sanction.¹⁰⁶⁷ Oklahoma restricts its eligibility to felonious, indigent prisoners.

Approximately a dozen jurisdictions require the DNA testing to be generally accepted by the scientific community and the testing lab must be accredited or meet standards in at least 14 jurisdictions. Some jurisdictions allow the parties to agree on the testing facility with court approval and the court picking if the parties can not agree,¹⁰⁶⁸ others have a state department test or approve the testing facility.¹⁰⁶⁹ Testing may be paid for by the state,¹⁰⁷⁰ the applicant¹⁰⁷¹ or upon determination of the court.¹⁰⁷² Indigents may receive free testing in at least 26 jurisdictions, even if the jurisdiction otherwise requires the applicant to pay.¹⁰⁷³ Some jurisdictions condition payment upon circumstances or the outcome. *E.g.*, if postconviction DNA testing conclusively determines the applicant's culpability, Iowa requires him to pay all costs including that of any appointed attorney. Kentucky requires the applicant to pay if the outcome only lessened the sentence or improved the verdict. In Maryland, the state or the applicant pays dependent upon which side the test result favors. In Wyoming, the state will pay if the applicant is imprisoned, needs somebody to pay for the test and the results favor him.

At least 16 jurisdictions require the government to preserve the evidence relating to the motion. For some jurisdictions, upon filing, the court directs the state to preserve the evidence pending the outcome.¹⁰⁷⁴ In at least two jurisdictions,¹⁰⁷⁵ the court orders preservation if the motion is heard rather than upon filing. In other jurisdictions, the

¹⁰⁶⁵ Ala., Ky., Nev. & S.D.

¹⁰⁶⁶ Neb. & N.H.

¹⁰⁶⁷ *E.g.*, Alaska, Me., Miss. & Ohio

¹⁰⁶⁸ *E.g.*, Miss. & Mont.

¹⁰⁶⁹ *E.g.*, Alaska & Fla.

¹⁰⁷⁰ *E.g.*, Alaska, Haw., Nev., Okla. & Tex.,

¹⁰⁷¹ *E.g.*, Ala., Colo., D.C., Fla., Idaho, Iowa, N.H., N.J. & Or.,

¹⁰⁷² *E.g.*, Ariz., Ark., Conn., Del., Ga., Ind., Kan., Ky., N.M. & Wis.

¹⁰⁷³ *E.g.*, Or.

¹⁰⁷⁴ *E.g.*, Ga., Ky., Me., Nev. & Wyo.

¹⁰⁷⁵ *E.g.*, Haw. & Colo.

court is authorized rather than required to order preservation of the evidence.¹⁰⁷⁶ In other jurisdictions, the prosecutor is statutorily required to preserve biological material pending outcome of the proceedings.¹⁰⁷⁷

Appendix G¹⁰⁷⁸ lists jurisdictions that statutorily require preservation of evidence. Thirty-six jurisdictions statutorily mandate the preservation of certain types of evidence. The types of evidence to be preserved varies, as does the type of offenses for which preservation is mandated. Preservation periods vary, too, and few jurisdictions provide for any remedy or punishment for violations of the statute. In short, there is very little uniformity or commonality among the statutes nationwide.

Twenty-seven jurisdictions mandate preservation of biological evidence or material. A few jurisdictions require preservation of physical evidence¹⁰⁷⁹ or physical evidence likely to contain biological material.¹⁰⁸⁰ Eight jurisdictions limit the mandate to evidence that could be tested for DNA or at least is believed to contain DNA material.¹⁰⁸¹

Twenty jurisdictions limit preservation to some combination of killings, criminal sexual conduct, violent felonies and felonies. Thirteen jurisdictions apply the law to all crimes. Two jurisdictions apply the mandate to crimes for which a postsentencing DNA test may be requested.¹⁰⁸² Four jurisdictions extend the preservation mandate to investigations rather than limiting it to those crimes that were prosecuted or resulted in convictions.¹⁰⁸³

The requirement to preserve evidence requirement is triggered in certain instances. Evidence must be preserved by at least 18 jurisdictions when it is obtained in an investigation, secured in connection with a crime or otherwise collected, gathered or identified. Several jurisdictions use a conviction as the trigger to require preservation.¹⁰⁸⁴ California requires preservation of evidence when jailed. Some jurisdictions attach the requirement to a motion or court order.¹⁰⁸⁵

The requisite period to preserve evidence varies among jurisdictions and according to the penalty or crime. Evidence must be held indefinitely in three states.¹⁰⁸⁶ Colorado requires preservation during the life of the defendant. If there is a death penalty, some jurisdictions require preservation until execution.¹⁰⁸⁷ Some jurisdictions

¹⁰⁷⁶ *E.g.*, Wash. & Ariz.

¹⁰⁷⁷ *E.g.*, D.C., Kan., Neb., S.D. & Wis.

¹⁰⁷⁸ *Infra* p. 287.

¹⁰⁷⁹ *E.g.*, Ark., Fla. & S.C.

¹⁰⁸⁰ *E.g.*, Ga. & Wis.

¹⁰⁸¹ Colo., Haw., Iowa, La., Md., Mo., Mont. & N.M.

¹⁰⁸² Fla. & Me.

¹⁰⁸³ N.H., N.M. N.C. & R.I.

¹⁰⁸⁴ *E.g.*, Conn., D.C., Haw., Mo., S.C., Tex. & Wis.

¹⁰⁸⁵ *E.g.*, Conn., Me., Va. & Wash.

¹⁰⁸⁶ Permanently for a crime of violence in Ark., death in Ill. & Ohio so long as the murder remains unsolved.

¹⁰⁸⁷ *E.g.*, Ga. & La. (Fla. requires preservation until 60 days after execution.)

require preservation during incarceration.¹⁰⁸⁸ Some jurisdictions extend the period to completion of supervised release.¹⁰⁸⁹ Some jurisdictions require preservation until the sentence expires.¹⁰⁹⁰ In one jurisdiction, the court specifies the period to preserve upon a motion at the time of sentencing.¹⁰⁹¹ Mississippi requires preservation during the custody of all co-defendants. Two jurisdictions have specific dates for the statute's applicability.¹⁰⁹²

Two jurisdictions disallow early disposition, but one of these only preserves via court order to begin with.¹⁰⁹³ At least 22 jurisdictions allow early disposition of evidence with notice. Some states specify to whom notice must be given and this can extend beyond the person in custody to the attorney of record, public defender association, district attorney, victim and attorney general. At least half a dozen jurisdictions allow early disposition of evidence too impractical to be retained with size as a common characteristic determining that impracticality;¹⁰⁹⁴ a few more jurisdictions allow early disposition of the same evidence if part of it is saved to test later.¹⁰⁹⁵ Two jurisdictions may dispose of evidence for “good cause.”¹⁰⁹⁶

At least 21 jurisdictions do not provide any penalties for violations of the preservation requirement. In two jurisdictions, a violation of the statute is a misdemeanor;¹⁰⁹⁷ in another two jurisdictions, a violation of the statute is a felony.¹⁰⁹⁸ Another two jurisdictions can fine and imprison statutory violators up to five years.¹⁰⁹⁹ Several jurisdictions provide appropriate remedies or sanctions for violations of the statute.¹¹⁰⁰ Statutory violations in Iowa do not create a cause of action for damages and doesn't presume spoliation if the evidence is unavailable to test. Three jurisdictions condition liability of statutory violations on bad faith, gross negligence or misconduct.¹¹⁰¹

Appendix H¹¹⁰² lists jurisdictions that provide statutory compensation for exonerees. Twenty-nine jurisdictions statutorily compensate exonerees. To qualify for compensation, a person must have been convicted of a crime (eight jurisdictions)¹¹⁰³ or felony (13 jurisdictions)¹¹⁰⁴ and have been incarcerated. Iowa includes convictions for

¹⁰⁸⁸ *E.g.*, Conn., Ky., Me., Mich., N.M. Okla. & S.C. (If the plea in S.C. was guilty or *nolo contendere*, the required period to preserve is the shorter of release, execution or seven yrs.)

¹⁰⁸⁹ *E.g.*, Ariz. & Haw. (Haw. is the later of exhausted appeals or completed sentence, which includes parole & probation.)

¹⁰⁹⁰ *E.g.*, Md., Minn. & Nev.

¹⁰⁹¹ Wash.

¹⁰⁹² La. & Or.

¹⁰⁹³ Fla. & Wash.; the latter uses a court order.

¹⁰⁹⁴ *E.g.*, Alaska, Ariz., Ark., Ill. & S.C.

¹⁰⁹⁵ *E.g.*, Colo., D.C., Miss., Nev., N.M., N.C., Ohio & Or.

¹⁰⁹⁶ Conn. & Va.

¹⁰⁹⁷ Ark. & S.C.

¹⁰⁹⁸ Ky. & N.C.

¹⁰⁹⁹ D.C. & U.S.

¹¹⁰⁰ *E.g.*, Alaska, Me., Minn. & Miss.

¹¹⁰¹ La., S.C. & Tex.

¹¹⁰² *Infra* p. 295.

¹¹⁰³ Conn., D.C., La., Me., Md., N.J., Vt. & Wis.

¹¹⁰⁴ Ala., Cal., Fla., Mass., Miss., Mo., Mont., Neb., N.C., Ohio, Okla., Utah & Va.

aggravated misdemeanors if the person is incarcerated for up to two years, while New York includes felonies or misdemeanors and imprisonment. West Virginia also allows claims for unjust arrest. Several jurisdictions compensate based upon a pardon on the ground of innocence, a judicial certificate of innocence or a full pardon for error.¹¹⁰⁵

Three jurisdictions require DNA analysis to prove innocence to qualify for statutory compensation.¹¹⁰⁶ To be compensated, California requires that the person suffered a pecuniary injury as a result of the erroneous conviction. The standard of proof of innocence is not always prescribed statutorily, but 10 jurisdictions require proof on the basis of clear and convincing evidence.¹¹⁰⁷ The standard of proof of innocence in two jurisdictions is a preponderance.¹¹⁰⁸ Florida provides for either standard of proof, dependent upon whether the prosecutor certifies or contests the innocence.

The statute of limitations for submitting a claim ranges from six months¹¹⁰⁹ to 10 years,¹¹¹⁰ but the most of the states with a limit (13) use two years.¹¹¹¹

Amounts of compensation vary widely. It can be an indeterminate award, a fair and reasonable amount or actual damages. It can be based on a daily rate.¹¹¹² It can be anywhere from \$15,000 per year of incarceration¹¹¹³ to \$100,000 per year.¹¹¹⁴ Daily rates can be capped annually,¹¹¹⁵ and total compensation amounts can also be capped, anywhere from \$20,000¹¹¹⁶ to \$2,000,000.¹¹¹⁷ Illinois determines the maximum amount receivable on the basis of the period of imprisonment.¹¹¹⁸ Texas pays \$80,000 per year spent in prison and \$25,000 per year while on parole or while registered as a sex offender.

Still others use an estimate of potential income foregone due to the incarceration: in Utah, it is the average annual nonagricultural payroll wage in the state for up to 15 years, and, in Virginia, it is 90% of the Virginia per capita personal income per year for up to 20 years. Iowa also allows up to \$25,000 per year in lost earned income. New Jersey grants the greater of twice the amount of the person's income in the year prior to incarceration or \$20,000 per year of incarceration, whichever is greater. Ohio also allows for recovery of lost income and the costs of debts recovered while in custody.

¹¹⁰⁵ *E.g.*, Ill., Me. Md. & N.C.

¹¹⁰⁶ Mo., Mont. & Vt. If there is biological evidence, DNA testing must also be sought in Utah.

¹¹⁰⁷ D.C., Iowa, La., Me., Mass., Neb., N.J., N.Y., Utah & Wis,

¹¹⁰⁸ Conn. & Vt.

¹¹⁰⁹ Cal.

¹¹¹⁰ Mont.

¹¹¹¹ Ala., Conn., Fla., Ill., Iowa, La., Me., Mass., Neb., N.J. N.Y., Ohio & W.Va. Mass. can extend this period by another year.

¹¹¹² \$50/day in Iowa; \$100/day in Cal.

¹¹¹³ La.

¹¹¹⁴ U.S. for those sentenced to death.

¹¹¹⁵ Mo.

¹¹¹⁶ N.H.

¹¹¹⁷ Fla.

¹¹¹⁸ If a person is imprisoned for up to 5 years, the maximum receivable is \$85,350; for up to 14 years, \$170,000; for more than 14 years, \$199,150.

Other compensation can include expenses of employment training and counseling¹¹¹⁹ and tuition and fees at a state institution of higher education.¹¹²⁰ Tuition assistance can include assistance in meeting admissions standards.¹¹²¹ Several states specifically provide for reintegrative services,¹¹²² while others provide for medical and counseling services,¹¹²³ living expenses¹¹²⁴ and accrued child support arrears.¹¹²⁵ Also recoverable are fines, penalties and court costs paid,¹¹²⁶ reasonable attorneys' fees¹¹²⁷ and expenses for all proceedings.¹¹²⁸

Payouts can be in a lump sum,¹¹²⁹ installment¹¹³⁰ or either.¹¹³¹ Five states provide for survivor benefits,¹¹³² while others extinguish the award at the death of the exonerated person.¹¹³³ The state cannot offset expenses of arrest, prosecution and imprisonment against the award.¹¹³⁴ Tennessee has a right to subrogate against any person who intentionally and willfully caused the wrongful conviction.

Other benefits include exclusion of the compensation from state gross income for tax purposes.¹¹³⁵ Several of these statutes specifically call for expungement or sealing of criminal records.¹¹³⁶

Disqualifications for compensation can occur if the person is in prison for another crime.¹¹³⁷ Conviction of other acts along with the charge resultant in the wrongful conviction precludes recovery in Alabama and Utah. While not always clearly defined, if the individual contributed to their arrest and conviction, *e.g.*, by tampering with evidence or committing perjury, 11 jurisdictions will not allow recovery.¹¹³⁸ Additionally, persons wrongfully convicted of crimes for which they entered a guilty plea cannot receive compensation in several jurisdictions; Virginia makes an exception for this if the guilty plea resulted in the death penalty or imprisonment for life.¹¹³⁹

¹¹¹⁹ *E.g.*, Conn., La., Md., N.C. & Va.

¹¹²⁰ *E.g.*, Conn., Fla., La., Mass., Mont. & N.C.,

¹¹²¹ Mont. & N.C.

¹¹²² Conn., Tex. & Vt.

¹¹²³ La., Mass., Tex. & Vt.

¹¹²⁴ Tex.

¹¹²⁵ Tex.

¹¹²⁶ Fla., Iowa, Me. & Ohio,

¹¹²⁷ Fla., Ill. Iowa, Miss., N.J., Ohio & Vt.

¹¹²⁸ Ala.

¹¹²⁹ Conn.

¹¹³⁰ Fla., La., Tex., Utah & Va.

¹¹³¹ Ala., Md., Mass., Okla. & Tenn.

¹¹³² Ala., La., Miss., Tenn. & Va.

¹¹³³ Mo., Neb. & Tex.

¹¹³⁴ Ala., La., Mass., Mo., Neb., Utah & Vt.

¹¹³⁵ Cal., Miss., Utah & Vt.

¹¹³⁶ Fla., Mass., Mo. & Utah.

¹¹³⁷ Ala., Iowa, La., Mass., Mo., Neb., N.J., N.C., Okla., Tex. & Vt.

¹¹³⁸ Cal., D.C., Miss., Neb., N.J., N.Y., Vt., Va., W. Va., Wis. & U.S.

¹¹³⁹ D.C., Iowa, Mass., Okla., Va.

A subsequent felony conviction can result in forfeiture of any unpaid balance of the compensation in three states¹¹⁴⁰ or general disqualification in Florida. Intentionally waiving other postconviction remedies to benefit by the compensation law will disqualify an exoneree from receiving statutory compensation in Mississippi. Payments are tolled during any subsequent felony incarceration and resume upon release in two states.¹¹⁴¹

Appendix I¹¹⁴² lists jurisdictions that have established reform commissions to address wrongful convictions. Ten states have established organizations to study and review cases of wrongful convictions.¹¹⁴³ North Carolina's Innocence Inquiry Commission uniquely investigates claims of factual innocence by living convicts to determine credible claims of factual innocence. Most of the remaining ones were directed to study the causes of wrongful convictions and recommend policies and procedures to prevent recurrences. Three of these were judicially established;¹¹⁴⁴ the rest were legislatively established. Some of these are permanent; the rest have been scheduled to terminate following release of a final report.

¹¹⁴⁰ Ala., Tex. & Va.

¹¹⁴¹ Utah & Vt.

¹¹⁴² *Infra* p. 305.

¹¹⁴³ Cal., Conn., Fla., Ill., N.Y., N.C., Pa., Tex., Vt. & Wis.

¹¹⁴⁴ Fla., N.Y. & Tex.

**Senate Resolution No. 381 of 2006
(Printer's No. 2254)**

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE RESOLUTION

No. 381 Session of
2006

INTRODUCED BY GREENLEAF, COSTA, LEMMOND, O'PAKE, BOSCOLA, FERLO,
BROWNE, C. WILLIAMS, PILEGGI, MUSTO AND DINNIMAN,
NOVEMBER 20, 2006

REFERRED TO RULES AND EXECUTIVE NOMINATIONS, NOVEMBER 20, 2006

A RESOLUTION

1 Directing the Joint State Government Commission to establish an
2 advisory committee to study the underlying causes of wrongful
3 convictions and to make findings and recommendations to
4 reduce the possibility that in the future innocent persons
5 will be wrongfully convicted.

6 WHEREAS, Nationally more than 180 individuals have been
7 exonerated through postconviction DNA testing, and some of those
8 individuals spent time on death row; and

9 WHEREAS, At least eight individuals have been exonerated in
10 Pennsylvania through postconviction DNA testing, three of whom
11 were in prison for murder and one of whom was on death row; and

12 WHEREAS, It is important for us to understand why these
13 individuals were wrongfully convicted and how wrongful
14 convictions may be avoided in the future; and

15 WHEREAS, Not only is it a great injustice to imprison an
16 innocent person, but by incarcerating an innocent person, it is
17 likely that a guilty person remains capable of committing
18 additional crimes; therefore be it

19 RESOLVED, That the Senate direct the Joint State Government

1 Commission to establish an advisory committee to study the
2 underlying causes of wrongful convictions so that the advisory
3 committee may develop a consensus on recommendations intended to
4 reduce the possibility that in the future innocent persons will
5 be wrongfully convicted in this Commonwealth; and be it further
6 RESOLVED, That the advisory committee be comprised of
7 approximately 30 members and represent at least the following
8 constituencies: prosecution, defense, law enforcement,
9 corrections, judiciary and victim assistance; and be it further
10 RESOLVED, That the advisory committee may include
11 representatives of academia, the faith community, private and
12 public organizations involved in criminal justice issues and
13 other criminal justice experts; and be it further
14 RESOLVED, That the advisory committee review cases in which
15 an innocent person was wrongfully convicted and subsequently
16 exonerated, review any other relevant materials, identify the
17 most common causes of wrongful convictions, identify current
18 laws, rules and procedures implicated in each type of causation,
19 and identify through research, experts and discussion potential
20 solutions in the form of legislative, rule or procedural changes
21 or educational opportunities for elimination of each type of
22 causation; and be it further
23 RESOLVED, That the advisory committee consider potential
24 implementation plans, cost implications, including possible
25 savings, and the impact on the criminal justice system for each
26 potential solution; and be it further
27 RESOLVED, That the advisory committee report to the Senate
28 with its findings and recommendations no later than November 30,
29 2008.

Pennsylvania Exonerees

PENNSYLVANIA EXONEREES

Name	Conviction date	Exoneration date	Sentence	Contributing causes of conviction	Compensation	Real perpetrator found?	County
Brison, Dale	1990	1994	18-42 years	Eyewitness misidentification; government misconduct unvalidated or improper forensic science	Not yet	Not yet	Chester
Brown, Patrick	2002	2010	22-70 years	Eyewitness misidentification; government misconduct	Not yet	Yes	
Doswell, Thomas	1986	2005	13-26 years	Eyewitness misidentification; government misconduct	Yes	Not yet	Allegheny
Godschalk, Bruce	1987	2002	10-20 years	Eyewitness misidentification; false confessions/admissions; government misconduct; informants	Yes	Not yet	Montgomery
Kelly, William	1990	1993	10-20 years	Eyewitness misidentification; false confessions/admissions	Not yet	Yes	Dauphin
Laughman, Barry	1988	2004	Life	False confessions/admissions; unvalidated or improper forensic science	Yes	Not yet	Adams
Moto, Vincent	1987	1996	12-24 years	Eyewitness misidentification	Not yet	Not yet	Philadelphia
Nelson, Bruce	1982	1991	Life+	False confessions/admissions; informants	Not yet	Not yet	Allegheny
Nesmith, Willie	1982	2000	9-25 years	Eyewitness misidentification	Not yet	Not yet	Cumberland
Whitley, Drew	1989	2006	Life	Eyewitness misidentification; informants; unvalidated or improper forensic science	Not yet	Not yet	Allegheny
Yarris, Nicholas	1982	2003	Death	Eyewitness misidentification; informants	Yes	Not yet	Delaware

DALE BRISON

On July 14, 1990, the thirty-seven year old victim was walking home from a convenience store when she was approached from behind. The assailant put one hand on her throat, one on her waist, and forced her to walk with him. The assailant stabbed her in the side as they were walking and she became unconscious. When she woke up, they were walking to bushes near an apartment complex, where he sexually assaulted her repeatedly. Shortly thereafter, the victim gave a description of her assailant to police. Two weeks later, the victim purportedly saw her attacker while walking among a crowd of people in Oxford, Pennsylvania. The victim located a police officer and told the officer that she had seen her attacker. A description of the individual was given to the officer by the victim who subsequently detained Dale Brison based upon his clothing which matched the description given by the victim. Arrest and search warrants for Brison and his home were executed the next day. Once in custody, Brison was informed by the interrogating detective that DNA evidence in this case which would be “99.9% certain” of identifying Brison as the assailant. Despite the availability of physical evidence from Brison and the victim that could have been tested, Brison’s request for DNA testing was denied.

Dale Brison was convicted of this rape, kidnapping, aggravated assault, carrying a prohibited offensive weapon, and three counts of involuntary deviate sexual intercourse. Brison was sentenced to eighteen to forty-two years of imprisonment. During the trial, Brison’s repeated request for DNA testing was denied.

The victim had provided police and prosecutors with separate identifications of Brison near her apartment building. At trial, a hair sample from the scene of the crime was deemed consistent with Brison’s. Because there is not adequate empirical data on the frequency of various class characteristics in human hair, however, an analyst’s assertion that hairs are consistent is inherently prejudicial and lacks probative value. Brison presented an alibi defense, which was corroborated at trial by his mother.

In 1992, the Pennsylvania Superior Court ruled that DNA testing must be performed if evidence had been maintained and the semen stain from the victim’s underwear was not too degraded.¹¹⁴⁵ The cost of the test was placed upon the Commonwealth.

The laboratory reported that no result could be found from the vaginal swab, but testing on the spermatozoa found in the semen stain on the victim’s underwear provided results that exculpated Brison. The district attorney’s office performed the same tests and came up with the same results.

Brison was released after serving three and a half years of his sentence.¹¹⁴⁶

¹¹⁴⁵ *Commonwealth v. Brison*, 618 A.2d 420, 425 n.13 (Pa. Super. Ct. 1992).

¹¹⁴⁶ Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Dale_Brison.php (last visited Feb. 2, 2011).

THOMAS DOSWELL

In March 1986, a white woman was attacked by an African American man as she entered the Forbes Health Center hospital where she worked located in east end of Pittsburgh, Pennsylvania. The victim told the investigating detective that the perpetrator followed her into the building and then the cafeteria. He locked the cafeteria doors behind him, threatened to kill the victim, and then forcibly raped her. A short while later, a co-worker began banging on the cafeteria doors in an effort to help the victim. The assailant fled the hospital and was chased for three blocks by another hospital employee.

The victim was taken to another hospital, where a rape kit was collected. Investigators also took the victim's clothing as evidence. Though nothing was found on the clothing, the Allegheny County Crime Laboratory found evidence of spermatozoa on the vaginal swabs from the rape kit.

On the day of the crime, the police showed the victim and the co worker who came to her defense a photographic lineup consisting of eight individuals. None of the photographs were marked except for Doswell's. His photograph had the letter "R" written on it. At trial, a police officer explained that photographs marked with an "R" represented photographs of people who had been charged with rape. Two years prior to this criminal incident, Doswell was acquitted on one count of rape of his former girlfriend who had brought charges against Doswell. Doswell's argument at trial was that the charges were brought as retribution for the alleged victim's unrequited affection. After trial, several witnesses heard the investigating detective in that case say to Doswell, that "he had not seen the last of him" and that he was "going to get him." This same detective was the investigating detective in the subsequent case that resulted in Doswell's exoneration.

After this identification by the victim and her co-worker, Doswell was arrested and charged. At trial, both the victim and the co-worker who had initially come to her aid made in-court identifications of Doswell. Testing was performed on samples from the rape kit. The serologist found A, B, and H antigens on the samples. Because the victim was a type AB secretor, no conclusions could be made about what blood type the rapist was because the victim's type masked the perpetrator's.

Doswell's defense challenged the reliability of the identifications, arguing that the photographic lineup was faulty due to Doswell's picture being the only picture that was marked. The defense also argued that Doswell did not fit the victim's initial description of her attacker.

A jury convicted Doswell of rape, criminal attempt, simple assault, terroristic threats, and unlawful restraint in November 1986. He was sentenced to 13-26 years (aggregate).

The physical evidence in the case at trial was largely unhelpful for the prosecution and the defense. Instead, Doswell continued to press his innocence attacking the reliability of the two eyewitnesses' evidence against him. Doswell was unsuccessful in his appeals. In 1998, he filed a request for DNA testing but was denied because the motion was filed too late. In 2004, after confirming that the evidence from trial was located in the police department's property room, Doswell filed a motion to gain access to the evidence and have it subjected to DNA testing. Testing was granted in March 2005.

For nearly 19 years, Doswell has maintained his innocence. Refusing to confess to a crime he did not commit, Doswell was turned down for parole four times. Only one week after exculpatory test results returned from the Allegheny County Crime Lab, prosecutors agreed to join in Doswell's motion to vacate his conviction and sentence.

After nineteen years in prison, Thomas Doswell was released on July 21, 2005. He was 25 years old when he was arrested for this crime in 1986.

BRUCE GODSCHALK

In May of 1987, Bruce Godschalk was convicted of two counts of forcible rape and two counts of burglary in Montgomery County, Pennsylvania. He received ten to twenty years for the crimes. Godschalk's conviction was based primarily on the eyewitness identifications of the victims and the detailed confession that was taken after his interrogation by police.

In 1986, two women in the same apartment complex were accosted by the same perpetrator. Both were awoken by an intruder and raped. Only one of the two victims was able to identify Godschalk. The second victim was able to assist police in creating a composite sketch of her assailant that was subsequently broadcast on television and placed in local newspapers. On December 30, 1986, the police received a call telling them that Bruce Godschalk resembled the man in the composite sketch.

On January 13, 1987, the police obtained a taped confession from Godschalk that contained information not available to the public. The tape consisted only of Godschalk's confession and did not include any part or portion of the interview/interrogation. The two rapes were tried together in May of 1987. The prosecution relied on the identification made by the second victim, Godschalk's confession, the testimony of a jailhouse informant who claimed that Godschalk had made inculpatory statements, and the presence of semen in the evidence collected from the investigation of both crimes. Conventional serology could not exclude Godschalk from being the donor of the semen. The defense put forth an alibi defense, but Godschalk was convicted of both crimes.

Godschalk's appeals were denied. His motion for post trial DNA testing was denied.¹¹⁴⁷ In 1999, Godschalk obtained a copy of his taped confession that was sent to an expert, who concluded that it was likely that Godschalk had falsely confessed.

In November 2000, Godschalk filed a Section 1983 civil rights complaint seeking access to the evidence. After the Federal District Court granted access to the evidence and the prosecution's motion to dismiss was denied, the District Attorney consented to release the evidence in the spring of 2001.¹¹⁴⁸

The prosecution revealed that they had sent the relevant evidence to a laboratory for testing and had not been able to obtain results. The prosecution represented that the evidence had been consumed in this testing. In further support of its position, the District Attorney also provided an affidavit from the police officer who had elicited the confession from Godschalk.

Godschalk asserted that the District Attorney failed to send all of the evidence from one of the crimes to the laboratory. Godschalk specifically noted a carpet sample with semen that was never received by the laboratory. The District Attorney's Office responded to the Court that the carpet sample was not introduced as evidence and was not significant to the case. The sample originated from the home of the victim who could not identify Godschalk and was used at trial to place him to the scene of the crime.

The evidence from both cases was tested at Forensic Science Associates in January 2002. Profiles were obtained from the evidence in both rapes, and in both cases, the male profiles matched meaning that the same perpetrator committed both crimes. Bruce Godschalk was excluded. The District Attorney had their own laboratory perform testing.

The District Attorney's Office refused to release Godschalk from prison, citing concerns over possibly flawed testing in the face of the evidence, namely the confession and the identification.

Finally, on February 14, 2002, Bruce Godschalk was released after fifteen years in prison and seven years of trying to secure DNA testing.

¹¹⁴⁷ *Commonwealth v. Godschalk*, 679 A.2d 1295, 1296 (Pa. Super. Ct. 1996).

¹¹⁴⁸ *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F.Supp.2d 366, 370 (E.D.Pa. 2001).

WILLIAM M. KELLY, JR.

01/09/93

Jailed man set free after false confession

Proof of innocence approved at hearing

By Pete Shellem

A Dauphin County judge yesterday freed a man who pleaded guilty to murder two years ago after hearing evidence that Joseph D. Miller of Steelton, suspected of being a serial killer, committed the slaying.

President Judge Warren G. Morgan, after hearing prosecutors and defense attorneys making supporting arguments, ordered William M. Kelly Jr. released from county prison.

Kelly's attorney, David Foster, said Kelly will live with his grandmother in Harrisburg and continue undergoing psychiatric treatment.

Kelly had little comment upon being released, but did say he was going to try to get on with his life. "I couldn't believe it," he said. His grandmother, Murza K. Snively, called his release the "best Christmas present I ever had."

While not faulting police, Foster said he would investigate the possibility of seeking retribution for his client.

In February 1990, Kelly confessed to killing Jeanette D. Thomas, 25, of Hall Manor, whose bludgeoned body was found in the old Swatara Twp. landfill. He was sentenced to 10 to 20 years in prison after pleading guilty to third-degree murder.

County District Attorney Richard A. Lewis reopened the investigation after Miller, 28, allegedly led investigators to the same landfill, where they discovered the bodies of two other city women, Selina M. Franklin 18, and Stephanie McDuffey, 23. Swatara Twp. Detective Ronald L. Fernsler, who investigated all three killing sites, said he immediately noticed the similarities between the deaths of the three women. All the bodies were found within yards of each other in the landfill and were covered with boards and other debris in a similar fashion.

All were beaten about the head, he said. Semen found in Thomas' body was matched to Miller, whom authorities said eventually confessed to her killing.

County Chief Detective Thomas P. Brennan Jr. said Miller confessed in a September interview to the Thomas slaying, but when asked to go into detail, asked for his attorney.

Witnesses who identified Kelly as the last person seen with Thomas now say they were mistaken. One has identified Miller as that person. Lewis said Miller and Kelly resembled each other at the time and have a similar speech impediment. Lewis said the investigation into bringing charges against Miller in Thomas' slaying is continuing.

Kelly has an IQ of 69 and a history of mental illness, alcoholism and manic depression. A psychiatrist who interviewed Kelly at length said the combination of alcohol blackouts and his mental condition made him susceptible to believing he had committed the crime when questioned by police.

The psychiatrist said Kelly was trying to please his interviewers by saying what they wanted to hear. Morgan commended Lewis and the investigators for pursuing the bizarre case.

"The conduct of the district attorney and these officers reflects the highest standards of prosecutorial ethics," Morgan said.

Miller is facing trial in deaths of Franklin and McDuffey, which date back to 1987, as well as for two assaults in which women were raped and told they were going to be killed.

He also is a suspect in an unsolved Perry County slaying and is being investigated in a string of slayings in North Carolina, where his relatives reside. An out-of-county jury will be selected to hear his case because of pretrial publicity. The trial is expected to start in the next several months after defense objections to statements given police are resolved.

BARRY LAUGHMAN

Barry Laughman was convicted of raping and murdering his Aunt in 1988. After serving 16 years of his sentence, DNA testing on vaginal swabs proved that Laughman had not committed the rape/murder. Though he was released in November 2003, he was finally exonerated on August 26, 2004.

On August 13, 1987, the victim was found dead in her home. She had been raped and suffocated with pills that had been forced down her throat. Police were initially looking for a stranger that was seen walking through back yards in the area that day. However, the police focused on 24-year-old Barry Laughman, a neighbor whose pinkie finger couldn't bend properly. Police suspected that this injury could have been sustained during the commission of the crime.

The eighty-five year-old woman had lived alone for twenty-five years. Most evenings she would eat dinner at the home of her nephew, Barry Laughman, his parents, two brothers and sister. They lived two homes apart. When the victim did not show up for dinner one evening, Barry Laughman, his mother Madeline, and her other two sons, David and Larry who was joined by his wife, Ruann, went looking for her.

Upon entering her home, Larry and his wife discovered the victim's body. She was found naked, all but for a bra pulled up over her breast and her dress covering her face. Her upper body was on the bed and her feet were on the floor. Three safety pins were found on her bra with one being opened. The victim had pills stuffed in her mouth with a pill bottle in her hand. A Marlboro cigarette was seen extinguished on a chair next to the bed.

Laughman had an IQ of 70 and was said to be functioning at the level of a 10-year-old. Several weeks after the crime, police told Laughman that his fingerprints were found at the scene. After about one hour of interrogation, the interrogating trooper who was alone with Laughman, asked his partner to come into the interview room, telling him that Laughman had something to say. He then confessed to the police in great and convincing detail. His statement consisted of responses to fifty-three questions put to him by the interrogating trooper. The second trooper transcribed Laughman's responses as they were being given. Afterwards, the interrogating trooper retrieved a tape recorder. Instead of having Laughman give an account of his own confession on tape, and without having taped any part of Laughman's prior interview and interrogation by this same trooper, the interrogating trooper instead read the transcription to Laughman on tape having instructed Laughman to respond "yes" as to whether the entire statement was true . . . which Laughman did.

There were numerous discrepancies between the crime scene and his confession, such as his explanation of his point of entry conflicting with a seemingly undisturbed window at the scene. He also stated that he had killed the victim on August 12, but a neighbor reported seeing her in her yard on the morning of August 13.

The Pennsylvania State Police conducted serology testing on semen found on the victim's vaginal swabs and found evidence of Type A blood, either from the victim or the perpetrator. The victim was a type A secretor and Laughman is a type B secretor. The police chemist testified correctly at trial that the victim's profile could have masked Laughman's profile. The analyst testified incorrectly, however, that bacterial degradation could have changed type A blood to type B or vice versa.

PCR/DQ Alpha DNA testing was attempted in 1993 by Cellmark Diagnostics on the vaginal swabs collected from the victim but results were inconclusive.

By 2003, the samples were thought to have been lost, but were then discovered to be in the possession of a former Penn State professor residing in Germany. This discovery was made possible by the tireless reporting of the late Harrisburg *Patriot-News* reporter, Pete Shellem. In November 2003, Orchid Cellmark performed Y-STR DNA

testing and reported that Laughman had been excluded. He was released from prison under supervised house arrest, but the district attorney still planned to press charges. On August 26, 2004, however, Adams County District Attorney Shawn C. Wagner dropped all charges against Laughman.

VINCENT MOTO

The victim in this case was attacked a little after midnight on December 2, 1985, while walking in Philadelphia. A Chevrolet Caprice pulled up beside her and the passenger of the car, later identified as Vincent Moto, got out, pulled a gun on the victim, and forced her into the car. The two men drove the car to another location and proceeded to simultaneously and continuously sexually assault the victim. They then stole her money, gold chain, and glasses, and drove around the block. She was pushed out of the car half naked. Five months later, in May of 1986, the victim was walking down the street when she saw Vincent Moto walking on a Philadelphia street with a young woman and child. She went to an office nearby and asked an individual to hold the defendant until the police arrived. That individual complied with her request. The police arrived and Moto was arrested.

At trial, the prosecution revealed, during cross examination of Vincent Moto's mother, that Moto had been convicted in the past for crimes in relation to his girlfriend. At trial, Moto and his parents testified that he was at home at the time of the crime. The prosecution's case hinged upon the victim's identification of Vincent Moto as being one of her two assailants.

Post-verdict motions were filed alleging ineffective trial counsel. Evidentiary hearings on September 11, 1987, and January 12, 1988, the court denied the motions and sentenced Moto to an aggregate term of twelve to twenty-four years. A motion was filed asserting that DNA testing should be conducted. The Court of Common Pleas denied the motion, but made sure that all evidence pertaining to this case would be preserved. A subsequent request for testing was made to be conducted on a pair of the victim's underwear, which contained semen from the crime.

Testing was performed at Forensic Science Associates in California. The results eliminated Vincent Moto as the source of the spermatozoa on multiple samples obtained from the victim's underwear. A motion was filed to vacate the conviction based on exculpatory test results.

On November 13, 1995, Judge Joseph Papalini vacated Moto's conviction and granted him a new trial based on the DNA results, though the district attorney's office was not yet ready to drop the case against Moto, alleging that it wanted to have its own laboratory conduct PCR based DNA testing. Vincent Moto was released from prison after eight years of incarceration in July 1996. In 1998, an independent laboratory confirmed the exculpatory DNA test results.¹¹⁴⁹

Moto was granted a new trial but never retried because "the Commonwealth withdrew the charges . . . , and an order of *nolle prosequere* was entered."¹¹⁵⁰ The victim was "sexually assaulted and robbed" by two men.¹¹⁵¹ "DNA from three different men" was on her panties the night she was attacked, "none of whom could have been" Moto.¹¹⁵² Moto's petition expunge this criminal record was denied.¹¹⁵³

BRUCE NELSON

Two men had stolen a van with the intent to commit a robbery. On August 3, 1981, they came upon their victim in a parking garage where they proceeded to rob, rape and murder a Bethel Park, Pennsylvania woman. Bruce Nelson had already been in prison when Terrence Moore identified him as the individual who had initiated the crimes. On November 11, 1981, investigators staged a confrontation between Nelson and Moore at which time Moore pressed Nelson with his purported confession. Nelson asked Moore, "what did you tell them." Moore responded, "I told them everything." Nelson's query of Moore was, at trial, characterized as a confession.

Bruce Nelson was convicted of rape and murder based on the confession of Terrence Moore, who implicated Nelson as the instigator of a robbery scheme. Moore testified that the two men drove a van into a parking garage for the purposes of a robbery. The victim entered the garage, was attacked and thrown into the van, and was raped repeatedly before being strangled.

Based on this testimony, Nelson was convicted of rape and murder and sentenced to life for the murder, with a concurrent sentence of ten to twenty years for the rape.

Nelson's case was remanded in 1990. The Third Circuit Court of Appeals reversed the trial court's disposition of Nelson's Fifth Amendment claims. In preparation

¹¹⁴⁹ Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Vincent_Moto.php (last visited Feb. 4, 2011).

¹¹⁵⁰ *Commonwealth v. Moto*, 23 A.3d 989, 991 (Pa. 2011)

¹¹⁵¹ *Id.*

¹¹⁵² *Id.*

¹¹⁵³ *Id.* at 998-99. The Commw. didn't consider the exculpatory DNA results as exonerative of Moto and would've retried him because it was convinced by the victim's identification of him, but it couldn't find her after Moto was granted a new trial. *Id.* at 992.

for the 1991 trial, the District Attorney tested the biological materials taken from the victim's body and clothing. The results excluded Nelson as a perpetrator and matched Moore's profile. These materials included saliva on a cigarette, saliva on the victim's breast and bra, hairs, and fingerprints. All of these items were consistent with Moore. Nelson was exonerated of the rape and murder in August 1991 after serving nine years.

WILLIE J. NESMITH

Born on February 15, 1962, Willie Nesmith was the fifth of eight children born to a married couple who moved up and down the east coast picking fruit. In 1966, Willie's mother, Jesse Mae Nesmith, decided she wanted to establish a home for the children and stop the wandering lifestyle. Willie's father, Manning Nesmith, did not agree and moved back south. Not much is known about Manning Nesmith. During one of my first talks with Willie, I asked about his father. He couldn't think of his name and said he thought he met him once when he was little. Jesse Mae had only six years of education; the extent of Manning's education is unknown.

As a child, Willie was enrolled in the Carlisle Area School District. He spent his school years in special education classes, and his IQ was determined to be 69 in 1978. Willie dropped out of school on his 17th birthday in 1979.

Willie worked various low-paying, temporary jobs. He had no interests, and his Aunt Pat, Jesse Mae's sister, said that he got into a few actual fights over the years and looked so good that the family encouraged him to take up boxing. He joined the Carlisle Boxing Club, under professional boxer and trainer Bobby Wert, in 1981.

Mr. Wert trained the boxers at Dickinson College and also trained town kids from Carlisle, most of whom were from poor families and had no skills and little motivation. Willie had five bouts with the boxing club,¹¹⁵⁴ with his last being the night of May 14, 1982. About two weeks prior to the last fight, Mr. Wert told Willie that if he applied himself to his

¹¹⁵⁴ As an indication of Willie's lack of comprehension of many things, he has stated that he is a five-time Pennsylvania Golden Gloves winner. Mr. Wert states that Willie had a total of five bouts. One of those was a Golden Gloves bout, and Willie lost it. When other ex-boxers in the area complained to Mr. Wert about Willie's claim, Mr. Wert was inclined to let Willie keep this positive thing in his life, but he decided to talk with Willie when Willie was portrayed on local television and in the Patriot-News as a five-time Golden Gloves champion. Mr. Wert then explained to Willie that he was not a five-time Golden Gloves champion. Willie asked him, "Then what were those five fights I had?" Mr. Wert explained them, and Willie said, "Oh."

training, he could be somebody. Willie took this to heart and trained well those two weeks. He won his bout the night of May 14, and the trainers in the club decided to give him the night's award for best bout, considering how he had dedicated himself to serious training leading up to the bout. Mr. Wert said that the main reason for the award was that they wanted to give Willie something positive.

Unfortunately, the night of May 14, 1982 is notable for another reason: a 19-year-old Dickinson College student was brutally raped and beaten so severely about the face that her eyes swelled shut and the emergency room doctors at first thought her jaw and one side of her face were broken. Several other students heard the victim's screams and came to the scene. Some talked with the attacker, but none approached or touched him in any way. All were interviewed by a patrolman and then by the detective who was put in charge of the case, and all said it was dark (the attack lasted about 20 minutes around midnight of May 14 into May 15), that they only saw part of the attacker's face and only in shadow, and that they didn't know if they'd be able to identify the attacker if they saw him again. Only one said that he would be willing to try to identify the attacker.

The eyewitnesses all said the attacker was black, but their descriptions varied otherwise:

5'9", stocky build, white T-shirt, yellow shorts

5'8", stocky build – Said that the attacker said he was from South Philly and to leave him alone.

5'11", stocky build, white T-shirt, faded cut-off blue jeans, white tennis shoes

[No height or build mentioned] Short hair, round face, dark shirt

5'11", light-colored shirt, cut-off blue jeans, white shoes (victim's description)

5'11", 180 lbs., well-built – Said "I am from South Philly and I got a piece." Thought he saw a knife. Attacker also said that if they didn't back up, he was going to go a few rounds with him.

A tracking dog was brought in and, at 1:10 a.m., picked up a scent from the crime scene. He and his handler followed it to a bar several blocks away. The dog wanted to enter the bar, but it was closed. They then went to a man standing on the corner. The policemen talked with the man, but did not think he was the attacker, and the dog did not alert his handler to the man.

Nothing in the record indicates why Willie Nesmith was interviewed about the rape. Possibly, the "going a few rounds" remark a witness heard made

the detective think of Willie. (The detective's son boxed in the same boxing club as Willie.) However, I learned during my conversation with Mr. Wert that other members of the club were always in trouble – and one particular member came to mind as actually being nasty. This happens to be the same person Willie told me he heard talk about being the actual rapist. He was never even interviewed. Willie believes that the detective was upset with him for dancing with the detective's wife during a boxing club party at the detective's home, but can't think of a better reason why he was suspected in the crime. The detective has since passed away.

While the reason for approaching Willie Nesmith about the rape is left unexplained in the record, nothing – in my opinion – indicates misconduct on the part of the detective, police department, or district attorney's office.

Willie was tried in September of 1982, and the jury was hopelessly deadlocked. A mistrial was declared.

In November of 1982, a man who was incarcerated with Willie over the summer said that Willie had told him he "raped that girl." He testified to this when Willie was re-tried in December of 1982, and Willie was found guilty. He was sentenced to an aggregate of nine to 25 years to be counted from May 16, 1982.

Willie was eligible for parole in 1991 upon fulfillment of his minimum sentence, but the prosecutor wrote an unfavorable letter to the Parole Board and parole was denied.

Willie was released on parole on December 30, 1993 after having been incarcerated for 11 years and 7 ½ months. He had no money, no job, no training, no health insurance, no counseling, no help at all in reintegrating into society. He moved back home with his mom.

Willie was arrested on drug charges – delivery of less than a gram of crack cocaine – on November 17, 1995 and was eventually sentenced to 12 months to five years on the charges. If not for the rape conviction, the sentence would have been lighter (and I believe he wouldn't have been involved with drugs at all). Understandably, Willie had a difficult time with the re-incarceration, with one of the reasons being that he had to attend classes for sex offenders.

DNA testing developed over the years of Willie's incarceration, and in 2000 he finally got his DNA test for the rape. The July 10, 2000 DNA report stated, "Willie Nesmith is excluded as a source of the DNA

obtained from the sample.”¹¹⁵⁵ Willie was released from prison on August 24, 2000, just 3 months shy of completely serving the maximum five-year-sentence on the drug charges.

Willie had a few more problems with drugs, but has been clean for quite some time. Willie has said, and the record shows, that he drank alcohol before his wrongful 1982 rape conviction, but he was not involved with drugs until he was released on parole from his long wrongful incarceration. He was released without a job, without training, without health insurance, and without a plan. He was also released into a rough community where many believed he was a rapist. Life was never easy for Willie, and it was even more difficult after over 11 ½ years¹¹⁵⁶ of incarceration for a crime he did not commit.¹¹⁵⁷

DREW WHITLEY

On August 17, 1988, at around 3:00 AM, a 22-year-old McDonald’s night manager in Duquesne was finishing her shift when she was confronted by a man with a nylon mask over his face demanding money. The assailant chased her to her car, pistol-whipped her, and shot her in the back. He then fled across the parking lot toward a wooded area, shedding his nylon mask, hat, and women’s trench coat as he ran.

Another McDonald’s employee lived in the building next to Drew Whitley, 32 years old at the time and had been waiting outside of the restaurant to start his 3:00 AM shift. While he was waiting, a man wearing a nylon mask, a hat, and trench coat approached him from behind and told him not to move. He then saw the robber fire a shot in the air, struggle with the victim, and shoot her. As the perpetrator ran into the parking lot, his hat fell off and Whitley’s neighbor recognized the man as Whitley. The witness admitted that he could not see the perpetrator’s face clearly, but he recognized Whitley by his voice, the shape of his head, and the way that he walked.

¹¹⁵⁵ Cellmark Diagnostics of Germantown, Maryland performed polymerase chain reaction (PCR) testing on the panties the victim wore when she was raped. Cellmark used the AmpF/STR Profiler Plus PCR Amplification Kit to do the testing. “STR” stands for “short tandem repeat.” Results found through use of this kit are accepted by the FBI for inclusion in its Combined DNA Index System (CODIS).

¹¹⁵⁶ More than 16 years, counting the incarceration for parole violation.

¹¹⁵⁷ E-mail from Karen Haley to J. State Gov’t Comm’n (Aug. 4, 2011, 04:03 EST) (on file with J. State Gov’t Comm’n).

At trial, another witness testified that he saw the perpetrator fire a warning shot and hit the victim with a gun. This witness then drove to a nearby supermarket to telephone the police. Another McDonald's employee saw the perpetrator order the victim to give him a bag of money, fire a shot into the air, and chase the victim around her car. He described the perpetrator as a man wearing a trench coat and a hat and subsequently identified Whitley in court. A third employee attempted to help the victim get away from the perpetrator but was unable to identify Whitley.

Further, a death row inmate testified at trial that Whitley confessed while they were incarcerated together at the State Correctional Institution in Pittsburgh.

The police collected a trench coat, hat, and a 12-inch long nylon stocking from the parking lot. At trial, an Allegheny County Crime Laboratory technician testified that tiny hairs in the mask were similar to Whitley's hairs, but could not be certain they were his. The technician also testified that saliva from the mask did not match Whitley's. The prosecutor, however, argued in his closing arguments that the hairs were positively Whitley's.

Police also collected Whitley's tennis shoes, which had a drop of blood on them. Whitley told police that his son had bled on his shoes the day before. When serology testing was performed, the blood was found to be type A. Both the victim and Whitley's son had type A blood.

In 1989, Drew Whitley was convicted of second degree murder of the McDonald's night manager in Duquesne, Pennsylvania, and sentenced to a term of life in prison.

In November 1995, the court approved Whitley's motion for DNA testing, specifically on two rooted hairs from the mask, the blood on Whitley's shoes, and the blood on the coat found at the crime scene. The prosecution reported that Cellmark Laboratories had attempted to conduct DNA testing on the rooted hairs in 1993 and had consumed the sample. This testing yielded inconclusive results. The prosecution also reported that the 39 hairs without roots and the tennis shoes from Whitley's case had been lost in a flood of the Allegheny County Police Evidence Room. DNA testing was, however, conducted on the blood on the coat found near the scene. It was consistent with the victim, with the profile being found in 1 in 30,000 Caucasian individuals.

Whitley continued to seek further DNA testing in his case. In 2005, his attorney, Scott Coffey, was informed by the prosecution that the 39 hairs without roots did, in fact, still exist. Coffey then filed a Post-Conviction Relief Act Petition on Whitley's behalf to have the hairs tested. Mitochondrial DNA testing was then ordered by the court.

On February 28, 2006, Mitotyping Technologies completed DNA testing on 6 representative hairs, of the 39 non-rooted hairs that were suitable for testing, found in the stocking mask. They determined that Whitley was excluded from all of the hairs. The prosecution then decided to send five hairs found in the hat to the lab for testing. Whitley was again excluded as a source of these hairs.

On May 1, 2006, the prosecution dropped all charges against Drew Whitley and he was released from prison.¹¹⁵⁸

NICHOLAS YARRIS

On December 16, 1981, a young sales associate from the Tri-State mall in Pennsylvania was abducted in her car after her shift ended. When she did not arrive at home, hours after she was due, her husband called the police. Investigators quickly located her yellow Chrysler Cordoba, abandoned on a roadway in Chichester, PA. The following day, the victim's body was found - beaten, stabbed, and raped - in a church parking lot a mile and a half away from her car. Newly fallen snow covered her body. She was still clothed but the murderer had cut open her thick winter clothing to commit the sexual assault. The police determined that she had bled to death from multiple stab wounds in her chest. Biological materials, including sperm samples and fingernail scrapings, were collected from the victim's body. Police also collected gloves believed to have been left by the perpetrator from the victim's car. The biological evidence collected from the crime scenes would prove to be pivotal in the years to come.

Four days after the discovery of the body, police stopped Nicholas Yarris on a Pennsylvania roadway for a traffic violation. The routine stop escalated into a violent confrontation between Yarris and the patrolman. The two wrestled one another to the ground causing the officer's weapon to discharge. The altercation ended in Yarris's arrest for attempted murder of a police officer. While in custody for this offense, Yarris accused an acquaintance of committing the Tri-State mall murder in a gambit to gain his freedom. Yarris would later acknowledge he offered this information in an attempt to get out of custody where he was suffering from withdrawal as a result of his excessive drug use. When this suspect was ruled out by the police, Yarris became the prime suspect of the murder investigation.

¹¹⁵⁸ Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Drew_Whitley.php (last visited Jan. 28, 2011).

Word leaked in prison that Yarris was a “snitch” resulting in his receiving numerous beatings. Yarris also failed at his attempt to commit suicide. Pressed to make a statement, Yarris confessed to participating in the crime, of rape, but that he had nothing to do with murder.

Conventional serological testing was performed on the rape kit, the results of which at that time could not exclude Yarris. Along with the biological evidence, prosecutors relied on the testimony of a jailhouse informant and identifications by the victim’s co-workers, who identified Yarris as the man seen harassing the victim before her murder, to convict him. The jailhouse informant in this case was Charles Catalino who was serving a term of imprisonment of four to ten years for burglarizing the home of an assistant district attorney from the same county. Catalino was released from prison later in the year following Yarris’ conviction in 1982. Nicholas Yarris was convicted of murder, rape, and abduction and sentenced to death.

Still, Yarris maintained his innocence, leading to a long struggle for DNA testing of the crime scene evidence. In 1989, he became one of Pennsylvania’s first death row inmates to demand post-conviction DNA testing to prove his innocence. Successive rounds of DNA testing of various pieces of evidence followed throughout the 1990’s. All failed to produce conclusive results until 2003 when Dr. Edward Blake conducted a final round of testing on the gloves found in the victim’s car, fingernail scrapings from the victim, and the remaining spermatozoa obtained from the decedent’s underpants. Significantly, the profiles obtained from the gloves and the spermatozoa evidence appeared to originate from the same person. On July 2, 2003, Nicholas Yarris was excluded from all biological material connected with this crime.

On September 3rd, 2003, based on Dr. Blake’s results, the court vacated Yarris’s conviction. Due, however, to a 1985 conviction for escape with connected charges in Florida, Yarris still had a 30 year sentence on his record and he remained in jail.

On January 15th, 2004, Florida reduced his sentence to 17 years (time served) and granted his release. The following day, Nicholas Yarris was released from a Pennsylvania prison after spending over 21 years for a crime he did not commit.¹¹⁵⁹

¹¹⁵⁹ Innocence Project, Know the Cases, http://www.innocenceproject.org/Content/Nicholas_Yarris.php (last visited Jan. 27, 2011).

PENNSYLVANIA EXONERATIONS, 1989-2003
BY YEAR OF EXONERATION¹¹⁶⁰

“‘[E]xoneration’ is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.”¹¹⁶¹

(Exonerations based on DNA Evidence marked by *)

Matthew Connor, 1990
Bruce Nelson, 1991*
Jerry Pacek, 1991
Jay C. Smith, 1992
Dale Brison, 1994*
Vincent Moto, 1996*
Willie Nesmith, 2000*
William Nieves, 2000
Edward Baker, 2002
Steven Crawford, 2002
Bruce Godschalk, 2002*
Thomas Kimbell, Jr., 2002
Nicholas Yarris, 2003*

¹¹⁶⁰ Gross et al., *supra* note 21, at 559.

¹¹⁶¹ *Id.* at 524. The official acts for this article are: pardons based on innocence, judicial dismissals of criminal charges after evidence of innocence emerged and acquittals on retrial based upon evidence of no involvement in the crimes. *Id.*

**PENNSYLVANIA EXONEREES IDENTIFIED BY
CENTER ON WRONGFUL CONVICTIONS
AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW**

Any Pennsylvania “case in which a defendant was convicted of a crime and later restored to the status of legal innocence based on evidence not presented at the defendant’s trial. . . . The cases included on the” Center on Wrongful Convictions’ “list are those — and only those — in which there is evidence of actual innocence.”¹¹⁶²

Joseph Antoniewicz
Edward Baker
George Bilger
Dale Brison
George Bilger
Raymond Carter
Willie Comer
Matthew Connor
William Davis
Neil Ferber
Samuel Gleason
Bruce Godschalk
William S. Green
Ernest Haines
William A. Hallowell
Frank Harris
William Kelley
Thomas Kimbell Jr
Barry Laughman
Calvin Lyons
Vincent Moto
Bruce Nelson
Willie Nesmith
William Nieves
Anthony Piano
Edward H. Parks
Edward Ryder
Rudolph Sheeler
Michael Sabol
Jay C. Smith
Andrew Toth
Gerald C. Wentzel
Robert Wilkinson

¹¹⁶² Northwestern Law Bluhm Legal Clinic, Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/> (last visited Jan. 27, 2011).

A SAMPLE OF PENNSYLVANIA PARDONS BASED ON INNOCENCE

Applicant: James Jose Gapasin, D-5092, No. 6471, Dec. Sess., 1944¹¹⁶³

Conviction: statutory rape, etc.

Reason: "The investigator finally secured from one of the victim's and from the mother of one of the victim's that the charges were false The district attorney . . . corroborated . . . this applicant was improperly convicted and is not guilty of the crime."

Applicant: Thomas E. Dougherty, No. 7479, Jan. Sess., 1949¹¹⁶⁴

Conviction: establishing gambling place

Reason: "[T]his applicant was not responsible for the commission of this crime but was . . . innocent."

Applicant: Louis Cabona, No. 4503, Oct. Sess., 1945¹¹⁶⁵

Conviction: enticing a minor for immoral purposes, statutory rape

Reason: "[d]ocumentary evidence . . . showed this applicant . . . at the time it was alleged this offense was committed . . . that he was on the high seas . . . it is apparent from the records . . . he was not . . . guilty."

Applicant: Chester Latshaw, B-7828, No. 6509, Apr. Sess., 1946¹¹⁶⁶

Conviction: burglary, assault & battery w/intent to ravish

Reason: "We have . . . an affidavit which discloses that the applicant was not guilty Under these circumstances he could not have been guilty of the crimes."

Applicant: James Morran, No. 6753, No. 8946, June Sess., 1947¹¹⁶⁷

Conviction: rape & adultery

Reason: "The parole report indicates that from present investigation the brother of the applicant was the guilty person and not the applicant The record indicates applicant did not commit the crime."

Applicant: Michael John Dalessio, No. 9534, Nov. Sess., 1948¹¹⁶⁸

Conviction: vagrancy

Reason: "[T]he Board of Pardons is unable to see how he was charged with vagrancy and adjudged guilty. . . . [T]he investigation shows that the applicant did have sufficient funds on his person and was not engaged in any breach of the peace."

¹¹⁶³ Legis. J., vol. VI, at 5913 (Pa. 1947).

¹¹⁶⁴ *Id.*, at 5904.

¹¹⁶⁵ *Id.*, at 5848.

¹¹⁶⁶ *Id.*, at 5810.

¹¹⁶⁷ Legis. J., vol. VI, at 5525-26 (Pa. 1949).

¹¹⁶⁸ *Id.*, at 5658-59.

Applicant: Floyd T. Rager, B-8654, No. 8945, Oct. Sess. 1950¹¹⁶⁹

Conviction: burglary

Reason: “[S]ince he was not legally guilty of the crime of burglary . . . for a thing that was not a crime.”

Applicant: Albert E. Florig, A-469, Dec. Sess. 1950¹¹⁷⁰

Conviction: passing worthless checks

Reason: “[T]his criminal prosecution should never have been brought and this applicant should never have been sentenced criminally. In our opinion it was a civil matter.”

¹¹⁶⁹ Legis. J., vol. VII, at 7107 (Pa. 1951).

¹¹⁷⁰ Legis. J., vol. VI, at 5168-69 (Pa. 1953).

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Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Alabama	Ala. Code §§ 29-2-150 to 29-2-165	Ala. Code §§ 15-18-200	None	None	None	None
Alaska	None	Alaska Stat. §§ 12.73.010 to 12.73.090	If feasible ¹¹⁷¹	Alaska Stat. § 12.36.200	None	None
Arizona	None	Ariz. Rev. Stat. §§ 13-4240, 13-4232	None	Ariz. Rev. Stat. § 13-4221	None	None
Arkansas	None	Ark. Code §§ 16-112-201 to 16-112-208	None	Ark. Code § 12-12-104	None	None
California	Cal. Penal Code §§ 4900 to 4906	Cal. Penal Code § 1405	None	Cal. Penal Code § 1417.9	None	S. Res. No. 244 (2003-04 Reg. Sess.) ¹¹⁷²
Colorado	None	Colo. Rev. Stat. §§ 18-1-411 to 18-1-416	None	Colo. Rev. Stat. §§ 18-1-1101 to 18-1-1104	None	None
Connecticut	Conn. Gen. Stat. § 54-102uu	Conn. Gen. Stat. § 54-102kk ¹¹⁷³	None	Conn. Gen. Stat. § 54-102jj	None	Conn. Gen. Stat. § 54-102pp
Delaware	None	Del. Code, tit. 11, § 4504	None	None	None	None
D.C.	DC Code § 2-421 to 2-425	D.C. Code §§ 22-4131, 22-4133	D.C. Code §§ 5-116.01 to 5-116.03	D.C. Code § 22-4134	None	None

¹¹⁷¹ *Stephan v. State*, 711 P.2d 1156, 1162 (1985)

¹¹⁷² Adopted Aug. 2004.

¹¹⁷³ Conn. Gen. Stat. § 52-582 (2009).

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Florida	Fla. Stat. ch. 961	Fla. Stat. §§ 925.11, 925.12	None	Fla. Stat. § 925.11(4)	None	Fla. Sup. Ct. Admin. order No. AOSC10-39 ¹¹⁷⁴
Georgia	None	Ga. Code § 5-5-41	None	Ga. Code § 17-5-56	House Res. No. 352 ¹¹⁷⁵	None
Hawaii	None	Haw. Rev. Stat. §§ 844D-121 to 844D-133	None	Haw. Rev. Stat. § 844D-126	None	None
Idaho	None	Idaho Code § 19-4902	None	State police crime lab may dispose unused forensic samples in normal course of business	None	None
Illinois	Ill. Comp. Stat., ch. 705, §§ 505/8(c), 505/22(c); ch. 735, § 5/2-702	Ill. Comp. Stat., ch. 725 § 5/116-3	Ill. Comp. Stat., ch. 725, § 5/103-2.1	Ill. Comp. Stat., ch. 725, § 5/116-4	Ill. Comp. Stat., 725, §§ 5/107A-5, 5/107A-10	S. J. Res. Nos. 9 (2007) & 6 (2009)
Indiana	None	Ind. Code ch. 35-38-7	Ind. R. Evid. 617	evidence that could be tested for DNA--as long as appeals are pending	None	None
Iowa	Iowa Code § 663A.1	Iowa Code § 81.10	Recording encouraged ¹¹⁷⁶	Iowa Code § 81.10(10)	None	None
Kansas	None	Kan. Stat. § 21-2512	None	¹¹⁷⁷	None	None
Kentucky	None	Ky. Rev. Stat. § 422.285	None	Ky. Rev. Stat. § 524.140	None	None

¹¹⁷⁴ July 2, 2010.¹¹⁷⁵ Adopted Apr. 20, 2007.¹¹⁷⁶ *State v. Hajtic*, 724 N.W. 2d 449 (Iowa 2006).¹¹⁷⁷ If petition to test DNA postconviction is filed, until proceedings are completed.

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Louisiana	La. Rev. Stat. § 15:572.8; La. Code Civ. Pro. Ann. art. 87	La. Code Crim. Proc., Art. 926.1	None	La. Code Crim. Proc., Art. 926.1H(4) & (5)	None	None
Maine	Me. Rev. Stat., tit. 14, §§ 8241 to 8244	Me. Rev. Stat., tit. 15, §§ 2136 to 2138	Me. Rev. Stat., tit. 25, § 2803-B(1)(K)	Me. Rev. Stat., tit. 15, § 2138(14)	None	None
Maryland	Md. State Fin. & Proc. Code § 10-501	Md. Crim. Proc. Code § 8-201	Md. Crim. Proc. Code §§ 2-401 to 2-404	Md. Crim. Proc. Code § 8-201(j), (k)	Md. Pub. Safety Code § 3-506	None
Massachusetts	Mass. Gen. Laws ch. 258D	None ¹¹⁷⁸	Cautionary jury instruction if unrecorded ¹¹⁷⁹	None	None	None
Michigan	None	Mich. Comp. Laws §§ 770.16, 770.1	None	Mich. Comp. Laws § 770.16(12)	None	None
Minnesota	None	Minn. Stat. §§ 590.01 – 590.10	Admissibility rule ¹¹⁸⁰	Minn. Stat. § 590.10	None	None
Mississippi	Miss. Code §§ 11-44-1 to 11-44-15	Miss. Code §§ 99-39-5, 99-39-11	None	Miss. Code §§ 99-39-5, 99-39-9, 99-39-11	None	None
Missouri	Mo. Rev. Stat. § 650.058	Mo. Rev. Stat. § 547.035	Mo. Rev. Stat. § 590.700	Mo. Rev. Stat. § 650.056	None	None
Montana	Mont. Code § 53-1-214	Mont. Code § 46-21-110	Mont. Code §§ 46-4-406 to 46-4-411	Mont. Code § 46-21-111	None	None
Nebraska	Neb. Rev. Stat. §§ 29-4601 to 29-4608	Neb. Rev. Stat. §§ 29-2101, 29-4116 to 29-4124	Neb. Rev. Stat. §§ 29-4501 to 29-4508	Neb. Rev. Stat. § 29-4125	None	None
Nevada	None	Nev. Rev. Stat. § 176.0918	None	Nev. Rev. Stat. §§ 176.0911 to 176.0919	None	None

¹¹⁷⁸ *Commonwealth v. Donald*, 66 Mass. App. 1110, 848 N. E. 2d 447 (2006).

¹¹⁷⁹ *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004).

¹¹⁸⁰ Unrecorded statements generally inadmissible. *State v. Scales*, 518 N. 2d 587, 592 (Minn. 1994).

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
New Hampshire	N.H. Rev. Stat. § 541-B:14	N.H. Rev. Stat. §§ 651-D to 651-D:4	If record, must record in entirety ¹¹⁸¹	N.H. Rev. Stat. § 651-D:3	None	None
New Jersey	N.J. Stat. §§ 52:4C-1 to 52:4C-6	N.J. Stat. § 2A:84A-32a	N.J. Sup. Ct. R. 3.17	None	Guidelines mandated by Att’y Gen. ¹¹⁸²	None
New Mexico	None	N.M. Stat. § 31-1A-2	N.M. Stat. § 29-1-16	N.M. Stat. § 31-1A-2	None	None
New York	N.Y. Ct. of Claims Act § 8-b	N.Y. Crim. Proc. Law § 440.30(1-a)	None	None	None	Justice Task Force ¹¹⁸³
North Carolina	N.C. Gen. Stat. §§ 148-82 to 148-84	N.C. Gen. Stat. § 15A-269	N.C. Gen. Stat. § 15A-211	N.C. Gen. Stat. § 15A-268	N.C. Gen. Stat. §§ 15A-284.50 to 15A-284.53	N.C. Gen. Stat. §§ 15A-1460 to 15A-1475
North Dakota	None	N.D. Cent. Code § 29-32.1-15	None	None	None	None
Ohio	Ohio Rev Code §§ 2305.02, 2743.48 & 2743.49	Ohio Rev. Code §§ 2953.71 to 2953.84	Ohio Rev. Code § 2933.81	Ohio Rev. Code § 2933.82	Ohio Rev. Code § 2933.83 ¹¹⁸⁴	None
Oklahoma	Okla. Stat. tit. 51, § 154(B)	Okla. Stat. tit. 22, §§ 1370.1, 1371, 1371.1, 1371.2	None	Okla. Stat. tit. 22, § 1372	None	None
Oregon	None	Ore. Rev. Stat. §§ 138.690 to 138.698	SB 309 (ch. 488)	SB 310 (ch. 489)	None	None

¹¹⁸¹ No due process right to have custodial interrogations recorded; however, if it is recorded, it must be recorded in its entirety but does not have to include *Miranda* warnings or waiver thereof. *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001).

¹¹⁸² *State v. Christopher Romero*, 922 A.2d 693, 702-703 (N.J. 2007); *State v. Delgado*, 902 A.2d 888, 897 (N.J. 2006); *State v. Henderson*, (A-8-08)(062218) (N.J. 2011).

¹¹⁸³ Created by N.Y. Ct. of Appeals in May 2009.

¹¹⁸⁴ Section 3 of the statute enacting this provision calls for the Att’y Gen. to adopt rules prescribing specific procedures for law enforcement agencies and crim. just. entities to implement this provision. Additionally, it calls for the Ohio Judicial Conf. to review existing jury instructions regarding eyewitness identification to ensure compliance with the statute.

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Pennsylvania	None	42 Pa.C.S. § 9543.1	None	None ¹¹⁸⁵	None	S. Res. No. 381(2006)
Rhode Island	None	R.I. Gen. Laws §§ 10-9.1-11, 10-9.1-12	None	R.I. Gen. Laws § 10-9.1-11	R.I. Gen. Laws § 12-1-16	None
South Carolina	None	S.C. Code §§ 17-28-10 to 17-28-120	None	S.C. Code §§ 17-28-300 to 17-28-360	None	None
South Dakota	None	S.D. Codified Laws ch. 23-5B	None	None	None	None
Tennessee	Tenn. Code § 9-8-108(a)(7)	Tenn. Code § 40-30-301 to 40-30-313	None	None	None	None
Texas	Tex. Civ. Prac. & Rem. Code §§ 103.001 to 103.154; Tex. Gov't Code § 501.091; Tex. Health & Safety Code § 614.021	Tex. Code Crim. Proc. arts. 64.01 to 64.05	Tex. Code Crim. Proc. art. 38.22, § 3	Tex. Code Crim. Proc. art. 38.43	Tex. Code Crim. Proc. art. 38.20 ¹¹⁸⁶	House Bill 498, 81 st Leg. (R.S. 2009); ¹¹⁸⁷ Tex. Crim. Just. Integrity Unit ¹¹⁸⁸
Utah	Utah Code §§ 78B-9-401 to 78B-9-405	Utah Code § 78B-9-300 to 78B-9-304	Office of Attorney General Policy	None	None	None
Vermont	Vt. Stat., tit. 13, §§ 5572 to 5577	Vt. Stat., tit. 13, §§ 5561 to 5570	None	None	Act No. 60 (2007) §§ 2, 3	Act No. 60 (2007) §§ 2, 3
Virginia	Va. Code Ann. §§ 8.01-195.10 to 8.01-195.12	Va. Code Ann. § 19.2-327.1	None	Va. Code Ann. § 19.2-270.4:1	Va. Code Ann. § 19.2-390.02	None

¹¹⁸⁵ Receipt of a motion under 42 Pa.C.S. § 9543.1(b)(2) requires the Commw. and the ct. to preserve remaining biological material they possess pending completion of the proceedings.

¹¹⁸⁶ Effective Sept. 1, 2011.

¹¹⁸⁷ Established the Timothy Cole advisory panel on wrongful convictions.

¹¹⁸⁸ Created by Tex. Ct. of Crim. Appeals in June 2008 (<http://standdown.typepad.com/REPORT-TxCriminalJusticeIntegrityUnit-2008-Report.doc>; http://alt.coxnewsweb.com/statesman/pdf/06/060408_integrityunit.doc).

Jurisdiction	Compensation statute	Post-conviction access to DNA statute	Custodial interrogation recording statute	Preservation of evidence statute	Eyewitness identification reform	Reform commission
Washington	None	Wash. Rev. Code § 10.73.170	None	Wash. Rev. Code § 10.73.170(6)	None	None
West Virginia	W. Va. Code § 14-2-13A	W. Va. Code § 15-2B-14	None	None	W. Va. Code §§ 62-1E-1 to 1E-3	None
Wisconsin	Wis. Stat. § 775.05	Wis. Stat. § 974.07	Wis. Stat. §§ 938.31(3), 968.073 & 972.115	Wis. Stat. §§ 165.81(3), 757.54(2), 968.205, 978.08	Wis. Stat. § 175.50	Act No. 60 (2005) ¹¹⁸⁹
Wyoming	None	Wy. Stat. §§ 7-12-302 to 7-12-315	None	None	None	None
U.S.	28 U. S.C. §§ 1495, 2513	18 U.S.C. § 3600	None	18 U.S.C. § 3600A	None	None

¹¹⁸⁹ This Crim. Just. Reforms Package was enacted after its recommendation by Crim. Just. Reforms Task Force, which was created by the chairman of the State Assem. Judiciary Comm.

Jurisdictions Adopting Eyewitness Identification Reforms

JURISDICTIONS ADOPTING EYEWITNESS IDENTIFICATION REFORMS

Eyewitness identification reforms have been adopted in a variety of formats among the states. Some jurisdictions have drafted and adopted procedures specific for that state; others have adopted some form of model guidelines. Still others have appointed study groups to suggest reforms, while others have taken an experimental approach, authorizing pilot projects. The table below summarizes these reforms.

Juris.	Type of reform	Summary	Current status
CT	Div. of Crim. Just. and law enforcement community protocol	Issued by the Chief State's Att'y; incorporates double-blind procedures where practicable. Protocol is taught at comprehensive and ongoing training programs that are mandated for police and other law enforcement officers. Pub. Act 08-143 (2008) directs the Advisory Comm'n on Wrongful Convictions to monitor and evaluate the implementation of double-blind administration and report its findings to the Gen. Assem.	Issued September 23, 2005; recommendation to monitor and evaluate
FL	Sup. Ct. established Fla. Innocence Comm'n – Standards for State and Local Law Enforcement Agencies in Dealing With Photographic or Live Lineups in Eyewitness Identification	Interim Report issued June 2011 recommending that each law enforcement agency have a written policy regarding the conduct of lineups that conforms to the Commission's standards. Standards include composition of the lineup, instructions to witnesses, directions to the administrator not to provide feedback, taking of confidence statements immediately following the lineup view, documentation of the lineup procedure and training. No preference is expressed for sequential versus simultaneous lineups, blind administrators are preferred whenever possible and use of the folder system is also authorized for photo lineups.	Final rep. due by June 30, 2012
GA	House Study Comm. on Eyewitness Identification Procedures appointed by Gen. Assem.; policies and procedures voluntarily adopted by law enforcement	Rep. recommended enactment of a statute mandating that law enforcement agencies create written eyewitness identification policies, and passage of a resolution detailing procedures that should be incorporated into policies, including blind administration where possible; one suspect per lineup; confidence assessments; fillers should match description of perpetrator; specific instructions to the witness; and documentation of the result. Legislation introduced to implement these reforms failed, but all of the interested law enforcement agencies met with legislators and agreed that law enforcement should be given the opportunity to address the issue. The Ga. Pub. Safety Training Ctr. of the Ga. Police Academy developed a training program, which was approved by the Ga. Peace Officer Standards and Training Council for their member agencies in 2008.	Adopted Apr. 20, 2007; Rep. presented to Gen. Assem. Jan. 2008
IL	(1) Lineup procedures mandated (2) Pilot study of sequential lineup procedures authorized by State statute	(1) 725 Ill. Comp. Stat. 5/107A-5 lineups to be recorded; all photospreads and lineup photographs must be disclosed to defense during discovery; eyewitness must acknowledge that the suspect may not be in the lineup; the witness doesn't need to make an ID; instruction to the witness that the administrator may not know who the suspect is; suspects should not be presented in a way that makes them stand out (2) 725 Ill. Comp. Stat. 5/107A-10 Mandated a pilot study on sequential lineup procedures by Dep't of State Police, using 3 police depts., report due Sept. 1, 2005. Study results showed simultaneous lineups superior to sequential lineups; results disputed.	(1) Enacted Nov. 19, 2003; (2) Rep. released 2006

Juris.	Type of reform	Summary	Current status
MD	Adoption of written procedures that comply with U.S. Dep't of Just. standards	All law enforcement agencies to adopt procedures by Dec. 1, 2007; written policies must be filed with Dep't of State Police for public inspection	Enacted 2007
NJ	<p>(1) Att'y Gen. Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures</p> <p>(2) <i>State v. Delgado</i>, 902 A.2d 888, 897 (N.J. 2006); court rule on documenting eyewitness identification procedure</p> <p>(3) <i>State v. Romero</i>, 922 A.2d 693 (N.J. 2007); Sup. Ct. jury charge on reliability and believability of eyewitness testimony</p> <p>(4) <i>State v. Henderson</i>, (A-8-08)(062218) (N.J. 2011)</p>	<p>(1) Adopted procedures similar to 1999 Nat'l Inst. of Just. guidelines, with two significant additions: the blind administration of lineups, and a preference for the use of sequential lineups wherever possible.</p> <p>(2) Sup. Ct. mandated rule: as a condition to the admissibility of an out-of-court identification, officers must make a written record detailing the out-of-court identification procedure, including where it was conducted, the dialogue between the witness and the interlocutor, and the results. When feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared. Electronic recordation is advisable, although not mandated. "The making of a contemporaneous record is the preferred method. We suggest that law enforcement officers not delay in recording or summarizing the out-of-court identification procedures."</p> <p>(3) <u>Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, although made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.</u> In deciding what weight, if any, to give to the identification testimony, you may consider the following factors: [Model Jury Charge (Crim.), Identification: Out-of-Court Identification (2007) (New language underscored).]</p> <p>(4) Sup. Ct. found current test for reliability is inadequate; authorized suppression hearing when evid. of suggestiveness is shown that may lead to misidentification; also charged Crim. Prac. Comm. & Comm. on Model Crim. Jury Instructions to revise eyewitness id. charge, taking into account system & estimator variables</p>	(1) Adopted 2001
NC	Eyewitness Identification Reform Act; failure to comply is admissible re suppression and misidentification	Adopted blind administration & sequential presentation; if blind admin. not feasible, use of computer program or folder system authorized or other neutral administrator approved by N.C. Crim. Just. & Educ. Standards Comm'n; specific instructions to eyewitness detailed; fillers to match description of perpetrator while ensuring suspect does not stand out; one suspect per lineup; confidence statement to be obtained; documentation of lineup procedures by video, audio or in writing (in order of preference)	Enacted 2007

Juris.	Type of reform	Summary	Current status
OH	Ohio Rev. Code § 2933.83	Blind administrator – one who does not know the identity of the suspect; Blinded administrator – may know the suspect's identity, but not which lineup member is being viewed (includes person administering a folder system of ID); Folder system defined as use of suspect photo, five fillers and four blank folders. Witness views each folder individually – for each folder, witness must state whether or not the picture is of the perpetrator, and the witness's confidence in that ID; second viewing in same order permitted; documentation of procedures, source of photos. Statute requires criminal justice entities and law enforcement agencies to adopt specific procedures with minimum requirements: blind/blinded administrator (unless impracticable); written record; witness to be informed that perpetrator may or may not be in lineup; administrator does not know who suspect is. Failure to comply can be used in suppression motion, as evidence in support of any claim of eyewitness misidentification, or included in jury instruction. Statute does not prevent agencies or entities from adopting other more effective scientifically acceptable procedures	Effective 7/6/10
RI	R.I.G.L. § 12-1-16 (2010); Task Force to Identify and Recommend Policies and Procedures to Improve the Accuracy of Eyewitness Identifications	Every LEA to have written eyewitness identification policy by June 1, 2011; blind administration unless not practicable, then use of blinded administrator; only one suspect per lineup; one witness viewing lineup at a time; suspect and five fillers for each lineup; fillers to match witnesses description of perpetrator; suspect should not unduly stand out; if sequential lineup, show all photos; specific instructions to witness; confidence statement after identification; no confirmatory feedback; LEAs should "strongly consider" use of sequential lineups; documentation of identification procedure; special rules for showups; Municipal Police Training Academy should develop a training curriculum and law enforcement officers to receive training by June 30, 2012; extend task force for 16 months to study sequential lineups more thoroughly	Guidelines issued Dec. 2010
TX	Tex. Code Crim. Proc. art. 38.20	Bill Blackwood Law Enforcement Mgmt. Inst. of Tex. to develop model policy & training materials for photo & live lineups based on best practices supported by credible research; all LEAs to adopt written eyewitness ID procedures consistent w/B. Blackwood Law Enforcement Mgmt. Inst. of Tex. model or based on research addressing selection of fillers, instructions to witnesses, documentation of the outcome, admin. to person w/language deficiency, & blind admin.; policy must be reviewed every other yr. & updated as appropriate; noncompliance doesn't necessarily bar admission, admissibility is controlled by Tex. R. Evid. compliance/noncompliance w/model possible to be admissible in court	Model policy must be adopted & disseminated (w/associated training materials) by the end of 2011; all LEAs must adopt policies by Sept. 1, 2012
VT	Eyewitness Identification and Custodial Interrogation Recording Study Comm. appointed by State legis.	Study focused on eyewitness identification procedures for conducting lineups and audio and audiovisual recording of custodial interrogations. Report noted that Vermont Policy Academy currently teaches enrollees Innocence Project recommendations to minimize the suggestibility of the lineup. Comm. recommendations included: preferred use of sequential photo lineups, so long as coupled with blind administration. Use of fillers matching perpetrator's description and not to cause suspect to stand out required. If live lineup is used, recommendation is to follow 1999 Nat'l Inst. of Just. guidelines [which do not mandate sequential procedures]	Comm. rep. released Dec. 14, 2007

Juris.	Type of reform	Summary	Current status
VA	<p>(1) Written policies mandated by State statute.</p> <p>(2) Study of mistaken identification in criminal cases authorized by State legis.</p>	<p>(1) State police, local police departments and sheriff's offices required to establish written policies and procedures for in-person and photo lineups.</p> <p>(2) Va. State Crime Comm'n studied and made recommendations regarding lineup procedures. Sample directive produced: avoid suggestiveness, train personnel to establish uniformity and consistency; confer with Commonwealth's Att'y to determine best use of lineups and best instructions to witnesses; blind administration; one suspect per identification procedure; select fillers to match the witness' description of the offender; the suspect should not stand out; documentation of the procedure; use sequential procedure; certainty assessment to be obtained; second look-through permitted. Sample directive based in part on Va. Beach Police Dep't written policy, No. 10.08, "Eyewitness Identification Procedures" effective November 15, 2002.</p>	<p>(1) Enacted 2005</p> <p>(2) Crime Comm'n rep. released in 2005.</p>
WV	Eyewitness Identification Act. Lineup procedures established and task force to study blind administration and simultaneous versus sequential lineups	Established procedures and protocols for lineup administration, taking into account witness instructions; certainty assessments; documentation of the procedure and optional videotaping. Appointed a task force to develop guidelines for policies, procedures and training. Among topics to be considered are blind administration of lineups and simultaneous versus sequential lineups. Superintendent of State Police authorized to create educational materials and conduct training programs on how to conduct lineups in compliance with the act. Rep. due to legis. comm. 2008.	Enacted 2007
WI	Written policies for law enforcement agencies mandated by State statute	Each law enforcement agency (LEA) to adopt written policies designed to reduce mistakes; biennially review policies and consider what other jurisdictions have adopted. LEAs to consider the following specific policies: the person administering a lineup or photo array should not know identity of suspect; the use of sequential, not simultaneous showings; policies that would minimize influence of verbal or nonverbal reactions of person administering showing; and documentation of viewing procedure and results/outcome.	Enacted in 2005

Jurisdictions Adopting Electronic Recording of Custodial Interrogations

JURISDICTIONS ADOPTING ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

Approximately 650 police departments, county sheriffs and other local law enforcement agencies nationwide have adopted electronic recording of custodial interrogations in some form.¹¹⁹⁰ In addition, 18 states and the District of Columbia require electronic recordings of custodial interrogations for all law enforcement entities within their jurisdiction, either by statute or Supreme Court ruling or rule. Two other states have minimal recording requirements, but not a statewide mandate.

	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Legislative or Judicial mandate	J	L	L	J ¹¹⁹¹	J ¹¹⁹²	L ¹¹⁹³	L	J	J	L	L	L	J ¹¹⁹⁴	J	L	¹¹⁹⁵ L	L	L	L	L	¹¹⁹⁶	L
General Requirements:																						
In a place of detention ¹¹⁹⁷	X	X ¹¹⁹⁸	X	X				X	X		X	X		X	X	X	X	X	X		X	J ¹¹⁹⁹
At other locations, if feasible									X												X	

¹¹⁹⁰ Thomas P. Sullivan, chart dated 5/18/11, entitled *Departments That Currently Record a Majority of Custodial Interrogations*.

¹¹⁹¹ Ind. R. Evid. 617.

¹¹⁹² Sup. Ct. held that recording should be encouraged.

¹¹⁹³ Law enforcement agencies to develop policies.

¹¹⁹⁴ No due process right to have custodial interrogations recorded; however, if they are recorded, they must be recorded in their entirety, but do not have to include *Miranda* warnings or waiver thereof

¹¹⁹⁵ The following N.Y. law enforcement agencies joined together to adopt statewide protocols for the video recording of custodial interrogations in Dec. 2010: the N.Y. Dist. Att's Ass'n, N.Y. Sheriffs' Ass'n, N.Y. Ass'n of Chiefs of Police, N.Y.C. Police Dep't & N.Y. State Police. "New York State Guidelines for Recording Custodial Interrogations of Suspects" can be found at <http://daasny.org/most%20recent%20Video%20Recording%20Interrogation%20Procedures%20-%20Custodial%20-%20FINAL%20-12-8-10.pdf>

¹¹⁹⁶ Office of Att'y Gen. Policy.

¹¹⁹⁷ Generally defined as a jail, police station, station house, or other building owned or operated by a law enforcement agency or other place where persons are or may be held in detention in connection with crim. charges. The statutory mandate to record custodial interrogations in N.M. doesn't "apply within a correctional facility" but does apply to police stations.

¹¹⁹⁸ Only in Metropolitan Police Dep't interview rooms equipped with elec. recording equipment

¹¹⁹⁹ "All custodial recordings of juveniles . . . shall be electronically recorded . . . when questioning occurs at a place of detention." *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005).

JURISDICTIONS ADOPTING
ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS—(continued)

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	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Custodial interrogation, from Miranda warnings to conclusion		X		X			X ¹²⁰⁰		X	X	X	X ¹²⁰¹			X		X	X		X ¹²⁰²	X	
Custodial interrogation, a reasonable person considers himself to be in custody				X												X		X				X
Consent of suspect not required			X				X			X						X			X			X
Limited to particular crimes ¹²⁰³		X	H	X		X	X			X	X	X		X	X	X	H	X	X			X
Standard Exceptions:																						
Operator error				X												X			X		X	X
Equipment failure	X			X						X	X	X			X	X	X		X		X	X
Equipment unavailable										X		X			X	X					X	
Suspect refuses to speak	X	X	X	X						X	X	X		X	X	X	X		X		X	X
Statements in open court proceedings			X												X		X		X	X		
Spontaneous statement not made in response to a question			X	X						X	X			X	X	X	X		X			X

¹²⁰⁰ Custodial interrogation to retain its judicially determined meaning.

¹²⁰¹ Custodial interrogation to retain its judicially determined meaning.

¹²⁰² Oral or sign language statements that are the result of a custodial interrogation must be electronically recorded; no mandate to record the interrogation itself.

¹²⁰³ Generally only felonies/violent crimes. H=homicides.

JURISDICTIONS ADOPTING
ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS—(continued)

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	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Response to questioning routinely asked during processing or booking			X	X						X	X			X		X	X		X		X	X
Out of state interrogations			X	X						X	X	X		X	X		X		X	X		
Interrogators unaware/do not reasonably believe that person suspected of a crime that mandates recording			X	X								X		X		X	X		X		X	X
Recording not feasible/practicable	X		X					X				X		X		X						
Substantial exigent circumstances				X						X	X								X		X	X
Other exceptions			X							X	X			X	X	X	X		X	X		
Consequences for failure to record:																		1204				
Statement automatically inadmissible	X			X					X ¹²⁰⁵											X		
Rebuttable presumption of inadmissibility																	X					
Cautionary jury instruction								X			X	X		X			X		X			X

¹²⁰⁴ No consequences for failure to record; statute specifically states that failure to record does not create private cause of action against the law enforcement officer; shall not provide a basis for exclusion or suppression of statement.

¹²⁰⁵ Exclusion is mandatory if “substantial” violation; otherwise optional.

JURISDICTIONS ADOPTING
ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS—(continued)

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	AK	DC	IL	IN	IA	ME	MD	MA	MN	MO	MT	NE	NH	NJ	NM	NY	NC	OH	OR	TX	UT	WI
Withholding of state funding										X												
Rebuttable presumption of involuntariness		X															X					
Records retention:																						
Appeals exhausted			X								X						X ¹²⁰⁶	X	X	X	X	
Statute of limitations on underlying offenses has run			X								X ¹²⁰⁷							X ¹²⁰⁸	X	X	X	

¹²⁰⁶ Records retained for one year after appeals are exhausted.

¹²⁰⁷ If a custodial interrogation is recorded and crim. proceedings are not brought, recording must be retained until all applicable state and fed. statutes of limitation have run.

¹²⁰⁸ Upon defendant's motion, a ct. can order that a copy of the recording be preserved for any period beyond the expiration of all appeals, postconviction relief proceedings and *habeas corpus* proceedings.

Jurisdictions with Postconviction DNA Testing Statutes

JURISDICTIONS WITH POSTCONVICTION DNA TESTING STATUTES

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
AL	Evidence wasn't tested for trial; results would demonstrate factual innocence; issue wasn't resolved by prior DNA testing. There must be a reasonable possibility that testing will produce exculpatory evidence to exonerate. There must be prima facie evidence that id. of perpetrator was at issue.	By Aug. 1, 2010; by one year after final judgment if not appealed; w/in one yr. of deadline after time for filing appeal; extended up to 6 mos. of discovery/dismissal/denial/newly discovered facts ¹²⁰⁹	Conviction of capital offense & serving term of imprisonment or awaiting execution	Must be generally accepted in forensic community & results can be included in Nat'l DNA Index Sys.; upon receipt of motion, state must preserve remaining biological material it possesses; Dep't of Forensic Scis. or mutually selected lab tests (ct. selects if party can't agree) but lab must be nationally accredited. Unless indigent, the applicant pays for test.
AK	Evidence wasn't tested before or requested test is substantially more probative than prior test or for best interests of justice; defense has theory to establish innocence & DNA test would be new, material evidence in support of that; id. of perpetrator was disputed at trial; DNA test would raise reasonable probability that applicant didn't commit offense; applicant couldn't have admitted guilt under oath in official proceeding, but this can be waived & a guilty or <i>nolo contendere</i> plea doesn't count as this admission of disqualifying admission of guilt. (Prosecutor & convict can stipulate to test & bypass the statutory provisions)	Rebuttably timely if within 3 yrs. of conviction; rebuttably untimely thereafter	Conviction of felonious offense against a person & still under sentence (including probation & parole)	Method is scientifically sound & consistent with accepted forensic practice; test is at state expense by lab operated or approved by Dep't of Pub. Safety; add'l test requested by applicant & ordered by court is at applicant's cost but must be done by accredited lab
AZ	The court must order testing if it finds reasonable probability that defendant would not have been prosecuted or convicted had exculpatory test results been obtained; the evidence was not tested before, or was not tested by the same method and current test may resolve a doubtful issue. The court may order testing if it finds a reasonable probability that verdict or sentence would have been more favorable if DNA had been tested for trial or that test will produce exculpatory evidence, and the evidence was not tested before, or was not tested by the same method and current test may resolve a doubtful issue. Relief denied if case is on direct appeal or on post-trial motion, is finally adjudicated on merits or in previous collateral proceeding, or testing was waived.	None	Conviction and sentence for felony	Court may determine responsibility for payment. The court is directed to designate the lab, which must meet the standards of the DNA Advisory Bd. The court may make orders relating to preservation evidence and production of lab reports and may impose sanctions for knowing destruction of evidence.

¹²⁰⁹ Ala. R. Crim. P. 32.2(c).

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
AR	<i>Habeas corpus</i> can be sought if scientific evidence unavailable at trial establishes actual innocence or due diligence could not have discovered predicate for the claim & there is clear & convincing evidence that no reasonable fact finder would have found guilt. If evidence not tested before, there was no valid waiver or knowing failure to request in prior postconviction motion. If tested before, new testing method is more probative. Testing is consistent w/accepted forensic practices. Theory consistent w/ affirmative defense at trial & would establish actual innocence. ID was at issue. Defendant by preponderance can show that test might produce new material evidence supporting defense theory & raise reasonable probability of innocence. Relief denied if direct appeal is available.	Rebuttably timely if within 36 mos. of conviction	Conviction for any crime	Unless court approves another qualified lab, State Crime Lab does the test. Court may order defendant to pay for test.
CA	Identity was or should have been at issue; evidence is material; reasonable probability that defendant would have received a more favorable verdict or sentence if tested; test is generally accepted by scientific community; material has not been tested or new test is more probative of identity and has a reasonable probability of contradicting prior test result; motion is not filed solely for delay.	End of current term of imprisonment	Conviction for felony Right to test not waivable	Tested at lab mutually agreed with prosecutor. If parties disagree, court picks lab accredited by Lab Accreditation Board of the American Society of Crime Laboratory Directors. (ASCLD/LAB). Ct. pays.
CO	A preponderance of evidence that favorable result will demonstrate actual innocence; conclusive results were not available prior to the conviction; failure to test earlier due to unavailability of test or justifiable excuse, ineffective assistance, or excusable neglect.	End of imprisonment or parole	Conviction of felony	Court to order preservation of evidence upon grant of hearing. Test at law enforcement facility. Defendant pays: if indigent, public defender or assigned counsel may
CT	Reasonable probability that defendant would not have been prosecuted or convicted or the sentence would have been reduced if exculpatory results had been obtained; evidence not tested before or testing may resolve an issue; testing petition filed to demonstrate innocence and not for delay.	End of current term of imprisonment	Incarceration for crime	Court may order state or defendant to pay for test but cannot deny test for indigence.
DE	Evidence secured in relation to trial; no prior test because technology was unavailable; identity at issue; can produce new, noncumulative evidence materially relevant to actual innocence; test uses a generally accepted scientific method that satisfies evidentiary criteria. Relief denied if direct appeal is available.	3 yrs. after final judgment of conviction	Conviction of crime	Court determines responsibility for payment, unless the defendant is indigent.
DC	Evidence not tested before because test was unavailable or reasonable probability of more probative result than prior test, or is new evidence that was not known or could not have been known by the defendant or could not be produced at the time of trial. Reasonable probability that testing will produce non-cumulative evidence that would help to establish actual innocence.	None	Convicted or adjudicated delinquent for crime of violence	Prosecution must preserve biological material upon notice of application. Defendant pays for test, unless indigent.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
FL	Defendants sentenced after trial: reasonable probability of acquittal or lesser sentence if DNA evidence had been admitted at trial; no prior DNA test or results were inconclusive and subsequent testing techniques would likely produce definitive result; identity is genuinely disputed. Defendants sentenced after guilty or nolo plea: must also show that facts underlying the petition were unknown to defendant at the time of the plea and could not have been ascertained by due diligence or the physical evidence was not disclosed to defense by state prior to entry of plea.	None	Sentenced for felony	Unless indigent, defendant pays for test. Test done by Dep't of Law Enforcement or its designee. Gov't must preserve the evidence requested by the petition.
GA	Evidence not tested because defendant not aware of it prior to trial or technology unavailable; ID was/should have been a significant issue; if previously tested, test reasonably more discriminating for ID; test has scientific validity; evidence material to ID; test results would have raised reasonable probability of acquittal; motion not filed solely for delay or duplicative of a prior application.	30 days from entry of judgment	Convicted of serious violent felony	Upon motion, court orders state to preserve evidence containing biological material during pendency; ct. picks method of testing, who pays, orders Ga. Bureau of Investigation to test or other lab
HI	Reasonable probability that defendant would not have been prosecuted or convicted on favorable test results, even if the defendant later pled guilty or no contest; identity was at or should have been at issue; evidence was not tested before or prior test did not resolve issue that new analysis can; application is not filed solely for delay; reasonable probability that sentence or verdict would be more lenient. Successive motion must raise a new ground for relief, but court may hear a successive petition if interests of justice so require.	None	Convicted of and sentenced for a crime or acquitted on grounds of mental or physical disease	If motion is to be heard, court orders preservation of evidence that could be tested for DNA to be preserved pending outcome of proceeding. Tested at independent lab that must meet federal standards; ct. selects lab if parties cannot agree. Court can order the defendant, DNA registry special fund or both to pay, but DNA registry special fund pays for mandated tests.
ID	Identity was at issue; testing can produce new, noncumulative evidence of likely innocence. If material was not tested, technology for testing was not available at time of trial.	One year after conviction	Convicted of a crime	Defendant pays, unless indigent, then test paid for and conducted by state police forensic services.
IL	Material was not tested or a can be tested by a method not available at the time of trial that provides a reasonable likelihood of more probative results; identity was at issue; testing can produce new, noncumulative evidence materially relevant to innocence; scientific method is generally accepted within science community.		Convicted of a crime	

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
IN	Evidence is material to identity; sample was not tested before or the test is reasonably more discriminating or has a reasonable probability of contradicting prior test results; reasonably probable that defendant would not have been prosecuted or convicted or would have received a less severe sentence if exculpatory results had been obtained.		Convicted and sentenced for murder or felony of Class A, B, or C	Court orders method and responsibility for payment. Court determines the testing procedures and selects lab that must meet nationally recognized quality assurance and proficiency testing standards applicable to forensic DNA analysis. Upon filing, court directed to order preservation of evidence pending outcome.
IA	Identity was significant issue; reasonable probability that defendant would not have been convicted if DNA profile had been available at time of conviction. The evidence must be material and not merely cumulative to that in the trial record.		Convicted of felony	Test method within guidelines generally accepted within scientific community. Defendant pays all costs, including cost of appointed attorney, if culpability is conclusively determined.
KS	Testing may produce noncumulative, exculpatory evidence relevant to claim of wrongful conviction or sentence; material was not tested or new testing techniques provide a reasonable likelihood of more accurate and probative results.	None	In custody after conviction for murder or rape	If defendant is not indigent, court may make state or defendant pay; upon notice of filing. Prosecutor must secure remaining biological material pending outcome.
KY	Court directed to order testing if reasonable probability that defendant would not have been prosecuted or convicted if exculpated by testing and evidence was not tested before or requested test can resolve issue unresolved by prior test. Court may order testing if defendant would have received a more favorable verdict or lesser sentence if testing result had been available at trial and evidence was not tested before or requested test can resolve issue unresolved by prior test.	None	Convicted of and sentenced to death for capital offense	Court orders state to preserve all evidence in the state's possession or control that can be tested pending the outcome. Court can order payment for testing. Defendant pays if outcome will only lessen sentence or improve verdict.
LA	Articulable doubt based on competent evidence, whether or not introduced at trial, as to guilt; reasonable likelihood that the testing will establish innocence. Relief not granted solely because there is evidence available for testing but testing was not available or was not done at time of the conviction.	Aug. 31, 2014; thereafter either 1 or 2 yrs. after final judgment	Convicted of felony	Lab mutually agreed to by both parties; if disagree, ct. designates lab accredited by ASCLD/LAB. Application bars destruction until final resolution by court. DNA profile sent to state police for inclusion in the state's database; defendant may seek removal. Special fund for indigent testing.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
ME	<i>Prima facie</i> evidence that the evidence was not previously tested or can be tested by a technology that was unavailable at time of conviction; identity was at issue; evidence or additional information obtainable through new technology is material to the defendant's guilt.	2 yrs. after conviction or availability of new technology	Convicted and sentenced for crime with potential imprisonment of at least 1 yr. and in prison, on parole or under a sentencing alternative	Court orders preservation of evidence pending proceeding. State police crime lab pays for test of indigent defendant.
MD	Reasonable probability that testing may scientifically produce exculpatory or mitigating evidence relevant to claim of wrongful conviction or sentencing; test method is generally accepted within the scientific community.		Convicted of murder, manslaughter, rape, or sex offense	If parties cannot agree on lab, ct. may approve any lab accredited by ASCLD/LAB or Nat'l Forensic Science Technology Center (NFSTC). If results favor defendant, state pays; otherwise, defendant pays. (Procedures for preservation & disposition of evidence included.)
MI	Prima facie proof that evidence is material to identity; clear and convincing evidence that the material was not tested before or can be tested by technology that was unavailable when convicted and identity was at issue.	By Jan. 1, 2012 if convicted of felony before Jan. 8, 2001 and in prison; if convicted after that date, no time limit	Convicted of a felony	Court approves lab. State pays for test of indigent defendant.
MN	Evidence not tested because technology was unavailable or testing was not available as evidence; identity was at issue; testing can scientifically produce new, noncumulative evidence materially relevant to actual innocence; scientific method is generally accepted within the scientific community.	2 yrs. after final conviction or sentence (with exceptions)	Convicted of a crime	Governmental entities must retain any biological evidence relating to the identity of a convicted defendant until end of sentence unless court approves earlier disposition.
MS	Biological evidence not tested or reasonable likelihood that additional testing will yield a more probative result; testing will show reasonable probability that defendant would not have been convicted or would have received lesser sentence if favorable results were obtained at time of prosecution. Grounds apply despite plea of guilty or nolo, confession to crime or admission of guilt.	While serving eligible penalty; only first five yrs. of registration as sex offender	Sentenced by court of record to incarceration, civil commitment, parole, probation or registration as a sex offender	Tested by facility mutually agreed upon and approved by the court or designated by the court if parties cannot agree. State pays for test by state or county crime lab if defendant is indigent. Court can order either state or defendant to pay for test at private lab.
MO	Evidence was not tested previously because technology was not reasonably available to defendant at time of trial; defendant was not aware of evidence at time of trial or evidence was otherwise unavailable; identity was at issue in the trial; reasonable probability that defendant would not have been convicted if exculpatory test results had been obtained.	End of custody	In custody of dep't of corrections for a crime	Tested by facility mutually agreed upon and approved by the court; or designated by the court if parties cannot agree.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
MT	Identity was or should have been at issue; prima facie case that evidence is material to identity; evidence was not previously tested or results of another test would be reasonably more discriminating and probative or have reasonable probability of contradicting prior test results.	End of incarceration for a felony conviction	Convicted of felony	Tested by facility agreed upon by the parties & approved by the court; or designated by the court if parties cannot agree. State pays if defendant cannot afford test.
NE	Evidence was not previously tested or can be retested with more current techniques that provide reasonable likelihood of more accurate and probative results; testing was not effectively available at time of trial and can produce noncumulative, exculpatory evidence.	None	In custody pursuant to court judgment	Prosecution must assure preservation pending outcome of proceeding. Tested by lab that is accredited by ASCLD/LAB or NFSTC or by any other national accrediting body or public agency w/substantially equivalent or more comprehensive requirements; if indigent, state pays for test.
NV	Reasonable possibility that defendant would not have been prosecuted or convicted if exculpatory test results had been obtained; evidence was not tested before or method of analysis may resolve unresolved issue.		Convicted of crime and under death sentence	Court orders preservation of biological evidence during pendency of proceeding. Court selects lab operated by state or a political subdivision, when possible, that satisfy federal standards, Dep't. of Corrections pays for test.
NH	Clear and convincing evidence that: exculpatory results will constitute new, noncumulative evidence that will establish that defendant was misidentified as the perpetrator; evidence was not tested before or the technology was unavailable at time of trial; if tested before, requested test would be more discriminating and probative on identity issue and has a reasonable probability of contradicting prior test results; testing method is generally accepted within the scientific community; petition is timely and not unreasonably delayed.	None	In custody pursuant to judgment	Court identifies evidence to be tested and the technology to be used. If possible, state police forensic lab performs test; otherwise, court designates a lab accredited by the ASCLD/LAB unless parties agree on the lab. Defendant pays for the test, but state pays for indigent defendant.
NJ	Identity was significant issue; reasonable probability that favorable test result would constitute grounds for granting a new trial based upon newly discovered evidence; evidence was not tested before or requested test is reasonably more discriminating and probative of identity or has a reasonable probability of contradicting prior test results; testing method is generally accepted within the scientific community; application is not made solely for delay.	None	Serving term of imprisonment for a criminal conviction	Parties may agree on lab if accredited by ASCLD/LAB or a lab with certificate of compliance with federal standards from NFSTC; otherwise, State Police Forensic Sci. Lab performs test. Defendant pays for test.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
NM	Reasonable probability defendant would not have been convicted if exculpatory results were obtained before; was not tested before, or test was not type requested or was incorrectly interpreted; identity was at issue.		Convicted of a felony	Court orders preservation of evidence pending proceeding. Court orders who pays for test. Lab must meet minimum standards of national DNA index system.
NY	Reasonable probability that verdict would have been more favorable to defendant if results of requested test had been admitted at trial.	None		
NC	If material was not tested before, reasonable probability that verdict would have been more favorable if test had been conducted; if tested before, requested test is significantly more accurate and probative of identity or has a reasonable probability of contradicting prior test results.			State pays for test if defendant is indigent. Parties may agree on lab approved by the State Bureau of Investigation; if parties cannot agree, court designates the lab.
ND	Evidence not tested because technology for testing was not available or testing was not available as evidence at time of the trial; identity was at issue; testing has scientific potential to produce new, noncumulative evidence materially relevant to actual innocence; testing requested employs method generally accepted within the scientific community.	None	Convicted of crime	
OH	Evidence not tested at trial and exclusionary result would most likely have changed the outcome of the trial; testing was not generally accepted, testing results were not admissible or testing was not available at time of trial; test at trial was not definitive, and exclusionary result with the other evidence would have most likely changed the outcome of the trial; identity was at issue.	Posthumous applications aren't permitted	Convicted of a felony & sentenced to prison or death, paroled or on probation, under post-release control/released from prison and under community control sanction regarding that felony or sentenced to community control sanction; required to register for sexually or child-victim oriented offense; cannot have pled guilty or no contest	Court may order comparison of test results from an unidentified person other than defendant against CODIS. Court selects lab approved by attorney general. Test results are public record.
OK	Clear and convincing proof that no reasonable jury would have found defendant guilty beyond reasonable doubt in light of new evidence.	None	Indigent, and imprisoned for a felony. Indigent defense system determines the cases to test.	Must ask State Bureau of Investigation or city to test before using other professional services. Testing is paid for by Forensic Testing Revolving Fund.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
OR	<i>Prima facie</i> showing that exculpatory test result would, establish actual innocence or mandatory reduction in sentence; reasonable possibility of exculpatory results; motion timely and not filed for delay; identity was at issue (or should've been at issue if mentally retarded)		Convicted and incarcerated for aggravated murder or person felony in Dep't of Corrections inst.; not in custody but convicted of aggravated murder, murder or sex crime	Dep't of State Police tests unless parties agree otherwise. Defendant pays for test unless defendant is indigent.
PA	Exculpatory result would establish <i>prima facie</i> case of actual innocence of offense or of conduct that would require vacation of death sentence or would establish a mitigating circumstance; identity was at issue; if evidence discovered prior to conviction but not tested because technology was available or if verdict was rendered before 1995 and testing was not sought, or testing was requested and defendant sought funds for testing for indigent defendant, but funds were denied despite indigency; exculpatory results would establish actual innocence; motion timely and not made for delay.	1 yr. post-final judgment if state interfered with claim or facts are newly discovered. 60 days if claim is based on constitutional right newly recognized and applied retroactively.	Convicted of criminal offense and serving term of imprisonment or awaiting execution.	Tested by facility mutually agreed upon and approved by the court; or designated by the court if parties cannot agree, but if defendant is indigent, State Police tests or selects lab. State pays for test of indigent defendant., State and court directed to take steps reasonably necessary to preserve biological material pending completion of proceedings.
RI	Testing required on reasonable probability that defendant would not have been prosecuted or convicted if exculpatory test results had been obtained; evidence was not tested before or requested testing can resolve unresolved issue; petition not filed solely for delay. Testing authorized on reasonable probability that testing results would have altered the verdict or reduced the sentence if they had been available; petition not filed solely for delay.	None	Convicted, sentenced, and serving actual term of imprisonment and incarceration for crime	State pays costs unless defendant has present ability to pay. Dep't of Health performs test unless good cause is shown.
SC	Evidence is material to identity; exculpatory result would be new evidence that will probably change the result of the conviction if a new trial is granted and is not merely cumulative or impeaching; evidence was not tested before or requested test will be substantially more probative; application is not filed solely for delay.	During incarceration (if pled not guilty); during incarceration but within 7 yrs. from sentencing if pled guilty or nolo contendere	Convicted of any of 24 specified offenses	State pays for test if defendant is indigent.
SD	Evidence was not tested before and defendant did not validly waive right to test or knowingly fail to request in prior petition for relief, or requested test uses method that is substantially more probative; defendant had good cause for failure to test at trial; test is reasonable in scope and uses sound and accepted methods; defendant identifies defense consistent with affirmative defense presented at trial or would establish actual innocence; identity was at issue at trial.	End of sentence	Convicted of felony and sentenced to imprisonment or death	Prosecutors must preserve evidence in their custody pending completion of proceedings. Div. of Crim. Investigation performs test, unless court orders testing by another qualified lab.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
TN	Mandatory testing on reasonable probability that defendant would not have been prosecuted or convicted if exculpatory test results had been obtained. Discretionary testing on reasonable probability that the verdict or sentence would have been more favorable if results had been available before. Evidence not tested or was not tested under requested method that can resolve unresolved issue from prior analysis; petition not filed to delay.	None	Convicted of and sentenced for murder, rape, their attempts and any other offense as the court directs	Court may order defendant to pay if testing is ordered to reduce verdict or sentence. If payment is made by state, it is funded from appropriations for indigent defense. Evidence must be preserved pending the proceeding. Court selects lab that meet federal standards.
TX	Evidence not tested before because test was unavailable or not technologically capable of providing probative results or testing was not done through no fault of the defendant for reasons such that interests of justice demand testing; if tested before, reasonable probability of more accurate and probative result than prior test; preponderance of evidence that defendant would not have been convicted if exculpatory test results had been obtained; identity was at issue (even upon guilty or nolo contendere plea or an admission). Application is not filed to unreasonably delay.		Convicted of a crime	Except for good cause, state does not pay for test if tested by an accredited lab of the defendant's choosing (rather than by Dep't of Pub. Safety or a lab under contract with DPS).
UT	Preponderance that person is eligible for relief; theory of defense not inconsistent with those asserted at trial; evidence was not tested previously or new test can resolve unresolved issue; proposed testing is generally accepted as valid or is otherwise admissible and can produce new, noncumulative evidence of factual innocence. Relief denied if testing was available at time of trial and defendant did not request testing or present DNA evidence for tactical reasons.	None	Convicted of felony	By getting test, person waives statute of limitations in all jurisdictions to any felony offense identified by database comparison. State Crime Lab performs test unless it has a conflict or lacks capability. If defendant is in prison and indigent, state pays for test; court can order defendant to pay costs if results are unfavorable. Unfavorable (but not inconclusive) result is reported to Board of Pardons and Parole.
VT	Reasonable probability that defendant would not have been convicted or would have received lesser sentence if results of requested testing had been available at original prosecution; evidence was not tested before or was tested but additional test is reasonably likely to be significantly more probative. Test results can establish integrity of the evidence. Relief denied if record conclusively establishes that defendant is entitled to no relief or petition was not made to demonstrate innocence or appropriateness of lesser sentence and will unreasonably delay proceedings.	14 felonies: None. Other felonies: within 30 mos. after final conviction. May be extended for good cause or by consent of parties	Convicted of felony	Tested by facility agreed upon by the parties and approved by the court; or designated by the court if parties cannot agree. State pays for testing by the state crime lab or at a private lab if state lab lacks capability to perform the test, otherwise court can order either or both parties to pay for test by private lab.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
VA	Clear and convincing proof that: evidence was not known when conviction became final or was not tested because testing was unavailable at Dep't of Forensic Sci.; testing is materially relevant, noncumulative, necessary, and may prove actual innocence; testing involves scientific method employed by DFS; defendant has not unreasonably delayed filing the petition after evidence or test became available at DFS.	None	Convicted of felony	Dep't of Forensic Sci. performs test.
WA	Preponderance of evidence that evidence would demonstrate innocence; court ruling that testing did not meet acceptable scientific standards or testing technology of prior test was not sufficiently developed or requested testing would be significantly more accurate than prior testing or would provide significant new information; DNA evidence is material to identity of perpetrator or accomplice or to sentence enhancement.	None	Convicted of felony and serving term of imprisonment	Court may order preservation of evidence. State patrol crime lab performs test.
WV	Identity was or should have been significant issue; <i>prima facie</i> showing that evidence for testing is material to identity, crime, special circumstance, or sentence enhancement; testing results would raise reasonable probability that convicted person's verdict or sentence would have been more favorable had results had been available at time of conviction; evidence was not previously tested, or was tested previously, but requested DNA test is reasonably more discriminating and probative of identity or has reasonable probability of contradicting prior test results; testing method is generally accepted within scientific community; evidence or requested method of testing were unavailable to defendant at trial or court found ineffective assistance of counsel at trial; motion not made solely for delay. Test results can establish integrity of the evidence. Right to testing is not waivable.	None	Convicted of felony and serving term of imprisonment	Test performed by forensic lab in state. If testing requested by state or if defendant is indigent, state pays for the test
WI	Claim of innocence; no prior test or if tested, requested test uses scientific technique that was unavailable or was not used at time of prior testing and provides reasonable likelihood of more accurate and probative results. Mandatory testing on showing of reasonable probability that defendant would not have been found to have committed the crime. Discretionary testing on showing that outcome of the proceedings would have been more favorable, had exculpatory test results been available.	None	Convicted of crime, adjudicated delinquent or found not guilty by reason of mental disease or defect	Upon receipt of motion, prosecutor must ensure that the biological material is preserved pending completion of proceedings. Court may order state crime labs to test or send the material elsewhere. State lab may delegate testing to another facility upon approval of prosecutor and defendant. Court may order defendant or state crime labs to pay for testing, unless defendant is indigent.

Juris.	Proof required for testing	Time limitation	Eligibility	Testing procedure
WY	<i>Prima facie</i> showing that evidence is material to identity, crime, sentence enhancement or aggravating factor in capital case; test employs scientific method sufficiently reliable to be admissible; defense theory can be presented consistent with that asserted at trial and supported by the DNA evidence; evidence was not tested before or test result was inconclusive, new test can resolve unresolved issue or is significantly more accurate and probative; testing can produce new, noncumulative evidence that will establish actual innocence, or in capital case, actual innocence of aggravating circumstance, or mitigating circumstance. For guilty or nolo contendere plea cases from Jan. 1, 2000, relief is denied if the defendant did not request testing or present DNA evidence for strategic or tactical reasons or as result of a lack of due diligence, unless failure to exercise due diligence is result of ineffective assistance of counsel. (For convictions before 2000, showing of due diligence is not required.). Right to testing is not waivable.		Convicted of felony	Upon filing of motion, court directed to order state to preserve evidence pending outcome. State crime lab tests unless it has a conflict of interest or lacks capability; if another lab tests, it must comply with federal standards and be accredited by ASCLD/LAB. Defendant pays for test unless he is imprisoned, needy, and the testing supports the motion.
US	Claim of actual innocence; evidence was admitted at federal death sentencing hearing and exoneration would entitle defendant to a reduced sentence or new sentencing hearing; for state conviction, no adequate remedy under state law to permit testing and defendant has exhausted all remedies under state law; evidence was not previously tested and defendant did not validly waive right to testing or knowingly fail to request testing, or evidence was tested but requested test uses new, substantially more probative method; requested test is reasonable in scope and uses sound and accepted forensic practice; theory of defense is identified that is not inconsistent with affirmative defense presented at trial and would establish actual innocence; identity was at issue at trial. Testing may produce new material evidence that would support the theory of defense and raise reasonable probability that the defendant did not commit the offense; motion is timely. Relief denied if motion has same factual basis as previously denied motion or clear and convincing evidence that motion is filed solely to delay or harass.	36 mos. after conviction (with exceptions)	Under sentence of imprisonment or death pursuant to conviction for federal offense	Court required to direct government to preserve specific evidence relating to motion and direct FBI or another qualified lab to perform test. Gov't pays for test of indigent defendant.

Jurisdictions with Statutes Requiring Preservation of Evidence

JURISDICTIONS WITH STATUTES REQUIRING PRESERVATION OF EVIDENCE

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
AK	Homicide, some 1 st degree sex offenses (biological if convicted)	Obtained in investigation or prosecution (only prosecution if convicted)	Shorter of time to solve or 50 yrs.; if convicted, while in custody of Dep't of Corrections or registered as a sex offender	Don't need to preserve if physical character makes it impractical; yes, w/notice to convict, attorney of record, public defender agency, district attorney, no other law requires preservation & it doesn't have significant value for biological material	Dep't of Law, Dep't of Pub. Safety, court system or municipal law enforcement agency	Appropriate remedies ordered by court
AZ	Felony sex offense or homicide (all identified biological evidence)	Secured in connection with a crime	Incarceration or completion of supervised release (55 yrs. for cold case)	Bulk evidence; w/approval from county attorney or attorney general & notice to victim; yes, w/agreement of county attorney or AG after direct appeal & 1 st post conviction relief w/written notice to defendant, counsel of record & victim if no other law requires preservation	Appropriate governmental entity	None
AR	Sex or violent offense (physical evidence)	Conviction after trial	Permanent for violence, 25 yrs. for sex & 7 yrs. for felony collecting genetic profile	Yes, w/notice if no forensic value & must be returned to owner or is too big (also allowed if defendant preserves)	Law enforcement agency	Class A misdemeanor
CA	Crime (biological material) Att'y Gen. opinion exempts misdemeanor	When jailed	Incarceration	Yes, w/unwaivable (even as part of plea deal) notice to incarcerated felon, counsel of record, public defender, dist. att'y & Att'y Gen.	Appropriate governmental entity	None
CO	Class 1 felony or sex offense w/possible indeterminate sentence (reasonable & relevant evidence that may contain DNA)	Collected in relation to conviction (if no charges, collected for investigation during statute of limitations)	Life of defendant	Only need to save part if too big; yes, w/notice to district attorney & defendant's attorney of record	Accredited lab in Colo. or law enforcement agency that collected evidence	
CT	Capital felony, crime (biological evidence)	Conviction or court order	Incarceration	Yes, w/notice & hearing if Sup. Ct. decided appeal & defendant doesn't want it preserved or for good cause	Police, their agents & any person to whom biological evidence was transferred	None

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
DC	Crime of violence (biological material)	Conviction or adjudication as a delinquent	Longer of 5 yrs. or while in custody	Yes, after 5 yrs. if notice given to anyone still incarcerated & counsel of record or Pub. Defender Serv. (if it must be returned to owner, no need to preserve; if too big, keep enough to test)	Law enforcement agencies	Fine of \$100,000, jail up to 5 yrs. or both
FL	Crime for which post-sentencing DNA test may be requested (physical evidence)	Collection	Non-death penalty: term of sentence expired & no other rule or law requires retention; death penalty: 60 days after execution	No	Governmental entities in possession	None
GA	Crime (physical evidence that contains biological material)	Collection	Death penalty: execution; serious violent felony & sex offenses: 10 yrs. after judgment; other felonies & misdemeanors: purge after trial	No, but direct biological evidence for drug & alcohol testing doesn't need preserved	Governmental entities in possession	None
HI	Any conviction (biological evidence that can be tested for DNA)	Conviction (attorney general must establish procedures & protocols to uniformly collect & preserve)	Later of exhausted appeals or completed sentence including parole & probation		Police, prosecutor, lab or court	None
IL	Sex, homicide & their attempts (physical evidence likely to be forensic)	Chain of custody (documents must be kept along w/evidence). Before or after trial in sex offenses; in prosecutions for homicides or attempts	Death: always; otherwise--complete sentence including supervised release or 7 yrs. for felony collecting genetic profile	Yes, w/notice if no forensic value, is too big or defendant died & no reasonable basis to save it; also if ct. orders & defendant preserves it	Law enforcement agency, its agent or clerk of cir. ct.	None
IA	Criminal actions (DNA samples & evidence that could be tested for DNA)		3 yrs. beyond limitations for commencement of criminal action		Criminal or juvenile justice agency	Doesn't create cause of action for damages or presumption of spoliation if evidence is unavailable to test

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
KY	Criminal case (any biological material)	When gathered	Incarceration	Pretrial: if prosecutor won't try defendant & moves to destroy & adversarial hearing results in court authorization; Post trial: DNA evidence was tested for trial & defendant was convicted, DNA wasn't tested for trial but conviction & trial court orders after adversarial hearing, acquittal or dismissal post jeopardy & trial court orders after adversarial hearing (movant to destroy has burden)	Appropriate governmental entity	Class D felony
LA	Death sentence & felonies (up to certain dates) [evidence containing biological material w/DNA]	Service of application for post-conviction DNA test for convictions by 15 Aug. 2001; all death sentences by 15 Aug. 2001	Until execution; other felonies until 31 Aug. 2014		All law enforcement agencies & clerks of court (may forward to lab accredited in forensic DNA analysis by Am. Soc'y of Crime Lab Dirs./Lab Accreditation Bd.)	No liability unless willful or wanton misconduct or gross negligence
ME	Crimes allowing one to move post-judgment for DNA analysis (biological evidence)	Upon motion for post-conviction testing & when identified during investigation	Incarceration		Investigating law enforcement agency	Appropriate sanctions
MD	Murder, manslaughter, rape & sex (scientific id. evidence w/DNA material)	When secured	Time of sentence	Yes (unless required by other law or court order) w/notice to incarcerated person, attorney of record, Pub. Defender's office; hearing if objection finding no forensic value/too big (objector can preserve small sample)	State	None
MI	Felony (biological material)	When identified during investigation	Incarceration		Investigating law enforcement agency	None
MN	Crime (biological evidence)	Used to secure conviction	Expiration of sentence	Yes, w/notice (to defendant & counsel) & ct. authorization	All appropriate governmental entities	Appropriate sanctions for intentional destruction after postconviction motion for testing is filed

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
MS	Crime (biological evidence)	Possessed during investigation and prosecution	During custody of all co-defendants	Yes, if no other law requires preservation, w/notice to those in custody & their attorneys of record, MS Office of Indigent Appeals, dist. att'y & Att'y Gen.; if impractical to retain - portion to test for DNA must be retained	State	Appropriate sanctions & remedies
MO	Felony or sex offense (evidence that can be tested for DNA)	Conviction			Investigating law enforcement agency	None
MT	Felony (evidence believed to contain DNA material)	When obtained	At least 3 yrs. after conviction is final; longer if court orders	Yes, w/notice (state has burden by preponderance to dispose; based on interests of justice & integrity of system)	State	None
NE	Crime (biological material)	When secured	Incarceration (for alcohol concentration in blood, Dep't of Health & Human Services keeps for 2 yrs. unless requested to keep longer for pending action)	Yes, w/notice (unless another law or court order requires preservation)	State agencies & political subdivisions	None
NV	Conviction for category A or B felony (biological evidence)	Secured in connection with investigation or prosecution	Expiration of sentence	Bulk evidence that doesn't affect suitability of probative samples from it for testing	Agency of criminal justice	
NH	Crim. or delinquency investigation (biological material)	When obtained	Longer of 5 yrs. after conviction or while in custody	For custody longer than 5 yrs., yes (after 5 yrs.) w/notice	Investigating agency	None
NM	Crim. investigation or prosecution (evidence that could be tested for DNA)	When secured	Incarceration	Yes, if another law, regulation or court order doesn't require preservation, it must be returned to owner, it's too big & state preserves part to permit future testing	State	None

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
NC	Criminal investigation or prosecution (physical evidence reasonably likely to contain biological evidence)	When collected; court instructs when physical evidence is offered in criminal proceeding	Until execution (for death sentence); until death for life sans parole; homicide, sex offense, assault, kidnapping, burglary, robbery, arson: incarceration & mandated supervised release including sex offender registration (unless guilty plea, then 3 yrs. from conviction or release)	Yes, w/notice; has no significant value for biological analysis or it does but physical characteristic makes it too impractical to retain (part of evidence likely to contain biological evidence should still be retained)	Custodial agency	Appropriate remedy; felony
OH	Murder, manslaughter, vehicular homicide, rape, sexual battery, gross sexual imposition (biological evidence)	When secured for investigation or prosecution	Murder: while unsolved; the rest for 30 yrs., if unsolved; for conviction: later of incarceration, probation, parole, judicial or supervised release, post-controlled release, during civil litigation; registered sexually oriented offenders: later of 30 yrs. or incarceration or death	Yes, if no other law requires preservation, notice is given & nobody requests continued retention; only keep part if too impractical to retain	Governmental evidence-retention entity	None
OK	Violent felony (biological evidence)	Possession	Incarceration	Yes, w/notice (unless another law requires preservation)	Criminal justice agency	None
OR	Murder, manslaughter, homicide, sex crime (biological evidence)	Collection during investigation or possession preconviction	Act is repealed on Jan. 2, 2012	only keep part if too impractical to retain	Law enforcement agency or public body (excludes court)	None
PA ¹²¹⁰						
RI	Criminal investigation (biological evidence)	Possession	Incarceration	Yes, w/notice & hearing if Sup. Ct. decided appeal & defendant not seeking preservation	Police, their agents & any transferee	None

¹²¹⁰ Only statutorily requires evid. to be preserved when biological material remains in its possession & a motion for postconviction DNA testing is pending. 42 Pa.C.S. § 9543.1(b)(2).

Juris.	Specified offense	Trigger to preserve	Period to preserve	Early disposition	Preserver	Violations
SC	Conviction for killing, criminal sex conduct & other specified offenses (physical evidence & biological material)	Conviction	Incarceration; if plea was guilty or <i>nolo contendere</i> , then the earlier of release, execution or 7 yrs.	Yes w/notice, if material must be returned to rightful owner, is impracticable to retain or is otherwise required to be disposed of by law or DNA evidence was introduced at trial, was inculpatory & all appeals & post-conviction procedures are exhausted	Agency or political subdivision of the state & person ordered to take custody	Misdemeanor; no claim for damages sans gross negligence or misconduct
TX	Crime (evidence containing biological material)	Conviction	Capital felony: until death or parole; otherwise: until death, parole or completed sentence	Yes, w/notice	Att'y representing state, clerk or any other possessing officer	None (unless bad faith)
VA	Death sentence; non-death penalty felony conviction: upon motion & court order (human biological evidence)	Capital conviction; otherwise, motion	Execution; otherwise, 15 yrs. or greater w/court order	Yes, upon motion or for good cause shown	Div. of Forensic Sci. (if sentence reduced from death, original investigating law-enforcement agency)	Expressly none
WA	Felony (biological material that court specifies)	Sentencing upon motion	Court specifies	No		None
WI	Criminal conviction, delinquency adjudication or commitment as sexually violent person or not guilty verdict due to mental disease or defect (physical evidence w/biological material)	Conviction, delinquency adjudication or commitment	Discharge from custody	Yes, w/notice (unless another law requires preservation)	Possessing law enforcement agency, lab or submitting agency, ct. or dist. att'y	None
US	Offense (biological evidence)	Prison sentence	Prison sentence	Yes, if defendant's request to test for DNA was denied w/no appeal; defendant waives in court right to request test; conviction is final w/no direct review available & no motion after notice, it must be returned to owner or is too big & government saves part to test; it was already tested & no other law, regulation or court order requires preservation	Government	Fine, imprisonment up to 5 yrs. or both

Statutory Compensation

STATUTORY COMPENSATION

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
AL	Convicted of 1 or > felonies & served time in prison/incarcerated pretrial for felony for at least 2 yrs. through no fault of own w/charges dismissed for innocence	Conviction vacated/ reversed & accusatory instrument dismissed on grounds of innocence <i>or</i> accusatory instrument dismissed on ground consistent w/innocence	Division of Risk Management; 2 yrs.	\$50,000/yr. (pro rated for partial yr.) & supplemental amount if legislature enacts bill (contingent upon appropriation)	In prison for other crime; convicted of other acts along w/charge resultant in wrongful conviction; no prior award received; subsequent felony conviction forfeits unpaid award	Lump sum or installment; unpaid balance to estate; no offset for govt for expenses incurred in arrest, prosecution & imprisonment
CA	Convicted of felony & in state prison; pecuniary injury from erroneous conviction & imprisonment	Pardon for innocence or acquittal, discharge or release for innocence	Victim Compensation & Gov't Claims Board; 6 mos. after acquittal/pardon/discharge/release; & at least 4 mos. prior to next mtg. of legislature	\$100/day of incarceration post conviction	Contributed to arrest & conviction	Isn't treated as gross income
CT	Convicted of crime & served time in prison	Conviction vacated or reversed & the complaint/information dismissed on grounds of or consistent w/innocence; preponderance	Claims Commissioner; 2 yrs.	\$ & expenses of employment training & counseling, tuition & fees at state system of higher education & any services needed to ease reintegration		Immediate
DC	Unjustly convicted of & imprisoned for criminal offense	Reversed/set aside on ground not guilty or at new trial/rehearing found not guilty/pardoned on stated ground of innocence & unjust conviction; clear & convincing		Damages (but not punitive)	Own misconduct brought prosecution; plea of guilty (<i>Alford</i> pleas are ok)	

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
FL	Felony conviction & sentence have been vacated & original sentencing court issued order finding that the person neither committed the offense nor was an accomplice	Verifiable & substantial evidence of actual innocence; no further criminal proceedings will be initiated & no questions of fact remain as to the petitioner's wrongful incarceration; clear & convincing if prosecutor certifies; preponderance if prosecutor contests	For status of eligibility to sentencing ct. w/in 90 days after order vacating conviction & sentence becomes final; w/in 2 yrs. of this finding to Dep't of Legal Affairs	\$50,000/yr. (prorated & adjusted annually for inflation); max. \$2,000,000; fine, penalty, or court costs paid; reasonable attorney's fees & expenses for all proceedings & appeals; 120 hours of waived tuition & fees at community college or state university	Another felony conviction	Immediate administrative expunction of criminal record; in form of unassignable annuity for at least 10 yrs.
IL	Pardon on ground of innocence or certificate of innocence from Circuit Court	Conviction reversed/ vacated & dismissed/ acquitted at new trial/ not retried & dismissed/ statute unconstitutional; didn't bring about own conviction	Court of claims; later of 2 yrs. from prison discharge or from grant of pardon	Imprisonment: up to 5 yrs, max. of \$85,350; more than 5 yrs. up to 14 yrs, max. of \$170,000; more than 14 yrs, max. of \$199,150		Attorney's fees up to 25% of award; adjusted annually but can't increase more than 5% in any yr.
IA	Incarcerated up to 2 yrs. for aggravated misdemeanor or indeterminately for felony but conviction was vacated, dismissed or reversed & no further proceedings can or will be held	District court determines whether individual committed crime; clear & convincing	State appeal board or court; 2 yrs.	Fees & expenses incurred in civil actions for postconviction relief related to wrongful conviction; liquidated damages of \$50/day; lost wages, salary or other earned income as a result of conviction up to \$25,000/yr.	Guilty plea; imprisoned for other crime	Reasonable attorney fees w/this action; reasonable attorney fees & expenses for all criminal proceedings & appeals; an amount of restitution for fine, surcharge, other penalty, or court costs imposed & paid

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
LA	Imprisoned for conviction of crime, which was reversed or vacated	Clear & convincing; relevant evidence whether it was admissible in, or excluded from, the criminal trial	District court; 2 yrs.	\$15,000/yr. to max. of \$250,000; up to \$40,000 for job-skills training for 1/yr., medical & counseling services for 3 yrs., expenses for tuition & fees for up to 5 yrs. at any community college or public university including assistance to meet admission standards up to 10 yrs. after release; (if conviction involved willful misconduct by state actors, court findings are inadmissible in any judicial proceeding & may not form basis for any cause of action)	Concurrent sentence for another crime	Court may not deduct expenses incurred by state/ local government; compensation > \$100,000 may be paid over 5 yrs. via an unassignable annuity w/survivors' benefits
ME	Convicted of criminal offense; sentenced & incarcerated; pardon for innocence	Clear & convincing	Superior Court; 2 yrs.	Up to \$300,000	Governor's failure to issue a written finding that the person is innocent	Includes court costs & interest but may not include exemplary damages
MD	Convicted sentenced & confined under State law for crime; full pardon for error	Conclusive error	Board of Public Works	Actual damages; reasonable amount for financial/other appropriate counseling		Lump sum/ installments; only pardoned individual can be paid - can't pay anybody to collect the grant

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
MA	Felony conviction resultant in incarceration	Pardon for innocence; relief on grounds tending to establish innocence (vacated/ reversed & dismissed indictment/entry of <i>nolle prosequi</i> or acquitted at new trial & no criminal proceeding is/can be brought); clear & convincing	Superior Court; 2 yrs. (which can be extended by 1 yr.)	Up to \$500,000; tuition & fees reduced by ½ at any state or community college; services necessary for physical & emotional condition	Guilty plea (unless w/drawn/vacated/nullified on basis other than deficiency in plea warnings); sentenced to < 1 yr.; incarcerated for other conviction; revoked pardon	Lump sum or annuity; no offset for expenses incurred for custody or reduced tuition & fees; expunged/sealed records
MS	Imprisoned for felony	Documentary; pardon for innocence or on grounds not inconsistent w/innocence, conviction was vacated w/accusatory instrument dismissed or <i>not proseed</i> or new trial & acquittal	Circuit court of county in which claimant was convicted; 3yrs.	\$50,000/yr. up to \$500,000 total (preindictment detention doesn't count)	Intentional waiver of appellate or other post-conviction remedy to benefit by this law; suborned or committed perjury, or fabricated evidence to bring about own conviction	Untaxed; unpaid balance to estate; reasonable attorney fees: 10% for prepping & filing claim, 20% if contested by Attorney General; 25% if appealed; plus expenses; fees not offset; counsel may not receive add'l payment
MO	Guilty of felony; appeals of final order of release exhausted	DNA profiling analysis	Sentencing court	\$50/day of postconviction incarceration; limited to \$36,500/fiscal yr. & no interest	Serving concurrent sentence for other crime (unless it is revoked parole for this exonerated crime)	If appropriation inadequate, payments <i>pro rated</i> yrly. until paid in full; no charges for cost of care; unassignable & payments cease upon death; automatic expungement
MT	Convicted of felony & incarcerated in state prison	Court overturned conviction due to postconviction forensic DNA testing	Dep't of Corrections; 10 yrs.	Lesser of 5 yrs. of educational aid or completion of degree; includes meeting admission standards	Unsatisfactory progress in program	

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
NE	Convicted of felony, sentenced & served at least part of term	Pardoned or court vacated conviction or reversed & remanded for new trial & no subsequent conviction was obtained; innocent of crime; clear & convincing	State Claims Bd.; 2yrs.	Up to \$500,000/claimant per occurrence	No payment for period imprisoned concurrently for unrelated crime; committed/ suborned perjury, fabricated evidence, made false statements causing conviction (unless law enforcement coerced false guilty plea, confession, or admission)	Unassignable & extinguished at death; no offset for costs of imprisonment, value of any care/ education in prison; lien for costs of defense services extinguished; reasonable value of services treated as advance against award
NH	Unjustly served in state prison		Dep't of Corrections & Sec'y of State; 3 yrs.	Up to \$20,000		Attorney fees must be approved by board of claims; simple interest rate at prevailing discount rate on 26-week U.S. Treasury bills + 2% rounded to nearest 10 th
NJ	Convicted & subsequently imprisoned for crime which he didn't commit	Clear & convincing	Super. Ct.; 2 yrs.	Greater of twice the amount of claimant's income in yr. prior to incarceration or \$20,000/yr. of incarceration	Own conduct brought about conviction; serving term of imprisonment for another crime	Also entitled to receive reasonable attorney fees
NY	Unjustly convicted of felony or misdemeanor & imprisoned	Pardoned as innocent or conviction reversed/ vacated & dismissed/ if new trial ordered, acquitted/ not retried & dismissed; clear & convincing	Court of claims; 2 yrs.	Fair & reasonable compensation	Own conduct brought about conviction	

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
NC	Convicted of felony & imprisoned in State prison	Pardon for innocence	Indus. Comm'n; 5 yrs.	\$50,000/yr. prorated for partial yr.; max. of \$750,000; job skills training for at least 1 yr. thru. a State program; 5 yrs. of tuition & fees at public community college or university (used w/in 10 yrs.); assistance in meeting admission standards	Concurrent sentence for conviction of another, unpardoned crime	Includes pretrial imprisonment
OH	Found guilty of but didn't plead guilty to felony & sentenced to imprisonment in state correctional institution	Certified copy of determination of court of common pleas of wrongful imprisonment; conviction was vacated/ dismissed/ reversed on appeal, prosecution can/will not seek further appeal; upon leave of court & no criminal proceeding is pending, can or will be brought for any act associated w/that conviction; court determines the offense wasn't committed by this person	Ct. of claims; 2 yrs.	\$40,330/yr. or adjusted amount determined annually by state auditor ; <i>pro-rated</i> ; loss of wages, salary or other earned income; cost of debts recovered while in custody or under supervision		Right to counsel of own choice; amt. of fine or court costs; reasonable atty. fees & other expenses incurred in proceedings & appeals, discharge from & during confinement; ½ of amt. receivable awarded as preliminary judgment w/in 60 days of determination of wrongful conviction

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
OK	Wrongful felony conviction resultant in imprisonment	Full pardon on written basis of actual innocence/ judicial relief – order states clear & convincing basis of actual innocence; vacated/dismissed or reversed & no more proceedings can or will be held	State or political subdivision: 1 yr. of pardon or judicial relief	Up to \$175,000	Guilty plea; concurrent sentence for other crime	If state agency pays, can pay the following fiscal yr. or pay out over 3 fiscal yrs.; uninsured or underinsured municipalities pay out over 10 yrs. w/interest
TN	Exonerated by governor after exhausting all judicial appeals	Governor finds person didn't commit the crime	Board of claims; 1 yr.	Maximum aggregate total of \$1,000,000		Monthly installments, (lump sum if special needs); payments continue to surviving spouse & minor kids; state can subrogate against those intentionally causing conviction
TX	Served sentence in prison	Full pardon for innocence; granted relief for actual innocence	Comptroller; 3 yrs. for payment; 7 yrs. for tuition up to 120 credit hours	\$80,000/yr. in prison; \$25,000 per yr. on parole/ registered as sex offender; max. \$10,000 for living expenses at discharge (offset); accrued child support arrears; services for reentry/reintegration; help with medical, dental, MH treatment & support services	Concurrent for another crime; subsequent conviction for felony terminates compensation;	Paid in monthly installments for life at 5% annual interest; annuity payment is unassignable; annuity payments terminate at death & remaining payments don't pass to estate

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
UT	Court finds petitioner factually innocent of felony offense & petitioner served period of incarceration; lawfully in this country during incident giving rise to conviction	If there is biological evidence, petitioner must seek DNA testing; clear & convincing; newly, discovered material evidence; court may consider hearsay & evidence that was or would be suppressed	Dist. ct. in county in which person was convicted	Average annual nonagricultural payroll wage in state; up to 15 yrs.	Engaged in conduct relating to any lesser included offenses/committed any other felony arising out of the facts supporting the conviction; payments are tolled during incarceration for subsequent conviction of felony & resume upon release	Not subject to state taxes; no offset for expenses incurred by state; court orders expungement; initially paid greater of 20% of total or amount equal to 2 yrs. of incarceration, remainder paid quarterly (in full w/in 10 yrs.; incarceration due to separate & lawful conviction reduces payment
VT	Exonerated after conviction & imprisonment; conviction reversed/vacated, information/indictment was dismissed/acquitted after subsequent trial/pardoned	Postconviction DNA testing; preponderance	Washington Cnty. Super. Ct. (claim can be settled by Att'y Gen.); 3 yrs.	\$30,000-60,000/yr.; economic damages; up to 10 yrs. of eligibility for Vt. Health Access Plan using state-only funds: reasonable reintegrative services & mental & physical health care costs incurred by claimant for period between release & date of the award	Fabricated evidence or committed or suborned perjury during any proceedings related to the crime; yrs. during which claimant was incarcerated for other sentence	Reasonable attorney fees & costs for the action to get compensation, award isn't subject any state taxes (except for the attorney fees) & aren't offset

Juris.	Eligibility	Evidence of innocence/standard of proof	Application submitted to/deadline	Amounts receivable	Disqualification	Payment
VA	Claimant must be alive; wrongfully incarcerated for conviction of felony, person pled not guilty, or regardless of plea, was sentenced to death or convicted of a Class 1 or 2 felony or any felony w/maximum penalty of life imprisonment	Felony vacated via writ of actual innocence	Compensation must be approved by Gen. Assem.	90% of VA <i>per capita</i> personal income/yr. up to 20 yrs.; transition assistance grant of \$15,000 (deducted from award); up to \$10,000 for tuition for career & technical training w/in VA community college system upon successful completion	Intentionally contributed to own conviction; subsequent conviction immediately forfeits unpaid amounts	Initial lump sum of 20% of award; remainder paid monthly via annuity for 25 yrs. beginning no later than 1 yr. after appropriation; annuity can't be sold or used as security - contain beneficiary provisions
WV	Arrested or imprisoned for felony or convicted & imprisoned for felony or misdemeanor that he didn't commit	For arrest or imprisonment: documentary evidence another was convicted of same crime & charges dismissed; for conviction & imprisonment: pardoned on ground of innocence; conviction reversed/ vacated & dismissed; acquitted at new trial/ not retried & dismissed/ statute is unconstitutional	Ct. of claims; 2 yrs.	Fair & reasonable	Own conduct caused or brought about conviction; committed acts charged	
WI	Imprisoned as result of criminal conviction & released after Mar. 13, 1980	Clear & convincing evidence that petitioner was innocent	Claims bd.		Contributed to bring about own conviction & imprisonment	
US	Conviction reversed/ set aside because not guilty/ found not guilty at new trial/rehearing or pardoned on stated ground of innocence & unjust conviction	Certificate of the court or pardon w/requisite recitals; for pardon, applicant must have exhausted all recourse to courts & time for court jurisdiction expired	Ct. of Fed. Claims	Up to \$100,000/yr. for those sentenced to death; otherwise, up to \$50,000/yr.	Committed charged acts; own misconduct or neglect caused prosecution	

Jurisdictions with Reform Commissions

JURISDICTIONS WITH REFORM COMMISSIONS

Juris.	Name	Type of cases reviewed	To examine	To propose	Appointed by	Funding source	Status
CA	Commission on the Fair Administration of Justice	Process resultant in wrongful convictions or executions of innocent people	Safeguards & improvements of criminal justice system	Just, fair & accurate administration of criminal justice	S. Comm. on Rules	Uncompensated but reimbursed for travel expense by private funding	Finished 2007
CT	Advisory Commission	Criminal or juvenile case involving wrongful conviction	Causes of wrongful conviction	Reforms to lessen likelihood of a similar wrongful conviction	Chief Ct. administrator		Convenes for an exoneration
FL	Innocence Commission	Officially acknowledged wrongful convictions (proven innocent)	Causes of wrongful conviction	Recommendations to prevent conviction of innocent; reform to address source of errors	Chief Justice of Supreme Court	Appropriation, grant; uncompensated but reimbursed for <i>per diem</i> & travel expense	Final rep. due June 30, 2012
IL	Justice Study Committee	Wrongful non-capital felony convictions resulting from DNA test, pardons for actual innocence, dismissals or acquittals from retrials on judicial relief	Any other relevant material; most common causes of wrongful non-capital felony convictions; laws, rules & procedures; solutions; reforms; cost of wrongful convictions	Procedure to address factual innocence claims prior to appellate review	Governor, legislature, state's attorneys & public defenders		Rep. due by end of 2010
NY	Justice Task Force	Wrongful convictions	Police procedures, court rules & other issues	Look at ways to minimize wrongful convictions	Chief judge of court of appeals		Permanent
NC	Innocence Inquiry Commission	Cases	Claims of factual innocence by living convicts	Investigate & determine credible claims of factual innocence	Chief Justice of Supreme Court & Chief Judge of Court of Appeals	Appropriation, grants, private gifts, donations, or bequests (unsalaried commissioners get necessary subsistence & travel expenses)	Permanent; annual report to J. Legis. Corrections, Crime Control, & Juvenile Just. Oversight Comm. & the State Judicial Council

Juris.	Name	Type of cases reviewed	To examine	To propose	Appointed by	Funding source	Status
PA	Joint State Government Commission Advisory Committee on wrongful convictions	Cases in which an innocent person was wrongfully convicted & exonerated, any other relevant materials	Underlying causes of wrongful convictions; laws, rules & procedures implicated in each type of causation; implementation plans	Solutions for elimination of each type of causation of wrongful convictions	J. State Gov't Comm'n	Appropriation	Temporary; report to the Senate Sept. 2011
TX	Timothy Cole Advisory panel ¹²¹¹ on wrongful convictions	Causes of wrongful convictions	Procedures & programs to prevent future wrongful convictions; effects of state law on wrongful convictions	Whether creation of innocence commission to investigate wrongful convictions would be appropriate	Task force on Indigent Defense director, legislators, judge, one representative each of governor, public law schools, defense & prosecution counsel associations	It is assisting Task Force on Indigent Defense so that it is probably budgeted by the task force which is part of Texas Judicial Council budget	Rep. due not later than Jan. 1, 2011
VT		Fed. & state models and develop	Current statewide policies <u>re</u> eyewitness ID procedures & recording custodial interrogations; whether statewide policies should be adopted; current policies in local jurisdictions <u>re</u> eyewitness ID procedures & recording custodial interrogations; whether policies are consistent	Best practices for recording custodial interrogations of suspects during felony investigations & eyewitness ID	Police, executive, defense, prosecution, judicial & bar interests	Dep't of Pub. Safety provides professional & admin. support	Reported findings/ recommendations & ceased to exist in Dec. 2007

¹²¹¹ Separately, the Tex. Crim. Just. Integrity Unit, an *ad hoc* committee created by Judge Barbara Hervey of the Ct. of Crim. Appeals, is to review the strengths and weaknesses of the Tex.crim. just. sys. and to bring about meaningful reform through educ., training and legis. recommendations.

Juris.	Name	Type of cases reviewed	To examine	To propose	Appointed by	Funding source	Status
WI	Criminal Justice Reforms Task Force	Cases of exoneration	Recording police interrogations, eyewitness ID procedures, priority of DNA testing & preservation of biological evidence, statute of limitations	Reforms	Chairman of State Assem. Judiciary Comm. & included legislators, judges, academe, law enforcement, prosecutors & attorneys		2005 Wis. Act 60 enacted reforms

**Comments of Law Enforcement and Victim Group Representatives
on the Proposed Recommendations Before
the Advisory Committee to Investigate Wrongful Convictions**

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September 2011

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In May 2010, we submitted a version of the comments that follow in response to a series of proposals being considered by the advisory committee on wrongful convictions. Unfortunately, our comments were largely ignored. Most, if not all, of our previously submitted concerns and proposals have not been included despite our repeated requests for the larger committee's consideration. We are therefore resubmitting our comments with the hope that this time they will be seriously and meaningfully considered for inclusion in the final report.

We continue to believe that in the interest of objectivity, fairness, transparency and good public policy, no proposals should be issued in the committee's name unless they have first been voted on and recorded by the committee, and that there be an unbiased discussion about the different opinions that were discussed. Tellingly, this reasonable process did not occur. We also continue to have serious concerns about how the committee operated and how these proposals were developed.

As we said before, the committee was charged with conducting an independent study to learn from Pennsylvania cases in which the truly innocent have been convicted, identifying any recurring problems that have caused such results, and then proposing workable solutions that will increase the reliability of future verdicts. At no point has the committee done this. Instead, it has pressed forward with the erroneous assertion that wrongful convictions are frequent in Pennsylvania. To make matters worse, the committee has put forth

a largely pre-ordained slate of proposals that may well make verdicts *less* accurate and create more innocent victims, by making proper convictions less likely.

Beyond these cautionary global points, we continue to have the following specific critiques of the proposals submitted to us:

A. Legal Representation Proposals.

1. Proposed Interrogation-Recording Statutes.

- The need for mandatory recording of interrogations has not been established. There is no evidence that the absence of such a law in Pennsylvania has led to wrongful convictions.
- There is broad consensus among those who have conducted interrogations that, even if recording is preferable and should be encouraged as a best practice, it should not be mandatory and there should be no sanction for the failure to record.
- The requirement that courts issue an adverse jury instruction as a “sanction” against the prosecution for failure to record violates the constitutional separation of powers since such procedural issues are for the judiciary, not the legislature.

2. Proposed Eyewitness Statutes

- There has been no study showing that the proposed eyewitness statutes would have prevented any wrongful convictions in Pennsylvania. Neither has there been a study of whether they would have prevented *proper* convictions by discouraging even accurate identifications, or by making juries less likely to credit even accurate identifications.
- The proposed requirement that, upon request by counsel, juries be instructed on the effect of the proposed statutory procedures on the reliability of eyewitness identifications violates the constitutional separation of powers. In addition, the proposed instruction would improperly undermine Supreme Court precedent prohibiting expert commentary on eyewitness reliability. Moreover, the statutory provision concerning the proposed instruction fails to explain what the alleged effect of compliance or non-compliance with the statutory procedures is.

- The proposal that non-compliance with the statutory procedures be considered at a suppression hearing likewise violates the constitutional separation of powers and contradicts Supreme Court precedent.
- The proposed requirement of a “confidence statement” by eyewitnesses at identification procedures would facilitate gamesmanship since defense counsel routinely claim that, according to the pertinent social science studies, there is no significant correlation between a witness’s confidence in his identification and the accuracy of that identification.
- The proposed pre-lineup instructions are misleading, and would have the effect of making any identification -- even an accurate identification -- less likely.
- The requirement of “blind administration” could not be satisfied in many counties, particularly smaller counties, and has not been shown to be necessary. Moreover, the putative limitation to cases in which blind administration is “practicable” would be illusory, since, under the statute, counties that cannot comply will still face defense arguments (and jury instructions) in every case that the lack of blind administration makes any identification less reliable.
- The proposed requirements for “show-ups” are unrealistic, since officers on the scene cannot conduct the sort of detailed record-keeping that would be required of them, and there will never be a situation in which it is safe to leave the defendant unrestrained while he faces his accuser. Once again, the supposed limitation of such provisions to situations in which they are “practicable” would invite needless collateral litigation, disingenuous defense arguments, and misleading jury instructions in every case.

3. Proposed New Ethics Rules for Prosecutors.

- Prosecutors are held to the highest ethical standards. Prosecutors are required to take an oath in which they pledge to abide by the highest level of professional standards and ethics. Moreover, the National District Attorneys and the American Bar Associations have developed advisory codes of conduct. In addition, there are mandatory rules imposed by the Pennsylvania State Supreme Court and its Disciplinary Board, which set out specific ethical and professional requirements. In addition to oversight, these governing bodies also mandate annual continuing legal education requirements.
- Given that malfeasance or misfeasance by *defense counsel* is a much more frequent factor than prosecutorial misconduct in alleged wrongful convictions, it is inappropriate -- and reflective of an unbalanced

approach -- to propose new disciplinary rules only for prosecutors who engage in misconduct. A proposal that was serious about preventing unethical lawyering that leads to wrongful verdicts would also focus on the need for discipline when *defense attorneys* engage in misconduct. In particular, such a proposal would require the removal of defense lawyers from criminal appointment lists when they are found to have rendered ineffective assistance.

4. Proposed Statutes Concerning Informants.

- As with the other topics addressed in the proposed recommendations, there has been no study showing that the proposed informant statutes would have prevented any wrongful convictions in Pennsylvania. Neither has there been a study of whether they would have prevented *proper* convictions by discouraging juries from accepting even truthful testimony from incarcerated witnesses.
- The legislative requirement of a special cautionary instruction with respect to the testimony of informants violates the constitutional separation of powers.
- The proposed cautionary instruction reflects an unbalanced approach since it only applies to incarcerated witnesses for the Commonwealth. *Defense* witnesses incarcerated with the defendant have inherent incentives to help their fellow prisoner and inherent biases against police and prosecutors. Thus, if a legislatively-mandated cautionary instruction were necessary and appropriate for incarcerated prosecution witnesses, it would be equally necessary and appropriate for incarcerated defense witnesses. The failure to include such a recommendation is clear evidence of the report's bias.
- The proposed "reliability" hearing before informants may testify in capital cases has no legal precedent in Pennsylvania and is unnecessary, and we do not recall any significant support for it even among the subcommittee members who came from the criminal defense bar.

5. Proposed New Post-Conviction DNA Statute.

- The drafting of an entirely new statute was not shown to be necessary, and to our knowledge was not even considered by the subcommittee.
- The proposed new statute is so different in structure from existing law that it is impossible for us to be sure we have noticed all of the proposed changes, much less offer a detailed critique of what their practical effect would be.

- Any reasonable post-conviction testing statute should be focused on defendants who are actually innocent, and should have a gate-keeping mechanism that prevents defendants from filing petitions in cases in which they previously have made a strategic decision not to seek testing or have waited so long as to prejudice the Commonwealth's ability to retry them. Otherwise, the statute will encourage intentional gamesmanship.

B. Redress Proposals.

1. Proposed Compensation Statute.

- The proposed statute does not limit recovery to the actually innocent.
- The need for a compensation statute has not been established with evidence that wrongfully convicted defendants in Pennsylvania have been unable to recover adequate awards under existing laws.
- The financial awards mandated by the proposed statute are excessive.
- The proposed statute needlessly dispenses with standard rules of procedure and evidence by vaguely requiring judges to emphasize "the informality of the proceedings."
- The notice requirements, particularly those that call for the Supreme Court to identify all prior "wrongful convictions," are unrealistic.
- The proposal fails to recommend any compensation for those victims whose defendants were wrongfully acquitted or released.

2. Proposed Permanent Commission on "Conviction Integrity."

- The need for a permanent commission on "conviction integrity" has not been supported with any meaningful evidence, nor has the ability of such a commission to operate in an open and balanced manner been established.
- The proposal fails to define "wrongful convictions" even though the commission would only be authorized to study cases involving such outcomes.
- A commission that was truly dedicated to improving "conviction integrity" would study not only cases in which defendants have been wrongfully convicted, but also cases in which defendants have been wrongfully *acquitted*. Both classes of cases have innocent victims and undermine public confidence in the criminal justice system.

D. Science Proposals.

1. Proposed Forensic Advisory Board.

- If a forensic advisory board is necessary, the appointment process should not be centralized. The Pennsylvania Bar Association should appoint the member who is a privately-employed attorney, the Pennsylvania District Attorney's Association should appoint the member who is a District Attorney, the Pennsylvania Chiefs of Police Association should appoint the member who is a police chief, and the Commissioner of the Pennsylvania State Police should appoint an individual who is a member of the Pennsylvania State Police's Bureau of Forensic Services.
- The proposed appointment of a member who is a professor of criminal justice or forensic science would be redundant since there would already be criminal justice experts (a judge, two prosecutors, two defense attorneys, and a police chief) and forensic science experts (two police scientists, two scientists from private labs, director of a municipal lab, and a coroner).
- The proposed statutes impose needlessly rigid requirements for investigations that do not allow the board the ability to exercise appropriate discretion or flexibility on a case-by-case basis. If a forensic advisory board is proved necessary in Pennsylvania, a more reasonable model can be found at M.S.A. § 299C.156, Subd. 3 (Minn. Stat. 2006).

2. Proposed Statutes Concerning Preservation of Biological Evidence.

- The requirement that District Attorneys reserve funds from drug forfeitures to pay the costs of the statutes is unrealistic. Many District Attorney's Offices in Pennsylvania are already underfunded, and District Attorneys cannot predict future forfeiture funds. Moreover, where such funds are available, they are needed to pay basic operating costs, particularly the salaries of the police, detectives, and prosecutors who enforce the Controlled Substances Act.
- Under existing Supreme Court precedent, the destruction or loss of evidence does not provide a basis for relief in any criminal action unless the evidence was materially exculpatory and the prosecution destroyed it in bad faith. If a new evidence-preservation statute were proved necessary, it would have to expressly reaffirm that this remains the governing standard.

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The Legal Intelligencer

The Legal Intelligencer

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HEADLINE: Eyewitness Evidence in 2012: The State of the Law

BYLINE: JULES EPSTEIN Special to the Legal

BODY:

For those concerned about ensuring accurate eyewitness testimony and avoiding wrongful convictions based on sincere but mistaken evidence, one can paraphrase Charles Dickens in describing the current state of the law: It is at once "the best of times and the worst," and Pennsylvania is poised on the brink of a significant decision on this issue.

First, for the "best." Nationally, albeit not yet in Pennsylvania, legislative action, court decisions and some law enforcement initiatives have led police in many states to adopt "best practices" in eyewitness investigation, with the latest effort coming in Texas. Yes, Texas, not Pennsylvania, has legislation mandating that police departments adopt eyewitness investigation protocols, and then review and update them every two years. (Comprehensive eyewitness reform legislation has been proposed in Pennsylvania but not acted on.) And in a recent New York decision, a trial judge ordered that a lineup be conducted sequentially (one person viewed at a time) rather than simultaneously (all six viewed together), be administered in a double-blind fashion (where the lineup administrator does not know which person is the suspect, to avoid unintentional cuing), and be recorded.

In litigation, 2011 brought forth a remarkable holding in New Jersey in *State v. Henderson* following a challenge to the current federal constitutional standard for suppressing identifications. That standard was developed well before the explosion in scientific research on perception and memory, and it involves "weighing" the suggestivity of a pretrial

procedure against a series of scientific "reliability" factors.

New Jersey's Supreme Court appointed a special master to conduct extensive hearings on both science and law, and to submit recommendations. Acting upon that report, the *Henderson* court found that suggestivity and reliability were not discrete but instead overlapping and cross-pollinating concerns (for example, what a witness is told at a show-up identification or how a witness is interviewed can artificially impact the witness' memory of "reliability" factors - how long the event occurred, how much and how well the witness claims to have seen the perpetrator's face); held that the reliability determination required consideration of scientifically validated factors as well as those intuited by the U.S. Supreme Court in the 1970s; and concluded that even if an identification was not suppressed, the subsequent trial needed better safeguards, ensuring that jurors were informed of the science and the numerous factors that help determine whether the witness is accurate or mistaken. This information would be provided by experts and/or jury instructions.

After *Henderson*, the focus was on the U.S. Supreme Court and its first identification suppression challenge in 35 years. While the certiorari grant was narrow, addressing whether the due process remedy of suppression was available when an arguably suggestive confrontation occurred with no involvement of state actors (police), the court received amicus briefs from the American Psychological Association and from a group of crime victims and wrongly convicted exonerees, each urging that "reliability" rather than state action be the determinative factor and that science replace the court's 1970s pre-science criteria for how to judge whether an identification is truly independent of an initial suggestive display.

In the Supreme Court's Jan. 11 opinion in *Perry v. New Hampshire*, Barion Perry lost on the narrow issue, with the court limiting its due process jurisprudence to instances where police caused the pretrial identification to occur. Yet the court went further, maintaining its substantial threshold for the suppression of an identification on due process grounds by emphasizing that "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." And the court ignored the calls to reassess its 1970s criteria for determining what might make an identification actually reliable (unlike the New Jersey court in *Henderson*).

Yet *Perry* has two important facets that will inform ongoing eyewitness litigation, and one in particular that may impact the litigation currently before the Pennsylvania Supreme Court. Before *Perry*, courts weighed the "corrupting effect" of a suggestive process against a list of five factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Perry* makes it apparent that this list is not exclusive and that these are "among the factors to be considered" in assessing reliability. Undoubtedly, courts will be urged to weigh other, scientifically valid variables.

Perry's second critical facet is the linking of the admission of eyewitness testimony to the assurances that the trial process affords "the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." The court provided a non-exhaustive list of those "means," including the right to effective counsel, the right of confrontation and its concomitant right of cross-examination. Beyond these, the court noted that many jurisdictions have tailored jury instructions for eyewitness cases, and that "in appropriate cases, some states also permit defendants to present expert testimony on the hazards of eyewitness identification evidence."

Taken together, this listing suggests that what determines whether due process has been met, at least where there is the "taint of improper state conduct," are the safeguards available at trial. Arguably, the more complete the jury instructions, and the more information (as, for example, through an expert) the jury receives about the processes of perception, memory and recall, the more it will be clear that the resulting trial comports with due process. One can extrapolate a sliding scale - the determination of reliability must be more stringent when a state offers fewer trial protections, because in such cases the defendant has fewer (and potentially inadequate) "means to persuade the jury."

And how does this impact Pennsylvania? On March 7, the Pennsylvania Supreme Court is set to hear *Commonwealth v.*

Walker, where the principal issue is whether this state (now virtually alone among national jurisdictions in categorically barring such proof) will permit expert witness testimony in eyewitness cases. Since the 1990s, the high court has barred such evidence as unnecessary and as an improper comment on witness credibility; and the arguments being pressed now are that such evidence is necessary, as too many jurors are unaware of how mistaken identifications can occur and what factors support a conclusion that an identification is reliable, and that such expert evidence is no more a comment on credibility than an ophthalmologist who explains about a person's vision or a toxicologist discussing the impact of drinking alcohol on the ability to operate a car.

Walker, as with *Perry*, has ample amicus briefing (including one written by the author of this article). It also comes at a time when prosecutors are seeking legislation permitting expert testimony in child sexual assault cases, showing an apparent acceptance by both parties in *Walker* of the principle that experts who explain "how the mind works" are neither commenting on credibility nor invading the province of the jury. And while *Perry* does not mandate the admission of expert testimony, it does acknowledge that such testimony can help ensure the due process right to adequately test evidence at trial.

In 1899 the Pennsylvania Supreme Court approved a jury instruction that "questions, concerning the identity of persons, animals and vehicles are liable to confusion, uncertainty and mistake." Those questions persist today, nationally and in this commonwealth; and it is in cases such as *Walker* that it will be determined how well trials can successfully answer them.

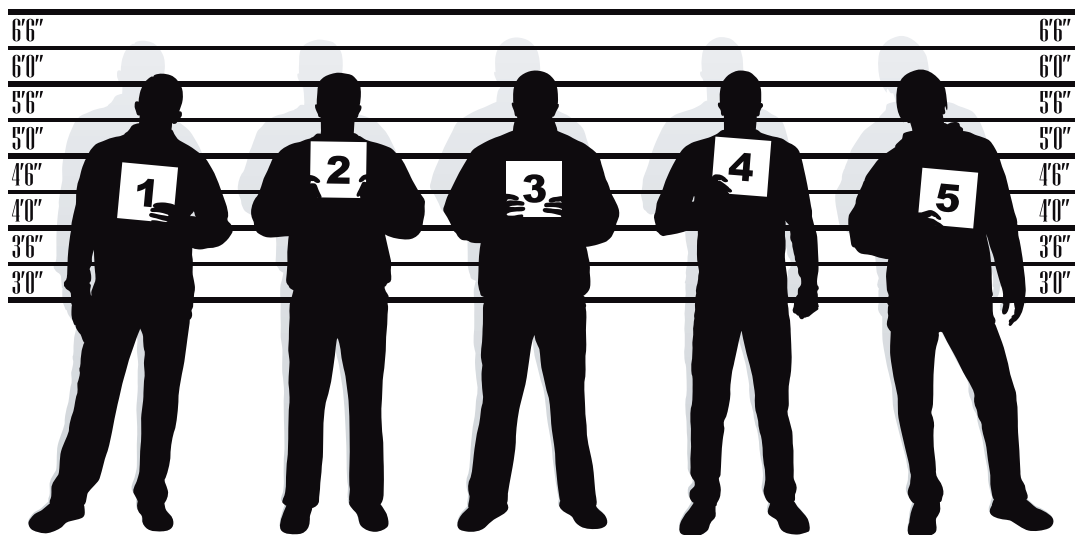
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A Test of the Simultaneous vs. Sequential Lineup Methods

An Initial Report of the AJS National Eyewitness Identification Field Studies

GARY L. WELLS, NANCY K. STEBLAY, and JENNIFER E. DYSART



A Test of the Simultaneous vs. Sequential Lineup Methods

*An Initial Report of the
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A Test of the Simultaneous vs. Sequential Lineup Methods

An Initial Report of the AJS National Eyewitness Identification Field Studies

Executive Summary

The significant role that mistaken eyewitness identifications have played in convictions of the innocent has led to a strong interest in finding ways to reduce eyewitness identification errors. Psychological scientists have been conducting laboratory studies on this problem for over 30 years and have proposed a number of possible reforms to the procedures used in conducting lineups. Most of the proposed reforms, including the critical requirement of double-blind administration (the administrator does not know the identity of the suspect), have not been considered controversial in principle and many jurisdictions across the United States have adopted them. The use of a double-blind (DB) sequential rather than a DB simultaneous lineup procedure, however, has engendered controversy, a controversy that has unnecessarily held back the adoption of non-controversial reforms in many jurisdictions.

The sequential lineup shows lineup members to the witness one at a time and asks the witness to make a decision on each one before showing the next one, whereas the traditional simultaneous lineup shows the witness all lineup members at once. Controlled laboratory experiments consistently show that the DB sequential procedure results in a substantial reduction of mistaken identifications and a much smaller reduction in accurate identifications. Overall, the DB sequential lineup produces a better ratio of accurate identifications to mistaken identifications than the DB simultaneous procedure. Nevertheless, in May of 2006, a highly publicized field study in Illinois, directed by the Chicago Police Department not only called into question the sequential/simultaneous laboratory findings but raised concerns as to whether eyewitnesses in controlled experiments were a good approximation for actual eyewitnesses to serious crimes, a large share of which are victim-witnesses. Specifically, the Illinois study showed that the status quo method produced higher suspect identification rates and lower filler picks than did DB sequential lineups in two of the three cities that were tested. Lineup fillers are not suspects but instead are in the lineup to “fill it out” and create a fair procedure for the suspect. In a field experiment, the identification of fillers is the only witness response that can be definitively classified as an error.

The Illinois study was quickly rejected by scientists for several reasons. Principal among the reasons were (a) that this field study confounded the simultaneous/sequential variable with non-blind versus double-blind testing, (b) there was no random assignment of cases to lineup procedure and later evidence from the Evanston site indicated that the “tougher” cases (e.g., cross-race, longer delay from crime to lineup) were more likely to be assigned to the sequential than to the simultaneous procedure, and (c) some unknown number of filler identifications were not recorded for the simultaneous lineups. Consequently, in September of 2006, the American Judicature Society convened a gathering of eyewitness scientists, lawyers, prosecutors, and police in Greensboro, NC, who developed what has become known as the “Greensboro Protocol.” The Greensboro Protocol was a set of guidelines for how to conduct a field experiment to test the simultaneous versus sequential issue and gather as much reliable data as possible

on witness and event variables (e.g., type of crime, presence of a weapon, cross-race event, viewing conditions, previous acquaintance with the culprit, sobriety of the witness), and the actual administration of the lineup itself (e.g., time between crime and lineup, quality of lineup, the witness's responses and statement of certainty). There was general agreement that the field study should feature a direct comparison of DB sequential and DB simultaneous procedures, true random assignment (the "gold standard" in scientific experiments), and the use of laptop computers.

The use of laptop computers for administering the lineup and recording the witnesses' responses was believed to be an especially important tool for conducting eyewitness field experiments because it could: 1) Ensure procedures were administered according to protocol (e.g., voice and printed pre-lineup instructions presented in every instance in a uniform fashion); 2) Reliably record all responses of the witness (e.g., no selectivity in deciding whether to make a record of a filler identification or lack of an identification); 3) Permit all the photos in a lineup to be preserved as part of the electronic record and reviewed subsequently by judges, juries, and scientists; 4) Randomly assign witnesses to conditions (e.g., whether a sequential or simultaneous procedure would be used); 5) Randomly determine order of the photos within each lineup; 6) Precisely record how long it took a witness to make an identification; 7) Require police officers to record systematically witness and event variables before the identification procedure was conducted; 8) Facilitate secure and contemporaneous recording of eyewitness data into the electronic information platforms of police departments; and 9) Enhance the confidence of prosecutors, judges, juries, and defense counsel that the eyewitness procedures were conducted fairly and in accordance with best practices. In short, there was an expectation that the design of this field study and the use of the laptop computers could produce a data set of unprecedented depth and detail beyond the sequential/simultaneous question.

The field experiment was developed, sites were recruited, and funding from foundations was secured with the help of many individuals and organizations. The funding foundations were the Laura and John Arnold Foundation, the Open Society Foundations, and the JEHT Foundation. The American Judicature Society oversaw the project with Danielle Mitchell as the project manager. Partner organizations included the Innocence Project, the Police Foundation, and the Center for Problem-Oriented Policing.

Three scientists (Dr. Gary Wells, Dr. Nancy Steblay, & Dr. Jennifer Dysart) were intimately involved in the design, implementation, detective training, and analysis of data. Mike Garner of SunGard Public Sector, Inc. programmed the software for the laptop computers that ran the lineups. Many other scientists, police officers, prosecutors, defense lawyers, and judges contributed to the development of the Greensboro protocol and actual language that appears on the different screens shown to witnesses. The District Attorney's offices at each of the sites gave their full cooperation to the project and the police departments at each of the sites were extremely cooperative, helpful, and, of course, essential in getting this project completed. A more detailed set of acknowledgements is contained in an Acknowledgements section.

The field experiment was conducted in the Charlotte-Mecklenburg (NC) Police Department, the Tucson (AZ) Police Department, the San Diego (CA) Police Department and the Austin (TX) Police Department. For various reasons, most of the data came

from Austin and the samples from the other three sites were not large enough to test for differences across sites. Thus the data were collapsed across the four sites in this report. Cases for which the eyewitness had prior knowledge of the suspect (e.g., went to school together or in some other way were previously acquainted) were removed from the primary set of lineups as were those instances in which the lineup was not conducted using a double-blind procedure. The resulting “protocol-consistent” set of cases totaled 497 lineups ranging in seriousness from simple assault to murder. Analyses of the data indicated that random assignment to condition was highly successful (e.g., key witness and event variables were equally distributed across simultaneous and sequential procedures and positioning of the suspect was equally distributed across simultaneous and sequential procedures).

Results

The overall analysis of identification data found that the simultaneous procedure yielded an identification of the suspect for 25.5% of the lineups and the sequential procedure yielded an identification of the suspect for 27.3% of the lineups. Statistical analyses showed that the simultaneous versus sequential difference in rates of identifying the suspect was not statistically significant. In other words, the small difference in suspect identification rates is within the margin of error (mere chance) and should not be interpreted as a meaningful difference. An analysis of filler identification rates, however, found that the simultaneous procedure yielded 18.1% identifications of fillers and the sequential procedure yielded 12.2% identifications of fillers. Statistical analyses showed that the rate of filler identifications was a statistically significant difference using a conventional probability level of $p < .05$. In other words, statistical analyses indicated that there is less than a 5% probability that the 5.9% lower rate of filler identifications using the sequential procedure was due to chance. The rates of non-identification were 56.4% for the simultaneous and 60.5% for the sequential, a difference that is due to the lower rate of filler identifications for the sequential procedure. A closer analysis showed that 80.8% of the non-identifications were clear rejections (“no” to all photos) for the simultaneous procedure and 19.2% were “not sure” responses. In contrast, 53.5% of the non-identifications were clear rejections for the sequential procedure and 46.5% were “not sure” responses.

The results are consistent with decades of laboratory research showing that the sequential procedure reduces mistaken identifications with little or no reduction in accurate identifications. Deeper analyses will be conducted on many other aspects of the data, including the certainty statements of the eyewitnesses, which were audio recorded for all identifications. This could tell us, for example, whether mistaken identifications of fillers using one procedure versus the other are associated with more certainty. Analyses will also be conducted on whether the witness was a victim-witness or a bystander witness, whether the identification was same-race versus other-race, and numerous other measured variables to see if superiority of the sequential procedure is restricted to certain types of circumstances. Scholarly articles will be published in refereed scientific journals that report these deeper analyses. Also, although filler identifications are clearly errors, identifications of the suspect might or might not be accurate identifications. Accordingly, a second phase of the research, led by the Police Foundation, is being conducted that follows up on these cases.

A Test of the Simultaneous vs. Sequential Lineup Methods

An Initial Report of the AJS National Eyewitness Identification Field Studies

Background

The identification of perpetrators from police lineups is an important tool in solving crimes and convicting guilty individuals. A lineup appears on the surface to be a simple, straightforward test. If the suspect is guilty, the eyewitness might be able to identify him; if he is not guilty the eyewitness will identify no one. Psychological scientists, who have been studying eyewitness identification evidence for over 35 years, however, have long questioned this view. Using simulated crimes, these researchers have noted that mistaken identification rates can be surprisingly high under some conditions. Particular interest has been taken by researchers in what are known as “system variables,” which are variables that the justice system can control that increase or decrease the accuracy of eyewitness identification evidence¹. By the late 1980s, eyewitness researchers had described several system-variable improvements or reforms that could increase the probative value of lineups, including the sequential lineup method².

Although the studies on eyewitness identification were well accepted in the scientific psychology community, it was not until the mid-1990s that the legal system began to take the issue of mistaken eyewitness identification more seriously. The impetus for this was a series of convictions of the innocent that were overturned using forensic DNA evidence. The Innocence Project in New York, launched by Barry Scheck and Peter Neufeld, marked the first systemic effort to test innocence claims of convicted prisoners using the new technique of forensic DNA testing. Forensic DNA

testing represented the first scientific test in the history of the criminal justice system that could definitively prove actual innocence under certain conditions³. Not surprisingly, these turned out to be almost exclusively sexual assault and murder cases because those are the cases for which certain conditions tend to be met; DNA-rich biological evidence (semen and blood) was collected and preserved and can be clearly attributed to the perpetrator. For purposes related to the current report, it is noteworthy that 75% of the exonerations, which now number 273, were cases that involved mistaken eyewitness identifications⁴. However, most cases of wrongful conviction that are based on mistaken eyewitness identifications can never be discovered with DNA tests because the biological evidence was lost, destroyed, deteriorated, not collected, or not collected properly. Moreover, only a small fraction of eyewitness identification cases (estimated at less than 5%) have biological evidence that can be tested for purposes of possibly trumping or validating the eyewitness identification. Hence, forensic DNA testing can only test a small fraction of innocence claims in old cases and can screen out only a small fraction of mistaken identifications in current cases. The result is that the criminal justice system is still heavily dependent on eyewitness identification evidence and therefore improving the reliability of eyewitness identification evidence remains an important goal.

There are now hundreds of published studies that use simulated crimes followed by lineups⁵ in which various conditions are systematically changed to see how those variations affect rates of mistaken and accurate identifications. This report refers to this body of literature as the lab studies. These lab studies are highly controlled in the sense that they vary only one factor at a time so that differences in eyewitness identification performance can be attributed to the factor that was varied rather than extraneous, uncontrolled factors. Importantly, because the researchers are the ones who created the witnessed event and the lineup, it is known with total certainty which member of

1. Wells, G. L. (1978). Applied eyewitness testimony research: System variables and estimator variables. *Journal of Personality and Social Psychology*, 36, 1546-1557.

2. Lindsay, R. C. L., & Wells, G. L. (1985). Improving eyewitness identification from lineups: Simultaneous versus sequential lineup presentations. *Journal of Applied Psychology*, 70, 556-564.

3. Scheck, B., Neufeld, P. & Dwyer, J. (2000). *Actual innocence*. New York: Random House.

4. As of July 29, 2011

5. The term lineup in this report is used to refer to either a photographic array or a live lineup.

the lineup, if any, is the actual perpetrator of the simulated crime. As a result, lab researchers can classify eyewitness identifications as having been accurate or mistaken without any doubt about the classification. Eyewitness scientists tend to prefer this lab-controlled experimental methodology for getting at cause-effect relations⁶. It is out of this lab-based research literature that most of the current literature of how to improve lineups was born⁷.

Resistance to some reform ideas has understandably surfaced among some in the legal system. While some jurisdictions have embraced the reforms, others raise serious concerns about changing their current, long-standing practices based on lab studies that have not been fully tested in actual cases. There are several arguments for dismissal of the lab studies: Participants in an experiment are not eyewitnesses to actual crimes and are usually debriefed shortly after viewing a simulated crime that it was not an actual crime; the consequences for mistakes in research participants' lineup decisions are not as serious as in actual cases, perhaps leading to some mere guessing; participants in experiments are not experiencing the levels of stress and fear that many actual eyewitnesses experience, especially victim-witnesses; and, a large percentage of lab studies rely on college students as their subjects, which is unrepresentative of the typical witness in an actual case. Eyewitness scientists have countered these criticisms with a number of observations. For example, studies have found that whether participants believe the crime was real versus simulated does not matter to the results; controlled studies testing the role of stress and fear show that both serve to reduce accuracy; and lab studies comparing college students to other populations show that college students are the best witnesses of all groups. Accordingly, the eyewitness scientists argue, the lab studies might actually be *overestimating* rather than underestimating the accuracy of eyewitnesses in actual cases.

Despite arguments for and against the utility of the lab experiments in extrapolating to actual crimes and eyewitnesses, the value of testing some key ideas of eyewitness scientists using actual eyewitnesses to serious crimes is undeniable. This is especially true for the somewhat controversial idea of sequential lineups. The sequential lineup is one in which the witness views each lineup member one at a time and makes an identification decision on each before seeing the next lineup member rather than viewing all lineup members as a group (simultaneous). The sequential

lineup was first tested in lab studies in 1985 and was predicted to be superior to the simultaneous method based on an emerging theory that eyewitnesses have a tendency to use relative judgments in making eyewitness identification decisions⁸. A relative judgment is one in which witnesses compare lineup members to one another and try to decide which one looks most like their memory of the perpetrator. Witnesses then have a propensity to select that person. The problem with relative judgment, according to the theory, is that someone will always look more like the perpetrator than the other members of the lineup, even when the lineup does not contain the perpetrator. A reliable effect, called the removal-without-replacement effect, was demonstrated in lab experiments in 1993 and has served as one of the core findings illustrating the relative-judgment process⁹. The effect simply shows that if the actual perpetrator is removed from a lineup and replaced with no one, a large share of eyewitnesses who would have picked the perpetrator tend to shift to another lineup member and identify that person rather than make no identification (even though they are clearly warned that the actual perpetrator might not be in the lineup).

The idea of the sequential lineup, therefore, was to prevent witnesses from merely comparing one lineup member to other lineup members (a relative judgment) and instead to compare each lineup member to their memory of the perpetrator and make an "absolute" judgment. Although relative judgments could still be made at one level with the sequential procedure (e.g., this person looks more like the perpetrator than the previous one), relative judgment should largely be blocked as long as the witness presumes that there still are (or might be) other lineup members to be viewed.

It is not the purpose of this report to review the lab studies of the sequential versus simultaneous procedure. Those who are interested can read the recent meta-analysis article that analyzed the extant literature and found that the sequential procedure produces a better ratio of accurate to mistaken identifications than does the simultaneous

6. Wells, G. L., & Penrod, S. D. (2011). Eyewitness identification research: Strengths and weaknesses of alternative methods. In B. Rosenfeld, & S. D. Penrod (Eds.), *Research methods in forensic psychology*. John Wiley and Sons, Hoboken, NJ.

7. Wells, G. L., Small, M., Penrod, S. J., Malpass, R. S., Fulero, S. M., & Brimacombe, C. A. E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads. *Law and Human Behavior*, 22, 603-647.

8. Wells, G. L. (1984). The psychology of lineup identifications. *Journal of Applied Social Psychology*, 14, 89-103.

9. Wells, G. L. (1993). What do we know about eyewitness identification? *American Psychologist*, 48, 553-571.

2 Initial Report of the AJS National EWID Studies

procedure¹⁰. But, the meta-analysis also provides evidence that with the sequential procedure accurate identifications might be reduced by 8% even while mistaken identifications are reduced by 22%. It is this possibility of lower rates of accurate identifications that has made the sequential lineup controversial. Supporters of the sequential lineup tend to argue that the 8% loss in accurate identifications is the result of diminished rates of guessing or that the important figure is the ratio of accurate to mistaken identifications. Critics argue that a loss of accurate identifications is a serious cost and should give pause to any jurisdiction about switching to sequential lineups. Supporters counter that any mistaken identification not only puts the innocent at risk of wrongful conviction but also lets the guilty escape detection and, hence, the simultaneous lineup also lets the guilty go free when the witness mistakenly identifies someone else¹¹.

Furthermore, the “lab studies are just lab studies” argument keeps open the possibility that the sequential procedure does not work as well in actual cases when compared to the traditional simultaneous procedure as it does in the lab. By the same token, the sequential procedure might work even better in actual cases than it does in the lab when compared to the simultaneous procedure. Continued back and forth arguments will never resolve the question. Hence, there is a need to compare the two lineup techniques in actual criminal cases.

The difficulties with testing the sequential versus simultaneous question in actual cases are numerous but surmountable. The most important difference between the lab and actual cases is that the actual identity of the “perpetrator” is known with certainty in the lab but not – in most circumstances - in actual cases. When an eyewitness identifies a suspect in an actual case, we cannot presume that the suspect is in fact the guilty person. Accordingly, we will use the term “suspect” in this report to refer to the focus person in the lineup, a term that is meant to embrace other

designations used by law enforcement such as “possible suspect” or “person of interest.” In any case, the term suspect should not be confused to mean perpetrator or culprit. A procedure that produces more or fewer identifications of the suspect might or might not be the best procedure, depending on the proportion or mix of innocent versus guilty suspect identifications that each procedure produces.

Nonetheless, this limitation about the guilty status of a suspect in a lineup does not prevent us from concluding that filler identifications are clearly mistaken identifications. A filler is a known-innocent member of the lineup whose presence in the lineup is merely to “fill it out” and help safeguard an innocent suspect by spreading identification mistakes across people who will not be charged if they are identified. A clear requirement that the current research placed on the police department sites is that every lineup include only one suspect embedded among five fillers. This permitted a test of a central tenet of the sequential procedure, namely that it reduces filler identifications. In other words, filler identifications serve as a clear proxy index for the relative ability of the two procedures to reduce mistaken identifications.

Furthermore, in order to effectively test the two lineup procedures, it is necessary to use a strategy that can equalize the proportions of guilty (and innocent) suspects between the two compared procedures; whatever the true proportion of guilty suspects in these lineups, true random assignment to sequential and simultaneous lineups will distribute this factor evenly between the tested groups.

The Illinois Study

In 2006 a study was conducted in the Evanston, IL Police Department, the Joliet, IL Police Department, and two stations of the Chicago Police Department. The study’s stated purpose was to compare a new procedure for conducting lineups, in particular the sequential double-blind method, to the traditional simultaneous non-blind procedure¹².

The research design, however, was problematic from the outset¹³. Eyewitness scientists had long argued that non-blind administration of lineups (i.e., the lineup administrator knows which lineup member is the suspect and which are fillers) will tend to lower filler identifications and raise identifications of the suspect via unintentional cues from the lineup administrator and, therefore, all lineups should use double-blind methods to ensure that the witness is

10. Steblay, N., Dysart, J. & Wells, G. L. (2011). Seventy-two tests of the sequential lineup superiority effect: A meta-analysis and policy discussion. *Psychology, Public Policy, and Law*, 17, 99-139.

11. As of July 29, 2011, the actual perpetrators have been discovered in 36% of the DNA exonerations involving mistaken identification. Thirty-one of the actual perpetrators were convicted of 77 violent crimes that they committed after the wrongful convictions involving mistaken identifications. These included 52 rapes, 17 murders, and 8 other violent crimes. [Source: WWW.innocenceproject.org]

12. Although there were two social science consultants involved in the data analysis, it is unclear that they played much role in the design. The design, procedure, interpretations, and conclusions were headed by an attorney with the Chicago Police Department.

making the identification based purely on his or her own memory. Yet the Illinois study always allowed the case detectives to administer their own lineups (non-blind) for the simultaneous procedure whereas the sequential procedure was always conducted double-blind. The results reported in the Illinois study indicated that the traditional non-blind lineups produced fewer filler identifications and more suspect identifications than did the double-blind lineups. But, of course, the non-blind lineups were simultaneous and the double-blind lineups were sequential, so it is unclear what caused this difference in witness identification decisions. Indeed, the social science concerns about non-blind lineup administration is that the case detective can unintentionally, and without awareness, influence the witness away from fillers and toward the suspect. Hence, it would be just as valid to interpret the results of the Illinois study as evidence that the non-blind lineup administrators influenced the witnesses' identifications as to interpret the difference as being due to the simultaneous versus sequential component of the study. Also, a later addendum report from the Illinois study acknowledged that some unknown number of filler identifications for the simultaneous procedure were not recorded in the results because the (non-blind) detective decided that the witness was not sure enough in the identification. Furthermore, none of the sites used random assignment to conditions, an essential requirement for a valid experiment. When the Evanston Police Department released the data from its portion of the study, analyses showed that the "tougher" identification cases (e.g., cross race cases, longer delay from the witnessed event to the time of the lineup¹⁴) were somehow assigned to the sequential lineups more often than to the simultaneous lineups¹⁵.

Greensboro Meeting

Later in 2006, an eyewitness field study meeting was held in Greensboro, NC. Many of the top eyewitness identification scientists in the country along with lawyers, prosecutors, and law enforcement with expertise in eyewitness issues discussed what questions a field study on eyewitness identification could answer and what kinds of scientific controls were necessary to conduct a field experiment that would answer the questions. From these meetings came what has been called the "Greensboro Protocol." In effect, the Greensboro Protocol articulated the view that any field study would have to use double-blind lineup procedures in all conditions in order

for the results to be accepted by the scientific community. Furthermore, the use of laptop computers for administering the lineup and recording the witnesses responses was needed to ensure that the procedures were administered according to protocol (e.g., voice and printed pre-lineup instructions presented in every instance in a uniform fashion) and that all responses of the witness were recorded (e.g., no selectivity in deciding whether to make a record of a filler identification or lack of an suspect identification). Furthermore, the use of the computer would permit all the photos to be preserved as part of the electronic record, the computer could randomly determine the order of the photos, the computer could randomly assign witnesses to conditions, and so on. Finally, there was a general view that the simultaneous versus sequential issue would be the important question to test, especially since the sequential procedure was already in use in several jurisdictions (e.g., New Jersey, Boston, and Minneapolis) and the Illinois study had created concern and confusion on the issue¹⁶.

A Partnership to Conduct the Current Study

After the Greensboro meetings, a partnership developed between the American Judicature Society (represented at the time by Christine Mumma), the Innocence Project (Barry Scheck and Ezekiel Edwards), the Police Foundation in Washington, DC (Karen Amendola and Megan Slipka), the Center for Problem-Oriented Policing, and social scientists. A records management company in North Carolina (SunGard

13. The problem that was most apparent was the confounding of the simultaneous versus sequential variable with the non-blind versus double-blind variable. Not only eyewitness scientists, but also top social scientists who are not involved in the eyewitness research area concluded that the confound "has devastating consequences for assessing the real-world implications of this particular study" [see Schacter, D., Dawes, R., Jacoby, L. L., Kahneman, D., Lempert, R., Roediger, H. L., Rosenthal, R. (2007). Studying eyewitness investigations in the field. *Law and Human Behavior*, 32, 3-5.]

14. "Tougher" in this context means that witnesses tend to perform more poorly under these conditions according to published controlled studies.

15. Steblay, N. K. (2011). What we now know: The Evanston Illinois field lineups. *Law and Human Behavior*, 35, 1-12.

16. Extensive consideration was given by the partners to the question of whether to test the double-blind versus non-blind question as well. However, this idea was rejected for several reasons. The most important reason is that any better "performance" of witnesses in the non-blind compared to the double-blind conditions would simply raise the interpretational argument that the detectives were influencing witnesses away from fillers and toward suspects in the non-blind conditions. Such a finding would make any law enforcement agency participating in the study look bad. Furthermore, showing influence from detectives in the non-blind conditions would present problems for prosecutors in those cases. Alternatively, if no differences emerged between the double-blind and non-blind conditions, the lack of a difference might be attributed merely to the "observation" effect in which the behaviors of the investigators were unnaturally controlled due to their being observed in a study.

Public Sector, Inc.) with extensive experience with law enforcement agencies was added as a partner to develop and administer the software that would run the lineups on laptop computers and collect witness response data according to the protocol and needs of the study. SunGard Public Sector, Inc., was working with the Winston-Salem and Burlington (NC) police departments and had developed computer-based photo lineup software for these departments. Mike Garner, of SunGard Public Sector, Inc., had presented a version of this software at the Greensboro Conference. SunGard Public Sector, Inc. had the capability to create an interface between the laptop computers and the mainframe server in Charlotte-Mecklenburg (our first site) so that the results from each lineup could be uploaded after each lineup was completed. To ensure consistency with all sites, SunGard Public Sector, Inc. had to create a similar interface with each department that participated in the current study¹⁷. Four police departments, the Charlotte-Mecklenburg (NC) Police Department, the Tucson (AZ) Police Department, the San Diego (CA) Police Department, and the Austin (TX) Police Department, along with their respective prosecutor offices agreed to be sites for conducting the study. Funding was provided by the Open Society Foundations, the Laura and John Arnold Foundation and the JEHT Foundation. Throughout the project, many people made important contributions (see Acknowledgements).

Methods Used to Collect the Field Study Data

With considerable input from the scientist team and project partners, the Charlotte-Mecklenburg Police

17. Mike Garner of SunGard Public Sector, Inc. did excellent work during the course of this project. His time was not charged to the grants received for this project; instead, SunGard Public Sector, Inc. contributed his time and talents. During the project, Garner worked tirelessly to address technical difficulties that arose in creating unique interfaces with mainframe servers that varied from site to site. In some cases, technical difficulties led to delays in software implementation and data collection, despite the best efforts of Garner and information technology professionals in police departments. Law enforcement decisions, unrelated to this field study, to switch the source of filler photos from “mugshots” to driver’s license photos or other sources of photos also contributed to some delays. Furthermore, some sites, in particular Austin, had already developed their own interface systems and went to extraordinary lengths to conform to our protocol for purposes of the field study. One lesson that the partners took from these technical challenges is the need to develop new software applications embodying best practices that are compatible with a wide range of different law-enforcement server platforms. Adaptable software applications would allow law enforcement agencies to more easily transition to computer-based photo lineups that might eventually be available for use on handheld devices in the field, allowing for photo lineups to replace show-ups.



Department and later the other three police departments (Tucson, San Diego, and Austin), SunGard Public Sector, Inc. created a version of the software application that integrated the Greensboro Protocols and captured additional information about the crime (i.e. lighting conditions, witness type, whether the witness knew the perpetrator, etc.) that would aid the scientist team in further analyses beyond the primary research question. In addition, the software application would administer (photo) lineups to eyewitnesses with minimal need for help from a lineup administrator. For the purposes of the study, the case detectives continued to select the filler photos to be used in each lineup but once it was time to administer the lineup to the eyewitness, a second detective did the actual administration using the laptop computer. The software randomly scrambled the photos at the last second (after it was turned over to the witness) and randomly assigned the procedure to be simultaneous or sequential (also only after the computer was turned over to the witness). The computer provided the witnesses with instructions on the procedure (both in writing on the screen and orally with a female voice). The double-blind administrator continued to play a role if the witness had questions about the computer program, and this

administrator made written records of the witness’s certainty or other comments if the witness made an identification. The laptop made an audio recording of the entire session and preserved the recording as a WAV file. The recording started when the instructions began and stopped when the lineup

administrator ended the session.

Detectives were trained to use the software, which was loaded on laptop computers provided by the study team. The software used an interface with each police department’s data base source of photos for conducting photo lineups.

Detectives used whatever their usual criteria were for selecting filler photos. For each lineup to be presented, detectives used the software program to record information about the witness and the case. Below are screen shots of the information entered by the detectives before building the lineup¹⁸.

The information filled in by the detectives using these screens became part of a single electronic file for each lineup that was yoked with the lineup photos and all of the identification data. Notice that the information obtained from these screens included “current description of the perpetrator” which will later permit the researchers to assess the extent to which the suspect and fillers fit that description. In addition, information about distance, period of observation, the witness’s status as a bystander versus a victim, whether the witness made a composite drawing, whether the witness knew the perpetrator (and if so, how well), information about drugs or alcohol that the witness might have consumed, whether the witness wore glasses, and so on were collected. Detectives would ordinarily be expected to collect this information and document it in some number of police reports, but the software program helped make sure that this information was collected, made part of an electronic record, and was readily available for easy electronic retrieval. The systematic collection of this information permits the researchers to examine the extent to which these factors affect the performance of the witnesses.

Likewise, under the second tab

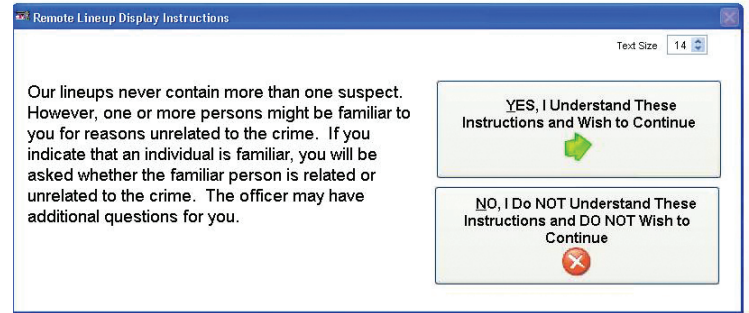
The screenshot shows the 'Remote Lineup Display Setup' window with the 'Lineup Information' tab selected. The 'Witness Name' field contains 'JEREMY WILSON'. The 'Race' dropdown is set to 'W', 'Sex' to 'M', and 'Age' to '30'. The 'Current Description of Perpetrator' dropdown shows 'WF, approx 30 yoa'. Other fields include 'Approximate Distance From Perpetrator', 'Period of Observation (min. sec.)', 'Date & Time Desc Given', 'Bystander Witness or Victim Witness?' (set to 'Bystander'), 'Did Witness Create a Composite Prior To This Lineup?' (set to 'No'), 'Did Witness Encounter Suspect's Photo After Crime (Wanted Poster, NewsPaper, etc.) Prior To This Lineup?' (set to 'No'), 'Was Perpetrator Previously Known By Witness?' (set to 'No'), 'Was Witness Under the Influence of Drugs and/or Alcohol At The Time of The Incident?' (set to 'No'), 'Does the Witness Wear Corrective Lenses?' (set to 'No'), and 'If Yes, Were They Being Worn At Time of Incident?' (set to 'No'). At the bottom are 'Start Lineup' and 'Cancel' buttons.

The screenshot shows the 'Remote Lineup Display Setup' window with the 'Additional Case Information' tab selected. The 'Witness Name' field contains 'JEREMY WILSON'. The 'Case Id' field contains '20100000001'. The 'Crime Type' field is empty. The 'Case Investigator' field contains 'MIKE'. The 'Crime Location' field is empty. The 'Crime Date & Time' field is empty. The 'Lighting' dropdown is set to 'Daylight' and the 'Weather' dropdown is set to 'Clear'. The 'Weapon Used?' dropdown is set to 'No'. The 'If Yes, What Kind of Weapon?' field is empty. The 'Number of Perpetrators' field contains '0' and the 'Number of Witnesses' field contains '0'. The 'Did the Witness Observe Physical Violence?' dropdown is set to 'No', 'If Yes, Was the Physical Violence Directed Against This Witness?' dropdown is set to 'No', and 'Did Witness Observe Crime?' dropdown is set to 'No'. At the bottom are 'Start Lineup' and 'Cancel' buttons.

(Additional Case Information) information was obtained about the type of crime, whether a weapon was involved (and, if so, what kind), whether there was violence involved, the number of witnesses, and the number of perpetrators. Again, detectives would ordinarily collect this information anyway, but the program helped make sure that this information was collected, electronically recorded, and readily retrievable by researchers so they could analyze the extent to which these factors might have affected the performance of witnesses.

Once the lineup was created and the information was entered, the lineup file was uploaded to the police department's server, where it became available for download to any of the laptops that were programmed with the presentation software. The detective then recruited a second person, who did not know which of the lineup members was the suspect and which were fillers, to administer the lineup to the eyewitness. When the administrator opened the designated lineup, the administrator entered additional information, including his or her own name, the name of the eyewitness, the date, time and location where the lineup was shown, and names of any other persons present during the showing. The administrator then began the lineup procedure by cueing up the program and turning the computer over to the eyewitness. Once the witness selected the **"Start Lineup"** button, the computer randomly assigned the lineup to the simultaneous or sequential procedure and randomized the order of the photos, with the caveat that the suspect never appeared in position one¹⁹. At that point, the computer began giving instructions to the witness.

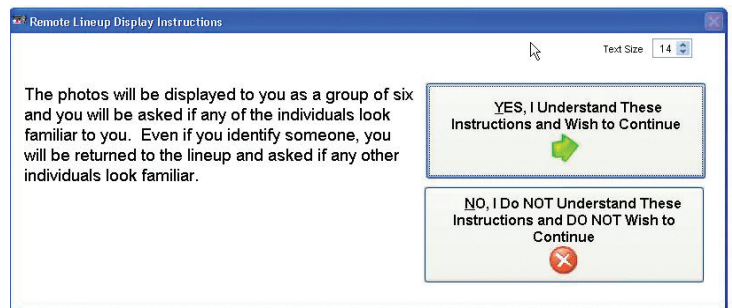
The computer program presented all the instructions to the eyewitness in both written form and via a pre-recorded audio using a female voice. Each instruction was on its own screen and required the witness to acknowledge that she or he understood the instruction before proceeding to the next instruction. These included an early instruction that a lineup contains only one possible suspect; if the witness indicated that someone was familiar she or he would be asked to indicate whether the person was familiar for reasons related to the crime or unrelated to the crime.



This instruction was important and consistent with best practices for two reasons. First, it made it clear to the witness that there was only one suspect in the lineup. Accordingly, if the crime was a multiple-perpetrator offense, the witness would know to not look for any more than one of the perpetrators in any given lineup. Second, because witnesses might see someone in the lineup that they know for other reasons (such as someone from their neighborhood), the instructions made clear that they should indicate that fact so that **"YES"** responses to the familiarity question would yield a record of what they meant by indicating familiarity. Specific witness comments about the familiarity of a lineup member were also captured by audio recording.

If the lineup was simultaneous, the next instruction noted that the photos would be presented as a group of six and that if someone was identified the witness would be returned to the display and asked if any other individuals look familiar. Alternatively, if the lineup was sequential, the next instruction noted that the photos would be shown one at a time and that even if an individual was identified the witness would be shown the remainder of the photos.

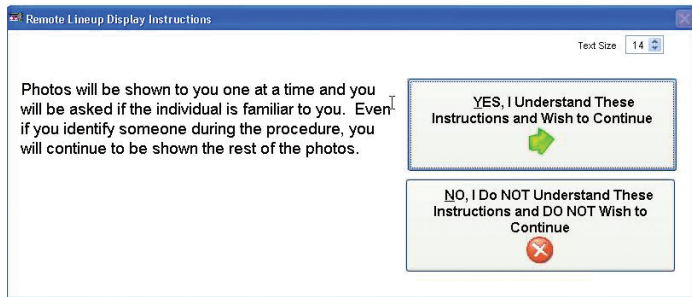
If the lineup was simultaneous:



18. Although the content of these screen shots was developed by the eyewitness team of scientists, lawyers, and police who conducted this field experiment, the software underlying the programs is proprietary intellectual property of SunGard Public Sector, Inc.

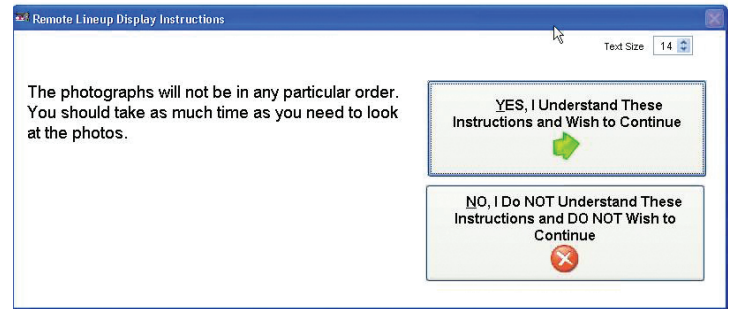
19. The decision to not place the suspect in position one was to allay any concerns that prosecutors might have about potential defense arguments if the witness identified the first photo they saw in a sequential procedure.

Or, if lineup was sequential:



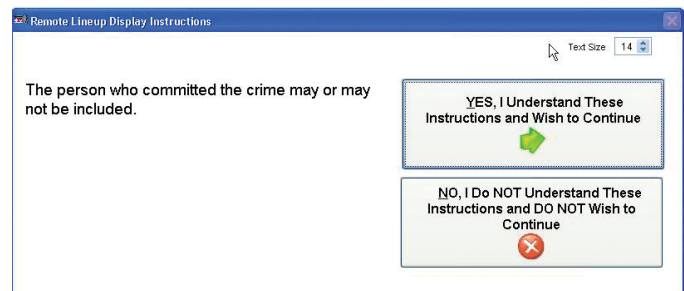
This instruction, pertaining to the photo display, was important to make clear to the witness what form the display of photos would have. This instruction made it clear to witnesses that they would always be returned to the display until they no longer indicated familiarity with any remaining lineup members and that they would view all the photos in the sequential lineup even if they had made an identification. Stating this upfront, before the procedure began, was important so that the witness did not think that returning to the photos after making an identification was some type of “feedback” indicating that a first choice was wrong. Also, the procedure of making sure that the witness viewed all the photos in the sequential procedure (called the continuation feature) was important to avoid cases where the witness might, for example, identify the suspect’s photo in position 2 and then not see any more photos. This might create an argument by the defense that the witness was shown only two photos. Furthermore, if the witness identifies a filler early in the sequence, before getting to the suspect’s photo, stopping the sequential procedure at that point could prevent the case detective from knowing what the witness might say if she or he were to view the suspect’s photo. Even if a witness’s identification of a filler undermines the reliability of the witness for purposes of a trial, what the witness says when later getting to the suspect’s photo can have investigative value. Other jurisdictions using the sequential procedure implement this “continuation” feature of the sequential lineup.

Other than the instruction pertaining to photo display, all of the instructions were the same for the simultaneous and sequential procedures. The next instruction simply informed the witness that there was no particular order to the photos and to take as much time as needed.



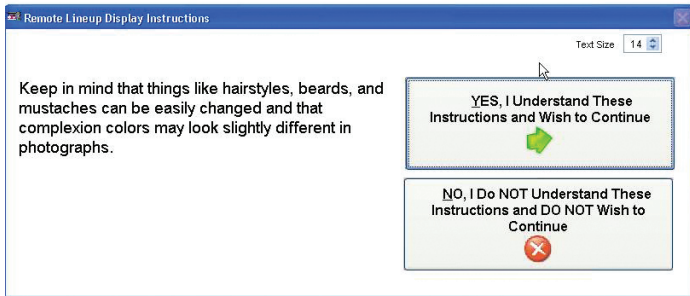
This instruction was important because it helps nullify any implicit theory that some witnesses might have that lineup suspects appear in a particular position in the lineup and it also makes clear that the pace of progression of the lineup is controlled by the witness, not by the computer.

The next instruction was an admonition that the person who committed the crime may or may not have been included in the lineup.



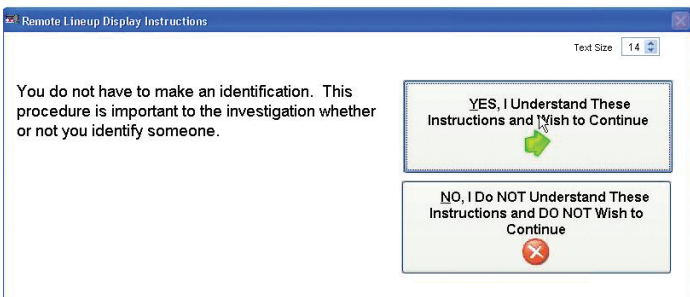
This instruction was critical to the integrity of the lineup procedure. Extensive research has shown that it is essential to disabuse witnesses of the assumption that the perpetrator is in the lineup²⁰ and this instruction is explicitly recommended by the National Institute of Justice guide for law enforcement on the collection and preservation of eyewitness evidence²¹.

The next instruction reminded witnesses that some features, such as facial hair, can be easily changed and that complexion colors may look slightly different in photos.



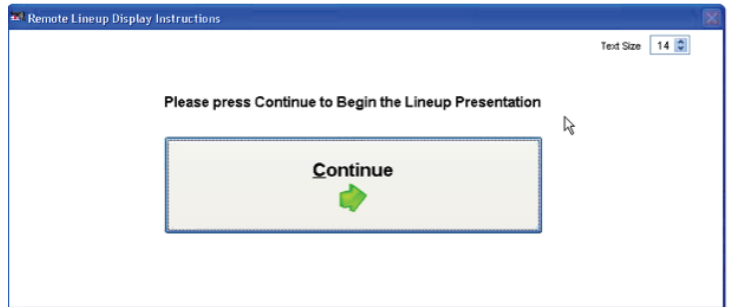
The appearance-change instruction is considered good practice so witnesses do not have the unrealistic expectation that the suspect photo presented by law enforcement for the lineup would necessarily reflect his appearance at the time of the crime. This instruction is also recommended by the NIJ Guide²¹.

The next screen told witnesses that they did not have to make an identification and that the investigation would continue even if they did not identify someone.

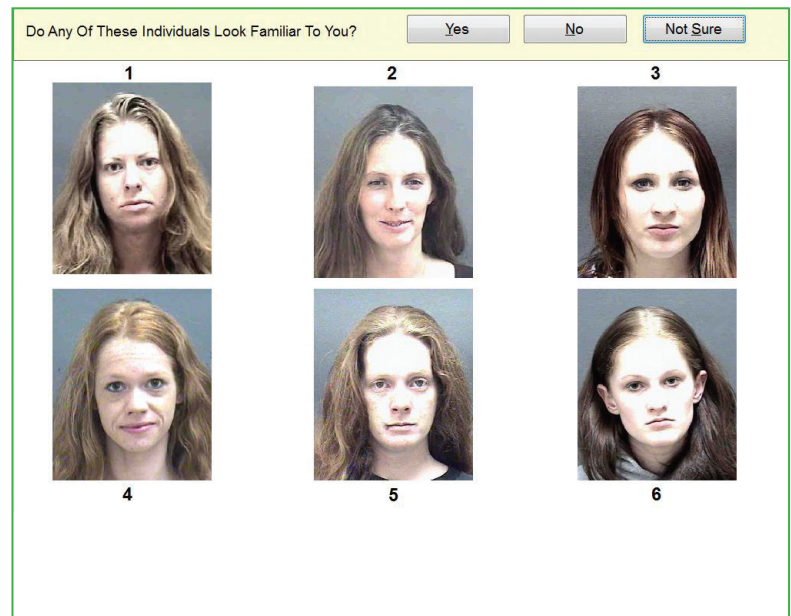


This instruction helped make sure that the witness would not feel undue pressure to make an identification. Such an instruction is considered a best practice and is recommended by the NIJ Guide (see Footnote 21).

The last instruction screen required the witness to click the continue button to start the lineup.



The next screen was either the six photos of a simultaneous lineup or the first photo of a sequential lineup. Example screen shots for the simultaneous and sequential lineups, respectively, are shown below²²:



Simultaneous Lineup

20. Malpass, R. S., & Devine, P. G. (1981). Eyewitness identification: Lineup instructions and the absence of the offender. *Journal of Applied Psychology*, 66, 482-489; Steblay, N. M. (1997). Social influence in eyewitness recall: A meta-analytic review of lineup instruction effects. *Law and Human Behavior*, 21, 283-298.

21. Technical Working Group for Eyewitness Evidence (1999). *Eyewitness evidence: A guide for law enforcement*. Washington, DC: United States Department of Justice, Office of Justice Programs.

22. "Due to the method used to capture screen images of the software application's lineup instructions and mugshot displays, the quality of the screen images contained within this report are slightly diminished. The software images viewed by witness were very clear, high resolution images."

Does This Person Look Familiar To You?			
<input type="button" value="Yes"/>	<input type="button" value="No"/>	<input type="button" value="Not Sure"/>	

1



Sequential Lineup

The images of the lineup members were exactly the same size on the screen regardless of whether the display was simultaneous or sequential²³. If the witness clicked the **“YES”** button at the top of the screen to indicate that a person or people appeared familiar, the next screen (not shown in this report) asked him or her to confirm whether he or she meant to indicate **“YES”** and gave an option to click **“CONFIRM”** or to click a “go back” button. If the witness confirmed a **“YES”** response for a simultaneous lineup, he or she was asked to click the photo of the familiar person. The clicked photo was then highlighted and the witness again had to confirm that this was the photo he or she intended to select; the witness next indicated whether the person was familiar for reasons related to the crime or unrelated to the crime.

Regardless of whether related or unrelated to the crime, the next screen (not shown in this report) told the witness that the officer had some questions. The lineup administrator, who could also hear the female voice on the computer, then asked the witness to make a statement about the identified person (“How do you know this person?”) and, if the witness indicated that this was the person who committed the crime, the lineup administrator asked the witness to use his or her own words to say how sure he or she was that this was the

person who committed the crime. Answers to these questions were written down by the lineup administrator and were also part of the audio recorded record.

The software continued to return the witness back to the lineup until the witness indicated that no one else in the lineup was familiar (with the simultaneous procedure) or until the witness had gone through all the lineup members (with the sequential procedure). Witnesses were not told that they could view the sequential lineup a second time. However, if the witness requested a second viewing of the sequential lineup after having gone through the photos, the lineup administrator could initiate a second “lap” of the sequential lineup through a password-secure procedure; the lineup was shown with photos in the same order.

When the lineup ended, the lineup administrator took over the laptop computer and using a yes/no toggle box answered a question about whether any aspect of the protocol could not be followed. If the answer was yes, a text box was provided to explain what aspect could not be followed. The administrator then answered a question about whether he or she (the lineup administrator) knew which person in the lineup was the suspect, again using a yes/no toggle box.

The lineup results were then uploaded to the police department server. A record of all the lineup information (all photos, responses, response latencies, order of photos, whether the lineup was simultaneous or sequential, witness information, case information, and so on) was immediately available as a .pdf document on the laptop for the case detective or others to view the results. In addition, the uploaded file could always be retrieved from the police department server. The audio recording file (a .wav file) was maintained as a separate file that was also uploaded to the police department server. These files could be readily retrieved from the police department server by any of several means, such as via the case number, witness name, or suspect name.

The researchers were provided with these electronic files in the form of both Excel data files as well as the .pdf documents by the police departments via downloading them from the police department server.

23. Keeping the images the same size for the simultaneous and sequential was done only for purposes of this study. One advantage of the sequential lineup in actual practice (rather than this study) is that the sequential images can be larger while still fitting on a screen (or on paper) than they can be when using the simultaneous procedure. However, for purposes of the current study, that would have been a confound for the interpretation of the results and, hence, the image size was kept constant across lineup type.

Creating the Database of Lineups that Followed the Protocol

Across the four sites, a total of 855 lineups were conducted using the laptops and uploaded to the respective department's servers. The numbers of lineups at each site were quite variable for a variety of reasons. The Charlotte-Mecklenburg Police Department, for example, had to discontinue the study soon after it started because of a new law in North Carolina that required all lineups in the state to be done using the sequential method. There were technical problems in Tucson and San Diego with making the software interface with their photo database. The final numbers of lineups were 53 from Charlotte-Mecklenburg, 43 from San Diego, 144 from Tucson, and 615 from Austin, yielding the total of 855 lineups. Among the 855 lineups, 48.8% were sequential and 51.2% were simultaneous. However, 358 of the 855 lineups had to be set aside while testing the primary research questions because of one or more of four problems: 1) the lineup administrator knew which person in the lineup was the suspect, and hence the procedure was not double-blind, 2) the eyewitness knew the suspect at some level of prior familiarity (hence, not a "stranger" identification case), 3) the identification decision of the witness could not be determined (witness picked more than one person and neither the audiotape nor the lineup administrator's notes could disambiguate the question of whether the identification should count as a filler identification or as a suspect identification), or 4) the witness had encountered the suspect or the suspect's photo at some point after the crime and before viewing the lineup. **In other words, the core set of lineups for the central analyses were double-blind lineups from witnesses who were attempting to identify a stranger and who were seeing the suspect's photo for the first time.** The computer documentation from each lineup provided the criteria and the information for decisions about this "protocol-consistent" set of lineups. The following more explicitly describes the criteria for inclusion in the protocol-consistent set:

1. Was it a double-blind lineup? The lineup was considered to be not double-blind if the computer record for any of the following three criteria applied: 1) The lineup administrator answered "YES" to the question "Did you know which image was the suspect?" or 2) the case detective and

the lineup administrator were the same person or 3) the detective commented (in the record) that the lineup was not performed double-blind.

2. Was it a stranger identification case? The lineup was considered to not be a case of a stranger identification if the detective answered "YES" to the question of whether the witness knew the perpetrator.

3. Could it be determined whether an identification was of the suspect versus a filler? There were cases in which a witness identified more than one person. If both were fillers, the witness's decision was considered a filler identification outcome for that lineup. If the witness identified a filler and also the suspect, the researchers - blind to the position of the suspect in the lineup - listened to the audiotape to make a determination as to whether the witness clearly preferred one individual over the other(s) as a "final" decision. If, after reviewing the audiotape, it could not be determined which lineup member was preferred by the witness, it was considered an "unresolved" identification.

4. Had the witness encountered the suspect or the suspect's photo after the crime and before viewing the lineup? The pre-lineup computer program asked the detective if the witness had encountered the suspect's image prior to viewing the lineup (e.g., a picture in the newspaper or on television, or a previous identification attempt such as that from a show-up). If the answer was "YES", then the lineup was not included in the protocol-consistent set.

The following is a breakdown of the 358 lineups that were not included for purposes of the current analyses for the following reasons:

Not double-blind = 58.9% of the 358

Not stranger = 34.9% of the 358

Not resolved multiple picks = 6.4% of the 358

Witness encountered suspect or suspect's image prior to lineup = 8.1% of the 358

Notice that the percentages total more than 100% because some of the lineups that failed to fit the study protocol had more than one of these problems and, hence, appear in more than one of the categories.

The lineups that were set aside because they did not meet the protocol for the experiment were equally distributed between the simultaneous and sequential lineups (50.0% were sequential and 50.0% were simultaneous). This is what

would be expected because there is no reason for these protocol breaches to affect how the computer assigned lineups to the simultaneous versus sequential conditions.

Setting aside these 358 lineups that did not meet the protocol, there were 497 lineups that could be analyzed. For purposes of this report, these 497 lineups will be called the “protocol-consistent” set to reflect the fact that they met the protocol standards of being stranger identification cases using double-blind lineup procedures, the suspect or the suspect’s image had not been encountered between the time of the crime and the time of the lineup, and the decision of the witness could clearly be categorized as a suspect identification, filler identification, or no identification²⁴.

The Protocol-Consistent Dataset: Results Assumptions Tests

Among the first analyses on the protocol-consistent data set

were statistical checks on whether some critical assumptions of the study had been met. Particularly important is the assumption of random assignment, both to the simultaneous versus sequential variable and also to the position of the suspect in the lineup. For example, the expectation should be that approximately 50% of the lineups ended up being simultaneous lineups and 50% sequential lineups. In fact, 47.9% were sequential lineups and 52.1% were simultaneous lineups. Neither differs significantly from the expectation of 50%, so these figures are consistent with one of the important assumptions in the experiment.

Because the suspect was never put in position 1 for either the simultaneous or sequential lineup²⁵, the position of the suspect could be any of five positions, namely 2, 3, 4, 5, or 6. Accordingly, we would expect the suspects to represent about equally often across positions 2-6, or about 20% of the time in each position. Figure 1 shows the actual percentages of time

that the lineup’s suspect appeared in each of the five possible positions as a function of whether the lineup was simultaneous versus sequential. The percentages of times that the suspect was placed in each position from the random assignment does not differ from that expected by chance for either the simultaneous or the sequential lineups.

Additional checks were made to see if other characteristics of the lineups assigned to the simultaneous versus sequential procedures appeared to be equally distributed. For example, the median number of days between the time of the crime and the time of the lineup for the protocol-consistent data set was 14 days for the sequential and 13 days for the simultaneous. Overall, the assumptions of random assignment seem to have been well met.

Main Identification Results

24. The researchers intend to also analyze the non-blind lineups and the non-stranger cases at a later date to see if there are meaningful patterns to be discerned. But these are outside the scope of the questions that were driving this study and are not part of this report.

25. Position 1 in a sequential lineup is the first photo viewed for a sequential lineup. For a simultaneous lineup, position 1 is the upper-left corner of a 2 (number of rows) X 3 (number per row) photo-array.

Figure 1. Percentages of the Time that the Suspect Appeared in Positions 2 through 6 For the Simultaneous and Sequential Procedures [N = 497]

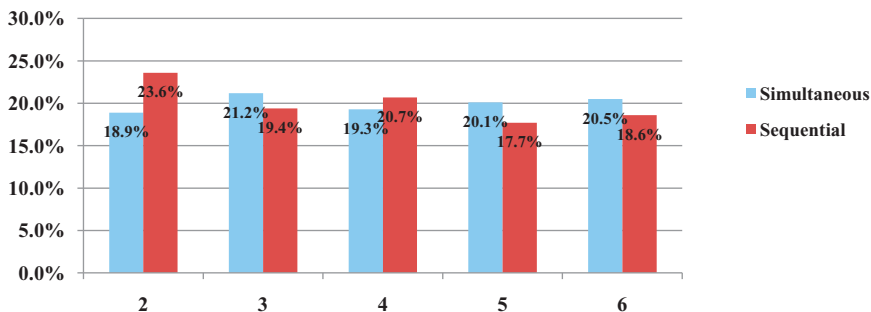
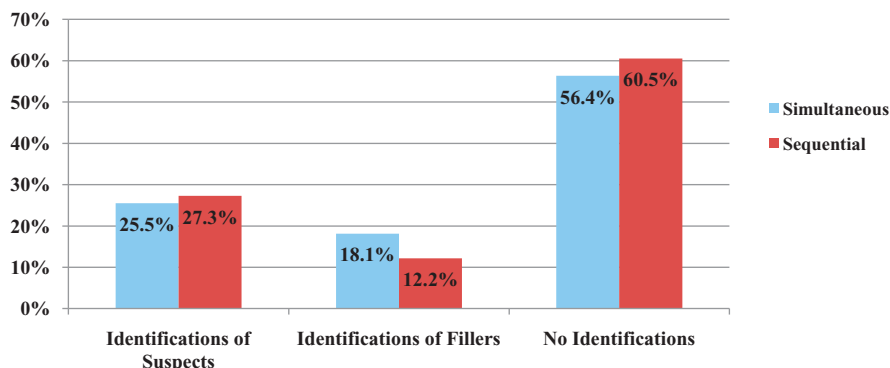


Figure 2. Percentages of Witnesses Identifying the Suspect, a Filler, or Making No Identification for the Simultaneous and Sequential Procedures [N = 497]



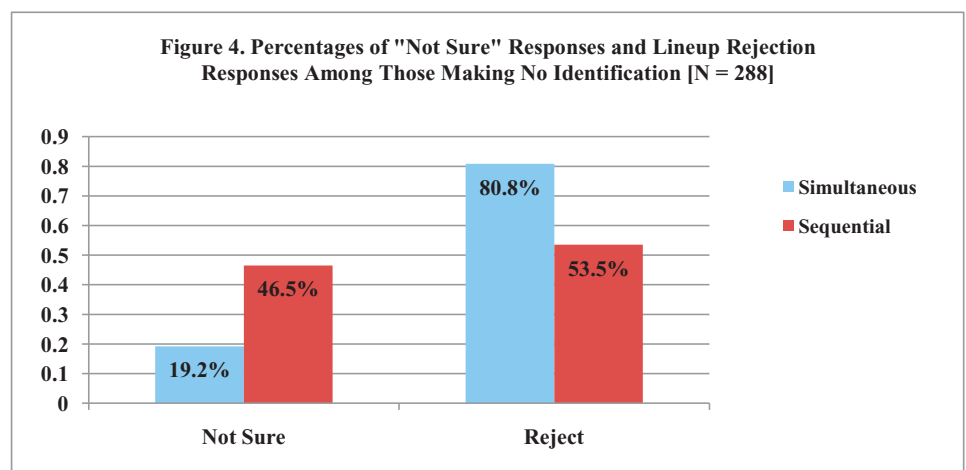
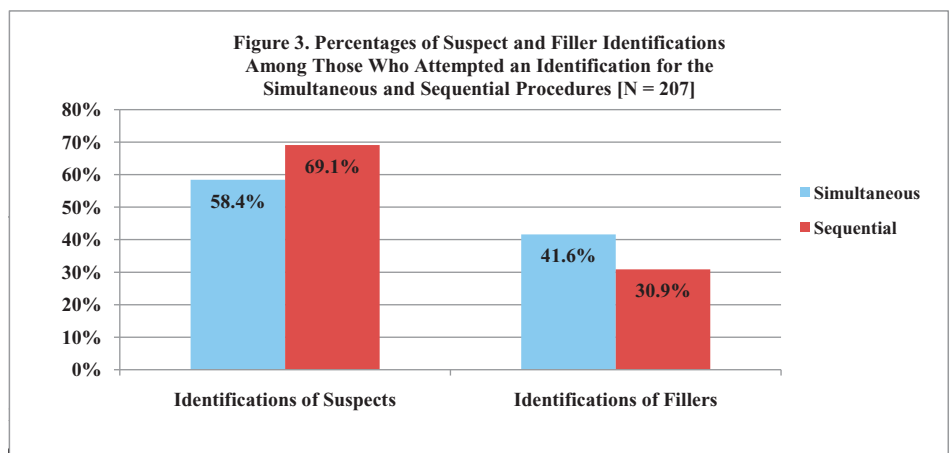
The results of the identification data from the protocol-consistent data set of 497 lineups are shown in Figures 2 and 3. Figure 2 shows that the rates of identifying the suspect were largely the same for the simultaneous versus sequential lineup procedures, with the simultaneous yielding 25.5% suspect identifications and the sequential yielding 27.3% suspect identifications. This small difference was not statistically significant, meaning that the difference is within the margins that could be expected by chance using conventional scientific levels of probability. The rates of filler identifications, however, yielded a larger difference, with 18.1% filler identifications for the simultaneous and 12.2% filler identifications for the sequential. Unlike the suspect identification rates, the filler identification rates produced a difference that is outside of the margins that would be expected by mere chance using conventional scientific levels of probability. More specifically, the probability of obtaining this difference by chance is less than 5%. Hence, using conventional scientific criteria, this difference in filler identification rates is considered to be a reliable difference. Notice as well that the sequential procedure produced fewer identifications overall, a difference that can be accounted for by the lower rate of filler identifications for the sequential procedure.

There are various ways to express these results. For example, it could be noted that the filler identification rate for the sequential procedure is approximately 67% of the rate that was yielded by the simultaneous procedure (i.e., $12.2\% \div 18.1\%$) or that the simultaneous procedure produced approximately 1.5 times the rate of filler identifications that the sequential procedure produced (i.e., $18.1\% \div 12.2\%$). More meaningful, perhaps, is a calculation that considers both suspect identifications and filler identifications. Figure 3, for example, considers only cases in which the eyewitnesses made identifications and the figure shows the percentages of those identifications that were of the suspect and the percentages that were of a filler. In

Figure 3, suspect identification rates and filler identification rates total 100% within the simultaneous and 100% within the sequential because a suspect identification or a filler identification are the only two possible outcomes among those who made an identification. In this analysis, the suspect was identified by 58.4% of those who made an identification using the simultaneous procedure and identified by 69.1% of those who made an identification using the sequential procedure. On the flip side, this means that 41.6% of those who made an identification with the simultaneous procedure identified a filler whereas only 30.9% of those who made an identification using the sequential procedure identified a filler.

“Not Sure” Lineups versus Lineup Rejections

An analysis of “not sure” responses permits an important



distinction to be made between two types of non-identification. One type of non-identification is called a lineup rejection. A lineup rejection is when the witness never says “yes” to any photo *and* never uses the “not sure” option. In other words, a lineup rejection occurs when “no” is the only answer given. A “not sure” lineup, in contrast, is when the witness never says “yes” to any photo but says “not sure” to at least one photo with the sequential procedure or says “not sure” to the set of photos with the simultaneous procedure. Lab research studies have not tended to use a distinction between “not sure” responses and lineup rejections, although there are some notable exceptions²⁶. An analysis of “not sure” versus lineup rejections for these field data produced very large differences between the simultaneous and sequential procedures. As shown in Figure 4, for the simultaneous procedure, 80.8% of the non-identifications were of the lineup rejection type and only 19.2% were “not sure” instead of lineup rejections. For the sequential procedure, in contrast, only 53.5% of the non-identifications were of the lineup rejection type and 46.5% were “not sure” responses (Figure 4). Hence, compared to the simultaneous procedure, those using the sequential procedure were not only less likely to identify a filler and just as effective in identifying the suspect, but also less likely to reject the lineup altogether when they did not make an identification. Furthermore, an examination of the “not sure” responses with the sequential procedure found that 28.8% of the “not sure” responses included the suspect. In other words, 28.8% of the witnesses in the sequential conditions who gave a “not sure” response did so to the suspect’s photo. This could be an extremely important finding for law enforcement and prosecutors because the “not sure” answer by a witness does not definitively rule out a suspect in a case where there is other evidence, or there are other witnesses, implicating the suspect.

Position Effects?

A position effect means that there is a tendency for a witness to be more or less likely to pick a suspect as a function of the where the suspect’s photo is in a simultaneous array or the order of the photo in a sequential presentation. One potential concern that has been raised about the sequential lineup is that there might be “position effects.” Because the

Table 1. Witness Identifications and Non-Identifications as Functions of Suspect Position in Simultaneous and Sequential Lineups [Total N = 497].

Suspect position	Witness Pick							
	No ID	1	2	3	4	5	6	
Sequential	2	66.0%	7.5%	24.5%	0.0%	0.0%	1.9%	0.0%
	3	56.5%	6.5%	0.0%	34.8%	2.2%	0.0%	0.0%
	4	69.4%	0.0%	4.1%	2.0%	20.4%	0.0%	4.1%
	5	63.4%	0.0%	7.3%	0.0%	2.4%	26.8%	0.0%
	6	55.0%	5.0%	5.0%	0.0%	7.5%	2.5%	25.0%
Simultaneous	2	58.3%	6.3%	27.1%	0.0%	4.2%	2.1%	2.1%
	3	63.0%	5.6%	3.7%	20.4%	0.0%	3.7%	3.7%
	4	67.3%	0.0%	4.1%	2.0%	20.4%	4.1%	2.0%
	5	44.9%	6.1%	4.1%	2.0%	4.1%	36.7%	2.0%
	6	54.7%	5.7%	7.5%	1.9%	3.8%	1.9%	24.5%

Note: Identifications of the suspect are the boldfaced percentages, which run along the diagonal of the table for which suspect position number coincides with witness pick.

position of the suspect was randomly assigned to position 2-6 for both the simultaneous and sequential lineups, it is possible to look for position effects. Table 1 shows the percentages of time that a witness selected an individual in positions 1-6 as a function of the actual position of the suspect (positions 2-6) for both the sequential and the simultaneous lineup procedures. A position effect is evident to the extent that the percentage of time that the suspect is identified deviates from the expected percentage based on the overall rate of suspect identifications. The boldfaced percentages across the diagonal in Table 1 represent selections of the suspect by position. For the sequential procedure, the suspect was selected between 20.4% of the time (when in position 4) and 34.8% of the time (when in position 3). For the simultaneous procedure, the suspect was selected between 20.4% of the time (in positions 3 and 4) and 36.7% of the time (in position 5). Care should be taken in interpreting these percentages because the sample sizes are small when the data sets are divided into such a large number of categories. For current purposes, however, the important observation is that there is no more evidence of position effects for the sequential than for the simultaneous.

These Field Data Compared to Lab Data

In controlled laboratory experiments, there is no single

26. E.g., Wells, G. L., Rydell, S. M., & Seelau, E. P. (1993). On the selection of distractors for eyewitness lineups. *Journal of Applied Psychology*, 78, 835-844.

“typical” rate that can be used to describe suspect identifications, filler identifications, or lineup rejections. These rates change as a function of numerous variables, including the proportion of lineups for which the actual perpetrator is in the lineup, which is unknown in most field studies. Furthermore, the overall rates of identification and non-identification depend on how good the witnessing conditions are, events that occur between witnessing and the time of the lineup, how well the photograph of the suspects match their actual appearance or their appearance at the time of the crime, and so on. For these reasons, there are likely to be differences between percentages obtained in lab studies and percentages obtained in field studies. We note, for instance, that a recent meta-analysis of controlled laboratory studies showed accurate identification rates to be in the 45%-50% range²⁷ whereas the current field data produced suspect identification rates of around 27%. The lower suspect identification rate in actual criminal cases could be due to having a modest base rate for suspect guilt (i.e., a fair share of suspects who are innocent). But, it could also be due to poorer witnessing conditions and hence weaker memories by actual witnesses than in the lab studies. Alternatively, the lower suspect identification rates might be due to longer durations between the crime and the lineup in actual cases than in the lab studies or to the use of photos that do not match the appearance of the culprit as well in actual cases as they do in lab studies.

But, it is not the absolute percentages in the lab studies versus the field that are at issue here. Instead it is the pattern of the results that matter. In the context of the simultaneous versus sequential pattern, for instance, the significant reduction in filler identifications that resulted from the sequential lineup procedure in the field experiment is the same pattern observed in the lab studies. There are two reasons to be extremely interested in the reduction of filler identifications. First, filler identifications are the only definitively incorrect response that can be observed in a field study. Identifications of the suspect might or might not be correct, but filler identifications are definitely incorrect. Likewise, making no identification might be a correct decision (the suspect might not be the culprit) or might be an incorrect “miss,” but, again, a filler identification is

unquestionably a mistake. A second reason to be interested in fewer filler identifications is that filler identifications “spoil” the eyewitness for any later identification attempts should a new suspect surface in the case. For instance, we discovered that in one of the simultaneous lineups the “wrong” suspect was placed in the lineup (someone who shared the name of the suspect). When shown that lineup, the witness picked a filler. That filler identification spoiled the witness in the sense that when the actual suspect was located the witness could not be shown a new lineup without raising serious concerns about the reliability of the eyewitness. Better to get no identification than a filler identification because it keeps the witness unspoiled for a possible new lineup later.

The reduction in filler identifications is especially important in the context of no reduction in identifications of suspects. The main concern that has been raised about the sequential procedure is that it might result in a loss of some accurate identifications even while it reduces mistaken identifications. No evidence supporting that concern was found in these data. This raises an interesting question. Why do lab studies, on average, find that the sequential lineup reduces accurate identifications, albeit to a lesser extent than it reduces mistaken identifications, but the field data do not show a reduction in suspect identifications? The most recent meta-analysis of lab studies of simultaneous versus sequential lineups (Stebly et al, 2011), for example, found an 8% reduction in accurate identifications accompanied by a 22% reduction in mistaken identifications from use of the sequential method.

There are some potentially important differences between the sequential procedure in the current field study and the sequential procedure often used in the lab studies. The current field experiment used a sequential procedure that is more similar to actual practices in the field than is the typical lab procedure. Some lab studies, for instance, stop the sequential procedure as soon as the witness makes a pick whereas the procedure used in this study (and the practice in the field) showed the witness all lineup members even if he or she picks one early in the sequence. The meta-analysis shows that the difference between simultaneous and sequential culprit identification rates in lab studies shrinks to only 5% when the witness is allowed to continue to the end of the lineup. Also, laboratory studies typically use a decision rule for multiple picks in the sequential lineup (“first-choice,” or “last-choice”) that is an inexact means of determining the

27. Steblay, N., Dysart, J. & Wells, G. L. (2011). Seventy-two tests of the sequential lineup superiority effect: A meta-analysis and policy discussion. *Psychology, Public Policy, and Law*, 17, 99-139.

witness's final decision. In this field test, multiple picks were resolved by the witness. The audiotape was reviewed, and the witness's own words were used to determine which lineup member the witness preferred.

Furthermore, the sequential procedure used in the current field study permitted the witness to do a second "lap" if the witness requested it. A second lap increased pick rates by 4.6%. If only the first lap counted, sequential suspect identification rates would have been lower, at 23.5%, which would have been 2% lower than the simultaneous procedure. Moreover, if the lineup were terminated after the first sequential lap, filler identification rates for the sequential would also have been lower, dropping to 10.9% which is 7.2% lower than simultaneous.

It should also be noted that these field data used a somewhat different format than almost all the lab studies. In these field experiments, witnesses always had an explicit "not sure" option available to them and this option was displayed just as prominently as the "yes" and "no" responses to the recognition question. Most lab studies testing the sequential have not explicitly included the "not sure" option. The one lab study that tested this found that an explicit not-sure option reduced witness picks of both culprits and fillers, but led to stronger performance of the sequential lineup; the not-sure option had no effect for simultaneous lineups.

Some social scientists have proposed that the sequential procedure produces a higher decision criterion and this higher decision criterion reduces potential false picks but also raises the chance that a fraction of culprits might not rise above the recognition criterion. Those who consider the simultaneous versus sequential difference merely as a difference in criterion setting will have trouble accommodating these field data, because filler identifications declined but suspect identifications did not. An alternative view is that the difference between the simultaneous and sequential procedures may be seen as a qualitative difference in psychological processes. In fact, the original conceptualization of the simultaneous versus sequential difference was that the simultaneous procedure promoted "relative judgments" involving comparisons between one lineup member and another whereas the sequential procedure promoted comparisons of each lineup member to memory with a more "absolute" decision made about recognition. This original conceptualization tends to

predict little or no effect on the witness's ability to identify the perpetrator as long as the perpetrator is present and the witness has a good memory. But, if the perpetrator is not present in the lineup or the witness does not have a good memory, the sequential should reduce mistaken identifications. In this sense the field data tend to fit the qualitative-difference interpretation better than the data fit the criterion-shift interpretation.

Practical Implications of the Results

What do these new field data tell police departments and policy-makers about lineup procedure? Ultimately, that is up to the police departments and policy-makers themselves. But, to the extent that filler identification rates are a reasonable proxy for mistaken identifications of innocent suspects, the sequential procedure should catch fewer innocent suspects in its net. At the same time, there is no evidence from these data that the sequential lineup produces fewer identifications of suspects, at least when the sequential procedure is operationalized the way it was here (double-blind administration of the lineup; witness sees all photos even if an identification is made; second lap permitted if the witness requests it; a clear "not sure" option). Furthermore, there seems to be no practical reason why lineups in actual criminal cases cannot be conducted just as easily using the sequential method as they are using the simultaneous method; there are no meaningful differences between the simultaneous and sequential lineup procedures in effort or time on the part of law enforcement.

At the same time, these field data clearly indicate that the sequential lineup is not a "silver bullet" for the mistaken identification problem. The sequential did better than the simultaneous, but even the sequential procedure still yielded a 31% rate of filler identifications among those who made a selection from the lineup. This is why the eyewitness scientists on this project will look deeper into the data to try to find various "markers" that might help in assessing the reliability of a given identification. For instance, the eyewitness scientists will analyze factors that predict filler identifications versus suspect identifications such as the presence or absence of weapons, whether the witness was a bystander-witness or a victim-witness, the certainty of the witness at the time of identification (extracted from the audiotapes), qualities of the lineup that predict filler and suspect identifications, lighting conditions, duration of the witnessed event, time

passage between the crime and the lineup, whether the witness and perpetrator are of the same or a different race, type of crime, witnesses' verbalizations while viewing the lineup (extracted from the audiotapes), how long it took the witness to make an identification, and numerous other variables. Results of these analyses will come out in later reports and in refereed scientific journal articles.

In addition, subsequent analyses will examine the “non-protocol-consistent” lineups to see how they might differ from the protocol-consistent lineups. For instance, we know little about eyewitness identification performance under conditions in which there was “prior familiarity” between the witness and the suspect. The presumption in the legal system has been that these prior-familiarity situations are much more reliable and in many cases a lineup is never done at all, but instead the witness is shown a single photo to make sure that it is the person that the witness was referring to (e.g., “yes, that is the guy who lives in my building”).

Subsequent analyses will also examine the non double-blind lineups to see how their results might differ from the double-blind lineups. Importantly, the decision to conduct the lineup using a non double-blind procedure (e.g., no other detective around to serve as the blind administrator) would be unrelated to whether the lineup was conducted using the simultaneous versus sequential procedure because assignment to the simultaneous versus sequential procedure occurred at the last second (after the witness starts the lineup). And, of course, a computer-generated random assignment would have been indifferent as to whether the lineup administrator was blind or not.

Final Remarks

These are the first data using a double-blind procedure to measure eyewitness identification from lineups for simultaneous versus sequential lineups with actual eyewitnesses. The double-blind aspect of this research is extremely important because it prevents any unintentional influence of the lineup administrator on the eyewitness and thereby takes the lineup administrators' behaviors out of the game as far as interpretations are concerned. This will prove to be particularly valuable when analyzing the certainty data because these are the first field data on eyewitness identification certainty that were collected using double-blind procedures. Of particular interest will be the certainty with which witnesses identify fillers versus suspects and whether

this varies by simultaneous versus sequential procedures. Those data are complicated by the fact that witnesses use their own words to describe their certainty (rather than as a number solicited in lab studies). Hence, it will take extra time to have those certainty statements scored using double-blind coders. The current report is only the first “mining” of these data. Later articles will continue to extract additional new findings from this data set.

The method used in this experiment represents the only field test of eyewitnesses using laptop computers to instruct, administer, and record identification decisions from photographic lineups. The software did a great job for purposes of obtaining pristine data, but it turned out to be somewhat clumsy and took longer to use than simply printing the photos and administering the lineup in the traditional way. Because this was the “first generation” of the laptop lineup software, it should not be difficult to make more user-friendly software for the detective and the witness and perhaps make it compatible with a variety of platforms rather than only a PC.

This project was a very successful example of collaboration between numerous groups and individuals. This collaboration involved prosecutors' offices, the Innocence Project, social scientists, the American Judicature Society, the Police Foundation, legal scholars, and law enforcement. [See Acknowledgements]. Also essential to this project were the three foundations that provided the financial backing for this work, without which the project could not have been completed (*Open Society Foundations, Laura and John Arnold Foundation, and the JEHT Foundation*). This project illustrates the value and potential of collaborations between various entities in addressing an important problem in criminal justice.

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

No. 28 EAP 2011

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

BENJAMIN WALKER,

Appellant.

**BRIEF FOR AMICUS CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF APPELLANT**

**Appeal From The August 23, 2010, Order Of The Superior Court In No. 1477
EDA 2008, Affirming The December 12, 2007, Order Of The Court Of
Common Pleas Of Philadelphia County At CP-51-CR-1201561-2005**

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INTEREST OF AMICUS CURIAE

The American Psychological Association (“APA”) is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, it has approximately 155,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA’s major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.

APA has filed more than one hundred amicus briefs in state and federal courts around the country. These briefs have been cited frequently by courts over the years, including the U.S. Supreme Court. *See, e.g., Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether the case is one in which there is sufficient scientific research, data, and literature on a question before a court that APA can usefully contribute to the court’s understanding and resolution of that question. APA regards this as one of those cases.¹

The issue here is whether expert psychological testimony regarding the factors that bear on the accuracy of eyewitness testimony is admissible. Those factors have been the subject of significant psychological research, and APA submits this brief both to present the results of that research and to address why expert testimony discussing them would be helpful to triers of fact. APA supports the admission of such testimony. The integrity of the criminal-justice system is undermined if jurors are left to determine whether to rely on eyewitness identifications without

¹ APA gratefully acknowledges the assistance of Lori Butts, J.D., Ph.D.; David DeMatteo, J.D., Ph.D.; Marc Pearce, J.D., Ph.D.; and Steven Penrod, J.D., Ph.D. in the preparation of this brief.

understanding the scientifically established factors that affect the accuracy of such identifications.²

SUMMARY OF ARGUMENT

Although eyewitness testimony is compelling and often very important in the search for truth, courts around the country have long recognized that eyewitness identifications are often inaccurate. Indeed, more than a century ago this Court sharply questioned the accuracy of eyewitness testimony, stating that “[t]he carelessness or superficiality of observers, the rarity of powers of graphic description, and the different force with which peculiarities of form or color or expression strike different persons, make recognition or identification one of the *least* reliable of facts testified to even by actual witnesses who have seen the parties in question.” *In re Bryant’s Estate*, 176 Pa. 309, 318 (1896) (emphasis added), *modified on other grounds*, 180 Pa. 192, 195-196 (1897). And nearly fifty years ago, the U.S. Supreme Court similarly observed that “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). Empirical studies released as early as 1932 and as recently as 2008 confirm that observation, documenting wrongful convictions that rest largely or wholly on incorrect eyewitness identifications. *See, e.g.,* Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) (out of the first 200 people exonerated by post-conviction DNA, nearly 80 percent were convicted based on eyewitness testimony); Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005) (concluding that “[t]he most common cause of wrongful convictions is eyewitness misidentification,” which occurred in “64% of the[340]

² This brief focuses on the first question on which this Court granted review, namely whether the trial court had discretion to admit appellant’s proffered expert testimony regarding eyewitness identifications. APA does not separately address the second, more general question presented, although the two questions are closely related and hence much of the argument herein pertains to both.

exonerations” reviewed by the authors); Borchard, *Convicting the Innocent* xiii (1932) (“[T]he major source of these tragic errors[(65 wrongful convictions)] is an identification of the accused by the victim.”); Epstein, *Tri-State Vagaries: The Varying Responses of Delaware, New Jersey, and Pennsylvania to the Phenomenon of Mistaken Identifications*, 12 *Widener L. Rev.* 327, 328 (2006); Connors et al., *Convicted by Juries, Exonerated by Science*, National Institute of Justice (NIJ) Research Report (1996).³ Moreover, “given the exceedingly small number of cases in which DNA exonerations are even possible, it is clear that the number of verifiably mistaken convictions [is] dwarfed by the number that actually occur in the United States each year.” Loftus et al., *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia* 1.⁴

This case presents the Court with an opportunity to address the long-recognized limitations of eyewitness identifications, by allowing—indeed, encouraging—trial courts to admit expert scientific testimony regarding such identifications in appropriate circumstances. This testimony meets the requirements of Rule of Evidence 702: The relevant scientific findings largely lie “beyond [the knowledge] possessed by a layperson,” such that expert testimony about them will “assist the trier of fact to understand the evidence,” Pa. R. Evid. 702. *See infra* Part I.A. And although this Court has previously deemed such testimony inadmissible on the ground that it invades the jury’s province to evaluate witnesses’ credibility, APA respectfully submits that this does not provide a sound basis for exclusion, and urges the Court to overrule the relevant precedents. *See infra* Part I.B. Moreover, the subject matter of the proffered

³ NIJ is “the research, development and evaluation agency of the U.S. Department of Justice.” About NIJ, <http://www.nij.gov/about/welcome.htm> (last visited Aug. 1, 2011).

⁴ Available at <http://www.pdsdc.org/Resources/SLD/PDS%20Poll%20-%20Juror%20Knowledge%20of%20Eyewitness%20Factors%20-%20article%20by%20Dr.%20Elizabeth%20Loftus%20and%20Tim%20O'Toole.pdf> (last visited Aug. 1, 2011).

testimony—eyewitness science—has been thoroughly researched, using widely accepted methodologies. *See infra* Part II.A. The testimony thus meets the general acceptance standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which governs in this Commonwealth. The findings drawn from this research are also overwhelmingly accepted within the scientific community, *see infra* Part II.B., although that is not a prerequisite for admission. A growing number of state and federal appellate courts have held that expert testimony on eyewitness science is admissible in appropriate cases. *See infra* Part III. This Court should hold likewise.

ARGUMENT

I. EXPERT PSYCHOLOGICAL TESTIMONY REGARDING EYEWITNESS IDENTIFICATION WILL ASSIST THE TRIER OF FACT WITHOUT INVADING ITS PREROGATIVES

A. Most Jurors Either Do Not Know Or Misunderstand The Accuracy Of Eyewitness Identifications

To be admissible, proffered expert testimony must address matters “beyond [the knowledge] possessed by a layperson,” such that the testimony would “assist the trier of fact to understand the evidence or to determine a fact in issue.” Pa. R. Evid. 702. Expert testimony regarding psychological research on eyewitness identification satisfies this test.

Since the 1980s, several studies have assessed jurors’ understanding of the factors that adversely influence an eyewitness’s accuracy. *See* Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 *Applied Cognitive Psychol.* 115 (2006); Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics* 177, 191-205 (2006).⁵ These studies have consistently concluded that jurors misunderstand the accuracy of eyewitness identification. In a 1992 study, for example, researchers surveyed a sample of

⁵ *See also, e.g.,* Seltzer et al., *Juror Ability To Recognize the Limitations of Eyewitness Identifications*, 3 *Forensic Reports* 121, 124-133 (1990); Noon & Hollin, *Lay Knowledge of Eyewitness Behaviour*, 1 *Applied Cognitive Psychol.* 143, 143, 145-149 (1987); Deffenbacher & Loftus, *Do Jurors Share A Common Understanding of Eyewitness Behavior?*, 6 *Law & Hum. Behav.* 15, 24-26 (1982).

potential jurors and asked them whether they agreed with a series of 21 propositions about eyewitness reliability that had previously been posed to psychologists. *See* Kassin & Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Potential Jurors*, 22 J. of Applied Soc. Psychol. 1241, 1243-1244 (1992). The study found that there was statistically significant disagreement between the jurors and the experts on 15 of 21 topics. *See id.* at 1246.

Jurors' misconceptions about eyewitness' accuracy, moreover, have proved resilient even in the face of the recent wave of high-profile exonerations. In a 2006 study, researchers found statistically significant discrepancies between jurors' and experts' responses in connection with 26 out of 30 statements about eyewitness accuracy. *See* Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 Applied Cognitive Psychol. at 119. If anything, jurors performed more poorly in the 2006 study than in the 1992 study, where potential jurors had agreed with the experts on 33 percent of the issues tested—as opposed to merely 13 percent in 2006. *See id.* at 119, 126.⁶

As a general matter, this research also shows that jurors tend to “over believe” eyewitness identifications, perhaps because of their lack of knowledge of the factors that bear on eyewitness accuracy.⁷ In a seminal 1983 study, researchers presented a sample of registered voters with crime scenarios derived from previously conducted empirical studies and asked them to predict the accuracy rate of eyewitness identification observed in those studies. *See* Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 22-24 (1983), *cited in* Leippe & Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, in *Expert Testimony*

⁶ Similar findings have been made with respect to judges, suggesting that the grounds for admission discussed in this brief apply equally to bench trials. *See, e.g.,* Wise & Safer, *A Comparison of What U.S. Judges and Students Know and Believe About Eyewitness Testimony*, 40 J. Applied Soc. Psychol. 1400, 1416-1418 (2010).

⁷ These factors are discussed in Part II.B.

on the *Psychology of Eyewitness Identification* 169, 171 (Cutler ed., 2009). On average, nearly 84 percent of respondents overestimated the accuracy rates. *See id.* at 28. Moreover, according to the same study, juror overestimation is not only widespread, but also of alarming magnitude. Respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification. *See id.* at 24. Other studies confirm that jurors often “over believe” eyewitness testimony. *See, e.g.,* Sigler & Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (conviction rate by mock juries increased from 49 percent to 68 percent when a single, vague eyewitness account was added to the circumstantial evidence described in a case summary).⁸

In short, “[a]fter a quarter of a century, the discrepancy between lay understanding of factors affecting eyewitness accuracy and what decades of empirical research has reliably demonstrated to be true continues to be evidenced. The ... discrepancy not only still exists but also is large.” Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 Applied Cognitive Psychol. at 126. Expert testimony can bridge this knowledge gap—i.e., “assist the

⁸ Jurors are particularly likely to credit eyewitnesses who are confident about their identifications. *See, e.g.,* Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45, 60 (2006); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. App. Psychol. 79, 87 (1981). This belief that confidence correlates with accuracy was once shared by some courts. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 199 (1972). Modern scientific research, however, has called that notion into very serious question. As one report concluded, “[t]he outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29.” Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002). Even these various correlation figures, moreover, are likely overestimates, because the confidence of eyewitnesses in actual cases, unlike in controlled experiments, can be infected by positive feedback received in the investigative process (for example, an officer stating during a photo array or lineup, “good, you identified the suspect”). *See* Wells & Bradfield, “*Good, You Identified the Suspect*”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360, 374 (1998).

trier of fact to understand the evidence,” Pa. R. 702—and thus help juries assess eyewitness identifications more accurately—i.e., “determine a fact in issue,” *id.* Indeed, such testimony has been shown to improve potential jurors’ understanding of the factors affecting eyewitness reliability. According to one study, mock jurors who hear expert testimony on the subject significantly correct their judgments about the accuracy of eyewitness identification, and spend significantly more time discussing eyewitness identifications during jury deliberations. *See* Hosch et al., *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 Law & Hum. Behav. 287, 294 (1980). Similarly, in another study that presented a large sample of individuals with a videotaped armed-robbery trial, researchers found that permitting expert testimony generally resulted in increased juror attention to identification conditions and better post-trial knowledge of the factors affecting identification accuracy. *See* Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 Law & Hum. Behav. 311, 320-326 (1989). Expert testimony thus leads to better-informed jury deliberations. That is surely a sound basis for admission.

B. Expert Testimony On Eyewitness Science Does Not Invade The Province Of The Factfinder

In the past, this Court has expressed concern that expert psychological testimony on eyewitness identification would improperly “intrude upon the jury’s basic function of deciding credibility.” *Commonwealth v. Spence*, 534 Pa. 233, 245 (1993); *see also Commonwealth v. Simmons*, 541 Pa. 211, 231 (1995) (“Such testimony would have given an unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess.”). APA respectfully submits that this concern does not warrant exclusion of the expert testimony discussed herein.

As an initial matter, in expressing this concern this Court has appeared to use the term “credibility” to mean simply whether a witness is lying, rather than whether the witness’s testimony should be credited or discredited (e.g., because the witness is mistaken). *See Commonwealth v. Miner*, 562 Pa. 46, 55 (2000) (“Because the truthfulness of a witness is solely within the province of the jury, expert testimony cannot be used to bolster the credibility of witnesses.”). But the expert psychological testimony proffered by Mr. Walker did not include an opinion on whether any witness is lying. Consistent with the discussion herein, it instead addressed factors pertinent to eyewitness *accuracy*—and the conditions that favor or disfavor accurate identifications. Concern about experts invading the jury’s role of assessing witnesses’ honesty thus should not result in exclusion of the testimony contemplated here.⁹

Furthermore, the expert testimony proffered here did not include an opinion on the accuracy of a particular eyewitness’s identification. To the contrary, to give the expert testimony envisioned in this case, an expert would not have to know anything about either the relevant eyewitnesses or their identifications. Instead, the expert would make a general presentation about objective scientific research and knowledge pertinent to eyewitness testimony. *See Commonwealth v. Johnson*, 456 Pa. Super. 251, 256 (1997) (en banc) (holding that expert testimony was admissible and did not intrude on the jury’s right to evaluate credibility because it “pertained to objective medical facts”), *quoted in Miner*, 562 Pa. at 53. This would provide the jury knowledge with which to evaluate the circumstances of this case. It would remain

⁹ To the extent an expert in a particular case sought to opine on the truthfulness of a witness, the trial court would presumably have discretion to exclude that opinion, while allowing the remainder of the expert’s testimony.

exclusively for the jury to decide what if anything to do with those general principles, i.e., whether to apply them to the identifications presented in the case, and if so how.¹⁰

Recognizing this, courts in other jurisdictions have permitted expert testimony that provides juries with knowledge of the factors affecting the accuracy of eyewitness identifications, excluding only hypothetical questions that narrowly link the relevant factors to the specifics of the eyewitness testimony at hand. *See, e.g., State v. Clopten*, 223 P.3d 1103, 1114 (Utah 2009) (“It is ... acceptable for an eyewitness expert to ‘give a dissertation or exposition’ of factors found in the case that are understood to contribute to eyewitness inaccuracy. As long as the expert does not attempt to tell the jury that a specific eyewitness identification either is or is not accurate, then the expert has not impinged on the jury’s duty as the sole evaluator of witness credibility.” (citation omitted)); *State v. Fontaine*, 382 N.W.2d 374, 378 (N.D. 1986) (“The trial court reached an appropriate balance when it permitted Dr. Maki to testify concerning the difficulty of eyewitnesses to properly identify persons [including the various factors which affect one’s ability to remember], but did not permit an answer to the hypothetical question.” (footnote omitted)).¹¹

Empirical research suggests, moreover, that jurors do not abdicate their fact-finding prerogatives when presented with expert testimony. In one study, scholars found that, while

¹⁰ To be sure, the fact that the testimony comes from an expert called to testify by one side or the other (the prosecution could certainly adduce expert testimony if a case involved an identification by a defense witness) may lead jurors to conclude that the testimony is intended to steer them to one finding or another, or even lead them to conclude that the expert him- or herself has a view regarding the accuracy of an identification. But such concerns apply to almost any expert witness. They do not provide a basis for keeping important and otherwise-admissible information from the jury. *See Minerd*, 562 Pa. at 54 (citing *Commonwealth v. Hawk*, 551 Pa. 71, 79-80 (1998)).

¹¹ APA notes that Rule of Evidence 704 allows experts to opine even on “an ultimate issue to be decided by the trier of fact.” While this provision suggests that even expert psychological testimony that *did* include an opinion on the accuracy of a particular identification might be admissible, this case does not present that issue.

expert testimony resulted in significantly improved sensitivity to relevant witnessing and identification conditions, it does not replace jurors' independent judgment as to the credibility of the particular eyewitness who testified in the case before them. *See* Cutler & Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 238 (1995) (reviewing Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 Law & Hum. Behav. 311).

Psychological expert testimony thus has precisely the salutary effects that its proponents have identified.¹²

II. A LARGE BODY OF PSYCHOLOGICAL AND OTHER SCIENTIFIC RESEARCH, RESEARCH THAT EMPLOYS GENERALLY ACCEPTED METHODOLOGIES, DEMONSTRATES THE LIMITS OF EYEWITNESS IDENTIFICATION

A second requirement for the admission of expert scientific testimony is that “the methodology that underlies the evidence ha[ve] general acceptance in the relevant scientific community.” *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 555 (2003).¹³ That test is also satisfied here: In the past several decades, extensive psychological research has been done on human memory (and its limits), including research both on the phenomenon of inaccurate eyewitness identification that flows from these limits and on the factors that cause such misidentification.

¹² Opponents of the testimony discussed herein sometimes contend that voir dire, cross-examination, and jury instructions adequately safeguard against erroneous identifications. *See, e.g.,* Devenport et al., *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising From Mistaken Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 51, 55-64 (Cutler ed., 2009). But these procedures (alone or in combination) are not an effective substitute. None of them provides a jury with actual evidence, i.e., substantive scientific information from a witness or other source of admissible information, regarding eyewitness testimony. Cross-examination, for example, can elicit the *facts* surrounding an eyewitness' acquisition, retention, and retrieval of the relevant event—facts that would likely raise red flags with someone knowledgeable in the field. But it cannot establish the *significance* of those facts for a jury that is not familiar with the relevant scientific principles. *See* Cutler & Penrod, *Mistaken Identification* at 143.

¹³ This “general acceptance” test was first enunciated in *Frye*, and it continues to govern in Pennsylvania courts despite the U.S. Supreme Court's rejection of it as a matter of federal law in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585-589 (1993). *See Grady*, 576 Pa. at 556-557.

The methodology underlying this research is valid and all-but-universally accepted in the psychological community. And although admissibility does not require a showing that the relevant scientific findings have likewise been generally accepted, *see id.* at 558, here they unquestionably have been.

A. The Science Of Eyewitness Identification Is Overwhelmingly Accepted Within The Scientific Community

This Court embraced *Frye*'s general acceptance test in order to "assur[e] that judges would be guided by scientists when assessing the reliability of a scientific method." *Grady*, 576 Pa. at 557 (citing *Commonwealth v. Topa*, 471 Pa. 223, 232 (1977)). As the Court explained, "[r]equiring judges to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the admissibility of scientific proof ... is the better way of insuring that only reliable expert scientific evidence is admitted." *Id.* Hence, "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Id.* at 555. As indicated by several factors, the scientific community has overwhelmingly accepted the science of eyewitness identification.

First (and perhaps conclusive on the point), "[e]yewitness reliability research uses methods accepted in all sciences." Schmechel et al., *Beyond the Ken?*, 46 *Jurimetrics* at 179. In particular, the vast majority of the relevant research involves experimental methods, specifically, experiments in which researchers expose a controlled set of subjects to different videotaped or staged crimes (or, occasionally, still images of criminal conduct) and then test the accuracy of the subjects' identification skills. *See, e.g., Wells et al., Eyewitness Evidence: Improving Its*

Probative Value, 7 Psychol. Sci. in Pub. Int. 45, 49 (2006).¹⁴ This approach is widely considered to yield “the most robust findings” in eyewitness research because it controls for exogenous factors and thus “ensures strong internal validity.” Malpass et al., *The Need for Expert Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 3, 13; see also Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 49 (“The primary strength of experimental methods is that they are proficient at establishing cause-effect relations.”). Controlled studies also usefully produce error rates in the form of statistical probabilities.

Second, the sheer volume of relevant research demonstrates that the subject matter is accepted and established. Sixteen years ago, two prominent researchers observed that eyewitness psychology had been the subject of more than 2,000 publications. See Cutler & Penrod, *Mistaken Identification* at 68. That number has grown substantially since then. Several texts are now dedicated entirely to the factors influencing eyewitness performance. See, e.g., *Expert Testimony on the Psychology of Eyewitness Identification* (Cutler ed., 2009); *The Handbook of Eyewitness Psychology* (Toglia et al. eds., 2007); Thompson et al., *Eyewitness Memory* (1998); *Psychological Issues in Eyewitness Identification* (Sporer et al. eds., 1996); Loftus & Ketcham, *Witness for the Defense: The Accused, the Eyewitness and the Expert Who Puts Memory on Trial* (1991). Indeed, the psychology of eyewitness identification has become part of the core curriculum of psychology, featured in almost all introductory psychology textbooks and comprising a significant portion of textbooks for programs in social psychology, cognitive psychology, and interdisciplinary law-and-psychology. See Hosch et al., *Expert Psychology Testimony: Consensus Among Experts?*, in *Expert Testimony on the Psychology of Eyewitness*

¹⁴ A minority of the studies have involved archival analyses, i.e., review of actual identifications, especially with regards to lineups. See *id.*

Identification 143, 161-163. The large body of research on eyewitness identification also builds on, and is consistent with, an even larger body of research pertaining to human memory generally. *See infra* pp. 14-16 (discussing this larger body).

Third, psychological research on eyewitness identification has been—and continues to be—subject to thorough peer review. At the funding stage, a proposed project normally must satisfy the strict standards of institutions such as the National Science Foundation and the National Institute of Mental Health, which fund much of the relevant research. *See* Cutler & Penrod, *Mistaken Identification* at 66. These agencies “typically subject research proposals to a review process in which anonymous evaluations are solicited from a half-dozen to as many as 20 scientific reviewers.” *Id.* at 66-67. It is estimated that “only one in five such proposals receives funding.” *Id.* at 67. And if funding is secured and a study completed, research psychologists typically submit their work to a scientific journal for potential publication, at which point the research undergoes a second round of anonymous peer review. *See id.* An “essential requirement” of this peer review “is that a study be sufficiently well designed ... that it can be relied upon to address the questions posed by the researcher.... The standards are high and in leading journals it is not unusual for 80-90% of all submissions to be rejected.” *Id.* That so many studies regarding the reliability of eyewitness identification obtain peer-reviewed funding and are published in peer-reviewed journals is itself a testament to the general acceptance of this field of science. As the U.S. Supreme Court has explained, “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Daubert*, 509 U.S. at 593.

Finally, although the admission of expert testimony does not require general acceptance of the relevant scientific findings, *see Grady*, 576 Pa. at 558, surveys of experts show that the

findings and conclusions in this field are indeed widely accepted. In a 1989 study, researchers surveyed psychologists who had published in the field. *See* Kassin et al., *The “General Acceptance” of Psychological Research on Eyewitness Testimony*, 44 Am. Psychologist 1089, 1090 (1989). This study revealed that, even 22 years ago, experts generally agreed that at least nine variables had been reliably shown to influence eyewitness accuracy. *See id.* at 1093, 1094 & tbl. 4. A follow-up survey conducted in 2001 confirmed the 1989 results as to each of those nine factors. *See* Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001). It also found that two factors connected to the accuracy of eyewitness identifications were considered significantly more predictive in 2001 than in 1989. And it identified several new (i.e., previously untested) factors reliably linked to eyewitness error. *See id.* More recent results confirm this near-universal acceptance. *See* Hosch et al., *Expert Psychology Testimony* at 152 (according to an unpublished 2008 study (cited therein), “the level of general acceptance in the field is even higher than it was in 2001”). “In fact, relative to other scientific research that enters courtrooms, the lack of controversy in the field of eyewitness identification is remarkable.” Schmechel et al., *Beyond the Ken?*, 46 Jurimetrics at 179.

“In short, eyewitness reliability research today is an established body of knowledge. It uses well-accepted methodologies. It is part of the research agenda at major universities throughout the world. It is a subject of thousands of peer-reviewed publications. It has existed for decades[, and t]here is nearly unanimous consensus among researchers about the field’s core findings[.]” Schmechel et al., *Beyond the Ken?*, 46 Jurimetrics at 180; *accord, e.g.*, Report of the Special Master at 72, *State v. Henderson*, No. A-8-08 (N.J. June 18, 2010) (“The scientific evidence accumulated ... in [recent decades] is voluminous, comprehensive and consistent....

The soundness and reliability of that evidence are indisputable.”);¹⁵ *id.* (quoting the testimony of one scholar that “[e]yewitness identification is the gold standard in terms of the applicability of social science research to the law”).

B. Researchers Have Identified Numerous Factors That Bear On The Accuracy Of An Eyewitness Identification

As noted, *Frye*’s test for admissibility does not require that the actual findings and conclusions yielded by a generally accepted science themselves be generally accepted. *See Grady*, 576 Pa. at 558. Nonetheless, the body of research discussed above has in fact produced numerous generally accepted findings and conclusions relevant to eyewitness identification. Many of these flow from the functioning (and limitations) of human memory. Cognitive psychologists have long “established that when we experience an important event, we do not simply record it in our memory as a videotape would.” Loftus et al., *Eyewitness Testimony* § 2-2, at 12 (4th ed. 2007). This finding traces its origin to the 1930s foundational work of Frederic Charles Bartlett. Through a series of experiments, Bartlett debunked the notion that “remembering is ... the re-excitation of innumerable fixed, lifeless and fragmentary traces.” Bartlett, *Remembering: A Study in Experimental and Social Psychology* 213 (1932). Instead, the process of remembering something “is an imaginative reconstruction, or construction.... It is thus hardly ever really exact, even in the most rudimentary cases of rote recapitulation[.]” *Id.* Inaccuracies are unavoidable, in other words, because the process of remembering necessitates the active processing of sensory inputs through the individual’s pre-existing cognitive patterns, patterns that are not infallible. As one more recent commentary explained, “human perception does not work like a camera or video recorder. Rather, what is perceived and stored in memory is often incomplete or distorted as a result of the individual’s state of mind or the nature of the

¹⁵ Available at <http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF> (last visited Aug. 1, 2011).

event observed.” Brigham et al., *Disputed Eyewitness Identification Evidence*, 36 Ct. Rev. 12, 13 (1999). Bartlett’s “reconstructive” analysis enjoys widespread acceptance in the relevant scientific community. See, e.g., Castelli et al., *Evaluating Eyewitness Testimony in Adults and Children*, in *The Handbook of Forensic Psychology* 243, 244 (Weiner & Hess eds., 3d ed. 2006) (“The reconstructive view of memory is generally accepted among psychologists who study human memory and eyewitness testimony.”); Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. at 20.

Psychologists analyzing the nature of memory have focused on its three discrete steps: (1) the acquisition stage, whereby information is entered into the memory system; (2) the retention stage, which occurs after the acquisition stage but before the witness’s attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. See Loftus et al., *Eyewitness Testimony* § 2-2, at 13. “This three-stage analysis is central to the concept of human memory,” and “[p]sychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages.” *Id.* Those psychologists have identified in particular several factors that may taint an eyewitness’s memory at each of the three stages. At the acquisition stage, memory is subject to both event-specific variables—such as duration of the event or presence of a weapon at the crime scene—and witness-specific variables—such as age and race. *Id.* At the retention stage, additional factors such as the passage of time or post-event information may contaminate a witness’s memory. *Id.* Finally, at the retrieval stage, a witness’s memory may be negatively affected by confidence level or the method of questioning. *Id.*

As discussed, research psychologists have conducted a vast number of empirical studies—most using experimental methods—that document the adverse impact of these various

factors on the accuracy of eyewitness identification. Because of the breadth and depth of this research, almost any overview of it is necessarily incomplete. But the following abbreviated discussion of several factors underscores that they are not only numerous but also pervasive in the criminal justice system.¹⁶

Witness Stress. The level of stress experienced by an eyewitness at the time of the exposure to the perpetrator can affect the reliability of a subsequent identification. One “meta-analysis”—an analysis of data from a cross-section of prior studies—found “clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy.” Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 694 (2004) (examining 27 prior studies). Another study, involving participants at military survival schools who were exposed to genuine stress, similarly found “robust evidence that eyewitness memory for persons encountered during events that are ... highly stressful[] ... may be subject to substantial error.” Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int’l J. L. & Psychiatry 265, 274 (2004). Being the victim of a crime is of course a stressful experience.

Exposure Duration. Research has likewise demonstrated that the reliability of an eyewitness identification diminishes when the witness sees the perpetrator for a short period of time. One study, for example, found an accuracy rate of 85 to 95 percent when subjects were exposed for forty-five seconds to the image of the perpetrator during a videotaped reconstruction of robbery, and a subsequent photo array contained the perpetrator. But that rate fell to between 29 percent and 35 percent when the exposure lasted only twelve seconds.

¹⁶ For a more complete discussion, see, for example, Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 51-68; Wells & Olsen, *Eyewitness Testimony*, 54 Annual Rev. Psychol. 277, 280-290 (2003); Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139, 140-142 (1986).

See Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 British J. Psychol. 339, 345 tbl. 1 (2003).¹⁷ This study, of course, did not involve many of the other factors discussed herein (witness stress, for example). That is important because research has shown that the various factors that affect eyewitness accuracy often interact to compound the risk of mistaken identification. See Pezdek, *Content, Form, and Ethical Issues Concerning Psychological Expert Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 29, 37 (Cutler ed., 2009). Hence, both the 85 to 95 percent and 29 to 35 percent accuracy figures almost certainly overstate the accuracy of real-world identifications by crime victims.

Passage of Time. Empirical research also establishes that as time passes between an event and a resulting identification, the identification becomes increasingly unreliable—put simply, the memory “decays.” See, e.g., Deffenbacher et al., *Forgetting the Once-Seen Face*, 14 J. Experimental Psychol. 139, 147-148 (2008); Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139, 139, 143 (1986). Importantly, “[t]he decay function is not linear; rather, greater decay occurs early on and the rate of decay lessens over time.” Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L., Pol’y & Ethics J. 327, 336 (2006). Even a gap of only a few hours between exposure and identification, then, can affect the reliability of an identification.

¹⁷ See also Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. at 140, 150 (conducting a meta-analysis of 128 studies involving nearly 17,000 subjects, and finding a linear trend in the relationship between exposure duration and identification accuracy); Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy*, Psychol., Crime and L. (forthcoming 2011) (“[E]xposure time ... significantly predict[s] facial identification accuracy.”).

Weapon Focus. Weapon focus is “the visual attention eyewitnesses give to a perpetrator’s weapon during the course of a crime”—attention that is “expected ... [to] reduce his or her ability to later recall details about the perpetrator or to recognize the perpetrator.” Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 53. Several studies, including a meta-analysis, have found that weapon focus has a statistically significant adverse impact on eyewitness identification accuracy. See Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 420 (1992); O’Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 Law & Hum. Behav. 385, 392 (1989).

Cross-Race Bias. Empirical research similarly demonstrates that eyewitnesses are more accurate at identifying perpetrators of their own race than those of a different race. In 2001, two researchers conducted a meta-analysis that spanned 39 research articles and nearly 5,000 participant witnesses. See Meissner & Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 Psychol., Pub. Pol’y, & L. 3, 21 (2001), cited in Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 52. They concluded that cross-race identifications are 56 percent more likely to be erroneous than same-race identifications. See *id.* at 15.

Lineup Instructions. Finally, empirical research has found that the instructions conveyed to eyewitnesses prior to a lineup have a “considerable impact” on the accuracy of any resulting identification. Wells & Olsen, *Eyewitness Testimony*, 54 Annual Rev. Psychol. 277, 286 (2003). For example, in one meta-analytic study, psychologists found that failing to instruct witnesses that the suspect “might or might not be” in the lineup significantly increases false identifications (41.6 percent), while only minimally decreasing accurate identifications (1.9

percent). *See id.* at 286-287 (citing Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 Law & Hum. Behav. 283 (1997)).¹⁸

In sum, psychologists have identified various factors that can affect the accuracy of an eyewitness identification. This has been done through extensive research, using accepted methods, and there is widespread consensus in the scientific community that these factors are in fact related to eyewitness accuracy.

III. A SUBSTANTIAL AND GROWING MAJORITY OF STATE AND FEDERAL APPELLATE COURTS HOLDS THAT EXPERT PSYCHOLOGICAL TESTIMONY REGARDING EYEWITNESS IDENTIFICATION IS ADMISSIBLE

The fact that psychological expert testimony regarding eyewitness identification is both helpful to juries and generally accepted is confirmed by the large and expanding number of appellate courts that in recent years have held such evidence admissible. Until the 1970s, the field of psychological research on the reliability of eyewitness identification was far from fully developed. Not surprisingly, courts at the time often viewed expert testimony in this field with skepticism. *See, e.g., United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (“[T]he offer did not make clear that the testimony, even if relevant to the particular witnesses involved, would be based upon a mode of scientific analysis that meets any of the standards of reliability applicable to scientific evidence.”).

But as explained, *see supra* Part II, over the last thirty or so years the scientific community has developed a vast and sophisticated body of science on eyewitness identification. Courts around the country have taken note of these scientific developments. Several jurisdictions have expressly overruled their prior holdings imposing a *per se* bar. *See, e.g.,*

¹⁸ Psychologists commonly divide all of these various factors into two categories: “system variables,” those that are the product of the investigative and legal proceedings, and “estimator variables,” those that are largely beyond the control of state actors. *See Wells, Applied Eyewitness Testimony Research*, 36 J. Personality & Soc. Psychol. 1546, 1548 (1978). Of the variables enumerated in the text, all but lineup-related factors are estimator variables.

State v. Copeland, 226 S.W.3d 287, 290 (Tenn. 2007); *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002); *Johnson v. State*, 526 S.E.2d 549, 552 (Ga. 2000); *State v. Schutz*, 579 N.W.2d 317, 320 (Iowa 1998). Others have deemed the evidence admissible when considering the issue for the first time. See *Fontaine*, 382 N.W.2d at 377 (“[T]he issue of whether or not an expert witness should be permitted to testify concerning the accuracy of an eyewitness identification is one of first impression in North Dakota.”). As a result, despite differences in controlling precedent and evidentiary standards, a vast majority of state courts and a near unanimity of federal courts have agreed on the baseline principle presented for decision in this case: Trial courts should, at a minimum, have discretion to admit psychological expert testimony under appropriate circumstances.¹⁹ Indeed, one state court observed that “only three

¹⁹ The relevant state court decisions include *Ex parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992); *Skamarocius v. State*, 731 P.2d 63, 67 (Alaska Ct. App. 1987); *State v. Chapple*, 660 P.2d 1208, 1218 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984), *overruled in part on other grounds by People v. Mendoza*, 4 P.3d 265 (Cal. 2000); *Campbell v. People*, 814 P.2d 1, 7 (Colo. 1991), *overruled in part on other grounds by People v. Shreck*, 22 P.3d 68 (Colo. 2001); *Garden v. State*, 815 A.2d 327, 338 (Del. 2003), *superseded by statute on other grounds*, 11 Del. Code Ann. § 4209(d); *Russell v. United States*, 17 A.3d 581, 585 (D.C. 2011); *McMullen v. State*, 714 So. 2d 368, 371-372 (Fla. 1998); *Johnson*, 526 S.E.2d at 552; *State v. Wright*, 206 P.3d 856, 861 (Idaho Ct. App. 2009); *People v. Allen*, 875 N.E.2d 1221, 1229 (Ill. App. Ct. 2007); *Cook v. State*, 734 N.E.2d 563, 569-570 (Ind. 2000); *Schutz*, 579 N.W.2d at 319; *Commonwealth v. Christie*, 98 S.W.3d at 487-488; *Bomas v. State*, 987 A.2d 98, 112 (Md. 2010); *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1118-1119 (Mass. 1997); *State v. Miles*, 585 N.W.2d 368, 371 (Minn. 1998); *State v. DuBray*, 77 P.3d 247, 255 (Mont. 2003); *White v. State*, 926 P.2d 291, 295 (Nev. 1996); *State v. Gunter*, 554 A.2d 1356, 1363 (N.J. Super. Ct. App. Div. 1989); *People v. LeGrand*, 867 N.E.2d 374, 380 (N.Y. 2007); *Fontaine*, 382 N.W.2d at 378; *State v. Buell*, 489 N.E.2d 795, 801 (Ohio 1986); *State v. Whaley*, 406 S.E.2d 369, 371-372 (S.C. 1991); *State v. Hill*, 463 N.W.2d 674, 677 (S.D. 1990); *Copeland*, 226 S.W.3d at 301-302; *Clopten*, 223 P.3d at 1114; *State v. Percy*, 595 A.2d 248, 253 (Vt. 1990); *Rodriguez v. Commonwealth*, 455 S.E.2d 724, 727 (Va. Ct. App. 1995); *State v. Cheatam*, 81 P.3d 830, 841 (Wash. 2003); *Hampton v. State*, 285 N.W.2d 868, 871 (Wis. 1979); and *Engberg v. Meyer*, 820 P.2d 70, 136-139 (Wyo. 1991).

The relevant federal decisions include *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995); *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999); *United States v. Brownlee*, 454 F.3d 131, 144 (3d Cir. 2006); *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993);

jurisdictions”—including Pennsylvania—“have retained th[e] *per se* exclusion.” *Bomas v. State*, 987 A.2d 98, 107 (Md. 2010). This Court should embrace the majority view.

CONCLUSION

The judgment of the Superior Court should be reversed.

Dated: August 1, 2011

Respectfully submitted,

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Convicted by Juries, Exonerated by Science:

*Case Studies in the Use of
DNA Evidence to Establish
Innocence After Trial*



R e s e a r c h R e p o r t

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The National Institute of Justice, a component of the Office of Justice Programs, is the research and development agency of the U.S. Department of Justice. NIJ was established to prevent and reduce crime and to improve the criminal justice system. Specific mandates established by Congress in the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the Anti-Drug Abuse Act of 1988 direct the National Institute of Justice to:

- *Sponsor special projects and research and development programs* that will improve and strengthen the criminal justice system and reduce or prevent crime.
- *Conduct national demonstration projects* that employ innovative or promising approaches for improving criminal justice.
- *Develop new technologies* to fight crime and improve criminal justice.
- *Evaluate the effectiveness of criminal justice programs* and identify programs that promise to be successful if continued or repeated.
- *Recommend actions* that can be taken by Federal, State, and local governments as well as private organizations to improve criminal justice.
- *Carry out research on criminal behavior.*
- *Develop new methods of crime prevention* and reduction of crime and delinquency.

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- Pioneering scientific advances such as the research and development of DNA analysis to positively identify suspects and eliminate the innocent from suspicion.
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Convicted by Juries,
Exonerated by Science:
Case Studies in the Use of
DNA Evidence to
Establish Innocence After Trial

by

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June 1996



U.S. Department of Justice
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Message from the Attorney General

Our system of criminal justice is best described as a search for the truth. Increasingly, the forensic use of DNA technology is an important ally in that search.

The development of DNA technology furthers the search for truth by helping police and prosecutors in the fight against violent crime. Through the use of DNA evidence, prosecutors are often able to conclusively establish the guilt of a defendant. Moreover, as some of the commentaries suggest, DNA evidence—like fingerprint evidence—offers prosecutors important new tools for the identification and apprehension of some of the most violent perpetrators, particularly in cases of sexual assault.

At the same time, DNA aids the search for truth by exonerating the innocent. The criminal justice system is not infallible, and this report documents cases in which the search for truth took a tortuous path. With the exception of one young man of limited mental capacity, who pleaded guilty, the individuals whose stories are told in the report were convicted after jury trials and were sentenced to long prison terms. They successfully challenged their convictions, using DNA tests on existing evidence. They had served, on average, 7 years in prison.

By highlighting the importance and utility of DNA evidence, this report presents challenges to the scientific and justice communities. Among the tasks ahead are the following: maintaining the highest standards for the collection and preservation of DNA evidence; ensuring that the DNA testing methodology meets rigorous scientific criteria for reliability and accuracy; and ensuring proficiency and credibility of forensic scientists so that their results and testimony are of the highest caliber and are capable of withstanding exacting scrutiny.

Meeting these scientific challenges requires continued support for research that contributes to the advancement of the forensic sciences. The research agenda must also enable criminal justice practitioners to understand and to make appropriate use of the rapidly advancing and increasingly available technology.

The National Institute of Justice (NIJ) commissioned this study to encourage discussion of the challenges to the scientific and justice communities



presented by DNA evidence. The commentaries presented here—authored by prominent experts from a variety of disciplines—and the cases documented in the pages that follow, are testimony to the power and potential of DNA evidence. We hope that these commentaries and the NIJ report spur a broader debate about the value of DNA technology and the role of science in the criminal justice system’s search for truth.

Janet Reno



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Foreword

Commentaries on DNA Testing



Commentary by Edward J. Imwinkelried

Professor of Law
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The outcomes in the 28 cases documented in this report dramatize the real nature of the question of standards for determining the admissibility of scientific evidence in the United States.

Until recently, the *Frye* standard governed that question in most jurisdictions. In *Frye v. United States*,¹ the court announced that to be admissible, scientific testimony must be based on a technique that has “gained general acceptance in the particular field in which it belongs.”² The court singled out novel scientific evidence and prescribed a special test for the introduction of such testimony. At one point, that test was the controlling law in both the Federal courts and 45 States.³ It is true that in 1993 the United States Supreme Court abandoned *Frye* and adopted a more flexible validation standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴ However, the Court decided *Daubert* on statutory rather than constitutional grounds, and, consequently, each State remains free to fashion its own standard for admitting scientific evidence. As of 1995, 22 States apparently remained committed to *Frye*.⁵ In short, the conservative general acceptance test is still in place in almost half the States.

Moreover, even in his lead opinion in *Daubert*, Mr. Justice Blackmun indicated that, at least in some respects, trial judges may continue to admit scientific evidence more cautiously and restrictively. The Justice initially pointed to Federal Rule of Evidence 403, authorizing trial judges to exclude logically relevant evidence when “its probative value is substantially out-

¹293 F.1013 (D.C. Cir. 1923).

²*Id.* at 1014.

³Note, 40 *OHIO ST.L.J.* 757, 769 (1979).

⁴113 S.Ct. 2786 (1993).

⁵Meaney, Joseph R., “From *Frye* to *Daubert*: Is a Pattern Unfolding?” 35 *JURIMETRICS* 191, 193 (1994).

weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....” The Justice then quoted Judge Weinstein, a distinguished jurist and scholar, as declaring: “[E]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403...exercises more control over experts than over lay witnesses.”⁶

Two points must be made. First, Justice Blackmun and Judge Weinstein are voicing conventional wisdom in suggesting that lay jurors attach greater weight to scientific evidence. The California Supreme Court has asserted that a “misleading aura of certainty...often envelops a new scientific process.”⁷ In a similar vein, the Court of Appeals for the District of Columbia, birthplace of the *Frye* rule, has written that jurors frequently attribute a “mystic infallibility” to scientific testimony.⁸

There have been empirical investigations into the impact that scientific evidence has on lay jurors. Although those studies are far from conclusive, they largely contradict the assertion that scientific evidence overwhelms lay jurors.⁹ After surveying the literature, two respected commentators concluded that “the image of a spellbound jury mesmerized by...a forensic expert is more likely to reflect...fantasies than the...realities of courtroom testimony.”¹⁰

Second, and more importantly, the advocates of special restrictions on the admissibility of scientific testimony misunderstand the fundamental nature of the question:

It is misleading to focus solely on the strengths and weaknesses of scientific evidence. In principle, the judgment must be comparative. To the extent that we discriminate against scientific evidence, subjecting it to uniquely discriminatory, restrictive rules such as *Frye*, we encourage the

⁶138 *F.R.D.* at 632.

⁷*People v. Kelly*. 17 Cal. 3d 24, 32, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976).

⁸*United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974).

⁹“Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology,” 28 *VILL.L.REV.* 554 (1983) 566–70.

¹⁰Rogers, Richard, and Charles Patrick Ewing, “Ultimate Opinion Prescriptions: A Cosmetic Fix and a Plea for Empiricism,” 13 *LAW 7 HUM.BEHAV.* 357, 363 (1989).

courts to rely on other types of evidence. Thus, our task is not to make an absolute judgment about the merits of scientific evidence. Rather, our task is to compare it with other types of evidence to decide whether the differential treatment of scientific evidence is justifiable.¹¹

As the 28 cases collected in this report demonstrate, when we subject new scientific techniques such as DNA typing to special admissibility rules, we force the courts to rely on inferior types of evidence, such as eyewitness testimony. In all 28 cases, without the benefit of DNA evidence, the triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate. In *United States v. Wade*,¹² Mr. Justice Brennan noted: “The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.” Those annals must now be lengthened to include the 28 wrongful convictions discussed in this report. In roughly two-thirds of the cases, the triers heard testimony based on traditional forms of expertise, such as hair analysis—testimony that passes muster under the *Frye* standard but that, again, turned out to be erroneous. There are numerous proficiency studies establishing that there is a significant margin of error in such traditional forensic techniques.¹³ The sobering fact is that in all 28 cases, the error was unmasked—and justice finally served—only because of the novel scientific technique of DNA typing.

The “junk science” controversy has made it tempting to propose special restrictions for scientific evidence, especially testimony resting on relatively new scientific techniques. One lesson to be learned from this report, however, is that before succumbing to that temptation, we should pause to pose two questions. First, have the critics of scientific evidence *proven* that the type of testimony in question presents a unique probative danger—or have they merely made that assertion? Further, if we impose a unique restriction on scientific testimony, on balance are the courts more likely to reach just results—or are we condemning the courts to reliance on suspect types of testimony that call into question the caliber of justice dispensed in our courts? This report should be read with those two questions foremost in mind.

¹¹28 *VILL.L.REV.* at 564.

¹²388 U.S. 218 (1967).

¹³Giannelli, Paul C., “The Admissibility of Laboratory Reports: The Reliability of Scientific Proof,” 49 *OHIO ST.L.J.* 671 (1988).



Commentary by Walter F. Rowe

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The introduction of DNA profiling has revolutionized forensic science and the criminal justice system. DNA technology has given police and the courts a means of identifying the perpetrators of rapes and murders with a very high degree of confidence.

As recently as the late 1960s, the only methods available for genetic marker analysis of blood and other body fluids were the Lattes test, the absorption-elution test, and the absorption-inhibition test. Only ABO blood group substances and ABO isoantibodies could be detected in biological stain evidence. Over the intervening years, electrophoretic methods for typing polymorphic proteins—such as phosphoglucomutase, esterase D, glyoxalase, hemoglobin, and haptoglobin—became available.

While these methods are in theory capable of greatly narrowing down the possible sources of biological stain evidence, they often fail to yield a result because of deterioration of the genetic marker. They even can yield completely erroneous results.

For a variety of reasons, DNA profiling has significantly advanced the analysis of biological stain evidence. First, these methods are intrinsically more discriminating than the methods of genetic marker analysis heretofore used. DNA profiling is more likely to exonerate a wrongly accused suspect. Second, the DNA molecule is more stable than polymorphic proteins. Third, microbial degradation does not lead to erroneous typing results.

An unforeseen consequence of the introduction of DNA profiling has been the reopening of old cases. Persons convicted of murder and rape before DNA profiling became available have sought to have the evidence in their cases reevaluated using this new technology. In some cases, DNA test results have exonerated those convicted of the offenses and resulted in their release from prison.

The National Institute of Justice commissioned a research study of such DNA exculpatory cases. Conducted by the Institute for Law and Justice and described in this report, the study has identified 28 cases in which DNA testing led to the exoneration of persons previously convicted of murder or rape.

Most forensic scientists involved in DNA analysis have been aware that in some cases, DNA profiling has been instrumental in correcting injustices. Previously, however, almost all the information had been anecdotal. This report assembles a wealth of information on such cases, and the accounts of exculpatory DNA cases it presents will go a long way toward countering uninformed attacks on forensic DNA testing. Study results also should provide strong arguments for law enforcement officials who seek funding from State legislatures to establish forensic DNA laboratories. Furthermore, the study should completely dispel any lingering public perception of forensic DNA testing as a threat to civil liberties.

At the same time, the study also raises several important issues that need to be confronted by the legal community, law enforcement agencies, and the forensic science profession. The careful reader of this report will note the number of cases in which law enforcement agencies and prosecutors went forward with criminal prosecutions when only minimal genetic marker data were available. Critics of DNA typing who have opposed the admission of any DNA evidence should ponder the likely consequences of such an absolute prohibition: Law enforcement agencies and forensic science laboratories would be compelled to revert to the older and less discriminating serological methods (such as ABO blood typing and polymorphic protein typing). Many innocent defendants who would be exonerated by DNA typing would instead be prosecuted because the less powerful techniques failed to exclude them.

A second important issue is the number of cases in which there was misconduct on the part of the prosecution's scientific experts. For example, the forensic serologist who testified against Gary Dotson failed to disclose that, because the alleged victim was also a type B secretor, the fraction of the male population that could have contributed the semen found on the vaginal swabs exceeded 60 percent, making the serological evidence in the case probative of very little.¹ In this instance, the prosecution's expert witness

¹Webb, Cathleen Crowell, and Marie Chapien, *Forgive Me*, New York: Berkeley Books, 1986.

failed to volunteer potentially exculpatory information but did not actually lie under oath.

Three cases discussed in this report involved expert scientific testimony by Fred Zain. Mr. Zain was a forensic serologist in the West Virginia State Police Crime Laboratory for a number of years; he then worked briefly as a forensic serologist for the Bexar County (Texas) Medical Examiner's Office. Mr. Zain's conduct as a forensic serologist was called into question when the results of a DNA test freed Glen Woodall. At Mr. Woodall's original trial, Zain testified that Woodall's ABO, phosphoglucomutase (PGM), glyoxalase (GLO), and secretor types matched those found in the semen sample. Such an event is possible but highly unlikely given that Woodall was unambiguously excluded by subsequent DNA tests. A special commission convened by order of the West Virginia Supreme Court of Appeals investigated Zain and the West Virginia State Police Crime Laboratory. As a result of this investigation, the State Supreme Court ruled that none of the testimony given by Zain in more than 130 cases was credible.² The court further ordered that Zain be indicted for perjury.³ It is sobering to reflect that but for the adventitious appearance of DNA typing, Glen Woodall would still be languishing in prison and Fred Zain might still be sending innocent persons to prison.

The advent of DNA typing will go a long way toward preventing miscarriages of justice, like the Dotson and Woodall cases, in the future. Most wrongly accused suspects will be exonerated during the initial testing of physical evidence, long before prosecution would even be considered. The quantity and quality of documentation required by laboratory quality assurance/quality control protocols preclude the wholesale falsification of test results. The minuscule quantities of DNA required for PCR-based typing procedures also allow the preservation of sufficient DNA for independent laboratory testing.

One problem that DNA testing will not remedy is inadequate legal counsel. In case after case reported here, defense counsel failed to consult competent scientific experts. Even a neophyte forensic serologist would have detected the problems with the prosecution's serological evidence in the Dotson

²"Court Invalidates a Decade of Blood Test Results in Criminal Cases," *New York Times* (November 12, 1993):A20.

³Harper, Jane, "West Virginia Court Wants Forensics Expert Prosecuted," *Houston Post* (July 17, 1994):A22.

case. It is also clear that in case after case, defense counsel failed to review the case notes of the prosecution's forensic serologists. Even a layperson would have seen that Fred Zain's written reports and sworn testimony were contradicted by his case notes. Again, one has to reflect on the likelihood that numerous innocent persons are presently incarcerated because of the inadequacy of their attorneys.

This National Institute of Justice report on DNA exculpatory cases is a unique contribution to the growing literature on forensic DNA profiling. It should be read and pondered by anyone having an interest in this burgeoning field of forensic science.



Commentary by Rockne Harmon

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The introduction of forensic DNA typing into the legal system was heralded as the most significant event in criminalistics since dermal fingerprint identification. Few developments ever live up to their advance billing—but DNA has!

Cases are now being prosecuted that never would have been possible before the advent of DNA typing. Many States have created DNA data bases on known offenders that they compare against unsolved crimes. Several States have produced matches from their data base searches, and a handful of these cases already have been successfully prosecuted.

About 9 years after its introduction, forensic DNA typing is still used only selectively. This is due, in part, to several factors: the unavailability of forensic typing to local prosecutors, the time required to perform the typing, and the costs of the tests if private laboratories are utilized.

When forensic DNA typing is performed in cases under investigation or still pending in court, the results occasionally exonerate a suspect or suspects. Such cases rarely are front-page news because the tests have served their purpose. Investigators can redirect their efforts to alternative suspects. Prosecutors can dismiss charges filed against innocent suspects.

This report reviews more than two dozen cases in which forensic DNA typing ultimately exonerated suspects or defendants. Most were prosecuted at a time when forensic DNA typing was not available to police or prosecutors. Each case has a slightly different sequence and series of events. Because of these differences, each case provides additional insight into how the legal system might avoid the pitfalls of the past, whether or not the testing is performed in pending or postconviction cases.

Some already have used the cases discussed in this report to argue that hundreds more innocent defendants are in prison. They contend that the current “exclusion” rate for forensic DNA labs—close to 25 percent—suggests that

a similar percentage of innocent defendants were wrongly convicted before the availability of forensic DNA typing. Unfortunately, too many variables are contained in the “exclusion” rate to draw any meaningful conclusions from it. Furthermore, nothing about the cases reviewed here necessarily supports such a conclusion.

The only clear conclusion that can be drawn is that this new technology can be used within the existing legal framework to undo past injustices. In other words, both the science and the legal system worked in these cases! This report provides additional insights into how such cases can be identified in the future.



Commentary by Ronald S. Reinstein

Presiding Judge, Criminal Department
Superior Court of Arizona
Maricopa County

This report is an excellent example of the marriage between science and law and of the invaluable resource that DNA evidence has become in the forensic field. When justice can be served in such dramatic fashion by the exoneration of previously adjudged guilty individuals, science demonstrates its practical effect.

Yet the 28 cases cited in the report relate only to individuals released from prison because of DNA testing. Vastly more far-reaching in the long run is the use of DNA typing both to exclude some suspects who otherwise might be charged and to identify many other suspects who might not have been charged but for the DNA typing.

What is frustrating to many who are excited about the possibilities of the use of DNA in the forensics area is the slow pace it is traveling on the road to admissibility. Many jurisdictions do not have sufficient funds to establish their own laboratories or to send to private laboratories items of evidence for typing. Laboratories that perform testing often have backlogs measured in months. Courts, prosecutors, and defense counsel impose a great burden on laboratories' time in the usual discovery battles that occur whenever a new technique arrives on the forensic scene.

It is interesting to observe how quickly some DNA-evidence opponents embrace the science when it benefits certain defendants' interests but how defensive they become when the evidence points *toward* other defendants. But this is not unique to DNA evidence.

It is the responsibility of the court to promote the search for truth. If that search can be assisted by science that can give reliable results, the whole system as well as society benefits. It is also the responsibility of the court to try to prevent juror confusion caused by lawyers and experts who sometimes seem unable to explain scientific evidence in language the jury understands.

The future should be brighter as the technology improves so that the process of DNA typing will likely become much quicker, less complex, and less expensive. The battle of the experts, it is hoped, will also subside eventually, especially in the confusing area of the statistical meaning of a match.

The conflict between various forensic experts, population geneticists, and statisticians on “the meaning of a match” is a prime example of how science and the law sometimes do not mesh, especially in jurisdictions that follow the *Frye* test of general acceptance in the scientific community. The numbers being bandied about by various experts are almost beyond comprehension for trial jurors.

It seems logical to allow relevant, reliable, qualitative expert opinion—for example, that the probability of a random match in DNA testing is extremely remote given a reliable multilocus match. Likewise, experts should be able to testify from their experience about whether they are aware of random matches at four or five loci of unrelated individuals, and whether one evidence sample matches another to a reasonable degree of scientific certainty. There is a serious question about whether DNA-match testimony should be treated any differently from that of fingerprints, bite marks, hair and fiber samples, ballistics, shoe prints, and the like.

Restrictions currently imposed in some jurisdictions on the use of DNA evidence unreasonably divest such evidence of its compelling nature. If our justice system’s goal is the continuing search for truth, as evidenced by the results of the study described in this report, then a similar argument can be made for the admissibility of relevant and reliable DNA-match testimony in our courts.



Commentary by George W. Clarke and Catherine Stephenson

Deputy District Attorneys
San Diego County, California

The study described in this report highlights significant aspects of the use of DNA evidence in the investigation and prosecution of criminal cases. While DNA typing is employed in various types of criminal cases (e.g., murder, robbery, kidnaping), the majority of DNA investigations entail sexual assault offenses. Indeed, in all of the cases reported in this study, sexual assault was alleged alone or in tandem with other crimes.

That the majority of DNA profiling cases concern sexual assault—usually rape—is not surprising. In few other criminal endeavors is the perpetrator as likely to deposit significant physical evidence. Occasionally, that evidence is hair, blood, or saliva; more often it is semen. Of the 28 cases reported in this study, all but two appear to have involved the analysis of the sperm component of the semen. Sexual assault cases by their very nature normally include evidence rich in DNA profile evidence.

Our enthusiasm for the use and interpretation of DNA typing, however, should be tempered inasmuch as the vast majority of sexual assault cases involving both child and adult victims do not require resolution of identity. The majority of child and adult sexual assault cases presented to us for determinations of whether to file criminal charges involve a perpetrator known to the victim. The defense normally presented is consent. In other cases, there is a denial that any sexual act occurred at all. These cases frequently do not involve physical evidence of sexual assault (injury, semen, saliva). This absence of physical evidence can be due to delay on the part of the victim in making a report to the police or to the very nature of the act, such as fondling, which is unlikely to result in the deposit or recovery of trace evidence. In such cases, the prosecutor first must resolve whether an assault even took place.

This report emphasizes that in those cases where identity *is* an issue, law enforcement officers must be diligent in the search for DNA evidence both

at the scene and in or on the victim. Careful and timely collection and preservation of evidentiary material is critical. Collecting the bed sheets before they are washed and recovering evidence from the victim before the victim showers are important components of effective investigation. Thorough, well-documented, and honestly disseminated interviews of the victim are equally critical.

Forensic DNA typing laboratories—as numerous commentators have noted—encounter rates of exclusion of suspected attackers in close to 25 percent of cases. Careful examination of such results is commonly required whether in the pre- or postconviction setting. Typing results that exclude a suspected assailant may not demonstrate innocence. Not uncommonly, evidence collected and subjected to DNA profiling may reveal results from biological material left by other consensual sexual partners unrelated to the offense investigated or from other individuals having contact with the victim. Consideration of those results in the context of all other evidence in a specific case is essential to the determination of what took place. Law enforcement officers, prosecutors, and judges must conscientiously undertake such examinations in order to fulfill the factfinding functions with which they are entrusted.

As this report notes, judges and juries may soon routinely expect DNA typing evidence in sexual assault cases as the use of DNA technology becomes more widely known. DNA profiling evidence can speak, but not with the passion of a victim's voice. DNA typing results can shed light on "who"; it cannot explain precisely when, or how, or even why. The victim who survives the sexual assault must always be the primary and most important source of information.

Commentary by Matt L. Rodriguez

Superintendent of Police
Chicago Police Department

Criminal justice in the United States is a system founded on skepticism. “Innocent until proven guilty” and “beyond reasonable doubt” reflect more than the systematic doubt and deferred judgment that are afforded individuals accused of crime in our society. These maxims help define the incredibly high standards that the system’s practitioners must meet before someone can be judged guilty.

In recent years police and prosecutors have increasingly turned to technology as a way to achieve these standards of proof with greater efficiency and effectiveness. Throughout the Nation, law enforcement agencies have entered an era in which high technology is not only desirable but also necessary to combat crime and ensure justice. Recent advances in forensic and biometric technologies, in particular, have created enormous opportunities for law enforcement to identify offenders with greater speed and certainty.

But while new technology presents opportunities, it is not without its challenges. The rate of change in technology, already fast-paced, is accelerating rapidly. And the demands on law enforcement are increasing dramatically in terms of both case volume and complexity. This environment of change exerts tremendous pressure on today’s law enforcement administrators. Not only must we figure out what new technology to acquire and when to acquire it, but, just as importantly, we must ensure that our internal policies and operational procedures are keeping pace with advances in technology.

This study of DNA analysis in exculpatory cases highlights—in a very “real world” manner—both the opportunities and the challenges that this particular technology poses for law enforcement.

As a forensic science tool for criminal justice, DNA analysis has a relatively short history, dating back to groundbreaking cases in the late 1980s. What is significant about this “start date,” from a law enforcement perspective, is that it stands in stark contrast to the age and experience levels of many of our police officers, especially those in larger cities. With an average age

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oftentimes of 40 or more, and with many police officers having 15, 20, or more years of experience, police departments today are populated with officers who did not grow up with DNA analysis and similar technologies. The result is that many agencies are still playing “catch up” when it comes to operating in today’s high-technology world.

At the same time, the O.J. Simpson case and other recent sensational trials have put law enforcement under an intensely powerful microscope, examining our most basic procedures for collecting, processing, and caring for evidence. Although such scrutiny is never comfortable, it is appropriate and welcome, for the ultimate test of what we do in policing is in the courtroom. Increased scrutiny has challenged police departments to become more knowledgeable about DNA technology and more professional in evidence collection and processing. How we respond to this challenge will be crucial to our success and to the cause of justice in an even higher tech future.

Typically, when faced with challenges of this magnitude, law enforcement’s first reaction is to concentrate on the specialists within our profession—in this case, the evidence technicians and crime laboratory analysts. These people are certainly critical to the effective processing of evidence, especially in the current environment of scrutiny and technological sophistication. But it is a mistake for law enforcement to focus solely on these specialists. Extensive and up-to-date training and procedures need to be provided to all of our police officers.

As the first responders to most crime scenes, patrol officers in particular must be aware of the potential opportunities and pitfalls posed by DNA technology, just as they must be extremely sensitive to the full range of evidentiary matters involved in protecting and processing crime scenes. Up and down the chain of command as well, police personnel must become more knowledgeable about DNA technology and more aware of, and responsive to, its implications for crime-scene and evidence processing. In the post-O.J. Simpson era, the handling of evidence until it reaches the crime laboratory will be as important as the laboratory technology, conditions, or procedures themselves.

Although the challenges posed by DNA analysis are many, they are outweighed by the enormous possibilities the technology presents. DNA analysis is a powerful and often necessary tool for establishing *the presence or absence* of someone at a crime scene. Readers of this study must remember that this issue cuts both ways.

In the future we must reduce the likelihood of innocent persons being wrongly convicted, just as we must *increase* the chances of guilty parties being identified and held responsible for the crimes they commit. This can be achieved through continued refinement of DNA technology, coupled with better training and procedures to ensure that evidence is skillfully gathered, stored, and submitted for analysis. When used properly and appropriately, DNA analysis can permit us to address the skepticism and doubt that are intrinsic to our system of justice.

Commentary by Peter Neufeld, Esq. and Barry C. Scheck

Mr. Scheck is Professor of Law and
Director of Clinical Education
Benjamin N. Cardozo School of Law
New York, New York

Postconviction DNA exonerations provide a remarkable opportunity to re-examine, with greater insight than ever before, the strengths and weaknesses of our criminal justice system and how they bear on the all-important question of factual innocence. The dimensions of the factual innocence problem exceed the impressive number of postconviction DNA exonerations listed in this report. Indeed, there is a strong scientific basis for believing these matters represent just the tip of a very deep and disturbing iceberg of cases. Powerful proof for this proposition lies with an extraordinary set of data collected by the Federal Bureau of Investigation (FBI) since it began forensic DNA testing in 1989.

Every year since 1989, in about 25 percent of the sexual assault cases referred to the FBI where results could be obtained (primarily by State and local law enforcement), the primary suspect has been excluded by forensic DNA testing. Specifically, FBI officials report that out of roughly 10,000 sexual assault cases since 1989, about 2,000 tests have been inconclusive (usually insufficient high molecular weight DNA to do testing), about 2,000 tests have excluded the primary suspect, and about 6,000 have “matched” or included the primary suspect.¹ The fact that these percentages have remained constant for 7 years, and that the National Institute of Justice’s informal survey of private laboratories reveals a strikingly similar

¹Although there is no sure way to determine what the results would have been on the inconclusive tests if results had been obtainable, it seems a fair assumption, given the strong trends over a 7-year period, that the percentages of exclusions and inclusions of the primary suspect would have run about the same as the cases where results were obtainable. Indeed, since most of the FBI’s cases since 1989 involved RFLP tests, which require greater amounts of sample than PCR-based testing, it would be interesting to test this hypothesis by performing PCR tests on some of the old inconclusive cases where primary suspects were either acquitted or convicted.

26-percent exclusion rate, strongly suggests that postarrest and postconviction DNA exonerations are tied to some strong, underlying systemic problems that generate erroneous accusations and convictions.

It must be stressed that the sexual assault referrals made to the FBI ordinarily involve cases where (1) identity is at issue (there is no consent defense), (2) the non-DNA evidence linking the suspect to the crime is eyewitness identification, (3) the suspects have been arrested or indicted based on non-DNA evidence, and (4) the biological evidence (sperm) has been recovered from a place (vaginal/rectal/oral swabs or underwear) that makes DNA results on the issue of identity virtually dispositive.

It is, of course, possible that some of the FBI's sexual assault exclusions have included false negatives. False negatives could occur, for example, because of (1) laboratory error; (2) situations where the victim of the assault conceals the existence of a consensual sexual partner within 48 hours of the incident *and* the accused suspect did not ejaculate (if the suspect ejaculated, the DNA should be identified along with the undisclosed sexual partner); or (3) multiple assailant sexual assault cases where none of the apprehended suspects ejaculated (the FBI counts the exclusion of all multiple suspects in a case as just one exclusion). Nonetheless, even with these caveats, it is still plain that forensic DNA testing is prospectively exonerating a substantial number of innocent individuals who would have otherwise stood trial, frequently facing the difficult task of refuting mistaken eyewitness identification by a truthful crime victim who would rightly deserve juror sympathy.

Without DNA testing, the prospects of wrongful convictions in these exclusion cases are evident. Even if one assumes half the normal conviction rate (State conviction rates for felony sexual assaults average about 62 percent), one would expect that hundreds of people who have been exonerated by FBI DNA testing in sexual assault cases over the last 7 years would have otherwise been convicted.

The Institute for Law and Justice report does not purport to be more than a quick survey, based primarily on press clippings and summary interviews, of postconviction DNA exoneration cases, and it does not undertake any systematic analysis of them. Since we have been, through the Innocence Project at Cardozo Law School, either attorneys of record or assisting counsel in the vast majority of these cases, we have attempted to

investigate, with care and in detail, some of the factors that have led to the conviction of the innocent.²

Interestingly, in many respects the reasons for the conviction of the innocent in the DNA cases do not seem strikingly different than those cited by Yale Professor Edwin Borchard in his seminal work, *Convicting the Innocent* (Garden City Pub., 1932), which reviewed 65 cases, and more recently by Hugo Bedau and Michael Radelet in *In Spite of Innocence* (Northeastern University Press, 1992), which reviewed 416 erroneous convictions in death cases from 1900 to 1991. Mistaken eyewitness identification, coerced confessions, unreliable forensic laboratory work, law enforcement misconduct, and ineffective representation of counsel, singly and often in combination, remain the leading causes of wrongful convictions.

There are, however, historically unique aspects to the DNA exoneration cases. Most significantly, both the postconviction cases described in this report and the prospective sexual assault exclusions produced by the FBI and other laboratories create an opportunity for groundbreaking criminal justice research.

Take, for instance, just the FBI's sexual assault cases. One can confirm among these cases, with greater scientific assurance than is ordinarily provided by a trial verdict, which suspects charged were truly innocent and which suspects were truly guilty. We believe it crucial to identify, prior to any DNA testing, precisely what factors in the investigatory and charging process produced incorrect results in some of these cases and correct results in others. Are there systemic weaknesses that can be identified in eyewitness identification procedures, crime scene investigations, non-DNA labora-

²While we would be the last to discount the possibility of laboratory error in any DNA testing case, be it an exclusion or an inclusion, great pains have been taken in the postconviction DNA exoneration cases to minimize this factor. First, it must be stressed that these cases, even if involving a homicide, have invariably involved analysis of sperm from swabs (vaginal, oral, or anal) or from clothes worn by the victim. Thus, the chance of inadvertently cross-contaminating the samples with someone else's sperm is remote. Secondly, sexual assault evidence provides an intrinsic redundancy, or internal control, in that the DNA profile from epithelial cells found in samples can be cross-checked against the known DNA profile of the victim. Finally, before convicted prisoners have been released, either through postconviction court orders or clemency grants from governors, the prosecution has insisted upon independent testing of samples by their own experts and elimination samples from other possible sperm donors (husbands or boyfriends) even if it was the prosecution's position at trial that the sperm came from the perpetrator.

tory tests (hair, fiber, etc.), police interrogation techniques, or other investigatory methods used by police and prosecutors that are conducive to false or true arrests and convictions? Perhaps there has never been a richer or more exciting set of cases for criminal justice researchers to explore in terms of shedding light on how law enforcement methods impact the crucial problem of factual innocence.

Finally, notwithstanding the research opportunities presented by the postarrest and postconviction DNA exoneration cases as to *how* wrongful accusations and convictions occur, the most significant implication of these cases is already apparent—the extent of factually incorrect convictions in our system must be much greater than anyone wants to believe. Postarrest and postconviction DNA exonerations have invariably involved analysis of sexual assault evidence (sperm), even if a murder charge was involved, that proved the existence of mistaken eyewitness identification. Since there does not seem to be anything inherent in sexual assault cases that would make eyewitnesses more prone to mistakes than in robberies or other serious crimes where the crucial proof is eyewitness identification, it naturally follows that the rate of mistaken identifications and convictions is similar to DNA exoneration cases.

The recently passed anti-terrorism bill contains a sweeping and unprecedented curtailment of the right to obtain postconviction habeas corpus relief in the Federal courts: Strict time limits (1 year in nondeath cases, 3 months in death cases) have been set for filing the writ; State court factual findings are “presumed to be correct”; State court misinterpretations of the United States Constitution are not a basis for relief unless those misinterpretations are “unreasonable”; and all petitioners must show, prior to obtaining a hearing, facts sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty. In short, just as DNA testing, the most important technological breakthrough of twentieth century forensic science, demonstrates that the problem of wrongful convictions in America is systemic and serious, Congress and the President, in our view, have eviscerated the “great writ” that for two centuries provided relief to those who were unjustly convicted. Hopefully, before this century closes, as the ramifications of the DNA exoneration cases become better understood, this triumph of political expediency over America’s traditional concerns for liberty and justice will be redressed.

CHAPTER I

Introduction

“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.”

*Arthur Conan Doyle, **The Adventure of the Speckled Band***

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One way to view science is that it is a search for truth.¹ Forensic science is no exception. As Attorney General Janet Reno emphasized, “The use of forensic science as a tool in the search for truth allows justice to be done not only by apprehending the guilty but also by freeing the innocent.”²

This report describes a study that focused on the freeing of the innocent—persons initially convicted and imprisoned but later released through postconviction forensic use of DNA technology.

Purpose and Scope of the Study

The principal purpose of the study, initiated in June 1995, was to identify and review cases in which convicted persons were released from prison as a result of posttrial DNA testing of evidence. As of early 1996, researchers had found 28 such cases: DNA test results obtained subsequent to trial proved that, on the basis of DNA evidence, the convicted persons could not have committed the crimes for which they were incarcerated.

The study also involved a survey of 40 laboratories that conduct DNA testing.

This report does not probe the strengths or weaknesses of forensic DNA technology when applied to criminal cases.³ The discussion of DNA instead is limited to its use in exculpating convicted defendants serving prison sentences.

The authors do not claim to be scientific experts in DNA technology. This report cites reference materials that probe technological details more deeply than occurs on these pages.

The balance of this chapter outlines the study’s design and provides basic background information on forensic DNA identification testing. Chapters II and III, respectively, present the study’s findings and their policy implications. The final chapter consists of brief profiles of the 28 exculpatory cases. A glossary defines DNA-related terms, and the appendix reports DNA test results for some of the exculpated persons profiled in this report.

Study Design

To identify cases that met study criteria—defendant conviction, imprisonment, and subsequent exoneration and release resulting from posttrial exculpatory DNA tests—researchers examined legal and newspaper data bases and interviewed a variety of legal and DNA experts. Once initially identified as likely candidates for the study, cases were verified and assessed through interviews with the involved defense counsel, prosecutors, and forensic laboratory staff; through reviews of court opinions; and, in some instances, through examinations of case files.

For example, initial identification of the Glen Woodall case resulted from an automated search of newspaper data bases, which identified articles about the case in several West Virginia newspapers, the *Philadelphia Inquirer*, and the *Cleveland Plain Dealer*. An opinion by the West Virginia Supreme Court of Appeals in the appeal of Woodall's conviction (*State v. Woodall*, 385 S.E.2d 253, W. Va. 1989) contained the name of Woodall's defense attorney, who was called and interviewed at length and who provided materials related to the criminal case.

Those materials described improper activities by Fred Zain, once a serologist for the West Virginia State Police. A phone conversation with the West Virginia assistant attorney general handling the Zain misconduct cases resulted in the receipt of public case documents containing extensive details on Zain's activities related to the Woodall investigation and prosecution.

A review of transcripts from the criminal and, later, civil cases yielded the name of the laboratory that conducted the DNA testing that exculpated Woodall. A lengthy interview was conducted with the laboratory's forensic scientist who performed the DNA tests on the Woodall evidence. He provided documentation related to his examinations in the case.

Cases related to a special West Virginia Supreme Court of Appeals investigation into government misconduct surrounding Woodall's case (438 S.E.2d 501, W. Va. 1993; 445 S.E.2d 165, W. Va. 1994) also were reviewed.

Researchers collected information for the survey of DNA-testing laboratories through telephone interviews. An experienced crime laboratory director assisted the Institute for Law and Justice in conducting the survey.

This study, conducted in a short time period with limited funding, reflects a modest level of analysis and focuses on a relatively small number of cases.

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One can state with confidence, however, that as of the study's completion, the 28 cases identified represent most of the situations in the country where convicted felons had been released from prison on the basis of postconviction DNA testing.⁴

Background on Forensic Use of DNA Identification Testing

Perhaps the most significant advance in criminal investigation since the advent of fingerprint identification is the use of DNA technology to help convict criminals or eliminate persons as suspects. DNA analyses on saliva, skin tissue, blood, hair, and semen can now be reliably used to link criminals to crimes. Increasingly accepted during the past 10 years, DNA technology is now widely used by police, prosecutors, defense counsel, and courts in the United States.

An authoritative study on the forensic uses of DNA, conducted by the National Research Council of the National Academy of Sciences, has noted that:

...the reliability of DNA evidence will permit it to exonerate some people who would have been wrongfully accused or convicted without it. Therefore, DNA identification is not only a way of securing convictions; it is also a way of excluding suspects who might otherwise be falsely charged with and convicted of serious crimes.⁵

Forensic use of DNA technology in criminal cases began in 1987 when police asked Dr. Alec J. Jeffreys (who coined the term "DNA fingerprints"⁶) of Leicester University (England) to verify a suspect's confession that he was responsible for two rape-murders in the English Midlands.⁷ Tests proved that the suspect had not committed the crimes. Police then began obtaining blood samples from several thousand male inhabitants in the area to identify a new suspect.⁸ In another 1987 case in England, Robert Melias became the first person convicted of a crime (rape) on the basis of DNA evidence.⁹

In one of the first uses of DNA in a criminal case in the United States, in November 1987, the Circuit Court in Orange County, Florida, convicted Tommy Lee Andrews of rape after DNA tests matched his DNA from a blood sample with that of semen traces found in a rape victim.¹⁰

Two other important early cases involving DNA testing are *State v. Woodall*¹¹ and *Spencer v. Commonwealth*.¹² In *Woodall*, the West Virginia Supreme Court was the first State high court to rule on the admissibility of

DNA evidence. The court accepted DNA testing by the defendant, but inconclusive results failed to exculpate Woodall. The court upheld the defendant's conviction for rape, kidnaping, and robbery of two women. Subsequent DNA testing determined that Woodall was innocent, and he was released from prison (see the case profile in chapter IV for more details).

The multiple murder trials in Virginia of Timothy Wilson Spencer were the first cases in the United States where the admission of DNA evidence led to guilty verdicts resulting in a death penalty. The Virginia Supreme Court upheld the murder and rape convictions of Spencer, who had been convicted on the basis of DNA testing that matched his DNA with that of semen found in several victims. In *Spencer*, the defendant's attack upon the introduction of DNA evidence was limited to the contention that its novelty should lead the court to "hold off until another day any decision ..."¹³ There was no testimony from expert witnesses that challenged the general acceptance of DNA testing among the scientific community.¹⁴

The first case that seriously challenged a DNA profile's admissibility was *People v. Castro*;¹⁵ the New York Supreme Court, in a 12-week pretrial hearing, exhaustively examined numerous issues relating to the admissibility of DNA evidence. Jose Castro was accused of murdering his neighbor and her 2-year-old daughter. A bloodstain on Castro's watch was analyzed for a match to the victim. The court held the following:

- DNA identification theory and practice are generally accepted among the scientific community.
- DNA forensic identification techniques are generally accepted by the scientific community.
- Pretrial hearings are required to determine whether the testing laboratory's methodology was substantially in accord with scientific standards and produced reliable results for jury consideration.

The *Castro* ruling supports the proposition that DNA identification evidence of *exclusion* is more presumptively admissible than DNA identification evidence of *inclusion*. In *Castro*, the court ruled that DNA tests could be used to show that blood on Castro's watch was not his, but tests could not be used to show that the blood was that of his victims.

In *Castro*, the court also recommended extensive discovery requirements for future proceedings, including copies of all laboratory results and reports;

explanation of statistical probability calculations; explanations for any observed defects or laboratory errors, including observed contaminants; and chain of custody of documents. These recommendations soon were expanded upon by the Minnesota Supreme Court, in *Schwartz v. State*,¹⁶ which noted, "...ideally, a defendant should be provided with the actual DNA sample(s) in order to reproduce the results. As a practical matter, this may not be possible because forensic samples are often so small that the entire sample is used in testing. Consequently, access to the data, methodology, and actual results is crucial...for an independent expert review."¹⁷

In *Schwartz*, the Supreme Court of Minnesota refused to admit the DNA evidence analyzed by a private forensic laboratory; the court noted the laboratory did not comply with appropriate standards and controls. In particular, the court was troubled by failure of the laboratory to reveal its underlying population data and testing methods. Such secrecy precluded replication of the test.

In summary, courts have successfully challenged improper application of DNA scientific techniques to particular cases, especially when used to declare "matches" based on frequency estimates. However, DNA testing properly applied is generally accepted as admissible under *Frye*¹⁸ or *Daubert*¹⁹ standards.²⁰ As stated in the National Research Council's 1996 report on DNA evidence, "The state of the profiling technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt."²¹ At this time, 46 States admit DNA evidence in criminal proceedings. In 43 States, courts have ruled on the technology, and in 3 States, statutes require admission (see exhibit 1).

Exhibit 1. DNA Evidence Admission in Criminal Trials by State

State	DNA Admitted	State	DNA Admitted
Alabama	Yes	Montana	Yes
Alaska	Yes	Nebraska	Yes
Arizona	Yes	Nevada	Statute
Arkansas	Yes	New Hampshire	Yes
California	Yes*	New Jersey	Yes*
Colorado	Yes	New Mexico	Yes
Connecticut	Yes	New York	Yes
Delaware	Yes	North Carolina	Yes
Florida	Yes	North Dakota	No
Georgia	Yes	Ohio	Yes
Hawaii	Yes	Oklahoma	Statute
Idaho	Yes	Oregon	Yes
Illinois	Yes*	Pennsylvania	Yes
Indiana	Yes	Rhode Island	No
Iowa	Yes	South Carolina	Yes
Kansas	Yes	South Dakota	Yes
Kentucky	Yes	Tennessee	Statute
Louisiana	Yes	Texas	Yes
Maine	No	Utah	No
Maryland	Yes*	Vermont	Yes
Massachusetts	Yes	Virginia	Yes
Michigan	Yes	Washington	Yes
Minnesota	Yes	West Virginia	Yes
Mississippi	Yes	Wisconsin	Yes
Missouri	Yes	Wyoming	Yes

* Decision by Intermediate Court of Appeals

Notes

1. "Science is the search for truth—it is not a game in which one tries to beat his opponent, to do harm to others."—Linus Pauling, 1958. Cited in Beck, Emily Morison (ed.), *Familiar Quotations*, Boston: Little, Brown and Company, 1980.

2. Keynote address by Attorney General Janet Reno before the American Academy of Forensic Sciences, Nashville, Tennessee, February 21, 1996.

3. For articles debating the forensic use of DNA technology, see Thompson, William, "Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the DNA War," *The Journal of Criminal Law & Criminology*, 84, 1 (1993):22–104; Harmon, Rockne, "Legal Criticisms of DNA Typing: Where's the Beef?" *The Journal of Criminal Law & Criminology*, 84, 1 (1993):175–188; and Neufeld, Peter, "Have You No Sense of Decency?" *The Journal of Criminal Law & Criminology*, 84, 1 (1993):189–202.

4. The study's results have been reviewed by many persons, including those involved in a peer review process. To date, no one has identified additional cases that, as of the study's completion in February 1996, are the type examined in this report.

5. National Research Council, National Academy of Sciences, *DNA Technology in Forensic Science*, Washington, D.C.: National Academy Press, 1992:156. (Cited as NRC report.) Another reference source is McKenna, Judith, J. Cecil, and P. Coukos, "Reference Guide on Forensic DNA Evidence," *Reference Manual on Scientific Evidence*, Federal Judicial Center (1994). This guide has a useful glossary of terms at p. 323.

6. Jeffreys, Alec J., Victoria Wilson, and Swee Lay Thein, "Hypervariable 'Minisatellite' Regions in Human Nature," *Nature*, 314 (1985):67; "Individual-Specific 'Fingerprints' of Human DNA," *Nature*, 316 (1985):76.

7. The first reported use of DNA identification was in a noncriminal setting to prove a familial relationship. A Ghanaian boy was refused entry into the United Kingdom (U.K.) for lack of proof that he was the son of a woman who had the right of settlement in the U.K. Immigration authorities contended that the boy could be the nephew of the woman, not her son. DNA testing showed a high probability of a mother-son relationship. The U.K. Government accepted the test findings and admitted the boy. See Kelly, K.F, J.J. Rankin, and R.C. Wink, "Methods and Applications of DNA Finger-

printing: A Guide for the Non-Scientist,” *Criminal Law Review* (1987):105, 108; Note, “Stemming the DNA Tide; A Case for Quality Control Guidelines,” *Hamline Law Review*, 16 (1992):211, 213–214.

8. Gill, Peter, Alec J. Jeffreys, and David J. Werrett, “Forensic Application of DNA Fingerprints,” *Nature*, 318 (1985):577. See also Seton, Craig, “Life for Sex Killer Who Sent Decoy to Take Genetic Test,” *The Times* (London) (January 23, 1988):3. A popular account of this case, *The Blooding*, was written by crime novelist Joseph Wambaugh, New York, N.Y.: William Morrow & Co., Inc., 1989.

9. Bureau of Justice Statistics, “Forensic DNA Analysis: Issues,” Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, June 1991, at 4, note 8.

10. The admissibility of the DNA evidence was upheld by the intermediate appeals court, which cited the uncontroverted testimony of the State’s expert witnesses. *State v. Andrews*, 533 So.2d 841 (Dist. Ct. App. 1989). See also Office of Technology Assessment, Congress of the United States, *Genetic Witness: Forensic Uses of DNA Tests*, Washington, D.C.: July 1990.

11. 385 S.E.2d 253 (W. Va. 1989).

12. 384 S.E.2d 775 (1989). Additional court appeals by Spencer were rejected by the Virginia Supreme Court at 384 S.E.2d 785 (1989); 385 S.E.2d 850 (1989); and 393 S.E.2d 609 (1990).

13. *Supra* note 12 at 783.

14. *Id.*, at 797.

15. 545 N.Y.S.2d 985 (Sup. Ct. 1989). Castro’s case was never tried. He pleaded guilty to the murders in late 1989.

16. *Schwartz v. State*, 447 N.W.2d 422 (1989).

17. *Id.*, at 427. The Minnesota Supreme Court further held that the use of statistical probabilities testimony should be limited because of its potential for prejudicing the jury. *Id.*, at 428. The opinion was later modified in *State v. Bloom*, 516 N.W.2d 159 (1994).

18. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The test for the admissibility of novel scientific evidence enunciated in this case has been the most frequently invoked one in American case law. To be admissible, scientific evidence must be “sufficiently established to have gained general acceptance in the particular field in which it belongs.”

19. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). The Supreme Court used this civil case to articulate new standards for interpreting the admissibility of scientific evidence under the Federal rules of evidence. This standard, while encompassing *Frye*, allows a court to expand its examination to include other indicia of reliability, including publications, peer review, known error rate, and more. The court also should consider factors that might prejudice or mislead the jury. For the application of *Daubert* to DNA technology, see Sheck, Barry, “DNA and *Daubert*,” *Cardozo Law Review*, 15 (1994):1959.

20. This brief overview is not a treatise on DNA evidence admissibility in criminal cases. For more authoritative articles, see, Thompson, *supra* note 3; Kaye, D.H., “The Forensic Debut of the National Research Council’s DNA Report: Population Structure, Ceiling Frequencies and the Need for Numbers,” *Jurimetrics Journal*, 34, 4 (1994):369–382; Comments, “Admissibility of DNA Statistical Data: A Proliferation of Misconception,” *California Western Law Review*, 30 (1993):145–178.

21. National Research Council, National Academy of Sciences, *The Evaluation of Forensic DNA Evidence* (prepublication copy), Washington, D.C.: National Academy Press, 1996:2.14.

CHAPTER II

Study Findings

Findings pertaining to characteristics of the 28 DNA exculpatory cases identified during the study are discussed first. The chapter concludes with the results of the telephone survey of DNA laboratories.

General Characteristics Shared by Many Study Cases

The 28 cases in this study were tried in 14 States and the District of Columbia. The States are Illinois (5 cases), New York (4 cases), Virginia (3 cases), West Virginia (3 cases), Pennsylvania (2 cases), California (2 cases), Maryland, North Carolina, Connecticut, Kansas, Ohio, Indiana, New Jersey, and Texas. Many cases share a number of descriptive characteristics, as noted below.

Most cases mid- to late 1980s. Most cases involved convictions that occurred in the 1980s, primarily mid- to late 1980s, a period when forensic DNA technology was not readily accessible. The earliest case involved a conviction in 1979, the most recent in 1991.

In each of the 28 cases, a defendant was convicted of a crime or crimes and serving a sentence of incarceration. While in prison, each defendant obtained, through an attorney, case evidence for DNA testing and consented to a comparison of the evidence-derived DNA to his own DNA sample. (In *Nelson*, the prosecutor conducted the tests.) In each case, the results showed that there was not a match, and the defendant was ultimately set free. Exhibit 2 presents an overview of the study cases.

Sexual assault the most frequent crime. All 28 cases involved some form of sexual assault. In six (*Bloodsworth*, *Cruz*, *Hernandez*, *Linscott*, *Nelson*, and *Vasquez*), assailants also murdered their victims. All alleged assailants were male. All victims were female: most were adults, others teenagers or children. All but one case involved a jury trial. (The nonjury case, *Vasquez*, involved a guilty plea from a defendant who had mental disabilities.) Of the cases where the time required for jury deliberations was known, most had verdicts returned in less than 1 day, except for *Kotler*, which required 2 days.

Prison time served. The 28 defendants served a total of 197 years in prison (an average of almost 7 years each) before being released as a result of DNA testing. The longest time served was 11 years, the shortest 9 months. For a variety of legal reasons, defendants in several cases continued to remain in prison for months after exculpatory DNA test results. In *Green*, DNA testing was performed after conviction but prior to sentencing.

Exhibit 2. Overview of DNA Study Cases

Case Name/Location	Primary Charges	Date Convicted	Sentence/Served
Alejandro, Gilbert Uvalde, TX	Sexual assault	October 1990	12 yrs/4 yrs
Bloodsworth, Kirk Baltimore, MD	Murder, rape	March 1985	Death, later reduced to life/Almost 9 yrs
Bravo, Mark Diaz Los Angeles Co., CA	Rape	December 1990	8 yrs/3 yrs
Brisson, Dale Chester County, PA	Rape, kidnaping	June 1991	18–42 yrs/3½ yrs
Bullock, Ronnie Chicago, IL	Aggravated sexual assault	May 1984	60 yrs/10½ yrs
Callace, Leonard White Plains, NY	Sodomy, sexual abuse	March 1987	25–50 yrs/Almost 6 yrs
Chalmers, Terry Leon White Plains, NY	Rape, sodomy	June 1987	12–24 yrs/8 yrs
Cotton, Ronald Burlington, NC	Rape (2 counts)	January 1985 November 1987 (second trial)	Life+54 yrs/10½ yrs
Cruz, Rolando Chicago, IL	Murder, kidnaping, rape	March 1985	Death/11 yrs
Dabbs, Charles Westchester Co., NY	Rape	April 1984	12½–20 yrs/7 yrs
Davis, Gerald Wayne Kanawha Co., WV	Kidnaping, sexual assault (2 counts)	May 1986	14–35 yrs/8 yrs
Daye, Frederick Rene San Diego, CA	Rape (2 counts), kidnaping	August 1984	Life/10 yrs
Dotson, Gary Chicago, IL	Rape, aggravated kidnaping	July 1979	25–50 yrs/8 yrs
Green, Edward Washington, DC	Rape	July 1989	Never sentenced/9 months
Hammond, Ricky Hartford, CT	Sexual assault, kidnaping	March 1990	25 yrs and 3 yrs probation/2 yrs
Harris, William O'Dell Charleston, WV	Sexual assault	October 1987	10–20 yrs/7 yrs, then 1 yr home confinement

Exhibit 2. Overview of DNA Study Cases (continued)

Case Name/Location	Primary Charges	Date Convicted	Sentence/Served
Hernandez, Alejandro Chicago, IL	Murder, kidnaping, rape	March 1985	Death/11 yrs
Honaker, Edward Nelson County, VA	Rape, sexual assault, sodomy	June 1985	3 life terms+34 yrs/10 yrs
Jones, Joe C. Topeka, KS	Rape, aggravated kidnaping	February 1986	Life+10–25 yrs/6½ yrs
Kotler, Kerry Suffolk County, NY	Rape (2 counts)	February 1982	25–50 yrs/11 yrs
Linscott, Steven Cook County, IL	Murder, rape	November 1982	40 yrs/3 yrs in prison; 7 yrs out on bond
Nelson, Bruce Allegheny Co., PA	Murder, rape	September 1982	Life/9 yrs
Piszcsek, Brian Cuyahoga Co., OH	Rape	June 1991	15–25 yrs/4+ yrs
Scruggs, Dwayne Indianapolis, IN	Rape	May 1986	40 yrs/Over 7½ yrs
Shephard, David Union County, NJ	Rape	September 1984	30 yrs/Almost 10 yrs
Snyder, Walter (Tony) Alexandria, VA	Rape, sodomy	June 1986	45 yrs/Almost 7 yrs
Vasquez, David Arlington Co., VA	Murder, rape	February 1985	35 yrs/5 yrs
Woodall, Glen Huntington, WV	Sexual assault, kidnaping	July 1987	2 life terms+203–335 yrs/4 yrs, then 1 yr under electronic home confinement

Many defendants also qualified for public defenders or appointed counsel. Most defendants appealed their convictions at least once; many appealed several times. Most appeals focused on trial error (e.g., ineffective assistance of counsel) or new evidence. For example, in some cases, the victims recanted their defendant identification testimony.

Prior police knowledge of the defendants. Police knew 15 defendants prior to their arrests, generally through criminal records. It is not known

whether, in some cases, that may have influenced police to place suspects in photo spreads and lineups shown to victims and other eyewitnesses.

Evidence Presented During/After Trial: Common Attributes

The 28 cases shared several common themes in the evidence presented during and after trial.

Eyewitness identification. All cases, except for homicides, involved victim identification both prior to and at trial. Many cases also had additional eyewitness identification, either placing the defendant with the victim or near the crime scene (e.g., in *Bloodsworth*, five witnesses testified that they had seen the defendant with the 9-year-old victim on the day of the murder). Exhibit 3 presents an overview of the evidence and DNA testing in the study cases.

Many defendants presented an alibi defense, frequently corroborated by family or friends. For example, Edward Honaker's alibi was corroborated by his brother, sister-in-law, mother's housemate, and trailer park owner. The alibis apparently were not of sufficient weight to the juries to counter the strength of the eyewitness testimony.

Use of forensic evidence. A majority of the cases involved non-DNA-tested forensic evidence that was introduced at trial. Although not pinpointing the defendants, that evidence substantially narrowed the field of possibilities to include them. Typically, those cases involved comparisons of nonvictim specimens of blood, semen, or hair at the crime scene to that of the defendants. Testimony of prosecution experts also was used to explain the reliability and scientific strength of non-DNA evidence to the jury.

Alleged government malfeasance or misconduct. Eight cases, as reported by defense attorneys and reflected in some judges' opinions, involved allegations of government misconduct, including perjured testimony at trial, police and prosecutors who intentionally kept exculpatory evidence from the defense, and intentionally erroneous laboratory tests and expert testimony admitted at trial as evidence. For example:

- In *Honaker*, the defendant's attorney alleged that the government intentionally kept exculpatory evidence from the defense, including information that two of the government's witnesses were secretly hypnotized to enhance their testimony and that the prosecution's criminalist was never

Exhibit 3. Overview of Selected Evidence and DNA Testing

Defendant	Selected Evidence	DNA Testing
Alejandro, Gilbert	DNA evidence testimony; victim ID	Restriction Fragment Length Polymorphism (RFLP) tests of semen stain on victim's nightgown excluded Alejandro.
Bloodsworth, Kirk	Five witness IDs; self-incriminating statements	Polymerase Chain Reaction (PCR) test of panties excluded Bloodsworth.
Bravo, Mark Diaz	Victim ID; blood analysis; misrepresentation	RFLP test of blanket, sheet, and victim's panties excluded Bravo.
Brison, Dale	Victim ID; hair analysis; weak alibi	RFLP test of semen-stained panties excluded Brison.
Bullock, Ronnie	Two victim IDs; police ID; proximity of residence	PCR test of semen-stained panties excluded Bullock. DNA tests on vaginal and anal swabs were inconclusive.
Callace, Leonard	Victim ID; blood analysis; weak alibi	RFLP test of semen-stained jeans excluded Callace.
Chalmers, Terry Leon	Victim ID; weak alibi	PCR test of two vaginal swabs excluded Chalmers.
Cotton, Ronald	Victim ID; similarity of shoes and flashlight	PCR test of vaginal swab and underwear excluded Cotton.
Cruz, Rolando	Alleged "dream visions" of the murder; inculpatory witness statements	PCR test of semen-stained underwear excluded Cruz and included Brian Dugan.
Dabbs, Charles	Victim ID; blood analysis	RFLP test of semen-stained panties excluded Dabbs.
Davis, Gerald Wayne	Victim ID; semen analysis	PCR test of the victim's underwear excluded Davis. No DNA found matching the victim from DNA tests done on Davis' bedsheets and underwear.
Daye, Frederick Rene	Victim ID; witness ID; blood analysis; misrepresentation	PCR test of semen-stained jeans excluded Daye.
Dotson, Gary	Victim ID; semen analysis; hair analysis	RFLP test of panties was inconclusive. PCR test of panties excluded Dotson and included victim's boyfriend.
Green, Edward	Victim ID; blood analysis	RFLP test of the victim's clothing excluded Green.

Exhibit 3. Overview of Selected Evidence and DNA Testing (continued)

Defendant	Selected Evidence	DNA Testing
Hammond, Ricky	Victim ID; victim ID of car; hair analysis; weak alibi	RFLP and blood tests excluded Hammond.
Harris, William O'Dell	Victim ID; semen analysis	PCR test of evidence slide excluded Harris.
Hernandez, Alejandro	Self-incriminating and inculpatory statements; inculpatory witness statements	PCR test of semen-stained underwear excluded Hernandez and included Brian Dugan.
Honaker, Edward	Victim ID; witness ID; hair analysis; similarity of clothing	PCR test of vaginal swab excluded Honaker and both of victim's boyfriends.
Jones, Joe C.	Victim ID; proximity to crime scene; similarity of pants; 2 witness IDs	PCR test of partial vaginal swab excluded Jones.
Kotler, Kerry	Victim ID; non-DNA genetic analysis	PCR test of panties excluded Kotler and victim's husband.
Linscott, Steven	Blood analysis; hair analysis; "dream confession"	Pretrial DNA tests were inconclusive. PCR test excluded Linscott.
Nelson, Bruce	Testimony of codefendant, self-incriminating statement	RFLP test excluded Nelson.
Piszcsek, Brian	Victim ID; weak alibi	PCR test of vaginal and anal swabs and nightgown excluded Piszcsek.
Scruggs, Dwayne	Victim ID; similarity of boots	PCR test of vaginal swab and bloodstain excluded Scruggs.
Shepard, David	Victim ID; blood analysis; weak alibi	DNA test of panty liner excluded Shepard.
Snyder, Walter (Tony)	Victim ID; similarity of clothing; blood analysis; weak alibi	PCR test of vaginal swab excluded Snyder.
Vasquez, David	Witness ID; no alibi; confession; hair analysis	PCR test of evidence matched Timothy Spencer. Attempts to compare hair with blood samples were inconclusive.
Woodall, Glen	Blood analysis; hair analysis; victim ID; similarity of clothing	PCR and RFLP tests of vaginal swabs and clothing excluded Woodall.

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told that Honaker had a vasectomy (and could not have been the source of the sperm in the victim).

- In *Cruz*, a supervising officer in the sheriff's department admitted, during the third trial, that he had lied about corroborating the testimony of his deputies in the earlier trials. This testimony focused on Cruz's "dream visions" of the murder.
- In *Kotler*, the government's serologist reportedly lied about his qualifications. In addition, Kotler's attorneys alleged that the government intentionally withheld exculpatory evidence from the defense. For example, police reports stated that the victim did not actually positively identify the defendant's picture but described him only as a "look alike." Furthermore, as recorded in police reports, the victim's description of the defendant was inaccurate for age, height, and weight. The defense was never informed about those reports.
- In cases involving defendants Glen Woodall, William O'Dell Harris, and Gerald Wayne Davis (and his father), the perjured testimony of Fred Zain, a serologist then with the West Virginia State Police, was in large part responsible for the wrongful convictions that ensued. The West Virginia Supreme Court of Appeals, in a special report on Zain's misconduct in more than 130 criminal cases, stated that such behavior included "...overstating the strength of results; ...reporting inconclusive results as conclusive; ...repeatedly altering laboratory records; ..."¹ The report also noted that Zain's irregularities were "the result of systematic practice rather than an occasional inadvertent error." In addition, the report stated that Zain's "supervisors may have ignored or concealed complaints of his misconduct."²
- In *Alejandro*, the defendant was also wrongfully convicted by expert testimony from Fred Zain, who had moved from West Virginia to Texas and worked for the Bexar County crime laboratory. In July 1994, a Uvalde County grand jury indicted Zain for perjury, tampering with government records, and fabricating evidence. As of early 1996, charges of tampering and of fabricating evidence had been dropped, leaving three charges for aggravated perjury in effect, for which Zain reportedly seeks dismissal on statute of limitations grounds.

Evidence discovered after trial. In most of the cases in this study, DNA test results represented newly discovered evidence obtained after completion of the trials. States have time limits on filing motions for new trials on

the basis of newly discovered evidence. For example, in Virginia, new evidence must be presented by motion within 21 days after the trial.³ Thus, the *Honaker*, *Snyder*, and *Vasquez* cases required a pardon from Virginia's governor to release the defendants from prison.

In some of the study cases, prosecutors waived time limits when presented with the DNA exculpatory results. However, prosecutors also have contested defendants' attempts to release evidence for DNA testing.

States also differ in the legislation and procedures pertaining to postconviction appointment of counsel and to authorization to pay for the DNA testing. Many cases involved indigents.

DNA testing. The DNA testing phase of these cases also has common characteristics. Nearly all the defendants had their tests performed by private laboratories. The tests were conducted using blood from defendants, blood or blood-related evidence from victims, and semen stains on articles of the victims' clothing or on nearby items (a blanket was tested in one case). In over half the cases, the prosecution either conducted a DNA test totally independent of that of the defense or sent test results obtained by the defendant's laboratory to a different one to determine whether the laboratory used by the defense interpreted test results properly.

Eight laboratories used Restriction Fragment Length Polymorphism (RFLP) DNA testing, 17 conducted Polymerase Chain Reaction (PCR) testing, and 2 used both tests. For one case, the type of DNA test conducted is unknown.

Preservation of evidence. In some cases, evidence samples had deteriorated to the point where DNA testing could not be performed. In *Brison*, the laboratory could not test cotton swabs from the rape kit but, instead, tested a semen stain from the victim's underwear. In *Daye*, after the appellate court affirmed the defendant's conviction and the State Supreme Court denied certification, the evidence was about to be destroyed when Daye's attorney filed to stay the destruction in order to conduct DNA testing.

The chain of custody in some of the cases also demonstrated a lack of adherence to proper procedures. Authorities on the subject note that the "mis-handling of real evidence affects the integrity of the factfinding process."⁴ In *Dabbs*, the defendant's attorneys reported that the defense was initially advised by the prosecution that the evidence (victim's underwear that contained a semen stain) had been destroyed (a conclusion based on failure of

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authorities to find the evidence in police or court custody). Eventually, the defense found the evidence at the county crime laboratory.

Results of DNA Laboratory Survey

Conducted in June 1995, the nationwide telephone survey of 40 public and private laboratories that performed DNA tests sought answers to such questions as: From the time the laboratories began DNA testing, how many cases have they handled? Of that number, what percentage yielded results that excluded defendants as sources of the DNA evidence or were inconclusive?

The 40 surveyed laboratories yielded 19 whose available data were sufficient for the purposes of this study. The 19 included 13 at the State/local level, 4 in the private sector, an armed forces laboratory, and the FBI's laboratory.

Most of the laboratories had initiated DNA testing only within the previous few years. Twelve began testing between 1990 and 1992. Three of the four private laboratories began in 1986 or 1987, while the FBI started DNA testing in 1988.

Seven of the laboratories reported using RFLP testing; four, PCR testing; and eight, both types of tests.

The 19 laboratories reported that, since they began testing, they had received evidence in 21,621 cases for DNA analysis, with the FBI accounting for 10,060 cases. Three of the 4 private laboratories averaged 2,400 each; the State and local laboratories averaged 331 each.

In about 23 percent of the 21,621 cases, DNA test results excluded suspects, according to respondents. An additional 16 percent of the cases, approximately, yielded inconclusive results, often because the test samples had deteriorated or were too small. Inconclusive results aside, test results in the balance of the cases did not exclude the suspect.

The FBI reported that, in the 10,060 cases it received, DNA testing results were about 20 percent inconclusive and 20 percent exclusion; the other 18 laboratories (11,561 cases) reported about 13 percent and 26 percent, respectively.*

*If inconclusive cases were omitted, the exclusion rate for the FBI would be approximately 25 percent, and the average exclusion rate for the other 18 laboratories would be about 30 percent.

Unfortunately, the laboratories were unable to provide more details. They did not maintain data bases that would permit categorization of DNA test results by type of offense and other criteria. What happened to the suspects who were excluded through DNA testing also cannot be determined. Were they released, or were they charged on the basis of other evidence, for example?

Thus, only the most general information is known about the results of DNA testing by laboratories. To obtain more detailed information would require a comprehensive research project.

Notes

1. Matter of West Virginia State Police Crime Laboratory, 438 S.E.2nd 501, 503 (W.Va. 1993).
2. *Id.*, at 504.
3. Virginia Supreme Court Rules, Rule 3A: 15(b).
4. Giannelli, Paul, "Chain of Custody and the Handling of Real Evidence," *American Criminal Law Review*, 20, 4 (Spring 1983):527–568.

CHAPTER III

Policy Implications

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The 28 cases examined by the study raise issues that have policy implications for the criminal justice system. The most significant are presented below.¹

Reliability of Eyewitness Testimony

In the majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong. In one of the clearest examples of eyewitness testimony overwhelmingly influencing the jury, the Pennsylvania Intermediate Court of Appeals commented on the evidence in the Dale Brison case:

The Commonwealth's evidence consisted primarily of the victim's identification testimony. However, the victim's stab wounds in addition to the weather and reduced visibility may well have affected the victim's ability to accurately view her assailant, and thus, she may have been prompted to identify appellant merely because she remembered seeing him in the neighborhood. Moreover, the victim did not specifically describe any of her assailant's facial characteristics to the police. There was also no conclusive physical evidence, aside from a single hair sample which may have been consistent with any male of [A]frican-[A]merican descent, linking appellant to the crime.²

This points conclusively to the need in the legal system for improved criteria for evaluating the reliability of eyewitness identification.

In *Neil v. Biggers*,³ the U.S. Supreme Court established criteria that jurors may use to evaluate the reliability of eyewitness identifications. However, the reliability of eyewitness testimony has been criticized extensively in the literature.⁴ In a recent interview, Dr. Elizabeth Loftus, one of the best-known critics of the reliability of eyewitness identification, commented on the role of DNA testing in exonerating innocent persons who served time in prison. Dr. Loftus noted that a significant factor is the potential susceptibility of eyewitnesses to suggestions from police, whether intentional or unintentional. As reported, Dr. Loftus stated that there is "pressure that comes from the police [who] want to see the crime solved, but there is also a psychological pressure that is understandable on the part of the victim who wants to see the bad guy caught and wants to feel that justice is done."⁵

Dr. Loftus has recommended more open-ended questioning of victims by the police to avoid leading questions. In addition, Dr. Loftus and others

have recommended use of expert testimony regarding the pros and cons of relying on eyewitness testimony.⁶

Reliability of Non-DNA Analyses of Forensic Evidence Compared to DNA Testing

In many of the study cases, according to documentation examined and those interviewed, scientific experts had convinced juries that non-DNA analyses of blood or hair were reliable enough to clearly implicate the defendants. Scientific conclusions based on non-DNA analyses, however, were proven less discriminating and reliable than those based on DNA tests. These findings point to the need for the scientific community to take into account the reliability of non-DNA forensic analyses vis-à-vis DNA testing in identifying the sources of biological evidence.

In a recent habeas corpus hearing in a murder case, a U.S. district court held that expert testimony on microscopic hair comparisons was inadmissible under the *Daubert* standard.⁷ The court cited studies documenting a high error rate and found that there are no accepted probability standards for human hair identification. The court ruled that in this case the expert's hair testimony was "imprecise and speculative, and its probative value was outweighed by its prejudicial effect."⁸

Competence and Reliability of DNA Laboratory Procedures

One of the lasting effects of the O.J. Simpson case will likely be greater scrutiny by defense lawyers of the prosecution's forensic DNA evidence presented in criminal cases. In the Simpson case, the defense, in essence, put the crime laboratory on trial. The National Research Council (NRC) report entitled *DNA Technology in Forensic Science* states:

There is no substantial dispute about the underlying [DNA] scientific principles. However, the adequacy of laboratory procedures and the competence of the experts who testify should remain open to inquiry.⁹

The NRC report recommends some degree of standardization to ensure quality and reliability. The report recommends that each forensic laboratory engaged in DNA testing must have a formal, detailed program of quality assurance and quality control. The report also states:

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Quality-assurance programs in individual laboratories alone are insufficient to ensure high standards. External mechanisms are needed to ensure adherence to the practices of quality assurance. Potential mechanisms include individual certification, laboratory accreditation, and state or federal regulation.¹⁰

As recently reported by the American Society of Crime Laboratory Directors, 32 public DNA laboratories have been accredited. In addition, one private laboratory is accredited.¹¹

Whether laboratories that conduct DNA tests possess the requisite qualifications has significant cost implications for the criminal justice system in terms of reducing the number of redundant DNA tests. In many cases in this study, both prosecution and defense obtained independent DNA tests of the biological stain evidence. Although independent examinations are common in areas that are more open to interpretation (e.g., mental fitness for trial), DNA testing, for exculpatory purposes, should be performed in a qualified laboratory, and the results, if they exculpate the suspect, should be accepted by both parties. Such acceptance would seem more likely if DNA tests were performed by laboratories that all parties agreed were qualified.

Preservation of Evidence for DNA Testing

In some States, sentenced felons may experience difficulty obtaining access to evidence for DNA testing. With an increasing volume of criminal cases, some police agencies destroy evidence when defendants have exhausted their appeals. Even when defendants obtain access to the evidence, it may be too deteriorated for DNA testing. In some of the study cases, insufficient evidence prevented laboratories from conducting Restriction Fragment Length Polymorphism (RFLP) testing, but Polymerase Chain Reaction (PCR) testing was still possible.

Preserving biological stain evidence and maintaining the proper chain of custody of the evidence are essential for successful DNA testing.¹² At the trial stage, however, the U.S. Supreme Court has ruled that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.¹³ After a defendant's conviction, prosecutors are not required by constitutional duty to preserve evidence indefinitely. As noted earlier, in *Daye*, the evidence was about to be destroyed when his attorney filed to stay the destruction to conduct what turned out to be an exculpatory DNA test.

Training in DNA Forensic Uses

The introduction of DNA technology into the criminal trial setting is likely to create uncertainty, spawned in part by the complexity of the technology, and also to possibly generate unrealistic expectations of the technology's power in the minds of some or all of the players: prosecution, defense, judges, and jurors. The scientific complexities of the technology may influence all parties to rely more heavily on expert testimony than on other types of evidence.

As the use of DNA technology becomes more widely publicized, juries will come to expect it, like fingerprint evidence. This will place more pressure on prosecutors to use the technology whenever possible, especially as the cost decreases. Prosecutors must be trained on when to use the technology and how to interpret results for the jury.

When the prosecution uses DNA evidence, the defense will be forced to attack it through expert testimony. The defense must rebut the persuasiveness of the evidence for the jury. As stated in the NRC report, "Mere cross examination by a defense attorney inexperienced in the science of DNA testing will not be sufficient."¹⁴ Thus, defense counsel as well as the prosecution and judiciary must receive training in the forensic uses of DNA technology.

Third-Party Consensual Sex Sources

The primary objective of the defense in using DNA testing in rape cases is to show that the defendant is excluded as the source of the semen evidence. Even when exclusion is established, the prosecution may be motivated, as in *Davis*, to eliminate as suspects any and all consensual sex partners as sources of semen in rape cases. During the first trial of Gerald Wayne Davis, the prosecution contended that the semen in the victim came from Davis. After DNA testing had excluded Davis as the source of the semen, the prosecution contended, in the second trial, that Davis could have still raped the victim but not ejaculated and that the semen in the victim could have come from the victim's fiancé just prior to the rape. The prosecution never obtained a blood sample from the fiancé because he died before the second trial.

A question under the law is whether third parties can be compelled to provide biological evidence for DNA testing. In some cases, the government refused to release defendants after exculpatory DNA results until third parties were located and tested. Kerry Kotler was held for an additional year after his exculpatory DNA test so the government could test the victim's husband. Edward Honaker was held for an additional 9 months after his exculpatory DNA test so the government could test the victim's boyfriend and "secret lover."

Multiple-Defendant Crimes

The DNA technology used to analyze biological evidence from crime scenes must not be oversold as an exculpatory tool—it does have limitations. Multiple-suspect crimes present a particular problem for use of DNA identification as a crime-solving tool. In multiple-suspect sexual assaults without eyewitnesses, such as a rape-murder, it is possible that only one of the suspects ejaculated in, or even raped, the victim. In such cases, DNA testing of semen would seem likely to exculpate one or more of the suspects. This type of situation presents a real dilemma for police and prosecutors. Because of exculpatory DNA tests on semen and possibly other exculpatory evidence (e.g., an alibi, lack of other physical evidence), pressure mounts on prosecutors to release one or more of the suspects. The only other evidence against them may be the testimony of a suspect who is matched to the crime by DNA analysis.

In *Dabbs*, for example, the victim testified that she was dragged into an alley and raped by one man while two other men held her down. The police arrested Dabbs on the basis of identification of him by the victim, a distant cousin. The other alleged assailants were never identified or arrested. The DNA test showed that the semen evidence from the victim did not match Dabbs. One theory of the case, however, was that Dabbs participated in the crime but was not the rapist. The prosecutor ultimately dismissed the original indictment against Dabbs because of the DNA results and the reluctance of the victim to testify at a new trial.

Posttrial Relief

Most States have a time limit on presenting evidence newly discovered after trial, conviction, and sentencing. The reason for limiting the time to file appeals based on new evidence is to ensure the integrity of the trial process

and jury verdicts. Many DNA issues in the study cases were not raised until the postconviction stages. Absent constitutional issues, many State procedures, as in Virginia,¹⁵ may preclude consideration of new exculpatory DNA evidence at postconviction stages. Some of the study defendants, after receiving exculpatory DNA results, were released only by agreement of the prosecutor; sometimes they needed a pardon by the governor.

Some States, such as Oregon, permit judges to use discretion to waive new-evidence rules and set aside verdicts or order new trials.¹⁶ Thus, some States may allow an out-of-time motion for a new trial when newly discovered evidence clearly serves the interests of justice.¹⁷

At postconviction stages, appointment of counsel and payment for DNA testing become issues for indigents. While some appeals courts have ordered State-paid DNA testing for indigents where justified (e.g., where the overall case against the defendant is weak), other court rulings deny such relief, especially where the exculpatory value is speculative.¹⁸ As DNA testing to exculpate convicted persons becomes more widespread, States need to consider these issues.

Future DNA Forensic Uses

The momentum is growing, spurred in part by the public's education from the Simpson trial, for DNA testing in criminal cases. Juries may begin to question cases where the prosecutor does not offer "conclusive" DNA test results if the evidence is available for testing. More defense attorneys in court-appointed cases may file motions for DNA testing and request the State to pay for the tests (this issue may also be raised as a *Brady* motion for the prosecutor to conduct the tests).

The shift will be for more DNA testing in pretrial stages. Prosecutors should find that DNA testing is as helpful to them as to the defense in excluding suspects early in the investigation. This will enable the police and prosecution to save money in the long run by focusing investigations in more fruitful directions.

In Britain, mass DNA screening in search of suspects has, in recent years, produced arrests in several highly publicized cases. The most recent case involved the rape-murder of a 15-year-old South Wales girl.¹⁹ The South Wales constabulary obtained saliva swab samples from over 2,000 men who lived in the vicinity of the murder. Police went door-to-door inviting men to

a makeshift laboratory to submit the samples. The saliva samples were used to develop DNA profiles to compare to the DNA profile obtained from the assailant's semen.

British law does not permit compulsory sampling, but the police made it clear that anyone who refused would become the subject of intense police investigation. A 19-year-old resident of the victim's neighborhood was arrested when his saliva sample was the only one of the thousands taken that could not be eliminated.

Such DNA dragnet methods, while employed sparingly in Great Britain, may increase as the ease and affordability of DNA testing improves. It is unlikely that such mass-testing methods would gain favor in the United States. Constitutional protections against self-incrimination and unreasonable searches and seizures, as well as the American public's zealous protection of privacy rights, would preclude such DNA dragnet practices from being implemented in this country.

Notes

1. This report does not discuss the issue of government misconduct because it is not particularized to the use of DNA technology. Beyond the limited instances noted in this report, enough examples of government misconduct in the criminal justice system exist in the popular media for government officials to be well aware of the problem.
2. *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa. Super. 1992).
3. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972) (factors include accuracy of the witness' prior description of the defendant, opportunity to view the defendant at the time of the crime, level of certainty demonstrated, witness' degree of attention, and time between the crime and the confrontation).
4. Loftus, Elizabeth, and D. Fishman, "Expert Psychological Testimony on Eyewitness Identification," *Law and Psychology Review*, 4 (1978):87–103 (lack of reliability on cross-racial identification); Loftus, Elizabeth, and W. Wagenaar, "Ten Cases of Eyewitness Identification: Logical and Procedural Problems," *Journal of Criminal Justice*, 18 (1990):291–319 (witnesses can be induced to point to the suspect after subtle suggestion on the part of the

investigator); and Cutler, Brian, et al., “The Reliability of Eyewitness Identification: The Role of System and Estimator Variables,” *Law and Human Behavior*, 11, 3 (1987):233–258 (level of stress experienced during crime may affect identification).

5. “DNA Testing Turns a Corner as Forensic Tool,” *Law Enforcement News* (October 15, 1995):10.

6. Loftus, Elizabeth, and N. Schneider, “Judicial Reactions to Expert Testimony Concerning Eyewitness Reliability,” *UMKC Law Review*, 56, 1 (1987):1–45; and Handberg, Roger, “Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury,” *American Criminal Law Review*, 32, 4 (Summer 1995):1013–1064.

7. *Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okl. 1995).

8. Id., at 1558. The National Research Council report, *DNA Technology in Forensic Science*, notes that, in contrast to microscopic hair comparison, with the advent of DNA technology, the use of hair as an individual identifier will become more common. National Research Council, National Academy of Sciences, *DNA Technology in Forensic Science*, Washington, D.C.: National Academy Press, 1992:158.

9. *DNA Technology in Forensic Science*, supra note 8, at 145–146.

10. Id., at 16. In its 1996 DNA report, *The Evaluation of Forensic DNA Technology* (National Academy Press, Washington, D.C.), the National Research Council reaffirmed this position (page 3.12). The DNA Identification Act of 1994 (Public Law 103–322) also provides for a DNA advisory board to set standards for DNA testing.

11. Telephone conversation with Manuel Valdez, treasurer, American Society of Crime Laboratory Directors, March 8, 1996. (More than 100 public laboratories perform DNA tests.)

12. See “Oops! We Forgot to Put It in the Refrigerator: DNA Identification and the State’s Duty to Preserve Evidence,” *The John Marshall Law Review*, 25 (1992):809–836.

13. *Arizona v. Youngblood*, 109 S. Ct. 333, 337 (1988). The Supreme Court also stated that “police do not have a constitutional duty to perform any particular tests.”

14. Supra note 9 at 160.

15. Virginia Supreme Court Rules, Rule 3A: 15(b).

16. An Oregon judge recently released Laverne Pavlinac and John Sosnovske from prison, where they had served 5 years after being convicted of murdering a young woman. The judge set aside their convictions because Keith Hunter Jespersen, a convicted serial killer, pleaded guilty to the murder for which the couple was convicted. See *The New York Times*, November 28, 1995:28.

17. *Tuffiash v. State*, 878 S.W. 2d 197 (Tex. App. 1994). This case involved perjured trial testimony from Fred Zain, the State's forensic serologist.

18. See *State v. Thomas*, 586 A. 2d 250 (N.J. Appl. Div. 1991); and *Commonwealth v. Brison*, 618 A. 2d 420 (Pa. Super. 1992). Compare to *People v. Buxon*, 593 N.Y.S. 2d 87 (App. Div. 1993).

19. "Crime-Solving by DNA Dragnet," *The Washington Post* (February 2, 1996):A21.

CHAPTER IV

Profiles of DNA Exculpatory Cases

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Presented alphabetically, each profile of the 28 DNA exculpatory cases identified by the study consists of a brief summary of the facts of the case, key prosecution evidence admitted during trial, postconviction challenges, DNA testing results, and case conclusion.

Gilbert Alejandro (Uvalde County, Texas)

Factual background. On the evening of April 27, 1990, a woman in her fifties came home and was attacked from behind by a man. The man placed a pillow over her head and sexually assaulted her. He then fled the house. The woman could not describe the man except for basic physical size. She also noted that the man was wearing some kind of cap, a gray T-shirt, and dark-colored shorts. The police canvassed the area and questioned three men, one of whom was wearing clothes matching the victim's description. The police did not detain them. The victim picked out Alejandro from his photograph in a mug book.

In October 1990 Gilbert Alejandro was convicted of aggravated sexual assault by a Uvalde County jury. He was sentenced to 12 years in prison.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim identified Alejandro from a police mug shot.
- The victim identified Alejandro in court (although she stated that she had a pillow over her head during the assault).
- Fred Zain, the chief forensic expert for Bexar County, Texas, testified that a DNA test of Alejandro's sample matched DNA found on the victim's clothing "and could only have originated from him [Alejandro]."
- Alejandro's only alibi was from his mother, who testified that he was at home at the time of the assault.

Postconviction challenges. Bexar County performed the forensic laboratory work in this case for the Uvalde County prosecutor's office. Bexar County discovered that the State's forensic expert in this case, Fred Zain (see also the Gerald Wayne Davis, William O'Dell Harris, and Glen Woodall cases), had falsified results and lied about his credentials when he was employed as a State police serologist in West Virginia. When

Alejandro's lawyers were informed of this, they filed a writ of habeas corpus. At this time, Alejandro was released to his parents and placed on electronic monitoring.

On July 26, 1994, a Uvalde County District Court heard Alejandro's petition. Present at this hearing were an original trial juror, the original jury foreman, and a Bexar County forensic DNA analyst. The two jurors testified that they based their guilty verdict solely on Zain's testimony and without his testimony the jury would have acquitted on the basis of reasonable doubt. The DNA analyst testified that results from at least one other DNA test had excluded Alejandro. He also testified that the test to which Zain testified was inconclusive and could not have been the basis of a conviction.

DNA results. In July 1990 the original DNA tests done in this case—the ones Zain testified were inculpatory—were inconclusive. A Restriction Fragment Length Polymorphism (RFLP) test performed by the Bexar County crime laboratory on October 3, 1990, excluded Alejandro as the source of the semen left on the victim's nightgown. The district court also reported that an additional test was done on December 19, 1990, after the trial, and it too excluded Alejandro. According to the district court's findings of fact, Fred Zain knew of these exculpatory results and failed to report them to anyone.

Conclusion. As a result of the findings of fact by the district court, the court of criminal appeals overturned Alejandro's conviction and released him to stand trial again without Zain's testimony. The district attorney, however, declined to prosecute the case. On September 21, 1994, Alejandro was released from electronic monitoring and all charges were dismissed. Alejandro served 4 years of his sentence. On June 27, 1995, he was awarded \$250,000 in a civil suit against Bexar County.

Kirk Bloodsworth (Baltimore, Maryland)

Factual background. On July 25, 1984, a 9-year-old girl was found dead in a wooded area. She had been beaten with a rock, sexually assaulted, and strangled.

Kirk Bloodsworth was convicted on March 8, 1985, of sexual assault, rape, and first-degree premeditated murder. A Baltimore County judge sentenced Bloodsworth to death.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- An anonymous caller tipped police that Bloodsworth had been seen with the girl earlier in the day.
- A witness identified Bloodsworth from a police sketch compiled by five witnesses.
- The five witnesses testified that they had seen Bloodsworth with the little girl.
- Bloodsworth had told acquaintances he had done something “terrible” that day that would affect his marriage.
- In his first police interrogation, Bloodsworth mentioned a “bloody rock,” even though no weapons were known of at the time.
- Testimony was given that a shoe impression found near the victim's body was made by a shoe that matched Bloodsworth's size.

Postconviction challenges. In 1986 Bloodsworth's attorney filed an appeal contending the following: Bloodsworth mentioned the bloody rock because the police had one on the table next to him while they interrogated him; the terrible thing mentioned to friends was that he had failed to buy his wife a taco salad as he had promised; and police withheld information from defense attorneys relating to the possibility of another suspect.

The Maryland Court of Appeals overturned Bloodsworth's conviction in July 1986 because of the withheld information. He was retried, and a jury convicted him a second time. This time Bloodsworth was sentenced to two consecutive life terms.

After an appeal of the second conviction was denied, Bloodsworth's lawyer moved to have the evidence released for more sophisticated testing than was available at the time of trial. The prosecution agreed, and in April 1992 the victim's panties and shorts, a stick found near the murder scene, reference blood samples from Bloodsworth and the victim, and an autopsy slide were sent to Forensic Science Associates (FSA) for Polymerase Chain Reaction (PCR) testing.

DNA results. The FSA report, issued on May 17, 1993, stated that semen on the autopsy slide was insufficient for testing. It also stated that a small semen stain had been found on the panties.

The report indicated that the majority of DNA associated with the epithelial fraction had the same genotype as the semen due to the low level of epithelial cells present in the stain. It was an expected result, according to the report. Finally, the report concluded that Bloodsworth's DNA did not match any of the evidence received for testing. FSA did, however, request a fresh sample of Bloodsworth's blood for retesting in accord with questions about proper labeling on the original sample.

On June 3, 1993, FSA issued a second report that stated its findings regarding Bloodsworth's DNA were replicated and that he could not be responsible for the stain on the victim's underwear (see appendix for complete results).

Conclusion. On June 25, 1993, the FBI conducted its own test of the evidence and discovered the same results as FSA. In Maryland, new evidence can be presented no later than 1 year after the final appeal. Prosecutors joined a petition with Bloodsworth's attorneys to grant Bloodsworth a pardon. A Baltimore County circuit judge ordered Bloodsworth released from prison on June 28, 1993. Maryland's governor pardoned Bloodsworth in December 1993. Bloodsworth served almost 9 years of the second sentence, including 2 years on death row.

Mark Diaz Bravo (Los Angeles County, California)

Factual background. On February 20, 1990, a patient at the psychiatric hospital where Bravo worked claimed she had been raped in an alcove earlier that afternoon. During the course of police interviews, she named several different people as her assailant. One of those she named was Bravo. She later stated she was sure Bravo was the attacker.

A Los Angeles County jury found Mark Diaz Bravo guilty of rape in 1990. He was sentenced by the court to a prison term of 8 years.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim named Bravo as the assailant and made an in-court identification.

- Bravo had misrepresented himself in the past on applications and on his business card.
- Blood tests done on a blanket near the crime scene showed a blood type consistent with Bravo's blood type, which is found in only 3 percent of the population.
- Bravo's alibi defense was not aggressively pursued.

Postconviction challenges. Bravo's appeal to the intermediate court of appeals was denied. Before his appeal was decided in 1992, he filed a postconviction motion in the Superior Court of Los Angeles County. In 1993 a superior court judge granted Bravo's motion to release a blanket, a sheet, and a pair of panties to the defense for DNA testing.

DNA results. Prosecutors received a report from Cellmark Diagnostics on December 24, 1993, stating that none of the tested semen had DNA that matched Bravo's.

Conclusion. On January 4, 1994, Bravo's lawyer filed a writ of habeas corpus. A Los Angeles County Superior Court judge ordered Bravo to be released on January 6, 1994. The judge stated that Bravo had not received a fair trial, that the victim had recanted her testimony, that Bravo's alibi was unimpeachable, and that the DNA tests were irrefutable. On January 7, 1994, Bravo was released from prison after serving 3 years of his sentence.

Dale Brison (Chester County, Pennsylvania)

Factual background. On the evening of July 14, 1990, the victim was walking from a convenience store to her home when an assailant came from behind her, put one hand on her throat and one on her waist, and forced her to walk with him. The assailant stabbed her in the side as they walked, and the victim lost consciousness. When she awoke, the assailant was walking her to some bushes near an apartment complex. The assailant then repeatedly assaulted the victim sexually.

In a jury trial before the Chester County Court of Common Pleas, Dale Brison was convicted of rape, kidnaping, aggravated assault, carrying a prohibited offensive weapon, and three counts of involuntary deviate sexual intercourse. Brison was sentenced to 18 to 42 years of imprisonment. His term was 8 to 20 years for rape and 4 to 10 years for assault, to be served consecutively. He also received 6 to 12 years for each of the involuntary de-

viate sexual intercourse convictions (although each of these was to run concurrently, they were to be served consecutively with the other sentences). Brison sought DNA testing during the trial, but his request was denied.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- There were two separate victim identifications of Brison near the victim's apartment building.
- A hair sample from the scene of the crime was consistent with Brison's.
- Brison's alibi, sleeping on the couch of his home, was corroborated only by his mother.

Postconviction challenges. In 1992 the Pennsylvania Superior Court ruled (618 A.2d 420) that DNA testing must be performed if the evidence had been maintained and the semen stain from the victim's underwear was not badly degraded. It also ruled that the burden of the cost of this test was upon the Commonwealth.

DNA results. Cellmark Diagnostics reported that no result was discernible from the vaginal swab, but the semen stain from the victim's panties yielded results that exculpated Brison as the assailant.

Conclusion. After the tests were performed, the district attorney's office conducted its own. Results matched those of the first one, and Brison was freed after serving 3½ years of his sentence.

Ronnie Bullock (Chicago, Illinois)

Factual background. On March 18, 1983, a 9-year-old girl was walking to school when a man dressed like a police officer approached her. He then chased the girl, forced her into a car, drove to a nearby alley, and raped her. On April 18, 1983, in the same area, a 12-year-old girl reported that a man displaying a badge chased her, forced her into a car, drove to an alley, and raped her.

Bullock was charged in both incidents, but charges stemming from the second were dropped. Ronnie Bullock was convicted of aggravated criminal sexual assault by a Cook County jury in May 1984. A judge sentenced Bul-

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lock to 60 years in prison for deviate sexual assault and 15 concurrent years for aggravated kidnaping.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- A police officer identified Bullock from a composite sketch compiled by the two victims.
- Both victims identified Bullock in a police lineup.
- Bullock lived in the area where the rapes occurred.

Postconviction challenges. Immediately following Bullock's conviction, he insisted that the evidence be impounded. This motion was approved, and the judge ordered that the victim's panties be stored in the circuit court clerk's office freezer. An appeals court upheld Bullock's conviction in March 1987. Bullock also filed a motion for postconviction relief, which was denied in October 1990. He then submitted a motion in 1993 to have the evidence released for DNA tests. The prosecution agreed to this motion; it was granted in June 1993. There was a delay, however, between the granting of the motion and Cellmark Diagnostics' test because some of the evidence (including the victim's panties) had disappeared. Bullock's attorneys eventually found the materials and sent them to Cellmark Diagnostics.

DNA results. The report from Cellmark Diagnostics, completed in October 1994, stated that PCR testing was performed on a sperm and nonsperm fraction of the victim's panties, a rectal swab, the blood of the victim, and the blood of Bullock. No conclusions could be reached from the rectal swab due to an insufficient quantity of human DNA. The report stated that Bullock was excluded as the source of both the sperm and the nonsperm fractions in the semen stain on the victim's panties (see appendix for complete results).

Conclusion. On October 14, 1994, Bullock was released without bond but ordered to remain confined to his parents' house on electronic monitoring. The prosecution wanted to run its own tests on the panties, so a hearing was scheduled for November 23, 1994. When the Cook County laboratory arrived at the same conclusion, a judge dismissed the charges, and the district attorney's office declined to prosecute in a new trial. Bullock served 10½ years of his sentence.

Leonard Callace (White Plains, New York)

Factual background. In January 1985 a teenage girl was walking to her car in the parking lot of a shopping center. She was accosted by two men at knife point and forced into a nearby car. One man, allegedly Callace, sexually assaulted the victim repeatedly while the other man watched from the front seat. The second man was never identified.

A Suffolk County jury took 1 hour to convict Leonard Callace of sodomy (four counts), sexual abuse (three counts), wrongful imprisonment, and criminal possession of a weapon. Callace rejected a plea bargain that would have given him 4 months in prison if he pled to a lesser charge. On March 24, 1987, Callace was sentenced to 25 to 50 years in prison.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- A sketch by police artists resembled Callace.
- The victim identified Callace from a photo array and made an in-court identification.
- The blood group of the semen was type A, the same as Callace's.
- Callace's alibi was uncorroborated.

Postconviction challenges. Callace's conviction was affirmed on appeal and leave to appeal to the court of appeals was denied. While in prison, Callace learned about DNA testing and how it was used to free a former inmate (see case summary of Charles Dabbs). He asked his attorney about the original trial evidence.

Callace's attorney remembered two things from the original trial record. First, the victim had just picked up her jeans from the cleaners. Second, the victim spit out semen onto the jeans after one of the assaults. Therefore, any semen on those jeans would have come from the assailant; if it did not match Callace's, he could be freed. The defense used this information to secure the jeans from the prosecution for DNA testing at Lifecodes, Inc. On June 27, 1991, a Suffolk County Court judge granted Callace's motion to consider DNA tests as "new evidence" (573 N.Y.S.2d 137). The judge also ruled that if the samples did not match, he would hold a hearing to consider postconviction relief for Callace.

DNA results. The RFLP analysis performed by Lifecodes, Inc., on the victim's jeans showed that DNA in the semen stains did not match Callace's.

Conclusion. On October 5, 1992, Callace was released from prison. The prosecution dismissed all charges against Callace and declined to prosecute in a new trial because of the DNA evidence and the reluctance of the victim to endure another trial. Callace served almost 6 years of his sentence.

Terry Leon Chalmers (White Plains, New York)

Factual background. On August 18, 1986, a woman was raped, and Terry Chalmers was arrested for the crime.

He was convicted by a Westchester County jury on June 9, 1987, of rape, sodomy, robbery, and two counts of grand larceny. The court sentenced Chalmers to 12 to 24 years in prison.

Prosecutor's evidence at trial. The prosecution based its case against Chalmers on several points:

- The victim identified Chalmers from a police photo array.
- The victim identified Chalmers in two separate police lineups and in the courtroom.
- Chalmer's alibi was uncorroborated.

Postconviction challenges. Chalmers filed an appeal claiming that the police lineup was improperly conducted. The Appellate Division of the New York Supreme Court ruled on July 18, 1990, that the lineup was properly conducted, and even if it were not, the victim's in-court identification was sufficient. The court affirmed Chalmers' conviction (559 N.Y.S.2d 27).

Chalmers applied to the Innocence Project to assist him in obtaining postconviction relief. Project lawyers secured the physical evidence and forwarded it to Forensic Science Associates (FSA) for DNA testing.

DNA results. FSA tested samples of blood from the victim and Chalmers as well as from the vaginal and cervical swabs from the original rape kit. The first report from FSA, on July 8, 1994, showed the results from tests of the victim's blood and the two swabs. The second report, dated July 26, 1994, stated that Chalmers could be eliminated as the source of the semen on the

two swabs on the basis of differences in three polymarker genes (see appendix for results).

Conclusion. Chalmers' conviction was vacated and charges were dismissed on January 31, 1995. The related larceny charges were dismissed in April 1995. Chalmers served 8 years of his sentence.

Ronald Cotton (Burlington, North Carolina)

Factual background. In two separate incidents in July 1984, an assailant broke into an apartment, severed phone wires, sexually assaulted a woman, and searched through her belongings, taking money and other items.

On August 1, 1984, Ronald Cotton was arrested for the rapes. In January 1985, Cotton was convicted by a jury of one count of rape and one count of burglary. In a second trial, in November 1987, Cotton was convicted of both rapes and two counts of burglary. An Alamance County Superior Court sentenced Cotton to life plus 54 years.

Prosecutor's evidence at trial. Cotton's alibi was supported by family members. The jury was not allowed to hear evidence that the second victim failed to pick Cotton out of either a photo array or a police lineup. The prosecution based its case on several points:

- A photo identification was made by one of the victims.
- A police lineup identification was made by one of the victims.
- A flashlight in Cotton's home resembled the one used by the assailant.
- Rubber from Cotton's tennis shoe was consistent with rubber found at one of the crime scenes.

Postconviction challenges. Cotton's attorney filed an appeal. The North Carolina Supreme Court overturned the conviction because the second victim had picked another man out of the lineup and the trial court did not allow this evidence to be heard by the jury.

In November 1987 Cotton was retried, this time for both rapes. The second victim had decided that Cotton was the assailant. Before the second trial, a man in prison, who had been convicted for crimes similar to these assaults, stated to another inmate that he had committed Cotton's crimes. The supe-

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rior court judge refused to allow this information into evidence, and Cotton was convicted of both rapes and sentenced to life.

The next year Cotton's appellate defender filed a brief that did not argue the failure to admit the second suspect's confession. The conviction was affirmed. In 1994 two new lawyers, at the request of the chief appellate defender, took over Cotton's defense. They filed a motion for appropriate relief on the grounds of inadequate appeal counsel. They also filed a motion for DNA testing that was granted in October 1994. In the spring of 1995, the Burlington Police Department turned over all evidence that contained the assailant's semen for DNA testing.

DNA results. The samples from one victim were too deteriorated to be conclusive, but the samples from the other victim's vaginal swab and underwear were submitted to PCR testing and showed no match to Cotton. At the defense attorneys' request, the results were sent to the State Bureau of Investigation's DNA data base containing the DNA patterns of convicted, violent felons in North Carolina prisons. The State's data base showed a match with the convict who had earlier confessed to the crime.

Conclusion. After Cotton's attorneys received the DNA test results in May 1995, they contacted the district attorney, who joined the defense attorneys in the motion to dismiss the charges. On June 30, 1995, Cotton was officially cleared of all charges and released from prison. In July 1995 the governor of North Carolina officially pardoned Cotton, making him eligible for \$5,000 compensation from the State. Cotton had served 10½ years of his sentence.

Rolando Cruz and Alejandro Hernandez (Chicago, Illinois)

Factual background. On February 25, 1983, a 10-year-old girl was kidnapped from her home, raped, and bludgeoned to death. Her body was found several days later in a wooded area. An autopsy showed she had died from several blows to the head, and her body evidenced a broken nose, postmortem scratches, and sexual assault. Two weeks later an anonymous tip led sheriff's detectives to Hernandez. He allegedly made statements that he knew the men involved in the crime but that he was not one of the perpetrators. On the basis of his statements, Hernandez was arrested on March 6, 1984.

Several days later, the detectives spoke with Cruz, who was an acquaintance of Hernandez. Cruz allegedly reported “visions” to the police—visions whose details were similar to those associated with the crime. Cruz was indicted on March 9, 1984, on the basis of those statements.

In 1985, in a DuPage County Circuit Court, Rolando Cruz and Alejandro Hernandez were jointly tried, convicted, and sentenced to death for kidnapping, rape, and murder. A jury was unable to reach a verdict on a third co-defendant.

Prosecutor’s evidence at trial. The prosecution based its case on several points:

- Several law enforcement officers testified that Cruz and Hernandez made incriminating statements.
- Several witnesses testified that Cruz and Hernandez admitted to having intimate knowledge of the crime.
- Cruz’s alleged “dream visions” of the murder, though not tape recorded, were admitted into evidence on the basis of the testimony of sheriff’s detectives.
- The alibi defenses of the two men were not aggressively pursued.
- The Hernandez defense also contended that any inculpatory statements by him against others were made to collect a \$10,000 reward.

Postconviction challenges. After an appeal by Cruz, the Illinois Supreme Court ruled that Cruz was “denied a fair trial by reason of introduction of admissions of codefendants” (521 N.E.2d 18). The court ruled on January 19, 1988, that the three men should have been tried separately when it was clear that the prosecution was going to use inculpatory statements by defendants as evidence against one another. The case was reversed and remanded to the DuPage Circuit Court. The Illinois Supreme Court essentially made the same ruling on Hernandez’s appeal (521 N.E.2d 25) on January 19, 1988.

Cruz was again convicted by a jury in a DuPage County Circuit Court, and he appealed. The Illinois Supreme Court initially affirmed the circuit court’s decision, but, in view of many amicus curiae briefs, the court agreed to look at Cruz’s conviction again. This time, on July 14, 1994, the court reversed

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the decision of the circuit court (643 N.E.2d 636). The reversal was largely based on statements made by another man, Brian Dugan, a convicted rapist-murderer, who claimed to have committed the crime alone. Dugan's confession was made through hypothetical statements during a plea bargain for other crimes, so the confession could not be used against him.

Hernandez's second conviction, in a separate appeal, was also reversed and remanded. He was convicted a third time by a jury, and this conviction, too, was overturned.

DNA results. In September 1995 DNA tests showed that neither Cruz nor Hernandez were the contributors of the semen found at the crime scene. Tests also determined that Brian Dugan could not be eliminated as a potential contributor. Prosecutors contended that the DNA evidence showed only that Cruz and Hernandez were not the rapists, but they could still have been present at the crime. Cruz's new defense team decided on a bench trial. Hernandez awaited a fourth jury trial.

Conclusion. Before the judge gave a directed verdict in the Cruz case, a sheriff's department lieutenant recanted testimony he had provided in previous trials. In the earlier trials, the lieutenant provided corroborating testimony that two of his detectives told him immediately about Cruz's dream-vision statements. At Cruz's latest trial, however, the lieutenant said he was in Florida on the day of the supposed conversations and could not have spoken to anyone about Cruz's statements. On November 3, 1995, a DuPage County judge acquitted Cruz on the basis of the recanted testimony, the DNA evidence, and the lack of any substantiated evidence against Cruz. Rolando Cruz served 11 years on death row.

Hernandez's case was also dismissed, and he was set free. He served 11 years on death row. Brian Dugan has not been charged with the murder. He has refused to testify about the case unless he is granted death-penalty immunity.

Charles Dabbs (Westchester County, New York)

Factual background. Early on the morning of August 12, 1982, the victim was walking home when she was assaulted from behind. She was forcibly dragged into an alley between a warehouse and another building. The assailant dropped the victim down a flight of stairs, and she lost consciousness. When she awoke, she saw two other men with the original assailant. One of

the attackers held the woman's legs, one held her arms, and the third raped her. She was able to identify only the face of the man who raped her (allegedly Dabbs). The alleged accomplices were never located.

Charles Dabbs was convicted of first-degree rape by a jury in a Westchester County Court on April 10, 1984. He was ordered to serve 12½ to 20 years in prison.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim was able to identify Dabbs because they are distant cousins.
- The victim testified that the assailant wore a distinctive cap and had a distinctive laugh, which she stated were both similar to Dabbs'.
- ABO typing of a semen stain on the victim's pants showed the presence of the H and the B antigens; Dabbs is an O secretor whose body fluids contain the H antigen. This blood typing showed that Dabbs could not be excluded as a source of the semen.

Postconviction challenges. Dabbs appealed his conviction, but it was upheld by the appellate court in June 1988 (529 N.Y.S.2d 557). On November 21, 1990, the Westchester County Supreme Court granted Dabbs' request for DNA testing (570 N.Y.S.2d 765). The court ruled that any preserved evidence was to be released by the county laboratory for testing by Lifecodes, Inc.

DNA results. Lifecodes, Inc., reported that DNA tests of a gauze pad and a cutting from the victim's jeans yielded inconclusive results. RFLP testing was conducted, however, on a cutting from the victim's underwear. The DNA from the semen on the panties did not match the DNA from a blood sample submitted by Dabbs.

Conclusion. On the basis of the DNA results, Dabbs' attorney filed a motion to have the conviction vacated. The prosecution elected not to oppose Dabbs' motion, and on July 31, 1991, the Westchester County Supreme Court ruled that the DNA analysis was sufficient to indicate that the defendant was not the perpetrator. The prosecution moved to dismiss the indictment on the basis of the DNA results and the reluctance of the victim to testify at a new trial. The dismissal was granted by the court on August 22,

1991. The court's written opinion was published on November 7, 1991 (587 N.Y.S.2d 90). Dabbs served 7 years of his sentence.

Gerald Wayne Davis (Kanawha County, West Virginia)

Factual background. The victim testified that on the evening of February 18, 1986, she had dropped off laundry at the home of Davis, a family friend. When she returned to pick up the laundry, she was attacked and raped by Davis on his waterbed. Davis's father, according to the victim's testimony, was present during the assault and made no efforts to intervene on her behalf.

In May 1986 Gerald Wayne Davis was convicted by a Kanawha County jury of kidnapping and two counts of sexual assault. The circuit court judge sentenced Davis to 14 to 35 years in prison. Dewey Davis, the defendant's father, also was convicted of abduction, first-degree sexual abuse, and second-degree sexual assault.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim knew Davis and identified him to police.
- The victim also made an in-court identification of Davis.
- A State police chemist testified that DNA tests could not exclude Davis as the source of the semen found on the victim's underpants.
- Police found a shoe and a jacket belonging to the victim in the Davis home.
- The Davises asserted an alibi that they did nothing while the victim washed clothes.

Postconviction challenges. Both Davis and his father filed appeals. The appellate court dismissed one count of sexual assault and the kidnapping charge for both defendants. As a result, their sentences were reduced to 10 years each.

After an investigation of cases involving chemist Fred Zain (see also the Glen Woodall and William O'Dell Harris cases), many convicted persons were permitted to file a writ of habeas corpus if Zain worked on their cases. Davis filed such a writ based on the potential for falsified evidence by Zain

and the possibility of exculpatory evidence in a new DNA test. The West Virginia Superior Court granted the writ on the condition that DNA tests be performed on the remaining trial evidence.

DNA results. Davis's defense attorney asked for DNA tests to be performed on the original trial evidence. The judge agreed to the use of the Center for Blood Research (CBR) for testing. The results showed DNA markings from the victim and a man, but not from Davis. Prosecutors ran a second series of tests. They also excluded Davis as the semen source. DNA tests also were performed on Davis's underwear and bedsheets. These tests showed no evidence of the victim's DNA.

Conclusion. As a result of these DNA test results, the convictions were annulled and Davis was released to home confinement on March 16, 1994, pending a new trial. The prosecution, contending that Davis still could have raped the victim and not ejaculated, pursued a second trial. On December 4, 1995, a Kanawha County Circuit Court jury deliberated for 90 minutes before acquitting Davis of second-degree sexual assault and first-degree sexual abuse. All charges have also been dismissed against the elder Davis. Both Davises had served 8 years of their sentences.

Frederick Rene Daye (San Diego, California)

Factual background. The crime occurred on the evening of January 10, 1984, while a young woman was walking from a drugstore to her car. One man (alleged to be Daye) opened the victim's driver side door, pushed the victim to the passenger side, and let a second man into the back seat. The two men, after finding only \$6 in the woman's purse, stole the woman's wedding and engagement rings, a pearl ring, and her earrings. Then they forcibly removed her clothes and raped her. The two men dumped the victim on a residential street and drove away.

The two defendants were prosecuted in separate trials, and at Daye's trial the other defendant, who was known to a person who witnessed the car theft, pleaded the Fifth Amendment. A jury required almost 8 hours to convict Frederick Rene Daye of kidnaping, robbery, two counts of rape in concert, and vehicle theft. On August 14, 1984, the San Diego County Superior Court sentenced Daye to serve life, with the possibility of parole, on the kidnaping charge, and 14 years and 8 months for all other counts. He was ordered to serve his sentence at California State Prison-Solano.

Prosecutor's evidence at trial. Daye's defense at trial was mistaken identification. The prosecution's evidence included:

- Blood typing from a semen stain matched Daye's ABO blood type B.
- The victim made a photo identification.
- The victim and a witness to the crime made lineup identifications.
- Daye gave a false name and other misinformation to the police at the time of his arrest.

Postconviction challenges. Daye appealed the conviction, claiming an erroneous admission of tainted identification evidence, ineffective counsel at trial, suppression of the out-of-court identification, improper impeachment with prior convictions, and instructional errors. The judgment of Daye's conviction was affirmed in appellate court on February 29, 1986. The California Supreme Court denied review of his case.

A statement by David Pringle, the other defendant in this case, was made to the San Diego County Superior Court on February 1, 1990. This statement indicated that Daye was not the other man involved in the crime; it also named the man who was with Pringle. The court appointed a defense attorney to investigate this matter. When no followup work was done by this attorney, Appellate Defenders, Inc. (ADI), helped Daye file a writ of habeas corpus petition. The petition, filed in June 1992, addressed both Pringle's affidavit and the lack of action taken by Daye's lawyer. Habeas relief was denied on August 11, 1992, and the case was remanded to superior court with directions to consider whether to vacate the appointment of Daye's attorney.

The court ruled that Daye was entitled to new representation, and ADI took over the case. In October 1992 Daye's attorney was notified that the original evidence from the trial was going to be destroyed. She filed for an evidentiary hearing to discuss release of the exhibits and DNA testing of any remaining semen stains. On September 17, 1993, the court of appeals denied Daye's request for an evidentiary hearing. The court, however, issued a writ making \$2,000 available from the county for Daye to investigate the DNA issue and authorized release of evidence to an investigator working on Daye's case. Daye also received permission to seek habeas corpus relief after the completion of the DNA investigation.

DNA results. The report from Cellmark Diagnostics, completed on April 21, 1994, stated that DNA from the left leg of the victim's jeans and Daye's blood sample were amplified using PCR and typed for DQ alpha using an amplitype HLA DQ alpha forensic DNA amplification and typing kit. A denim cloth cutting of the right leg of the jeans was also sent but produced no PCR results. The sperm fraction on the jeans produced results, but they were too faint for interpretation. The results excluded Daye as the source of the DNA from both the nonsperm cell fraction and the sperm fraction found on the left leg of the jeans (see appendix for results).

Conclusion. After the results of the DNA testing provided exculpatory evidence for Daye, his new appellate defender filed a petition for writ of habeas corpus on June 3, 1994. Her petition was based on the new DNA evidence, which was not available at the time of the crime or at the time of Daye's appeal. It was also based on the declaration of the other defendant that Daye did not commit the crime and that, in fact, he did not even know Daye. Daye's conviction was overturned on September 27, 1994. He had served 10 years of his sentence.

Gary Dotson (Chicago, Illinois)

Factual background. On the evening of July 9, 1977, the complainant was walking home from work when two men forced her into the back seat of a car and raped her. She also testified that one of the men tried to write words on her stomach using a broken beer bottle. She was then pushed from the car onto the street.

In July 1979 Gary Dotson was convicted of aggravated kidnaping and rape. He was sentenced to not less than 25 and not more than 50 years.

Prosecutor's evidence at trial. The prosecution's case included the following evidence:

- A composite sketch of the defendant, which the complainant helped with, was prepared by the police.
- The victim identified Dotson from a police mug book.
- Dotson was identified by the victim from a police lineup.

- The State's expert serologist testified that the semen on the victim's undergarment came from a type B secretor and that the defendant was a type B secretor. (It was later reported that the State's serologist failed to disclose that the victim was also a type B secretor.)
- Testimony was presented that a pubic hair removed from the victim's underwear was similar to the defendant's and dissimilar to the victim's.

Postconviction challenges. In March 1985 the victim recanted her testimony. She said she had fabricated the rape to hide a legitimate sexual encounter with her boyfriend. Dotson contended that the victim's recantation of testimony constituted grounds to vacate the original sentence. At the hearing on Dotson's motion for a new trial, the same judge from the original trial refused to order a new trial. His reasoning was that the complainant was more believable in her original testimony than in her recantation.

The governor accepted authority for the case and held a session of the Illinois Prisoner Review Board. The governor stated that he did not believe the victim's recantation and refused to pardon Dotson. On May 12, 1985, however, the governor commuted Dotson's sentence to the 6 years he had already served, pending good behavior. In 1987 the governor revoked Dotson's parole after Dotson was accused by his wife of assaulting her. The Appellate Court of Illinois affirmed Dotson's conviction on November 12, 1987 (516 N.E.2d 718). On Christmas Eve 1987 the governor granted Dotson a "last chance parole." Two days later, Dotson was arrested in a bar-room fight, and his parole was revoked. In 1988 Dotson's new attorney had DNA tests conducted that were not available at the time of the alleged rape.

DNA results. A sample of semen from the victim's underwear was sent to Dr. Alec Jeffreys in England for RFLP analysis. The sample was badly degraded, however, and results were inconclusive. Samples were then sent to Forensic Science Associates in Richmond, California. The lab performed PCR DQ alpha tests that showed that the semen on the victim's undergarments could not have come from Dotson but could have come from the victim's boyfriend.

Conclusion. The chief judge of the Cook County Criminal Court ruled that Dotson was entitled to a new trial. The State attorney's office, however, decided not to prosecute based on the victim's lack of credibility and the DNA test results. Dotson's conviction was overturned on August 14, 1989, after he had served a total of 8 years.

Edward Green (Washington, D.C.)

Factual background. The incidents occurred on July 3 and August 5, 1987. In the first, a young woman was raped near a footbridge at a high school. The second incident occurred at the same location, but the woman fled and found a police officer. Police picked up Green in the area of the two assaults.

Edward Green was arrested and tried for rape and assault with intent to rape (in two separate incidents). He was convicted by a jury of the rape and acquitted for the assault/attempted rape. The jury reached its verdict in 3 hours.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The second victim identified Green in a “show-up” on the street.
- The first victim identified Green from a photo array and a formal lineup.
- Both victims made in-court identifications of Green.
- The blood type of the assailant was consistent with Green's.

Postconviction challenges. After conviction but prior to sentencing, the defense moved to delay sentencing pending the results of DNA testing. While waiting for the DNA results, the prosecution opposed several time extensions, which were granted by the judge.

DNA results. DNA tests were performed on an item of the victim's clothing and compared to the victim's and Green's blood. The report, issued in February 1990 from Cellmark Diagnostics, excluded Green as the source of the semen.

Conclusion. On the basis of the DNA results, the defense moved for a new trial. In a superior court hearing on March 19, 1990, the judge granted the defense motion. The U.S. attorney's office immediately moved to dismiss the indictment. Green remained in jail on unrelated drug charges after a pre-trial confinement of 9 months in jail on the rape charges.

Ricky Hammond (Hartford, Connecticut)

Factual background. In the late afternoon of November 30, 1987, the victim was walking on a dark street when she was pushed off the sidewalk by an assailant. The man forced her into a car in a nearby parking lot. He drove for about 15 minutes, stopped on or near a dirt road, and sexually assaulted her. The assailant then drove the victim to an area with which the victim was unfamiliar and told her he would kill her if she told anyone about the incident. He then let her out of the car and drove away.

Ricky Hammond was convicted of kidnaping and sexual assault in March 1990 by a Hartford jury. Before sentencing, Hammond filed two motions: one for a new trial and another for further discovery using DNA and blood testing of the vaginal swabs and smears that were in evidence. The trial court denied both of these motions and sentenced Hammond to a prison term of 25 years, suspended after 23 years, and 3 years probation.

Prosecutor's evidence at trial. DNA and blood analyses were performed at the request of the State prior to trial. The results provided exculpatory results for Hammond. The prosecution argued to the jury that, in light of the remaining inculpatory evidence, the physical evidence must have been contaminated. The prosecution's case against Hammond relied on several points:

- The victim identified Hammond in a photo array.
- The victim made an in-court identification of Hammond.
- The victim identified various details about Hammond's car, including the make and model, scratches on the body, a ripped child seat, and a wristwatch hanging on the gearbox.
- Hammond's alibi was uncorroborated, and he also had altered several details of his alibi when originally interviewed.
- Forensic examination of hairs found in Hammond's car showed they were consistent with the victim's hair.

Postconviction challenges. Hammond appealed his conviction on three major grounds. Hammond claimed that (1) the trial court improperly denied his motion for a new trial because of exculpatory blood and DNA analysis, (2) the prosecution made improper statements to the jury and denied his right to

a fair trial, and (3) the trial court erred in not allowing his posttrial motion to have further testing of vaginal swabs from the victim.

On February 25, 1992, the Supreme Court of Connecticut ruled that the trial court and prosecution made several errors with regard to the DNA and blood evidence. The court also ruled that the trial court was not aware of “the logical inconsistencies in the prosecution’s case, the evidence suggesting that the chemical alteration of the assailant’s DNA was physically impossible, or the absence of any evidence that the defendant’s scientific tests were unreliable” (604 A.2d 793).

Because Hammond’s motion was for a new trial and not for acquittal, the State Supreme Court remanded the case to the trial court for further proceedings.

DNA results. The DNA results from this case were largely completed prior to trial. At the State’s request, the FBI’s DNA analysis unit tested the samples in May 1989. An FBI forensic analyst testified that the semen from the physical evidence could not have come from Hammond.

The victim’s testimony indicated that she had not had sexual relations with anyone other than her assailant after putting on the clothes that were tested. Furthermore, blood tests performed by the State laboratory and the FBI lab revealed that the assailant had an A antigen in his blood. The victim, the victim’s boyfriend, and Hammond all had type O blood. The secretions of blood type O contain the H antigen. Type O nonsecretors do not secrete the H antigen.

After the Connecticut Supreme Court’s ruling, three more tests were performed on the vaginal swabs. Testing was not originally performed on the swabs because the State argued that it would be repetitive evidence. These results also showed no match to Hammond.

Conclusion. Hammond was granted a new trial and was acquitted. He had served 2 years of his sentence.

William O’Dell Harris (Charleston, West Virginia)

Factual background. On December 16, 1984, a nurse was walking home from work when she was grabbed from behind and sexually assaulted. On July 25, 1985, Harris was arrested and charged with first-degree sexual as-

sault. Harris was a juvenile at the time of the offense, but the State's motion to transfer the case to adult status was granted on May 16, 1986.

A Kanawha County jury deliberated for nearly 4 hours before convicting William O'Dell Harris of second-degree sexual assault. On October 18, 1987, Harris was sentenced to 10 to 20 years in prison, with 75 days credit for time served.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- A sheriff's deputy testified that the victim had positively identified Harris as her attacker.
- The victim lived near Harris and originally claimed to have been acquainted with him.
- The victim identified Harris in a police lineup and made an in-court identification of him.
- Police serologist Fred Zain (see also Glen Woodall and Gerald Wayne Davis cases) testified that the genetic markers in the semen left by the assailant matched those of Harris and only 5.9 percent of the population.
- Harris's alibi, that he was with his girlfriend at the time of the crime, was corroborated only by her.

Postconviction challenges. On November 10, 1993, the West Virginia Supreme Court of Appeals authorized special habeas corpus proceedings on any case involving the testimony of Zain (438 S.E.2d 501). One week later, Harris's attorneys filed a writ of habeas corpus, consenting to DNA testing of Harris as a condition of relief. On December 8, 1993, the State Supreme Court of Appeals issued the writ and remanded the case to the Circuit Court of Kanawha County for further proceedings. On December 29, 1993, the circuit court judge ordered prosecutors to release the trial evidence. More than a month later, the judge repeated his order.

The judge freed Harris to home confinement on \$200,000 bond on June 21, 1994. At the same hearing, the judge again ordered the district attorney to release the evidence for DNA testing. At this time, the sheriff's department stated that all evidence from the trial had been lost. An investigator with the

public defender's office later found a slide containing semen evidence at the medical center originally used by the victim.

On September 13, 1994, the judge held a hearing on a prosecution motion to reconsider his order of release of evidence and then ordered for a fourth time that the evidence (the slide from the medical center and a sample of the victim's blood) be released for DNA testing. Harris's attorneys filed a contempt of court motion on the prosecutors on November 1, 1994. During these hearings, the district attorney stated that the victim was being uncooperative about giving a blood sample but had sent the evidence slide for DNA testing on November 2, 1994.

DNA results. On May 1, 1995, a report from Dr. David Bing of the Center for Blood Research Laboratories stated that DNA extracted from Harris's blood sample was inconsistent with DNA extracted from the semen on the evidence slide. Harris asked the circuit judge to dismiss the case against him. Prosecutors, however, requested that a second test be conducted by a court-approved laboratory, LabCorp in Research Triangle Park, North Carolina. This request was granted.

Conclusion. After the results of the second test also showed that Harris was not the donor of the semen on the evidence slide, the district attorney held a press conference on August 1, 1995, to state that Harris was innocent. On October 10, 1995, Harris's conviction was vacated. One month later, the court also dismissed the underlying indictment. Harris had served 7 years of his sentence and an additional year of home confinement. As an added note to this case, the detective who testified in this trial was later convicted for perjury.

Edward Honaker (Nelson County, Virginia)

Factual background. In the early morning of June 23, 1984, a woman and her boyfriend were sleeping in their car on a rural roadside when a man approached, pretending to be a police officer. He ordered the two out of the car, brandished a gun, and ordered the boyfriend to run into the woods. The assailant forced the woman into his truck, drove to a secluded area, and repeatedly raped her. The police compiled a composite sketch of the assailant from the victim and her boyfriend. A woman was later raped 100 miles away, near Edward Honaker's house. She said the assailant resembled Honaker, her neighbor. Honaker had an alibi and was never charged with

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this second rape. The detective on the second rape case, however, took a picture of Honaker and showed it to the first victim and her boyfriend.

A Nelson County jury took 2 hours to convict Edward Honaker of seven counts of sexual assault, sodomy, and rape. The Nelson County Court sentenced Honaker to three life sentences plus 34 years.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim and her boyfriend picked Honaker out of a photo lineup.
- The victim made an in-court identification of Honaker.
- The truck that Honaker drove was similar to the one driven by the assailant.
- Police found camouflage fatigues in Honaker's house, similar to those worn by the assailant.
- Honaker's alibi, which was corroborated by his brother, sister-in-law, owner of his trailer park, and mother's housemate, was called a "put-up job" by the prosecution.
- A State laboratory forensic specialist testified that hair found on the woman's shorts "was unlikely to match anyone" other than Honaker.

Postconviction challenges. Honaker made many written inquiries for any testing that could prove his innocence. Finally, Centurion Ministries (CM), a Princeton-based group that works to free the wrongfully imprisoned, agreed to work on Honaker's case. After CM discovered that some of the victim's and boyfriend's testimony was hypnotically induced, that the initial description given by the victim was inconsistent with Honaker's appearance, and that Honaker's 1976 vasectomy was barely mentioned in the trial (and not known by the prosecution's criminalist), the organization began working with the Innocence Project. Honaker's Innocence Project lawyers filed a motion with the State of Virginia to release evidence for DNA tests.

In the original trial, a forensics expert testified that sperm was present in the semen on the vaginal swab. The prosecution contended that the sperm was the boyfriend's, but they agreed to release the evidence to Honaker's lawyers. The Innocence Project, in turn, sent the evidence to Forensic Science Associates (FSA) for PCR testing.

The reason that FSA had to provide all the reports discussed below is that in June 1994 the victim claimed that she had a secret lover during the time of the original incident. This meant that DNA tests had to prove that one of the stains was not from Honaker or either boyfriend in order to establish Honaker's innocence.

DNA results. The first report from FSA, on January 13, 1994, showed DQ alpha typing of a vaginal swab from the rape kit, an oral swab from the victim, a semen stain from the victim's shorts, and a blood sample from Honaker.

This report indicated that there were two different seminal deposits (the one on the swab and the one from the shorts did not match). FSA requested blood samples from the victim and the boyfriend. The report stated, however, that even if Honaker were able to produce sperm, he was eliminated as the source of sperm from both deposits (see appendix for results).

The second report from FSA was written on March 15, 1994; it included the boyfriend's typing and verified the victim's DQ alpha. The boyfriend could not be eliminated as a potential source of the sperm on the shorts. Honaker and the boyfriend were both eliminated as the source of sperm on the vaginal swab.

The Virginia State laboratory tested the second boyfriend and could not exclude him as the sperm source on the vaginal swab.

FSA then repeated the DQ alpha typing of all the evidence and typed five additional polymarker genes. Their report from September 26, 1994, stated that these additional polymarker tests showed that neither the boyfriends nor Honaker could have accounted for the sperm from the vaginal swab.

Conclusion. Virginia law provides that no new evidence can be presented more than 21 days after a trial, so a pardon from the governor was necessary in this case. In June 1994 Honaker filed a clemency petition with the governor's office. The Commonwealth attorney's office joined the petition on June 29. The governor signed a pardon for Honaker on October 21, 1994. He had served 10 years of his sentence.

Joe C. Jones (Topeka, Kansas)

Factual background. Early in the morning of August 24, 1985, three women left a nightclub and sat talking in their cars. A man came between

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the two cars and ordered a woman out of one of them. He then got into the car with the victim and ordered her to drive away. After driving to a different section of town, the assailant asked the woman for her name and address. She supplied him with a phony name and number; then the assailant raped her.

Joe Jones was convicted of rape, aggravated kidnaping, and aggravated assault on February 13, 1986, by a Shawnee County jury. He was given a life sentence for the kidnaping charge, with lesser concurrent sentences for the other charges.

Prosecutor's evidence at trial

The prosecution based its case on several points:

- The two witnesses identified Jones as the man at the nightclub.
- The victim picked out a different man in a photo lineup but identified Jones when she saw him face-to-face.
- Jones was a member of the same club and had actually been there the night of the incident.
- The police found a pair of jeans that resembled those of the assailant in Jones' house.

In Jones' defense, a market employee testified that Jones was in his store at the time of the attack and was wearing different clothing.

Postconviction challenges. An initial appeal by Jones was not disposed of before he combined that appeal with a motion of remand on February 2, 1987, with the Kansas Supreme Court. This latter motion asked for a new trial based on newly discovered evidence and ineffective counsel at trial.

The new evidence consisted of the following: another man who was later convicted of sexual assaults with identical modus operandi; expert witnesses who would testify that identifying Jones was unconscious transference on the part of the witnesses because they had seen him earlier in the evening and the identification was also weak because it was cross-racial; and a psychological exam showed that Jones did not have the capability to commit a violent act such as rape.

On February 13, 1987, the Kansas Supreme Court granted the motion for remand, but only in considering the evidence that the other man may have committed the crime. A hearing was held in which the other man denied any involvement with the crime, and the prosecution presented evidence that the other man's photograph was shown to the witnesses and they did not identify him as the assailant. The court denied the motion for a new trial.

Jones' attorney filed another appeal to the Kansas Supreme Court on the grounds that the defendant's homosexuality was not allowed as evidence at the trial, that the trial court refused to admit evidence about the other man, and that his client's Sixth Amendment rights were violated when the court limited the scope of his original remand. This motion was denied on March 3, 1989. Two years later, in 1991, the prosecution agreed to release evidence to the defense for DNA testing.

DNA results. The samples and evidence were sent to Cellmark Diagnostics for DNA testing, but Cellmark was unable to get any readings from the evidence in the rape kit. Cellmark recommended Forensic Science Associates (FSA) as a laboratory that might be able to analyze the vaginal swab. The evidence was sent to FSA, which determined, in a report dated October 25, 1991, that the semen on the vaginal swab could not have come from Jones (see appendix for results).

FSA was asked to retype Jones' blood, and on April 13, 1992, FSA said that it had replicated its findings and Jones could not have supplied the semen on the vaginal swab.

Conclusion. On December 18, 1991, the defense submitted a motion for a new trial on the basis of newly discovered evidence. On July 17, 1992, a judge ruled that the DNA evidence was admissible. The court vacated Jones' conviction and ordered a new trial. The prosecution immediately stated it would not refile charges, and Jones was released that day. Jones served 6½ years of his sentence.

Kerry Kotler (Suffolk County, New York)

Factual background. A woman accused Kotler of raping her twice, once in 1978 and again in 1981. In the first incident, the victim alleged that she arrived home and a man wearing a ski mask raped her and robbed her of jewelry at knife point. She was unable to identify her assailant and reported only the burglary to the police. In the second incident, the victim again ar-

rived home and an unmasked man was there. She said that the assailant claimed to be coming “back for another visit” and again raped her at knife point. He robbed her of jewelry and \$343 and left through the back door. After 2 full days of deliberations, a Suffolk County jury convicted Kerry Kotler of two counts of rape in the first degree, two counts of burglary in the first degree, one count of robbery in the first degree, and two counts of burglary in the second degree. The court sentenced Kotler to 25 to 50 years.

Prosecutor’s evidence at trial. The prosecution based its case on several points:

- The victim identified Kotler from a group of 500 photographs.
- The victim’s identified Kotler by sight and voice from a police lineup.
- County laboratory tests showed that Kotler had three non-DNA genetic markers (ABO, PGM, and GLO) that matched those of the semen stain left on the victim’s underpants.

Postconviction challenges. Kotler brought a pro se motion to set aside the jury verdict prior to sentencing. In the motion, he alleged prosecutorial misconduct and deficiencies in the court’s jury charge. The motion was denied on December 2, 1983.

In 1986 Kotler made a direct appeal to the Appellate Division. Among his claims in the appeal: erroneous admission of testimony, insufficient evidence to convict, and excessive sentencing. The judgment of conviction was affirmed on March 3, 1986.

On March 10, 1987, Kotler brought to the court a second motion to set aside the conviction. He based his motion on false testimony by a police detective, concealment of evidence, and improper cross-examination of Kotler regarding his prior criminal charges. This motion was denied on July 7, 1988. The court, however, ordered a hearing on whether certain documents had been concealed from the defense prior to trial. On January 8, 1990, after the hearing, the county court again denied Kotler’s motion.

Upon hearing about DNA tests in September 1988, Kotler contacted the Legal Aid Society and asked for assistance in getting the tests performed. He secured funds from his father, and on February 15, 1989, the rape kit, the victim’s underwear, and blood from the victim and Kotler were sent to Lifecodes, Inc. It found an insufficient amount of DNA for testing and returned the evidence. Another legal aid attorney, however, heard about

Kotler's case and advised him to try Forensic Science Associates (FSA) in California.

DNA results. In February 1990 all the evidence was sent to FSA. A PCR test showed that Kotler was not the source of the semen. The prosecution, however, posited that since DNA from both Kotler and the underwear yielded a similar allele, part of the semen could have come from a consensual partner and another part from Kotler.

Tests were then conducted by the Center for Blood Research (CBR) in Boston. They showed the same results as the first test. The defense then asked for a blood sample from the husband of the victim because he was the only sex partner the victim claimed to have had prior to the rape. After a sample from the husband was received by both laboratories, tests showed that he was also not the source of the semen. These results showed that the semen in the victim's underpants could not have come from either Kotler or the victim's husband. Both FSA and CBR issued a joint statement to the Suffolk County Court attesting to these facts on November 24, 1992 (see appendix for results).

Conclusion. On March 10, 1992, Kotler's attorneys filed a memorandum of law in support of Kotler's motion to vacate judgment. Their brief referred to the results of the original DNA tests as well as to the withholding of evidence by the prosecution, which included police reports showing that the victim's description differed from Kotler in age, height, and weight and that the victim's identification of Kotler was a "look-alike," not a positive identification. The district attorney's office filed a memo of opposition to vacate the conviction.

After the defense attorneys received the results of the final DNA tests, they went to the judge, who ordered a hearing on the results. The prosecution then agreed to issue a joint statement with Kotler's lawyers to vacate the conviction. The Court of Suffolk County ruled to vacate the conviction on December 1, 1992, and ordered Kotler to be released on his own recognizance.

On December 14, 1992, the prosecution sought the dismissal of all indictments, which the court granted. Kotler served 11 years of the sentence before he was released on December 1, 1992.* Subsequently, the chief pros-

*According to an April 9, 1996, *New York Times* account, Kotler was arraigned April 8, 1996, in Suffolk County, New York, on charges of first-degree rape and second-degree kidnapping. The charges stem from an alleged sexual assault on August 12, 1995, and the results of DNA tests on evidence taken from the victim's clothing.

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ecution expert who conducted the serology tests pleaded guilty to perjury charges that alleged he lied about his qualifications and training.

Steven Linscott (Cook County, Illinois)


Factual background. On October 4, 1980, police found a woman dead in her apartment, face down and naked, except for a nightgown around her neck. Her head was covered with blood, and her body had many visible wounds. She had also been sexually assaulted.

Linscott was a neighbor of the victim and was questioned by police during a neighborhood canvass. He later remembered a dream he had the night of the murder, which seemed to parallel the incident. After reporting his dream to police, he gave several recorded interviews with police officers. He also gave saliva, blood, and hair samples to police.

Steven Linscott was arrested for murder and rape on November 25, 1980. In Cook County a circuit court jury took 10 hours to convict Linscott of murder and acquit him of rape. The judge sentenced Linscott to 40 years in prison.

Prosecutor's evidence at trial. The prosecution based its case against Linscott on several points:

- The dream that Linscott reported to police contained elements similar to those of the crime, including the following:
 1. The victim was beaten repeatedly both in the dream and in actuality.
 2. The victim was beaten in a downward motion both in the dream and in the actual crime.
 3. The weapon, in the dream, was long and thin; the actual weapon was a tire iron.
 4. The victim in the dream died passively; the actual victim was found with her hands formed in an “ommudra” sign used by Hindus to signify a passive acceptance of death.
- The results of blood-typing tests that showed that the semen from the crime scene could have come from Linscott.

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- The results of head and pubic hair analyses showed that hairs found at the scene were “consistent” with Linscott’s hair.

Postconviction challenges. Linscott appealed, and on August 7, 1985, the Appellate Court of Illinois overturned the conviction (482 N.E.2d 403). The court ruled that the State did not produce direct evidence of Linscott’s guilt and that his “confession” contained no voluntary acknowledgment of guilt. The prosecution appealed this decision to the Illinois Supreme Court. While the State’s appeal was pending, the Illinois Supreme Court ruled on October 31, 1985, that Linscott could be released on bond. On October 17, 1986, the Illinois Supreme Court ruled that there was enough evidence to convict and reversed the decision of the appellate court (500 N.E.2d 420). The Supreme Court, however, also ruled that there appeared to be issues from the trial that were not addressed in the appeal, and the case was remanded to the appellate court for further review.

The appellate court was asked to review issues involving the physical evidence. The State’s expert on the hair examination testified that only 1 in 4,500 persons would have consistent hairs when tested for 40 different characteristics. He only tested between 8 and 12 characteristics, however, and could not remember which ones. The appellate court ruled on July 29, 1987, that this testimony, coupled with the prosecution’s use of it at closing argument, constituted denial of a fair trial (511 N.E.2d 1303). The conviction was again overturned.

Leave to appeal was again granted to the prosecution by the Illinois Supreme Court. On January 31, 1991, the court vacated the judgment by the appellate court, reversed the judgment by the circuit court, and remanded the case for a new trial (566 N.E.2d 1355). A trial date was set for July 22, 1992.

DNA results. In preparation for the new trial, prosecutors attempted to bolster their case by submitting the physical evidence for PCR testing. The analysis by the Center for Blood Research (CBR) in Boston indicated that the semen could not have come from Linscott. DNA tests had been performed before the original trial, but the results were inconclusive and consumed all the swab material (see appendix for results).

Conclusion. On the basis of the results of the DNA analysis, the prosecutor decided that there were too many doubts to pursue the case any longer. On July 15, 1992, all charges against Linscott were dropped. He had served 3 years of his sentence and had been free on bond for 7 additional years.

Bruce Nelson (Allegheny County, Pennsylvania)

Factual background. Two men stole a van and drove to a parking garage in the hopes of committing a robbery. They accosted a woman when she came into the garage and forced her into the van. The two men allegedly sexually assaulted the woman repeatedly, pulled out a knife, and choked the woman to death with a piece of cloth.

Those details of the incident are available only through the testimony of Terrence Moore following his arrest for the rape-murder. He confessed but testified that Bruce Nelson was the one who initiated the crimes and forced the victim into the van and killed her.

Nelson, already in prison on unrelated charges, was arrested. Police had Moore confront Nelson with his confession. During this confrontation, Nelson reportedly asked Moore, “What did you tell them?” Moore reportedly responded, “I told them everything.”

Bruce Nelson was convicted of rape and murder in an Allegheny County jury trial. The district court sentenced him to life in prison for the murder and 10 to 20 years for the rape, to run concurrently with the life sentence.

Prosecutor’s evidence at trial. Evidence was provided at trial that showed Moore’s fingerprints on the victim’s purse. Saliva from the woman’s breast and bra was consistent with Moore’s saliva. Saliva found on a cigarette butt at the scene was also consistent with Moore’s saliva. Hairs found on the victim and her clothing were consistent with Moore’s. The hairs, saliva, and fingerprints were not consistent with those of Nelson. The prosecution based its case against Nelson on two points:

- The testimony of Terrence Moore named Nelson as the initiator of the crimes and as the murderer.
- The statement by Nelson, “What did you tell them?” was entered into evidence as a confession.

Postconviction challenges. Nelson filed a habeas corpus petition stating that the submittal of his confrontation with the other defendant, Terrence Moore, violated his Sixth Amendment right to counsel. Nelson also claimed a violation of his Fifth Amendment right to “restrictions on custodial interrogation of suspects who have invoked their right to silence.” The district court denied his petition and his certificate for probable cause for appeal. The Pennsylvania Supreme Court declined to review the case.

The United States Court of Appeals for the Third Circuit granted Nelson's probable cause petition and reviewed his claims de novo. On August 17, 1990, the circuit court affirmed the district court's rejection of Nelson's Sixth Amendment claim but reversed its Fifth Amendment decision and remanded the case to the district court for further review (911 F.2d 928).

DNA results. On remand, the prosecution obtained DNA tests to prepare for a new trial. The results of DNA tests excluded Nelson as the assailant.

Conclusion. On the basis of the results of the DNA testing, Nelson was cleared of all charges on August 28, 1991. He had served 9 years of his sentence.

Brian Piszczek (Cuyahoga County, Ohio)

Factual background. In the early morning of July 29, 1990, the victim was at home alone when she heard a knock at her door. She looked through the peephole and asked the man to identify himself. The man said he was with the victim's friend, who was parking the car. When he said this, the victim thought she recognized his voice as belonging to a man named Tim or Tom, who had been in her house before. The victim let the man inside; he immediately pulled out a knife, cut the victim on the neck, breast, and stomach, and then raped her.

On June 25, 1991, after 1 day of deliberations, a Cuyahoga County jury convicted Brian Piszczek of rape, felonious assault, and burglary. The court sentenced him to 15 to 25 years.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim identified Piszczek from a photo array 2 months after the incident.
- The victim made an in-court identification of Piszczek.
- Piszczek testified that he had, in fact, been in the victim's house once before with the mutual friend of the victim.
- Piszczek's alibi was corroborated only by his girlfriend.

Postconviction challenges. After Piszczek's conviction, a public defender took over his appeal. He filed an appeal on the basis of an improper photo

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identification process and ineffective counsel at trial (trial counsel never requested DNA testing, which was available at the time of conviction, and he was alleged to be ineffective in cross-examination of witnesses).

After the appeal was denied, the Innocence Project became involved. Its lawyers filed a release of evidence motion with the Cuyahoga County Court of Common Pleas. The request was granted on March 11, 1994. All evidence was forwarded to Forensic Science Associates (FSA) for PCR testing.

DNA results. The report from FSA, issued on July 6, 1994, showed that PCR DQ alpha typing (as well as typing for five other polymarker genes) was performed on the blood of both Piszczek and the victim and on the sperm and nonsperm cell fractions of a vaginal swab, an anal swab, and a semen stain from a nightgown. The tests showed that Piszczek's DNA did not match the tested evidence (see appendix for results).

Conclusion. The day after receiving the DNA test results, the prosecutor's office asked a judge to overturn the conviction. On October 6, 1994, a Cuyahoga County judge declared Piszczek not guilty on all charges. Piszczek served 4 years in prison, including a period after his conviction was overturned.


Dwayne Scruggs (Indianapolis, Indiana)

Factual background. On the night of February 1, 1986, when the victim was walking home from a bus station, a man came behind her, held a knife to her throat, and forced her to a grassy area near a highway overpass. There the assailant, while attempting to hide his face, sexually assaulted the victim and forcibly took \$6 from her. After telling the victim to roll away from him, the assailant left the area on foot.

On May 13, 1986, Dwayne Scruggs was convicted of rape and robbery in a jury trial in a Marion County Superior Court. He was sentenced to serve 40 years on the rape charge and 20 years on the robbery charge, with sentences to run concurrently.

Prosecutor's evidence at trial. The prosecution's main evidence consisted of the following:

- The victim identified Scruggs ("with 98 percent surety") from a sex crimes file of approximately 200 photographs.

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- The victim identified Scruggs a second time from a different picture and made an in-court identification of him at trial.
 - The victim identified Scruggs' boots as matching those worn by her assailant.
 - Scruggs acknowledged being familiar with the area where the rape occurred.

Postconviction challenges. In August 1987 Scruggs' appeal was heard before the Supreme Court of Indiana (511 N.E.2d 1058). His petition was based on both a lack of evidence to convict and an "evidentiary harpoon" committed by a police officer who had testified before the jury that the victim had viewed photos of "individuals who have all been arrested for rape or a sexual assault." The jury was admonished to disregard his statement, but no mistrial was declared by the court. The supreme court affirmed the decision of the superior court.

On December 18, 1992, Scruggs' public defender submitted two motions on his behalf. The first was to amend the petition for postconviction relief. This motion stated that the defendant was denied due process of law when he was given a sentence that was not based upon the evidence in the case. Entering evidence of the petitioner's previous arrest for rape (for which he was not convicted) was also cited as a denial of due process. The motion also stated that the defendant was denied effective assistance of counsel at both the trial and appellate levels.

The second motion was for the release of all the State's evidence that contained biological samples of the victim for the purpose of performing DNA tests that were not available at the time of trial. On February 24, 1993, prior to a ruling on this motion, Scruggs' attorney filed a motion to allow production of laboratory reports that would analyze the evidence and blood samples from Scruggs. On April 26, 1993, the public defender also petitioned for blood samples to be drawn from the defendant.

The court held a hearing on all these motions on April 27, 1993, and ruled that the blood sample could be drawn and that the Indianapolis Police Department laboratory must release the vaginal swabs and slides. Those materials were sent to Cellmark Diagnostics in Maryland for DNA tests. The public defender's office paid for the testing.

DNA results. The report from Cellmark stated that DNA from all the items sent were amplified using PCR and typed for DQ alpha using an amplitype HLA DQ alpha forensic DNA amplification and typing kit. The results excluded Scruggs as the source of the DNA from both the nonsperm cell fraction and sperm fraction of the vaginal swabs as well as from a bloodstain obtained at the scene of the crime (see appendix for results).

Conclusion. After verifying the results of this test, the prosecutor's office joined the defender's office in filing a motion to vacate Scruggs' conviction and sentence. On December 17, 1993, the Superior Court vacated both the sentence and the conviction and ordered Scruggs released. Five days later, the prosecution declined to prosecute in a new trial and asked the court to dismiss all charges against Scruggs. The court sustained the motion.

On March 28, 1994, the prosecuting attorney and the public defender filed for expungement of Scruggs' record. The next day, the court so ordered. Scruggs had served 7 years and 7 months of his sentence before release.


David Shephard (Union County, New Jersey)

Factual background. On December 24, 1983, two men abducted a woman in the parking lot of a shopping mall. The victim was forced into the back seat of her car where one man pinned her arms and legs while the other drove. The driver stopped in a residential area where both men repeatedly assaulted her sexually. She was ordered out of her car, then the men drove away. The second assailant was never identified.

In September 1984 a Union County jury deliberated 1 day and found David Shephard guilty of rape, robbery, weapons violations, and terrorist threats. Shephard was sentenced to 30 years in prison.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim identified Shephard by sight and voice at his work.
- The victim heard one of the attackers call the other man Dave.
- The victim's purse and car were found near the airport building where Shephard worked.

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- Blood test results showed that Shephard's antigens and secretor type matched those of the assailant.
 - Shephard's alibi was uncorroborated and was punctured by the prosecution in cross-examination.

Postconviction challenges. Shephard filed court papers in 1992 requesting that all evidence containing semen samples be released for DNA tests. The prosecution agreed.

DNA results. The first DNA test indicated that one discernible semen stain on the vaginal swab from the rape kit did not match Shephard's. But the defendant was not vindicated because there had been two rapists. A second test revealed a second DNA sample that was too faint to read.

Shephard's defense attorney then asked the laboratory if any samples could be found on the panty liner the victim was wearing at the time of the attack. This test found two distinct DNA patterns, neither of which matched Shephard's. Subsequent testing, at the prosecutor's request, of the victim's boyfriend (the only person she was having consensual sex with at the time) showed that the boyfriend did not match either of the samples from the panty liner.

Conclusion. The Union County Superior Court ordered a new trial on the basis of the DNA evidence. Moments later, the prosecutor declined to pursue another trial, and Shephard was released on May 18, 1994. Shephard had served almost 10 years of his sentence.

Walter Snyder (Alexandria, Virginia)

Factual background. In the early morning of October 28, 1985, a woman was raped and sodomized in her apartment by a man who had broken through her front door.

Walter Snyder was convicted of rape, sodomy, and burglary by an Alexandria, Virginia, jury on June 25, 1986. The jury recommended a sentence of 45 years, which the judge accepted and ordered Snyder to serve.

Prosecutor's evidence at trial. The prosecution based its case on several points:

- The victim identified Snyder as a person who lived across the street from her.
- The victim identified Snyder in a police station “show-up.”
- Police found red shorts in Snyder’s house similar to those worn by the assailant.
- Standard blood typing showed Snyder and the assailant were type A secretors.
- Snyder’s alibi, that he was at home sleeping during the time of the assault, was corroborated only by his mother.

Postconviction challenges. After Snyder’s appeal of his conviction was denied, the Innocence Project agreed to defend him pro bono if his family could pay for any necessary forensic tests. In May 1992 prosecutors agreed to release the necessary evidence to the defense for DNA testing. The defense forwarded the evidence to the Center for Blood Research (CBR) in Boston.

DNA results. On October 28, 1992, CBR issued a report stating that Snyder’s DNA did not match the DNA in semen found on a vaginal swab from the original rape kit. The prosecution asked CBR to repeat the test, which it did for free at the Innocence Project’s request. CBR replicated its findings, and the prosecution asked the FBI to look at the results. The FBI agreed with the methodology and the results in CBR’s report (see appendix for results).

Conclusion. Virginia has a 21-day rule for a motion for a new trial based on newly discovered evidence, so the only recourse for Snyder was to seek a pardon from the governor. The Commonwealth’s attorney joined the defense in filing a request for a pardon. Two months later, on April 23, 1993, the governor granted an absolute pardon; Snyder was released the same day. After being freed, Snyder petitioned the Alexandria Circuit Court to expunge his record. On January 11, 1994, the court granted his petition. Snyder had served almost 7 years of the original sentence.

Snyder’s civil suit against the city of Alexandria is pending at the time of this report. In addition to wrongful imprisonment, the suit alleges that Snyder was beaten and handcuffed during interrogation and that police claims that Snyder confessed were false.

David Vasquez (Arlington County, Virginia)

Factual background. In the early morning of January 24, 1984, a woman was sexually assaulted and murdered in her home by an assailant who had entered the home through the victim's basement window. The woman died from asphyxiation by hanging.

David Vasquez pleaded guilty to second-degree homicide and burglary (Alford plea) on February 4, 1985. He was sentenced to 35 years in prison. He had pled guilty to the crime after allegedly confessing to the crime and reporting details that were not released to the public. Vasquez, who is borderline retarded, later reported that he had only dreamed the crime.

Prosecutor's evidence. In addition to Vasquez's guilty plea, the prosecution proffered the following evidence to the court:

- Two witnesses placed Vasquez near the victim's house on the day of the crime.
- Vasquez could not provide an alibi.
- Hair analysis of pubic hairs found at the scene were consistent with Vasquez's hair.
- A guilty plea meant that Vasquez would not be subject to the death penalty upon conviction.

Postconviction challenges. There are no known postconviction challenges. Vasquez's defense attorneys, however, filed for a suppression of two of his confessions because they were issued without a Miranda warning.

DNA results. The Virginia State laboratory, Cellmark Diagnostics, and Lifecodes, Inc., performed DNA tests on the evidence from several rape/murders. All tests incriminated a man named Timothy Spencer as the assailant in rape-murders that were identical in modus operandi to the Vasquez incident.

Attempts by FSA to compare hair found at the scene with Vasquez's blood sample were inconclusive.

Conclusion. The Commonwealth's attorney and Vasquez's defense attorneys filed motions with the governor to grant Vasquez an unconditional pardon. The motions were based on the DNA tests of Spencer and an FBI report that indicated the Vasquez crime and the Spencer crimes were commit-

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ted by the same person. The report also stated that the crimes “were not perpetrated by someone who was mentally deficient.” The governor granted the pardon, and Vasquez was released on January 4, 1989. Vasquez had served 5 years of his sentence.

Timothy Spencer was arrested, tried, and convicted for two other rape-murders. He was never formally prosecuted in the Vasquez incident because he already had been sentenced to death. The United States Supreme Court denied Spencer’s request for a new DNA test. On April 27, 1994, Spencer became the first person in the United States executed on the basis of DNA testing.


Glen Woodall (Huntington, West Virginia)

Factual background. Two women, in separate incidents, were abducted at knife point in a shopping mall parking lot. Both times the assailant wore a ski mask and forced the victims to close their eyes throughout the attack. In the first instance, the attacker drove around in the woman’s car, repeatedly raped her, and stole a gold watch and \$5. The victim opened her eyes briefly to note that the assailant wore brown pants and was uncircumcised. In the second case, the man repeatedly raped the woman and stole a gold watch. This woman was able to note the man’s boots, jacket, and hair color. She also noted that he was uncircumcised.

On July 8, 1987, a jury found Glen Woodall guilty of first-degree sexual assault of one woman, first-degree sexual abuse of a second woman, kidnapping both women, and aggravated robbery of both women. He was sentenced by the circuit court to two life terms without parole and to 203 to 335 years in prison, to be served consecutively.

Prosecutor’s evidence at trial. The prosecution based its case on several points:

- A State police chemist testified that Woodall’s blood secretions matched secretions in a semen sample from the evidence.
- A comparison of body and beard hair from the defendant was consistent with hair recovered from a victim’s car.
- Partial visual identification of the defendant was made by one of the victims.

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- One victim identified clothing that matched clothing found in the defendant's house.
 - Both victims testified that the assailant was not circumcised, in common with the defendant.
 - A distinctive smell about the assailant was noted by both victims and also was found at the defendant's workplace.

During the pretrial hearing, the judge denied a defense request for an “experimental new” DNA test of the defendant's blood and semen samples from the victims' clothing. Denial was based on defense inability to offer any expert testimony on the test's validity or reliability. After trial, the defense raised this issue again, and a DNA test was finally performed. The court held that test results were inconclusive.

Postconviction challenges. On July 6, 1989, the West Virginia Supreme Court of Appeals affirmed Woodall's conviction (385 S.E.2d 253). Woodall continued to file motions to allow DNA testing of the evidence. He filed several appeal petitions and habeas corpus petitions with both the trial court and with the West Virginia Supreme Court. The State Supreme Court finally allowed the evidence to be released to the defense for additional DNA testing. This evidence was forwarded to Forensic Science Associates (FSA).

DNA results. FSA conducted PCR testing of the semen samples from the vaginal swabs from the original rape kits. FSA concluded that the assailant in both cases had the same DQ alpha type and neither matched Woodall's type. These results were reviewed and confirmed in testimony by several laboratories and forensics experts, including Dr. Alec Jeffreys and Dr. David Bing of the Center for Blood Research (CBR). CBR also conducted its own PCR analysis and arrived at the same results as FSA (see appendix for results).

Conclusion. Woodall submitted a habeas corpus petition based on the DNA test results. On July 15, 1991, the trial court held a hearing on the petition and vacated Woodall's conviction. Other relevant evidence included secret hypnosis of the two victims and a romantic relationship between one of the victims and an investigating officer. The court set bond at \$150,000 for Woodall and ordered him placed on electronic home monitoring. CBR continued conducting RFLP analysis and eliminated three potential donors as sources of the sperm. This was to counter the prosecution's argument that

the stains may have come from consensual partners. The RFLP analysis also excluded Woodall, and the State conducted its own DNA test. The State's results also excluded Woodall, as noted in a report of April 23, 1992.

As a result of the additional testing, West Virginia moved to dismiss Woodall's indictment on May 4, 1992, and the trial court granted the motion. Woodall served 4 years of his sentence in prison and spent a year under electronic home confinement.

It is important to note that the State police chemist in this case, Fred Zain (see also Gerald Wayne Davis and William O'Dell Harris cases), was investigated by the West Virginia attorney general's office and the State Supreme Court of Appeals for providing perjured testimony in criminal cases. Glen Woodall was the first person whose conviction was overturned after Zain testified for the State. Over 130 cases in which Zain either performed lab tests or provided the testimony are being reviewed by the State attorney general's office. In addition, an investigation is ongoing in several Texas counties where Zain worked and testified as a laboratory expert.

Glen Woodall was awarded \$1 million from West Virginia for his wrongful conviction and false imprisonment.

GLOSSARY

Alleles. Alternate gene forms or variations, which are the basis of DNA testing.

Antigens. Any biological substance that can stimulate the production of, and combine with, antibodies. Variances in human antigens can be used to identify individuals within a population.

DNA. Deoxyribonucleic acid, which contains genetic material and whose shape resembles a rope ladder that has been twisted (the double helix). An individual's DNA is unique except in cases of identical twins.

DNA match. See *inclusion*.

DNA profiling. The process of testing to identify DNA patterns or types. In the forensic setting, this testing is used to indicate parentage or to exclude or include individuals as possible sources of body fluid stains (blood, saliva, semen) and other biological evidence (bones, teeth, hair).

DNA typing. See *DNA profiling*.

DQ alpha (DQ α). An area (locus) of DNA that is used by the forensic community to characterize DNA. Because there exist seven variations (alleles) of DNA at this locus, individuals can be categorized into 1 of 28 different DQ alpha types. Determination of an individual's DQ alpha type involves a Polymerase Chain Reaction-based test.

Electrophoresis. A technique by which DNA fragments are placed in a gel and separated by size in response to an electrical field.

Epithelial cells. Membranous tissue forming the covering of most internal surfaces and organs and the outer surface of the body.

Epithelial cell fraction. One of two products from a differential extraction that removes DNA from epithelial cells before analysis of sperm DNA can be conducted. The other product is the sperm cell fraction.

Exclusion. A DNA test result indicating that an individual is excluded as the source of the DNA evidence. In the context of a criminal case, "exclusion" does not necessarily equate to "innocence."

Forensic science. The application of a field of science to the facts related to criminal and civil litigation.

Gene. A segment of a DNA molecule that is the biological unit of heredity and transmitted from parent to progeny.

Genotype. The genetic makeup of an organism, as distinguished from its physical appearance or phenotype.

Inclusion. A DNA test result indicating that an individual is not excluded as the source of the DNA evidence. In the context of a criminal case, “inclusion” does not necessarily equate to “guilt.”

Inconclusive. The determination made following assessment of DNA profile results that, due to a limited amount of information present (e.g., mixture of profiles, insufficient DNA), prevents a *conclusive* comparison of profiles.

Marker. A gene with a known location on a chromosome and a clear-cut phenotype (physical appearance or observable properties) that is used as a point of reference when mapping another locus (physical position on a chromosome).

Polymerase Chain Reaction (PCR). A technique used in the process of DNA profiling.

Restriction Fragment Length Polymorphism (RFLP). A technique used in the process of DNA profiling.

Secretor. A person who secretes the ABH antigens of the ABO blood group in saliva and other body fluids.

Serologist. A forensic scientist who specializes in biological fluid analysis.

APPENDIX

DNA (PCR) Results

A detailed laboratory report was obtained in 12 of the study cases; the results are reported here. The following PCR results are the actual DQ α types that laboratories found on evidence and blood samples. DQ α (pronounced DQ alpha) is one of several polymarkers that are compared in PCR testing. Each DQ α type is similar to blood type (e.g., O, A, B). One can see that many times the victim's DQ α matches the nonsperm fraction in a semen stain. One also can see that the sperm fraction of the semen stain does not match the type of the defendant (except Chalmers, where the difference occurred in polymarkers other than DQ α).

Kirk Bloodsworth

Sample	DQ α Type
Victim's blood sample	1.3, 4
Panties—semen stain (nonsperm fraction)	1.1, 3 (Trace 1.3, 4)
Panties—semen stain (sperm fraction)	1.1, 3
Bloodsworth's blood sample	1.2, 4

Ronnie Bullock

Sample	DQ α Type
Panties (nonsperm cell fraction)	1.1, 2, 3
Panties (sperm fraction)	3
Victim's blood sample	1.1,2
Bullock's blood sample	4

Terry Leon Chalmers

Sample	DQ α Type
Victim's blood sample	1.1, 3
Chalmers' blood sample	1.2, 4

Vaginal swab—sperm cell	1.2, 4
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Cervical swab—sperm cell	1.2, 4
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Note: The epithelial cells from the two swabs were too weak to get accurate readings. Although the DQa of Chalmers and the semen matched, three other polymarkers did not match.

Frederick Daye

Sample	DQα Type
Blue jeans—left knee (nonsperm fraction)	1.2, 4
Blue jeans—left knee (sperm fraction)	1.2, 4
Daye's blood sample	4, 4

Edward Honaker (results of three tests)

Sample	DQα Type
Victim's oral swab	3, 3
Vaginal swab (nonsperm fraction)	3, 3
Vaginal swab (sperm fraction)	3, 4
Shorts (nonsperm fraction)	3, 3
Shorts (sperm fraction)	1.2, 4
Honaker's blood sample	1.2, 3
Boyfriend's blood sample	1.2, 4
Secret lover's blood sample	4, 4

Joe Jones

Sample	DQα Type
Victim's blood sample	3, 4
Jones' blood sample	1.2, 3
Vaginal swab (sperm fraction)	1.1, 4
Vaginal swab (nonsperm fraction)	3, 4

Kerry Kotler

Sample	DQα Type
Underpants (sperm fraction)	1.1, 4
Victim's blood sample	4, 4
Kotler's blood sample	4, 4
Husband's blood sample	2, 3

Steven Linscott

Sample	DQα Type
Vaginal swab (sperm fraction)	3, 4
Vaginal swab (nonsperm fraction)	1.1, 3
Victim's blood sample	1.1, 3
Linscott's blood sample	4

Brian Piszczek

Sample	DQα Type
Nightgown (sperm fraction)	1.2, 4
Nightgown (nonsperm fraction)	2, 3
Vaginal swab (sperm fraction)	1.2, 4

Vaginal swab (nonsperm fraction)	2, 3
Victim's blood sample	2, 3
Piszczek's blood sample	4, 4

Dwayne Scruggs

Sample	DQα Type
Vaginal swab (nonsperm cell fraction)	2, 4
Vaginal swab (sperm fraction)	1.1, 4
Bloodstain	2, 4
Scruggs' blood sample	4, 4

Walter Snyder

Sample	DQα Type
Vaginal swab (sperm fraction)	1.2, 1.3
Vaginal swab (nonsperm fraction)	2, 4
Victim's blood sample	2, 4
Snyder's blood sample	1.2, 4

Glen Woodall

Sample	DQα Type
Underpants of victim 2 (sperm fraction)	3, 4
Underpants of victim 2 (nonsperm fraction)	1.2, 3
Denim skirt of victim 1 (sperm fraction)	3, 4
Denim skirt of victim 2 (nonsperm fraction)	1.2, 4
Victim 1's blood sample	1.2, 4
Victim 2's blood sample	1.2, 3
Woodall's blood sample	2, 3

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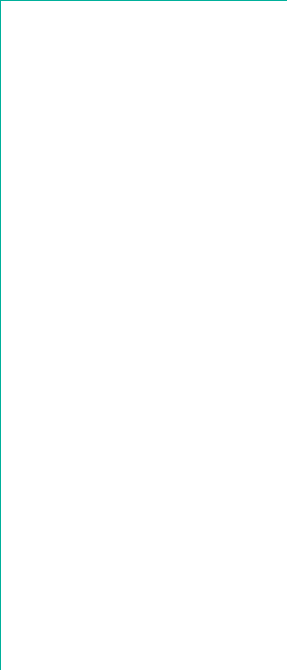
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Independent Report

of Law Enforcement and Victim Representative Members of the
Advisory Committee on Wrongful Convictions



September 2011

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September 2011

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I. INTRODUCTION AND OVERVIEW

The citizens of Pennsylvania can rightly take pride in the fact that, as the principal report of the Advisory Committee on Wrongful Convictions says,¹ their criminal justice system “is finely tuned and balanced and almost always delivers reliable results.” From 1970 through 2008, there were 5.1 million prosecutions in the state.² Of those, only a very few -- the principal report generally puts the number between eight and eleven -- are alleged to have resulted in a documented wrongful conviction. And, as we will show, even the principal reports’ estimates are overstated, since true factual “innocence” is far from certain in most of the cases cited in that report, and the evidence of guilt in several of those cases remains compelling.

Yet, as the principal report also says, pride in a well-functioning system is no reason for complacency. To the extent that specific reforms would better protect victims and serve the community by ensuring that the guilty are convicted, no one could be more supportive of such measures than police, prosecutors, and victims’ rights representatives.

¹ For the sake of clarity, we call the report issued by the advisory committee chairperson “the principal report” and our own report “the independent report.” As explained below, there is no true “committee report,” since no report or proposal was ever put to a vote and endorsed by a majority of the committee.

² Meeting Summary, Legal Representation Subcommittee, Jul. 7, 2008, at p.3.

The devil, of course, is in the details. The principal report at times admits that there were sharp divisions among committee members as to how best to approach many or all of the issues we examined. But it rarely acknowledges what those divisions were, and, more troublingly, it often claims that a “consensus” was reached even though no such agreement was reflected in a vote.

We, the committee members most experienced in law enforcement and victim representation, have a very different sense of whether any consensus was actually reached within the committee, and what the consensus would have been had the committee truly represented and considered in a balanced manner the views of all participants in the criminal justice system. We therefore present this independent report to explain our experiences with the committee, our views on its methodologies and conclusions, and our own proposals for ensuring reliable verdicts.

The committee’s flawed procedures and flawed conception of “innocence”

The unfortunate reality is that the advisory committee not only failed to reach a true consensus on how to improve the accuracy of verdicts in Pennsylvania, it never even really tried. The committee was originally formed in response to a law review article claiming that at least eight “wrongfully convicted” individuals in Pennsylvania had been “exonerated” through DNA evidence, and that a new, pre-determined set of pro-criminal-defendant laws was needed in response to those cases. Since the outcome of the committee process had been largely decided upon in

advance, and was designed solely to benefit criminal defendants, only the slightest token effort at balance was made when selecting the members. Police, prosecutors, and victim-advocates were severely underrepresented, while criminal defense attorneys and law professors who also maintained criminal defense practices were commensurately overrepresented.

Though outnumbered, we attempted to at least make our views as advocates for victims and public safety known at committee and sub-committee meetings. But not everyone was willing to listen to the concerns of victims and law enforcement, much less address those issues and attempt to forge a true consensus. As a result, the committee and its subcommittees entirely stopped meeting for the last few years, during which time the proposals set forth in the principal report were drafted anonymously and in secret, with members given no chance to vote on the recommendations to be issued in their name.

Similarly, the committee never studied any of the cases of alleged “wrongful convictions” in Pennsylvania even though that was supposed to be one of its most important tasks. Instead, committee members were expected to take at face value exaggerated claims of “wrongful convictions” in Pennsylvania, accept a definition of “actual innocence” that does not mean factual innocence which includes notorious murderers like Jay C. Smith and Timothy Hennis, and go along with proposals to make the conviction of people like Smith and Hennis more difficult.

The principal report

That brings us to the principal report. We must confess at the outset to being perplexed by the nature and structure of that report. It begins, quite promisingly, with a number of fair-minded observations on the generally reliable nature of Pennsylvania's criminal justices system, the shared commitment of the committee members to making verdicts even more reliable, and the "sharply divided" status of the members on how to achieve that goal.

The principal report then gradually morphs into a lengthy summary of law review articles, particularly those in which professors have studied how well their students performed as eyewitnesses when actors or their classmates playacted crimes in front of them. While the principal report frequently uses the word "science" to describe the results of such exercises, the articles it summarizes do not reflect true science with consistent, objective methodology and reliably quantifiable results. Nor do they in any meaningful way replicate what it is like, and how the mind operates, when an innocent victim is attacked in real life.

Instead, the only practical effect of that portion of the principal report is likely to be the perpetuation of a defense myth that ordinary jurors cannot be trusted to judge for themselves which witnesses are credible and which are not. We very strongly disagree with this worldview, and would much sooner place our trust in the collective wisdom, experience, and common sense of twelve ordinary jurors, than in any committee of law professors, defense attorneys, and defense experts.

Even that, however, ultimately proves to be merely tangential to the principal report's aims, for the specific proposals with which that report concludes have little or nothing to do with its summary of law review articles. Rather, all of the appeals to public-spiritedness and academic study at the forefront of the principal report turn out to be a Trojan horse carrying a long-awaited slate of new laws to help the criminal defense bar, whose job it is to zealously advocate for *all* of their clients, whether guilty or innocent. But making the conviction of *all* defendants more difficult does not make verdicts more reliable. It just makes Pennsylvania less safe.

The principal report's proposals

While the principal report claims that “none of the recommendations in this report present an outlier position” nationally, the reality is otherwise. For example, when the legal redress subcommittee last met – four years ago – its chairperson, whose recommendations are forwarded as proposals in the principal report, frankly admitted that those recommendations would make Pennsylvania the first state in the nation to enact a compensation statute that applies “to all wrongfully convicted individuals, not just those determined to be innocent.”³ The recommendations on post-conviction DNA testing take a similarly radical approach, proposing to eviscerate an effective, bipartisan DNA-testing statute, and replace it with an unprecedented new law that would ignore the question of “actual innocence” in

³ Legal Redress Subcommittee Meeting Summary, Dec. 11, 2007, at p. 1.

favor of defense gamesmanship. And the proposal for electronic recording of interrogations contains mechanisms to discourage juries from considering unrecorded confessions even though the witnesses before the committee consistently agreed that this would do nothing to prevent wrongful – as opposed to accurate – convictions.

More broadly, the principal report’s proposals, which we discuss below on a point-by-point basis, reflect the flawed, backroom process through which they were created. That process, again, was not designed to produce recommendations that would actually lead to greater verdict integrity, *i.e.*, the conviction of more guilty defendants and even fewer wrongful convictions. Instead, it was designed to make the conviction of *all* defendants more difficult, a result that would primarily benefit the guilty and deny justice to victims.

Our alternative approach

While we cannot agree with the principal report’s exclusively pro-criminal-defense agenda, we also could not be satisfied with an outcome that did nothing to improve the accuracy of verdicts in Pennsylvania. As we said, the fact that our state has an excellent track record in that regard is no reason it cannot be made even better. To that end, we offer a series of proposals to:

- Reform existing DNA laws to enable more DNA testing and more DNA-related investigations prior to trial.
- Reform the Wiretap Act to allow for the admission of more electronically-recorded evidence.

- Begin a pilot program to study whether and how statewide electronic recording of interrogations should be implemented.
- Expand police training on non-suggestive identification procedures.
- Establish a properly-funded system for preserving biological evidence.
- Establish an independent forensic advisory board with appropriate investigative protocols.

These proposals would allow us to even further reduce the number of wrongful convictions, while also providing justice to victims and protecting the community by ensuring the conviction of the guilty. And we are confident that they can achieve broad support among all parties sincerely interested in improving the reliability and accuracy of verdicts in Pennsylvania. Accordingly, these measures, unlike the flawed and one-sided proposals in the principal report, can fulfill the proper mission of the advisory committee.

II. THE PRINCIPAL REPORT'S PROPOSALS CANNOT ACCURATELY BE ATTRIBUTED TO THE ADVISORY COMMITTEE OR ANY SUBCOMMITTEE.

While the authors of the principal report are certainly entitled to make whatever recommendations they see fit, it must be made clear that their proposals have never been voted on by the members of the advisory committee, are not the product of any independent study of “wrongful convictions” in Pennsylvania, and consistently disregard the views of law enforcement and victim-advocates. As such, they should not be attributed to the advisory committee, and no claim should be made that they are tailored to correct specifically identified problems in Pennsylvania’s criminal justice system.

As the principal report implies, the creation of the advisory committee was largely a consequence of a law review article published by the committee’s chairperson claiming that at least eight “wrongfully convicted” individuals in Pennsylvania had been “exonerated,” and that an “innocence commission” was needed to enact a pre-determined slate of restrictions on police and prosecutors with respect to confessions, eyewitness identifications, informants, and scientific evidence.⁴ While all of us have a sincere personal respect for the committee chairperson, that article was a one-sided document. The chairperson’s evidence of

⁴ John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform From the Pennsylvania Eight* (hereafter “*Chaos*”), 12 Widener L. Rev. 359 (2006).

even eight demonstrated “wrongful convictions” (in 5.1 million prosecutions) depended on uncritically accepting second-hand reports and the accounts of the defendants’ own lawyers. The chairperson’s proposals came exclusively from criminal defense attorneys and their paid experts. And the chairperson considered no reforms that would lead to more frequent *conviction of the guilty*, which of course is the surest means of protecting all innocent persons, including innocent victims of crime.

Perhaps recognizing the unreliability of such an approach, the General Assembly did not grant the request for a permanent “innocence commission.” Instead, the Senate passed only a non-binding resolution -- which the House of Representatives did not join -- calling for a temporary advisory committee to study the causes of “wrongful convictions” and “report to the Senate with its findings and recommendations no later than November 30, 2008,” a deadline that has long since passed.⁵

When the advisory committee was first created, it was staffed overwhelmingly with criminal defense attorneys and others whose positions were similarly set, with only a relative handful who could be expected to speak up for any contrary views. Of the original thirty-seven members of the committee, just four were prosecutors and none were local victims’ services representatives. Eventually,

⁵ 2006 Senate Resolution No. 381, Pr.’s No. 2254.

it was brought to the public's notice how one-sided the committee's membership was, and more prosecutors, police, and victims' advocates were permitted to join -- though never in numbers that achieved a fair balance.⁶

Even with the membership thus stacked, the committee was never given a chance to study and discuss the alleged cases of wrongful convictions in Pennsylvania. Instead, that task was assigned to the chairperson's own law students, who, like the authors of the principal report, accepted at face value the claim that those "innocent" Pennsylvania defendants were "wrongly convicted" before DNA evidence conclusively "exonerated" them.⁷ Yet, as we discuss below, in most cases, it is far from clear that the defendants identified by the chairperson and the principal report were "innocent" and "wrongly convicted." What is clear is that the committee never properly defined what a "wrongful conviction" is, much less conducted a fair study of alleged wrongful convictions in this state.

Neither did the authors of the principal report ever put any of their proposals to the test of a vote, though we repeatedly requested one. In the legal representation and investigation subcommittees, pre-determined recommendations

⁶ See, e.g., Nancy Eshelman, *Prosecutors Blast Study Panel As Skewed*, The Patriot-News, Mar. 29, 2007.

⁷ Meeting Summary, Legal Representation Subcommittee, Nov. 15, 2007, at 1.

were forwarded even in the face of opposition.⁸ In the science subcommittee, pro-defense members simply asserted a “consensus” (among themselves), and refused to hold votes when requested to do so by members. And in the redress subcommittee, there was no danger of such disagreement because no specific proposals were ever circulated -- much less debated -- at the meetings.

Under the circumstances, it is not clear who among the committee supported any given proposal in the principal report, much less that the supporters ultimately constituted a majority. The subcommittees have not met for two to four years, and whatever work has been done during that time has taken place in secret, with no input from members who might offer a competing position.⁹

As a product of this deeply flawed process, the principal report cannot be accepted as neutral and reliable, nor can it rightly be described as a report of the committee. Indeed, it is not clear, even to us as committee members, whose report it is.

⁸ See Meeting Summary, Legal Representation Subcommittee, Jan. 29, 2009, at 3 (stating, in context of debate among subcommittee members concerning advisability of legislative mandate for electronic recording, “The taping issue will be presented to the full advisory committee in the manner determined by John Rago [who was not a member of that subcommittee]”).

⁹ The redress subcommittee last met on December 11, 2007, the legal representation subcommittee on March 27, 2009, and the investigations subcommittee on May 4, 2009. The science subcommittee did not have *any* formal meetings with recorded minutes.

III. THE PRINCIPAL REPORT'S PROPOSED RECOMMENDATIONS ARE BASED ON A FUNDAMENTAL MISUNDERSTANDING OF WHAT "ACTUAL INNOCENCE" MEANS.

The advisory committee's task was clear. It was to "review cases in which an innocent person was wrongfully convicted and subsequently exonerated," and, based on that study, to offer "recommendations to reduce the possibility that in the future innocent persons will be wrongfully convicted."¹⁰ But as we said, it did no such thing. At no point did the advisory committee engage in any serious examination of cases in which "innocent" persons were "wrongfully convicted" and subsequently "exonerated." In fact, the principal report's proposals do not display even a basic understanding of what those terms -- "innocent," "wrongfully convicted," and "exonerated" -- mean.

This failure is an extraordinary break from the letter and spirit of the advisory committee's responsibilities, and has significant consequences. Since the principal report does not first correctly identify what "innocent" persons have been "wrongfully convicted" in Pennsylvania, its proposals are apt to cause real harm to the criminal justice system if adopted. That is, since the principal report mistakenly defines the "innocent" to include even the plainly guilty, and then offers recommendations designed to make such convictions less likely in the future, what it actually does is propose rules and legislation that would protect the *guilty* and make their conviction more difficult.

¹⁰ 2006 Senate Resolution No. 381, Pr.'s No. 2254.

A. The principal report mis-defines “actual innocence.”

The principal report states that “actual innocence” is established in either of two relevant situations.¹¹ First, the principal report defines as “actually innocent” any defendant whose conviction is overturned “on grounds consistent with innocence” -- a standard so broad as to cover nearly *all* appellate reversals, since a ruling in favor of a criminal defendant can hardly expected to be *inconsistent* with innocence.¹² In addition, it defines as “actually innocent” any defendant who is found not guilty at a re-trial or has the charges against him dismissed.¹³ But in all respects, existing law, common sense, and experience are to the contrary.

Under existing law, a person is not “wrongfully convicted” unless he did not, in fact, commit the charged acts or the charged acts were not crimes, and he did not by misconduct or neglect cause his own prosecution.¹⁴ In other words, the term “actual innocence” means exactly what it says, and what any reasonable person would take it to mean: true factual innocence.

¹¹ We agree that a person is likely to be innocent under the principal report’s other alternative definition of “actual innocence,” which covers the rare situation in which an individual has been “pardoned by the Governor for the crime or crimes ... on the grounds that the crime or crimes was either not committed at all or, if committed, was not committed by the defendant[.]” Proposed 42 Pa.C.S. § 8582(a)(2)(i).

¹² Proposed 42 Pa.C.S. § 8582(a)(2)(ii).

¹³ Proposed 42 Pa.C.S. § 8582(a)(2)(iii).

¹⁴ 28 U.S.C. § 2513(a)(2).

Actual innocence thus involves far more than the bare fact that a conviction was overturned “on grounds consistent with innocence,” or that a defendant was found not guilty after a re-trial, or that the charges ultimately were dismissed. Consider that, to have obtained a conviction in the first place, the prosecution must have presented so much evidence of the defendant’s guilt as to convince a judge or jury beyond a reasonable doubt. And it often must have done so even though damning evidence of guilt was suppressed as a result of procedural rulings, or witnesses with compelling evidence of guilt refused to cooperate or could not be located.

If an appeals court reverses under such circumstances, its grounds invariably will be some species of perceived legal error, not a conclusion that the defendant is “actually innocent.” And if the second jury (or judge or prosecutor) reaches a different decision than the first one, its decision will usually reflect no more than a belief that the admissible evidence does not establish his guilt *beyond all reasonable doubt*. The Supreme Court has specifically explained that, contrary to the principal report’s belief, even an acquittal “does not prove that the defendant is innocent,”¹⁵

¹⁵ *Dowling v. United States*, 493 U.S. 342, 349 (1990) (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984)).

since a jury must acquit “someone who is probably guilty but whose guilt has not been established beyond a reasonable doubt.”¹⁶

Given this reality, it cannot seriously be argued that the principal report’s recommendations are based on an accurate understanding of what it means for a defendant to be “actually innocent” or “wrongfully convicted.” Consider for example, how the definition in the principal report would have applied to the case of Timothy Hennis, an Army sergeant who initially was convicted in a civilian court of raping and murdering Kathryn Eastburn and killing her two young daughters. In 1988, a North Carolina appeals court reversed his convictions after concluding that improper evidence was admitted against him and that the remaining evidence of guilt was less than “overwhelming.”¹⁷ And, after a re-trial the following year, a second civilian jury found him not guilty.¹⁸

¹⁶ *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring). Moreover, even if the second jury’s finding on this point is wrong -- that is, even if the admissible evidence, viewed objectively, establishes the defendant’s guilt beyond a reasonable doubt -- the prosecution has no recourse because the double-jeopardy bar will prevent an appeal or re-trial. See *Jackson v. Virginia*, 443 U.S. 307, 317 fn. 10 (1979) (“To be sure, the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of ‘not guilty.’ This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming”).

¹⁷ *State v. Hennis*, 372 S.E.2d 523 (N.C. 1988).

¹⁸ Myron B. Pitts, *Evidence Adds up in Support of Verdict*, The Fayette Observer, Apr. 18, 2010.

Hennis' case satisfied both of the alternative understandings of "actual innocence" reflected in the principal report: his original convictions were reversed on grounds broadly "consistent with innocence," and he was found not guilty at a subsequent re-trial. As a result, he long has found a place on prominent lists of innocent persons who were "wrongly convicted."¹⁹ His conviction was, in short, precisely the sort the principal report seeks to learn from and prevent.

But there is a problem: notwithstanding the appeals court's decision and the second jury's verdict, Hennis did indeed rape and murder Ms. Eastburn and kill her two young daughters, as the world now knows. In the years after Hennis' supposed "exoneration," compelling new evidence of his guilt, including DNA evidence that was not available at the time of his original trial, was obtained. Moreover, because of his military affiliation, his was a rare case in which an actually-guilty defendant could be brought to justice despite a wrongful acquittal. In April 2010, a military court convicted Hennis and sentenced him to death.²⁰

As should go without saying, the principal report is deeply flawed to the extent it would label people like Hennis "innocent" or "wrongfully convicted," and seek to compensate them or make their conviction less likely in the future. Any

¹⁹ See John Schwartz, *In 3rd Trial, Conviction for Murders from 1985*, New York Times, Apr. 9, 2010, at A13. ("Hennis had long appeared on the 'innocence list' maintained by the Death Penalty Information Center").

²⁰ Associated Press, North Carolina: *Tried 3 Times, Soldier Faces Death*, New York Times, Apr. 16, 2010, at A17.

sincere effort to improve fairness and accuracy in criminal verdicts must begin with a much more reasonable standard for determining who is -- and is not -- innocent, and thus whose cases we should learn from and what those lessons should be.

Again, a reasonable definition of “actual innocence” would deem a defendant “wrongfully convicted” only if he did not, in fact, commit the charged acts or the charged acts were not crimes.²¹ As the Supreme Court has explained, “[a]ctual innocence means factual innocence, not mere legal insufficiency,” and considers relevant evidence of guilt that was either excluded or unavailable at trial.²² Moreover, any showing of actual innocence must be “extraordinarily high” or “truly persuasive.”²³

The principal report’s failure to reasonably define “actual innocence” has serious consequences. In the first place, since the ostensible point of the principal report’s recommendations is to make convictions of the innocent less likely, the mis-definition of “innocent” persons to include scores of guilty defendants means that the “reforms” based on that mis-definition are likely to reward the *guilty* and make their convictions less likely in the future. Further, by encouraging a misperception that “innocent” persons are convicted with much greater frequency than is actually the case, the principal report is likely to undermine in the public’s eye both its own

²¹ 28 U.S.C. § 2513(a)(2).

²² *Bousley v. United States*, 523 U.S. 614 (1998); *Schlup v. Delo*, 513 U.S. 298 (1995).

²³ *Herrera v. Collins*, 506 U.S. 390 (1993).

legitimacy and that of the criminal justice system as a whole. As has been well stated by Joshua Marquis, a district attorney in Oregon, “Words like ‘innocence’ convey enormous moral authority and are intended to drive the public debate by appealing to a deep and universal revulsion at the idea that someone who is genuinely blameless could wrongly suffer for a crime in which he had no involvement. ... To call someone ‘innocent’ when all they managed to do was wriggle through some procedural cracks in the justice system cheapens the word and impeaches the moral authority of those who claim that a person has been ‘exonerated.’”²⁴

²⁴ Joshua Marquis, *Innocence in Capital Sentencing: The Myth of Innocence*, 95 J. Crim. L. & Criminology 501, 508 (Winter 2005).

B. Many of the alleged “wrongful convictions” in the principal report do not involve verifiable claims of “actual innocence” as that term is commonly and properly understood.

As we have explained, since the committee conducted no review of Pennsylvania cases in which defendants may have been wrongfully convicted, the principal report simply accepts without reservation that between eight and eleven individuals in Pennsylvania have been “exonerated” by DNA evidence after being “wrongfully convicted” of charges of which they were “actually innocent.” Despite professing to understand the difficulty in accurately identifying and quantifying wrongful convictions, the principal report suggests that our criminal justice system “routinely accept[s] the conviction of an innocent person,” and repeatedly asserts without qualification that Pennsylvania has seen as many as eleven “innocent” and “wrongly convicted” convicts “exonerated” through DNA evidence. But these assertions, like the principal report’s recommendations, are not based on a reasonable understanding of the term “actual innocence.”

In the committee chairperson’s law review article, which the principal report used as the primary basis for its claims of DNA “exonerations” in Pennsylvania, he revealed that his research into the cases of the individuals he dubbed the “Pennsylvania Eight” primarily consisted of reading newspaper articles and talking to the defendants and their lawyers. In some cases, he even accepted at face value the self-serving claims that the defendants made in their civil complaints, when they were trying to obtain millions of dollars in damages.

Yet the committee never went beyond this limited research by speaking with the actual victims or other witnesses of the “Pennsylvania Eight’s” alleged offenses, let alone the prosecutors of those crimes. This failure was simply unacceptable in a committee whose interest should have been a balanced search for the truth. While DNA can provide incontrovertible evidence, its findings can also be subject to debate and interpretation, and must be examined in light of *all* of the evidence in a given case.²⁵ This is particularly true for DNA evidence that was collected before the early 1990’s, *i.e.*, before DNA was on the radar screen of prosecutors, police, and defense counsels. Original collection methods, cross-contamination, time, and storage are common issues in post-conviction DNA testing.

In order to correct the deficiencies in the committee’s approach, we have taken it upon ourselves to do what the committee did not, and give prosecutors, detectives, and victims from those cases a chance to tell their side of the story. What we learned does not inspire confidence in the principal report or its recommendations. In one of the “Pennsylvania Eight” cases, it is clear that an individual was wrongly convicted. But in the other seven, true “innocence” is far less certain and the evidence of guilt in several of the cases remains compelling.

²⁵ See *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2316 (2009) (“DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent”). See also *id.* at 2326-29 (Alito, J., concurring) (explaining how “DNA testing - even when performed with modern STR technology, and even when performed in perfect accordance with protocols - often fails to provide ‘absolute proof’ of anything”).

This reality may surprise some, since the same people who find themselves on the principal report's list of alleged wrongful convictions in Pennsylvania are also on other prominent lists of the same sort, such as those published by the Innocence Project, the Center on Wrongful Convictions at Northwestern University School of Law, and the Death Penalty Information Center ("DPIC"). But if we cannot confidently rely on such lists when they discuss Pennsylvania cases -- and we submit it is abundantly clear that we cannot -- we also cannot rely on those lists when they discuss alleged wrongful convictions from other jurisdictions. Neither can we blindly accept claims based on those lists, such as assertions about alleged error rates with confessions, eyewitness identifications, and informants.

There is no need to take our word for this; it has been proven time and time again by independent studies. For example, Paul Cassell, a law professor who has also served with distinction as a federal judge, conducted his own investigation of cases nationwide in which false confessions allegedly led to wrongful convictions. What he found nationally, based on a dispassionate review of the entire records in randomly-selected cases, was consistent with what we found in Pennsylvania: "A detailed examination of the alleged miscarriages ... reveals that a significant fraction of the 'innocent' were, in fact, guilty criminals. The miscategorization of these cases stemmed primarily from reliance on inaccurate second-hand media

reports....”²⁶ Similarly, the Florida Commission on Capital Cases, which -- unlike this committee -- conducted its own study of cases of alleged exonerations in its state, concluded that innocence was clear in no more than four of the twenty-two Florida cases commonly cited as wrongful convictions.²⁷ And an exhaustive study by a member of the California Attorney General’s Office showed that a clear *majority* of the cases on the DPIC list of “wrongful convictions” do not present even *arguable* claims of “actual innocence,” as that phrase is commonly and properly understood²⁸

Below, we provide details that the principal report overlooked in its case summaries of the so-called “Pennsylvania Eight,” as well as two other individuals who have frequently appeared on lists of the “wrongfully convicted.” If anything, what these cases prove as a whole is that the criminal justice system in Pennsylvania works very well in that it frees those for whom there is any reasonable doubt concerning guilt -- a standard that, again, cannot be equated with “actual innocence.”

²⁶ Paul G. Cassell, *The Guilty And The "Innocent": An Examination Of Alleged Cases Of Wrongful Conviction From False Confessions*, 22 Har. J.L. & Pub Pol’y 523, 602-03 (Spring 1999).

²⁷ Florida Commission on Capital Cases, *Case Histories: A Review of 24 Individuals Released from Death Row* (Sept. 10, 2002), available at <http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf>.

²⁸ Ward A. Campbell, *Critique of DPIC List*, available at <http://www.prodeathpenalty.com/dpic.htm>.

Jay C. Smith

Any discussion of alleged instances of wrongful convictions in Pennsylvania should begin with the infamous case of Jay C. Smith, a school principal who was convicted of murdering a teacher and her two young children. The principal report lists Smith in appendices titled “Pennsylvania Exonerations 1989-2003 By Year of Exoneration” and “Pennsylvania Exonerees Identified By Center on Wrongful Convictions at Northwestern University School of Law.” In addition, the committee chairperson has cited Smith’s case as an example of “an exoneration[] ... which predated the advent of DNA as an information science.”²⁹ But in fact, Smith was clearly guilty of those murders, and his example shows just how misguided, misleading and manipulative the principal report’s claims of “exonerations” often are.

The reason that Smith finds himself on the principal report’s lists of supposed exonerees is that, after being convicted based on an extensive web of evidence proving his guilt, he obtained his release and an order barring his re-trial because the prosecutor did not provide him with evidence -- literally, a few grains of sand -- that could have been used to bolster a far-fetched defense theory. Of course, as we have already discussed, such an outcome is not a judicial determination of “innocence.” But upon receiving this remarkable procedural ruling, “Smith could

²⁹ *Chaos, supra*, 12 Widener L. Rev. at 373 n.41.

not leave well enough alone. He had the gall to sue ... for false imprisonment.”³⁰ Not surprisingly, a jury rejected that claim, as did the United States Court of Appeals for the Third Circuit, which firmly declared, “[O]ur confidence in Smith’s convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts.”³¹

Thus, Smith not only failed to earn his place on wrongful-conviction lists with a judicial determination of innocence, *he has since received judicial recognition of guilt*. Nevertheless, the principal report and the committee chairperson indefensibly characterize him as the sort of “exoneree” whose conviction we should seek to prevent in the future.

Roger Coleman

The committee chairperson has also expressed outrage over the case of Roger Coleman of Virginia, who was executed for a crime that death-penalty opponents long insisted he did not commit. In the other of the two law review articles the chairperson has published, he wrote, “[I]t is paradoxical that habeas corpus, the basis of all our freedoms, could not save the life of a man who discovered new and powerful evidence of his factual innocence ... evidence so powerful and disturbing

³⁰ *Kansas v. Marsh*, 548 U.S. 163, 195 (2006) (Scalia, J., concurring).

³¹ *Id.*, quoting *Smith v. Holtz*, 210 F.3d 186, 189 (3d Cir. 2000).

that Time magazine featured it as a cover story."³² But what Coleman's case really shows is that one cannot determine the rate and causes of wrongful convictions simply by looking at the cover of Time magazine and the specious lists of alleged "exonerations" found on anti-death penalty websites.

"Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the posterchild for the abolitionist lobby."³³ That trust in his innocence proved badly misplaced. After Coleman's execution, the governor of Virginia ordered posthumous DNA testing, which confirmed Coleman's guilt.³⁴ Yet his case has not caused those who produce inflated lists of "wrongful convictions" to change their methodology at all. As we will show when discussing the so-called "Pennsylvania Eight," any evidence of innocence is still considered incontrovertible, while any evidence of guilt is not considered at all.

Dale Brison

Relying largely on allegations that Dale Brison made in a civil lawsuit where he was seeking millions of dollars, the committee chairperson has proclaimed with

³² John T. Rago, *"Truth or Consequences" and Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 Dick. L. Rev. 845, 873 & n. 220 (Spring 2003).

³³ *Kansas v. Marsh*, 548 U.S. at 188 (Scalia, J., concurring).

³⁴ *Id.*

certainty that Brison was incarcerated “for a [rape] he did not commit.”³⁵ Likewise, the principal report lists him among its examples of DNA exonerations in Pennsylvania. But in doing so, the principal report makes the mistake we discussed above of confusing a decision not to re-prosecute a defendant with a determination that the defendant was “innocent.” In fact, a balanced examination shows that there is no question that Brison is a dangerous rapist, and there remains evidence -- namely, the victim’s account and Brison’s *modus operandi* -- that his crimes included the one for which he supposedly was “exonerated.”

Dale Brison was a defendant in two rape cases, not one. The first involved the rape of a woman who lived a few blocks from him in Oxford, Pennsylvania. The victim in that case was walking down the street when a man grabbed her and dragged into a briar bush area, where he stabbed and repeatedly raped her. She described her attacker as having worn black pants, a gray jacket, and a gold necklace -- a description that matched clothing that Brison had been seen wearing on the street a few days before the attack.

At a 1991 trial, the victim was adamant that Brison was the rapist, and a jury who heard her testimony firsthand agreed. Subsequently, however, the case was reversed by the Superior Court because there had been no DNA testing of the victim’s underwear. After the case was remanded, such testing was conducted, and it excluded Brison as the source of semen recovered from the victim’s underwear.

³⁵ *Chaos, supra* 12 Widener L. Rev. at 412.

Although it is always possible in such cases that the biological material came from an unrelated sexual encounter rather than the rape, or that the sample was too degraded for accurate testing, prosecutors no longer believed that they could prove Brison's guilt beyond a reasonable doubt in light of the DNA results, and he was released.

Three months after Brison's release for the original rape, he committed another. In the second attack, which also took place in Oxford, Brison repeatedly raped the 14-year-old girl daughter of a female Chester County Prison Guard. During the vicious attack, Brison told the young victim that her "mother didn't do me good" while he was in prison.

Brison originally denied the second rape as well, once again claiming mistaken identification, but this time DNA tests confirmed that he was the rapist. After learning of those results, Brison ultimately pled guilty to rape and received a prison sentence of 25 years to life. That sentence is being served consecutively with a six- to twelve-year sentence he had received for four drug delivery crimes that he also committed while out of jail.

The victim in the first rape continues to maintain that Brison is guilty, and, according to the prosecutor in the second rape case, the facts of that rape were similar to those of the first.

Thomas Doswell

The case of Thomas Doswell is another in which the committee chairperson is confident that the defendant was convicted of “a [rape] he did not commit,”³⁶ as is the principal report, which uses the same phrase. But an impartial person in a much better position to know -- the victim -- disagrees with the principal report’s claim.

There, a woman who was raped in her workplace identified the attacker as Doswell, as did a co-worker who intervened and chased the perpetrator away. Both witnesses’ pre-trial identifications likely would have been suppressed under modern case law because they occurred during photo arrays in which Doswell’s picture alone was marked with the letter “R.” But in September 1987, Doswell was convicted based on the eyewitness evidence.

In 2005, the prosecution agreed to post-conviction DNA testing, which excluded him as the source of biological material recovered from the scene. Because of those results, he was released and prosecutors declined to retry him. Despite the DNA results, the rape victim remains steadfast that Doswell is the man who raped her.

A year after Doswell’s release, he was arrested again in separate incidents for keeping a seventeen-year-old girl in his car against his will, and for conspiring to

³⁶ *Chaos, supra*, 12 Widener L. Rev. at 377.

kidnap or kill his estranged girlfriend. He ultimately pleaded guilty to reckless endangerment and unlawful restraint in the case of the seventeen-year-old girl. Charges were dropped in the conspiracy case involving his former girlfriend when the witnesses failed to appear in court.

Finally -- and of particular greater relevance to the commission -- Doswell's case does not show any current, systemic problems in Pennsylvania. Even if the principal report is right and the victim is wrong about whether Doswell was convicted of "a crime he did not commit" in the rape case, the law already provides a remedy to prevent the sort of suggestive photo array that led to Doswell's alleged "misidentification." Regardless of whether there was any doubt a quarter-century ago, Pennsylvania courts now make clear that pre-trial identification evidence is inadmissible when it is based on a suggestive photo arrays that created a likelihood of misidentification.³⁷

Bruce Godschalk

The committee chairperson has portrayed the alleged innocence of Bruce Godschalk in even more dramatic terms, asserting not only that Godschalk was "exonerated" after being convicted of "a crime he did not commit," but that an eyewitness against him "simply got it wrong."³⁸ So, too, the principal report lists

³⁷ *Commonwealth v. Kubis*, 978 A.2d 391 (Pa. Super. 2009).

³⁸ *Chaos, supra*, 12 Widener L. Rev. at 379.

him among its examples of DNA “exonerations” in Pennsylvania. Once again, however, the true picture is not so clear.

Godschalk was convicted of raping two women in the same Montgomery County apartment complex in 1986. At trial, the prosecution presented overwhelming evidence, including the victims’ testimony and a voluntary, taped confession in which Godschalk provided specific and accurate details about the crimes that were not publicly known. But in 2002, he was released after post-conviction DNA testing of biological materials recovered from the crime scene excluded Godschalk as a source.

While the test results in Godschalk’s cases created a reasonable doubt about his guilt, the principal report asserts far more than that when it lists him as having been exonerated. When judging that characterization, it is important to consider that:

- The biological materials that ultimately were subjected to DNA testing were found on sources outside the victims’ bodies, and consequently may not have been related to the crime. For example, there is no way to determine if a semen sample taken from the carpet was a semen sample from the perpetrator of the crime.
- Godschalk’s conviction was based in significant part on a taped, voluntary confession that he gave to police. The judge in his case found no evidence of threats, coercion, or any other improper influence by the police. Nor did Godschalk ever testify that he was forced, threatened, coerced, intimidated, pressured, or improperly influenced in any way.
- In the confession, Godschalk provided specific, accurate details about committing the rapes and gave accurate details of the

indecent exposure. None of the details had previously been released by the police.

- Godschalk so closely resembled a composite sketch of the rapist that his own sister turned him in to police after seeing the picture on television.

Barry Laughman

We agree with the committee chairperson and the principal report that Barry Laughman is likely innocent. It is important to note, however, that the principal report's recommendations would not have prevented Laughman's conviction, and therefore are not justified by his rare and tragic example.

In 1987, Laughman, who was mildly retarded, gave a tape-recorded interview in which, responding to leading questions from a detective, he confessed to the rape and murder of his 82-year-old neighbor. Semen samples were obtained during the autopsy of the victim, but DNA technology at the time was inadequate to compare the samples with Laughman's DNA.

In 2003, the semen samples were subjected to post-conviction DNA testing, which excluded Laughman as a source. Those results were particularly significant because the semen was recovered from the victim rather than an external source, her age made it unlikely that she had had a consensual sexual encounter before the murder, and there was no evidence to suggest the involvement of multiple assailants. Consequently, the Adams County District Attorney's Office concluded that Laughman was innocent, and re-opened its investigation, which remains ongoing.

Fortunately, a wrongful conviction in such a case is already much less likely because there would be no need to wait until after the trial to conduct DNA testing. But the proposed recommendations would not themselves have done anything to prevent Laughman's conviction, since his confession was recorded and yet nevertheless was both false and believed by a jury.³⁹

Vincent Moto

The committee chairperson has described the conviction of Vincent Moto for rape as a "sad" event, and stated unequivocally that his conviction was for "a crime he did not commit."⁴⁰ Similarly, the principal report lists him as a wrongfully convicted Pennsylvanian who supposedly has been exonerated through DNA evidence. But the reality of his case is also very different. The evidence of Moto's guilt has always been strong. He is on the street today not because DNA evidence showed that he "did not commit" the crime for which he initially was convicted, but because prosecutors could no longer locate the victim to testify against him again when a new trial was granted ten years later.

³⁹ The principal report's recommendations do not seek to change the settled rule that limited intelligence does not necessarily bar a voluntary confession, and do not attempt to impose courtroom rules regarding leading (or misleading) questions to the interrogation context, nor should they. The United States Supreme Court and Pennsylvania Supreme Court have consistently rejected such rules, and they would lead to the loss of an unknowable number of truthful confessions. *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Commonwealth v. Hughes*, 555 A.2d 1264, 1275 (Pa. 1989).

⁴⁰ *Chaos, supra*, 12 Widener L. Rev. at 409.

The evidence at Moto's 1987 trial showed that he and another man picked out a complete stranger, dragged her off the street, and raped her. The victim was able to create an excellent composite drawing of Moto that proved to be a remarkable match. After his arrest, the victim made a positive identification. Before trial, a man pulled up in a car next to the victim and threatened to shoot her if she testified against Moto. The victim refused to be intimidated and testified at trial -- where Moto presented an alibi that the jury rejected. The jury found beyond a reasonable doubt that Moto was guilty of rape.

A decade later, DNA testing of the victim's underwear showed traces of DNA from three different men, but Moto's cells could not be found. Upon receiving those results, the judge did not make any finding that Moto was "innocent," but instead merely granted him a new trial in order to present the evidence.⁴¹ Prosecutors were more than willing to meet the challenge. Unfortunately, however, they were unable to locate the victim -- again showing how lengthy delays in DNA testing undermine the search for the truth.

Had there been a new trial, the jury would have learned what few people presently understand: DNA can remain in minute quantities on clothing or bedding for weeks or months, even after repeated washings. Thus, the presence of other

⁴¹ See *Commonwealth v. Moto*, 23 A.3d 989, 991 n.2 (Pa. 2011) ("[I]t is important to emphasize that the PCRA court did **not** hold or conclude that the DNA results exonerated Appellee. Rather, the PCRA court found that the DNA results raised a jury question that should have been considered along with the other relevant evidence, and so the court granted Appellee a new trial") (emphasis in original).

men's DNA on the underwear proved nothing; it could have represented any combination of cells from the other perpetrator and prior sexual partners. There are also instances in sexual assault when DNA samples are not left behind because the perpetrator did not ejaculate, and if he did it may have been on a surface that was not preserved intact.

On March 23, 2011, the Pennsylvania Supreme Court affirmed the decision of the trial judge refusing to expunge Moto's arrest record. According to the Supreme Court, the trial judge properly considered "the strength of the Commonwealth's case against Appellee; the credibility of its witnesses; the fact that Appellee had not been found not guilty; and the public's interest in retaining the arrest record of an individual convicted of a serious crime, such as rape, who is subsequently granted a new trial due to DNA evidence" when refusing to grant expungement.⁴²

Bruce Nelson

The case of Bruce Nelson is another in which the committee chairperson has overstated the evidence of a "wrongful conviction" by declaring without reservation that Nelson was convicted of "a crime he did not commit."⁴³ Similarly, the principal report goes too far when it states without qualification that Nelson has been "exonerated." Once again, the true picture is less clear.

⁴² *Moto*, 23 A.3d at 992, 995-96. The principal report is mistaken when it states that the expungement issue is still on appeal.

⁴³ *Chaos, supra*, 12 Widener L. Rev. at 409.

In 1982, Bruce Nelson and Terrance Moore were convicted of the brutal rape and murder of Corrine Donovan in an Oakland, Pennsylvania parking garage. Nelson's conviction was based largely on two things: the testimony of Moore that he and Nelson committed the crime together, and a staged prison confrontation in which Nelson made an inculpatory statement.

In 1990, a federal court reviewing Nelson's habeas corpus petition ordered a new trial after concluding that his prison statement should have been suppressed. Prior to the re-trial, the prosecution conducted DNA testing of cigarette butts and hairs recovered from crime scene. The results of the DNA testing confirmed Moore's presence during the crime, but they did not affirmatively connect Nelson to the crime scene.

Regardless of whether Nelson was a source of any of the biological materials on the cigarette butts and other items found at the crime scene, his case was not one in which DNA testing could have conclusively "exonerated" him, since the items that were not linked to either of the defendants did not necessarily come from the perpetrators. Nevertheless, for a number of reasons, including the suppression of Nelson's inculpatory statement and evidence that Moore had fabricated additional evidence (a jailhouse letter purportedly written by Nelson), the prosecution chose not to re-try Nelson.

But whether Nelson's inculpatory prison statement was procedurally admissible at trial, it supported the original jury's conclusion that he was involved

in the crime. Further, while Moore's credibility would have been subject to impeachment, he remains adamant to this day that he and Nelson committed the crime together. Thus, while DNA testing may have created a reasonable doubt about Nelson's guilt, it did not conclusively establish that he was "actually innocent" as that phrase is commonly understood, *i.e.*, that he did not participate in the crime.

Willie Nesmith

Although the principal report claims that Willie "Champ" Nesmith suffered a "wrongful 1982 rape conviction," he was never exonerated in any meaningful sense by DNA testing or other evidence of innocence, and the evidence of his guilt remains compelling.

Nesmith, a competitive boxer, was convicted by a jury of rape and aggravated assault in 1982, and sentenced to nine to twenty-five years in prison based on compelling evidence that sexually assaulted a Dickinson College student and, in the words of the prosecutor, "beat[] [her] within an inch of her life." The victim specifically identified Nesmith by name as "Champ"; and he blurted out his guilt to police, tearfully telling an officer that he "messed up real bad."

Eventually, Nesmith was paroled and returned to Carlisle, where he violated the terms of his parole by committing a felony drug offense (to which he would ultimately plead guilty). It was while serving the remainder of his rape sentence because of the parole violation that Nesmith filed a post-conviction petition

requesting DNA testing of the victim's underwear, which had not been possible at the time of trial.

The post-conviction testing did not produce a DNA match for Nesmith *or the victim*. Thus, it is reasonable to conclude that the testing, rather than exonerating Nesmith, showed a lab error, such as an inadvertent switching of evidence. Nevertheless the Cumberland County District Attorney's office neither opposed Nesmith's release nor re-tried him because, by that point, he had already served almost the entirety of his sentence and the victim did not want to relive what had happened to her some 20 years earlier.

This is just one of the ways in which lengthy delays, including delays in DNA testing, work to the benefit of criminal defendants. Because prosecutors did not want to unduly burden the victim, they were unable to proceed, and Nesmith was freed despite the significant evidence of his guilt.

Since his release, Nesmith has been convicted of at least three more felony drug charges and an assault, and has been implicated in a sexual assault in which he and another man allegedly provided a young girl with crack cocaine and alcohol, and sexually assaulted her. Because of the victim's lack of a specific recollection of the incident, he managed to escape criminal charges in that case.

Nicholas Yarris

In the final case of the Pennsylvania Eight, the committee chairperson offered his by now familiar assurance that Nicholas Yarris was convicted of "a crime

he did not commit.” Likewise, the principal report lists him as having been wrongly convicted. But as with almost all of the principal report’s examples, things are not nearly as conclusive as it portrays them.

Before she was brutally raped and murdered, the victim in Yarris’ case worked at a sales booth in a shopping mall. The trial evidence showed that, in the weeks leading up to the crime, a coworker noticed that Yarris would consistently linger by the booth and behave suspiciously by, for example, repeatedly approaching the victim to ask the price of the same merchandise. The victim also complained to her husband that a man was stalking her at work, and pointed out Yarris to the vendor in an adjoining booth as a man who had been staring strangely at her and scaring her.

In the days after the killing, Yarris demonstrated a suspiciously detailed knowledge of the crime when he visited the sales booth where the victim had been employed, asked a worker whether she had been “grabbed from the parking lot,” and stated, “I heard that she was raped.” At that time, details of the crime had not been released to the public, and the fact that the victim had been abducted and raped was not public knowledge.

In the following months, while awaiting trial on unrelated charges, Yarris offered a series of confessions in which he contradicted himself about whether he committed the crime alone or with another man. First, he told police that he “took the guy there who did it,” but identified as the primary perpetrator a man whom

subsequent investigation would show could not have been involved. When confronted with the results of the police investigation, Yarris changed his story and claimed to have committed the crime alone. Subsequently, however, he changed his account yet again, telling police that he and a “buddy” (whom he would not identify) committed the crime together, and that he had previously lied about committing the crime alone to protect his friend. Finally, he had a number of conversations with a fellow inmate in which he solicited legal advice and admitted his guilt.

In 1983, a jury found beyond a reasonable doubt that Yarris was guilty of rape and murder. In 1985, he escaped from prison and fled to Florida, where he committed several new crimes, including armed robbery and false imprisonment, to which he ultimately would plead guilty.

In 2003, post-conviction DNA testing excluded Yarris as the source of biological material recovered from the victim’s fingernails and underwear, and from gloves found at the crime scene. In each instance, the testing showed that the material came from the same unknown person.

These results did not conclusively prove Yarris’ “innocence” since, even in his own accounts, he often claimed to have committed the crime with another man. But on the other hand, they were sufficiently incompatible with the prosecution’s original theory of the case, which portrayed Yarris as the sole perpetrator, that the Delaware County District Attorney's Office has elected not to re-try him unless it obtains new evidence of his guilt in the future.

In short, Yarris' case is yet another in which, even with DNA evidence, there is no way to know for sure whether he was convicted "of a crime he did not commit." A balanced examination of Yarris's case, like those of the rest of the so-called "Pennsylvania Eight" does not show that the "actually innocent" in Pennsylvania are convicted at even the very low rate suggested in the principal report. Rather, it shows that the system is operating as it is designed to in that individuals are freed even when there is a reasonable doubt about their guilt.

IV. AS A PRODUCT OF THIS FLAWED APPROACH, THE PRINCIPAL REPORT'S RECOMMENDATIONS CANNOT BE TRUSTED TO SAFELY IMPROVE VERDICT INTEGRITY AND RELIABILITY IN PENNSYLVANIA.

As we said at the outset, the failure to properly define "innocence" and study possible "wrongful convictions" prevented the committee from drawing reliable lessons about what causes wrongful convictions of the innocent and what should be done to prevent such occurrences. If the principal report itself cannot distinguish between the innocent and the guilty, there is no reason to believe that its recommendations can do so either. But even beyond that fundamental point, we have the following concerns with the principal report's proposals:

A. Proposed statute requiring electronic recording of interrogations.

The principal report proposes a statute that would require the mandatory, state-wide electronic recording of "custodial interrogations," and would call for instructions encouraging juries to disregard confessions that are not recorded. As

we discuss below in our own recommendations for ensuring verdict integrity, we would welcome a pilot program in Pennsylvania to study whether and how electronic recording of interrogations can be implemented in a fair, reliable, and cost-effective manner. But the principal report's recommendation of immediate and mandatory state-wide recording, with an adverse jury instruction in cases where the interrogation is not recorded, is a perfect example of a law that would simply reduce the total number of convictions *without respect to "wrongfulness"* while doing nothing to improve the accuracy of verdicts.

The evidence before the committee. Every witness at the meetings of the investigation and legal representation subcommittees with experience conducting interrogations agreed that, even if recording of interrogations is preferable and should be encouraged as a best practice, it should *not* be mandatory and there should be no sanction for the failure to record. For example, Lieutenant Jonathan Priest of the Colorado Police Department explained that his jurisdiction's experience with recording of interrogations left him with a favorable impression of the procedure, but also led him to believe that a legislative "mandate takes away from the flexibility needed to respond to local issues"; each police department should be able to develop its own protocols.⁴⁴ That was also the position of Pennsylvania experts, including Charles W. Moffatt, Superintendent of the

⁴⁴ Summary of Proceedings, Investigation and Legal Representation Subcommittees, Aug. 5, 2008, at 18.

Allegheny County Police Department; Cpt. Bret K. Waggoner and Sgt. Raymond C. Guth of the Pennsylvania State Police; and all of the current and former Pennsylvania District Attorneys represented at the meetings.⁴⁵

Moreover, this view was *consistent* with key aspects of the accounts from two witnesses hand-picked by the committee chairperson to support his recording proposal: Thomas Sullivan, a civil attorney from Illinois, and Saul Kassin, Ph.D., a psychologist from New York who frequently testifies on behalf of criminal defendants who have confessed. Mr. Sullivan informed the subcommittee that other jurisdictions, such as New Mexico and Maine, have been able to establish reasonable policies for recording interrogations without imposing any sanction for the failure to record.⁴⁶ And Dr. Kassin advised the subcommittee that, in practice, mandatory video recording has not been shown to reduce the rate of false confessions.⁴⁷ Thus, even the experiences that Mr. Sullivan and Dr. Kassin

⁴⁵ See, e.g., *id.* at 3-12.

⁴⁶ See Summary of Proceedings, Investigation and Legal Representation Subcommittees, Aug. 5, 2008, at 3 (“[Mr. Sullivan] pointed out that in New Mexico and Maine, there are no adverse consequences for failing to record, yet police are recording interrogations in those states”).

⁴⁷ See *id.* at 15 (“Saul Kassin stated that in Great Britain, mandatory video recording of interrogations began in 1986. The current policy and practice has greatly limited the interrogation techniques that may be used, but *the false confession rate has not changed*”) (emphasis added). See also *id.* at 10 (“Saul Kassin asserted that scientific research regarding lie detection has taken place for over 50 years, and in over a range of studies, researchers concluded that people on average are 54% accurate in recognizing lying. He added that odds are that any individual

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described, like the experiences of actual practitioners, contained significant support for the position that a mandatory sanction for failing to record interviews was unnecessary and even ineffectual.

In short, if there was any “consensus” among the advisory committee, it was that recording of interrogations should *not* be mandatory and there should *not* be a judicial sanction in cases in which the police do not electronically record the confession. The principal report’s recommendation of an approach rejected by the committee’s own experts is difficult to understand, except as a product of the unreliable, backroom procedures we discussed at the beginning of this report.

Practical concerns. Another problem with proceeding with immediate and mandatory state-wide recording, rather than a pilot program, is that it would deny the Commonwealth the opportunity to study and address practical concerns, such as whether victims, witnesses, and suspects will be less willing to participate if they know or believe they are being recorded.⁴⁸ Moreover, even the fear of such reluctance could put subtle pressure on police to shift from formal interrogation to

will accurately detect a lie 50% of the time, so that this accuracy level is barely statistically significant”).

⁴⁸ Heath S. Berger, Comment, *Let’s Go To The Videotape: A Proposal To Legislate Videotaping of Confessions*, 3 Alb. L.J. Sci. & Tech. 165, 180 (1993).

informal interviews, thereby increasing the danger to the officers by placing them in less controlled environments when dealing with potentially dangerous suspects.⁴⁹

In addition, electronically recording interrogations potentially removes the subject's opportunity to review the content of his or her statement for accuracy and completeness. It thus may lead to unconsidered answers that are less useful as evidence than thoughtful, written, responses, and are likewise easier for defense counsel to misinterpret or mischaracterize before the jury.

Along the same lines, defense counsel are sure to attempt to exploit the fact that many electronically-recorded interviews will include breaks for the comfort and convenience of the subject or the interviewer, or because the interviewer needs to attempt to verify a statement by the subject or change the recording media. Although such gaps are essentially unavoidable when electronically recording lengthy interviews, they could easily become a source of jury confusion and unfounded and potentially damaging defense claims of misconduct.

There is also, of course, the question of what electronic recording will cost and who must bear the expense. The principal report suggests that compliance with the statute would require nothing more than a single reconditioned video-camera and a few blank DVDs, while one of the few published estimates puts the cost at closer to

⁴⁹ See Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons From Australia*, 25 AMJCRL 493, 537 (Summer, 1998) ("There is evidence, for example, that when electronic recording of interrogations is required, police may shift their practice from formal interrogation to informal exchange.").

\$25,000 per investigative unit.⁵⁰ The only thing that is clear on this point is that matters are not as simple as the principal report portrays, since “custodial interrogations” do not just occur in police interview rooms.

In Pennsylvania, confessions have been given in supermarkets,⁵¹ prison cells,⁵² and in private homes.⁵³ Since any location can be the site of a custodial interrogation, a statute mandating electronic recording would, in practice, require that every single police officer in the state be trained in how to electronically record interrogations, and that every officer also be outfitted at all times with a video camera and recording media. The costs and other practical difficulties of such an arrangement cannot be known unless they are studied in a pilot program, but they are sure to be far more substantial than the principal report suggests.

Injury to Separation of Powers. Our final concern with the principal report’s proposal on electronic recording of confessions is that the legislative mandate of a punitive jury instruction in cases in which a confession is not recorded would violate the constitutional separation of powers. Under Article V, § 10(c) of the Pennsylvania Constitution, the Supreme Court has exclusive power “to

⁵⁰ Heath S. Berger, Comment, *Let’s Go To The Videotape: A Proposal To Legislate Videotaping of Confessions*, 3 Alb. L.J. Sci. & Tech. 165, 179 (1993).

⁵¹ See, e.g., *Commonwealth v. Eichinger*, 915 A.2d 1122, 1131 (Pa. 2007).

⁵² See, e.g., *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1084 (Pa. 2001).

⁵³ See, e.g., *Commonwealth v. Odrick*, 599 A.2d 974 (Pa. Super. 1991).

prescribe general rules governing practice, procedure and the conduct of all the courts ...” Thus, while the General Assembly can enact substantive law, only the Pennsylvania Supreme Court can promulgate court procedural rules.

A jury instruction, explicitly designated as an enforcement mechanism for a statute governing interrogation procedures, is as clear-cut an example as one could find of a law that is procedural rather than substantive.⁵⁴ The legislative requirement of such an instruction would thus violate the constitutional separation of powers.

B. Proposed statute regarding eyewitness identifications.

The principal report next proposes an eyewitness identification statute that would mandate various defense-oriented identification procedures. Unfortunately, rather than improve eyewitness identification procedures, many of these proposals would actually discourage *all* identifications (whether accurate or not). These proposals would also exclude or encourage juries to disregard identifications not made pursuant to those procedures. Consequently, this proposal is unnecessary, impractical, and misguided.

⁵⁴ See *Commonwealth v. McMullen*, 961 A.2d 842, 847 (Pa. 2008) (substantive law creates, defines, and regulates rights; procedural law addresses the method by which those rights are enforced). See generally Leo Levin and Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1 (1958).

Blind administration. The proposed statute begins with a seemingly benign requirement of “blind administration” of identification procedures, *i.e.*, a requirement that the police officer conducting a photo array, lineup, or the like not know himself who the suspect is. As an initial matter, this aspect of the proposal offensively and baselessly presumes that police investigators in Pennsylvania have been obtaining identifications by suggesting to witnesses, either intentionally or through incompetence, which members of lineups and photo arrays are the suspects. We believe it much more likely that, if officers who have investigated a case tend to be more successful than outside officers at obtaining identifications, it is for the entirely legitimate reason that the investigating officer has time to develop a relationship with frightened and reluctant witnesses, making the witnesses feel safe and invested in the identification process. This is the sort of real-world consideration that the academic studies whose results are reported in the principal report cannot measure, and do not even consider.

But even if the principal report were right about the supposed untrustworthiness of our police, its proposed solution would be unrealistic since the evidence before the committee showed that blind administration is logistically impossible in small- and medium-sized police departments, where all of the officers

are familiar with each investigation and know who the suspect is.⁵⁵ Thus, by proposing this requirement, the principal report intentionally recommends a law that would make *all* identifications in the typical Pennsylvania county's police department presumptively unreliable in the eyes of juries unless the county hires an additional officer just to conduct lineups and photo arrays. And, of course, the principal report does not propose any appropriation to enable cash-strapped counties to hire such extra officers to conduct the "blind" identification procedures.

The inclusion of a statutory caveat that blind administration procedures must only be employed "when practicable" would not allow counties to avoid the consequences of this unfunded and unnecessary mandate, but instead would merely create a new issue for defense attorneys to raise before the trial judge and on appeal, and argue to the jury, in each case. Defense counsel can hardly be expected to concede that blind administration is "impractical" in the Chester County Police Department or any other police department in which all officers are familiar with each investigation; rather, they are sure to present the unfounded -- but potentially successful -- argument that *all* identifications in counties that lack the resources for blind administration are suspect.⁵⁶

⁵⁵ See, e.g., Conference Call Summary, Legal Representation Subcommittee, May 4, 2009, at p. 2 (blind administration would be impractical in Chester County because everyone in the police department knows who the suspect is in each investigation).

⁵⁶ Neither does the impractical option of electronically recording all identifications solve the problem created by the proposed statute. Instead, it simply raises the
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Misleading instructions. The proposed statute further requires police at any identification procedure to issue misleading instructions to the witness. In particular, police would have to tell the witness that the perpetrator may or may not be among the people he will see, he should not feel compelled to make an identification, and the investigation will continue regardless of whether an identification is made.⁵⁷ These instructions would be required even in cases in which the witness indicates that no one has pressured her to make an identification or suggested to her that the perpetrator is present, and that no one has “compelled” her to make an identification. Even more tellingly, these instructions would be required even in cases in which they are *untrue*, such as cases in which there will be no further investigation.

If the goal is to enhance the accuracy of identification procedures -- and not simply to reduce the total number of identifications -- any instructions should be issued only when they are truthful and supported by the circumstances of the case. For example, under the Philadelphia Police Department’s lineup procedures, the detective asks the witness whether anyone has told him that the suspect will be in

same issues discussed above with respect to the electronic recording of interrogations.

⁵⁷ Proposed 44 Pa.C.S. §§ 8314(d), (h)(2).

the lineup, and gives a cautionary instruction if the witness answers yes.⁵⁸ In contrast to the proposed recommendation, that approach strikes an appropriate balance, discouraging only *suggestive* identifications, not *all* identifications.

Confidence statement. Defense attorneys routinely seek to inform juries that the sort of academic studies discussed in the principal report suggest that there is only a weak correlation between a witness’s confidence in his identification and the reliability of that identification.⁵⁹ In these studies, professors measured how reliably their students performed as eyewitnesses by having them playact crimes in front of the class. Nevertheless, the principal report’s recommendation would require that any eyewitness be asked to make an immediate statement, “in his own words, [of] how certain he is of the identification.”⁶⁰

The only explanation for this contradiction is that the proposed requirement of a “confidence statement” is designed to facilitate gamesmanship at trial. If the witness reports a high level of confidence, defense counsel will argue that the confidence statement is meaningless. And if the witness reports low or moderate

⁵⁸ Summary of Proceedings, Investigation and Legal Representation Subcommittees, Mar. 5, 2008, at 4-5.

⁵⁹ See, e.g., *Commonwealth v. Bormack*, 827 A.2d 503, 508 (Pa. Super. 2003) (addressing proposed defense expert testimony addressing the “relationship between confidence and accuracy,” which attributes only a ‘modest’ connection between the confidence a witness exhibits in the identification he has made and the accuracy of that identification”).

⁶⁰ Proposed 44 Pa.C.S. §§ 8314(d)(4); 8314(i).

confidence, defense counsel will make the opposite argument that the confidence statement is very significant, and itself a basis on which to acquit. Proposals that encourage such disingenuous tactics only further undermine the overall legitimacy and neutrality of the principal report's recommendations.

“Show-up” procedures. The proposed identification statute also would impose unrealistic requirements for “show-ups,” *i.e.*, identifications made at the crime scene. For example, the statute would require that police make a written or recorded account of the witness’ verbatim account of every detail of the crime and perpetrator before allowing an identification to take place, and that police attempt to remove the suspects’ handcuffs and take him away from the squad car before the identification.⁶¹ As was explained to the committee even by Jules Epstein, a longtime defense attorney who still practices criminal defense work part-time while employed as a full-time law professor at Widener University, these procedures do not reflect the reality of “show-up” procedures.⁶² Police on the scene cannot be expected to engage in such detailed recordkeeping, and there will rarely be a case in

⁶¹ Proposed 44 Pa.C.S. §§ 8313, 8314(b), (h).

⁶² See Conference Call Summary, Legal Representation Subcommittee, May 4, 2009, at 2 (“Jules Epstein stated that in the showup context, the draft may not accurately reflect the reality of the situation of an officer on the street. He noted that § 3(9) requires the same level of detailed recordkeeping before and after the showup as required in the station house for a lineup or photo array and that it is difficult to do in exigent circumstances”).

which it is safe and non-threatening to have the defendant unrestrained while the witness identifies him.

Again, the inclusion of caveats like “when practicable” in the statutory language does not solve the problem. Rather, it creates collateral issues that will have to be litigated before the trial judge and on appeal, and argued to the jury, in every case. While there will rarely, if ever, be a situation in which it is safe and “practicable” to leave the defendant unrestrained at the crime scene while he is facing his victim, that will not stop defense counsel from routinely arguing -- based on the statute -- that the failure to follow such procedures made the identification less reliable. As we have said before, it is not the proper role of the principal report to propose legislation that in practice will primarily serve as a basis for disingenuous arguments that undermine *all* identification evidence.

Separation of powers. Even if the proposed statute were otherwise fair and necessary, the provision recommending jury instructions “as to the requirements of this subchapter and how compliance or failure to comply with those requirements may affect the reliability of the identification” would be unconstitutional.⁶³ As we explained when addressing the proposed jury instruction in the draft statutes on electronic recording, the content, form, and necessity of jury instructions are matters for the judiciary, not the legislature. Pursuant to the constitutional

⁶³ Proposed 44 Pa.C.S. § 8315(c)(2).

separation of powers, it is not for the legislature to dictate what instructions the courts may or may not give.

Moreover, it cannot escape note that the proposal does not even attempt to explain in what manner and to what extent compliance with its requirements supposedly “may affect the reliability of the identification,” nor is the matter in any way obvious. As we discussed above, key aspects of the proposed statutes have no proven connection to the reliability of eyewitness identifications. This leads us to conclude that such proposals have been included simply to discourage identifications from being made in the first place and to provide fodder for defense counsel’s cross-examination. Yet we find it difficult to imagine that is what the principal report wants the judge to instruct the jury.

Similarly, the proposed statute’s (unexplained) provision that “[t]he trial court may consider evidence of failure to comply with this chapter in adjudicating a motion to suppress an eyewitness identification” violates the constitutional separation of powers.⁶⁴ The conditions under which identifications are subject to suppression is another purely procedural issue, and thus is within the exclusive province of the Supreme Court, whose rules do not deem the complete failure to conduct a lineup, much less the failure to conduct a lineup according to particular

⁶⁴ Proposed 44 Pa.C.S. § 8315(a).

procedures, a basis for suppression.⁶⁵ Once again, the proposed statute would be unconstitutional to the extent it attempts to legislatively dictate how the courts construe and apply their procedural rules. Indeed, even Mr. Epstein argued to the subcommittee that the inclusion of a reference to suppression was inappropriate in light of the Supreme Court's contrary case law.⁶⁶

C. Proposed rules for prosecutorial practice.

Perhaps no proposal better exemplifies the biased and one-sided nature of the principal report's recommendations than the proposal that prosecutors – and *only* prosecutors, not defense counsel – face formal and informal discipline when they commit “misconduct.” At the subcommittee meetings, there was broad consensus that prosecutorial misconduct is *not* a common cause of wrongful convictions in Pennsylvania, and that mishandling of cases by defense counsel is a much more significant problem.⁶⁷ Thus, if the principal report's recommendations fairly

⁶⁵ *Commonwealth v. Sexton*, 400 A.2d 1289, 1293 (Pa. 1979).

⁶⁶ In fairness, Mr. Epstein also recommended jury instructions on the issue -- a point with which we have already expressed our disagreement. The Supreme Court's decision in *Sexton*, *supra*, does not authorize jury instructions unless a lineup was bypassed entirely. *Cf.* Conference Call Summary, Legal Representation Subcommittee, May 4, 2009, at p. 4 (“Jules Epstein recommended that the reference to suppression in Section 4(1) (remedies) should be deleted. He noted that [in] the *Sexton* case, that with regard to lineup errors, the remedy is informing the jury that a procedure was skipped”).

⁶⁷ *See, e.g.*, Meeting Summary, Legal Representation Subcommittee, Jul. 7, 2008, at p.3 (since 1970, there have been 5.1 million prosecutions in Pennsylvania, but only
(continued. . .

reflected the evidence presented to the committee, they either would focus on rules that discipline *defense attorneys* who engage in misconduct, or would encourage the adoption of ethical rules that apply to both prosecutors *and* defense lawyers.

Unfortunately, once again, the principal report's recommendations are neither fair nor evidence-based. Thus, it should come as no surprise that the recommendations completely ignore the acknowledged failings of defense counsel, and instead urge the adoption of special new ethical rules requiring internal policies and sanctions only for "misconduct" by prosecutors. Of all the provisions contained in the principal report, this provision most clearly exposes the principal report's pre-determined agenda crafted on behalf of the defense bar, rather than the product of any evidence presented to the committee.

The reality is that prosecutors are *already* held to the highest professional and ethical standards of any attorneys under the mandatory rules imposed by the Pennsylvania State Supreme Court and its Disciplinary Board, as well the advisory codes of conduct promulgated by the National District Attorneys Association and the American Bar Association. Prosecutors are *already* the attorneys most constrained by the law. And there are *already* multiple rounds of judicial review to ensure that prosecutors have not obtained a conviction through "misconduct."

founded cases of prosecutorial misconduct, all of which resulted in appropriate disciplinary penalties).

It thus should come as no surprise that the committee found no evidence that prosecutors are a common cause of wrongful convictions in Pennsylvania. The principal report's decision to nevertheless suggest that the existing professional and ethical constraints on prosecutors are somehow inadequate, while ignoring the professional lapses by *defense counsel* that can cause wrongful convictions, confirms what we said at the beginning: the principal report's recommendations reflect a pre-determined set of rules favored by the criminal defense bar, not a balanced, evidence-based attempt to improve the reliability of verdicts in Pennsylvania.

D. Proposed statute and jury instruction governing informant testimony.

The principal report also attempts to make it more difficult for the prosecution to use testimony from jailhouse witnesses, whom it repeatedly and offensively refers to as “snitches” – a term taken straight out of the infamous “stop snitching” campaign. To that end, the report's recommendations contain several proposals to exclude, or encourage juries to ignore testimony from witnesses who obtain information while incarcerated with the defendant. Once again, there was no evidence presented to the subcommittee that such testimony has proven a common cause of wrongful convictions in Pennsylvania, or that new laws are needed to discourage its use or acceptance in the future. Rather, the principal report simply accepts at face value even the most dubious of the claims of “wrongful convictions” we discussed above. Moreover, the specific proposals for incarcerated witnesses contain serious flaws, which we discuss below.

Applicability. Once again reflecting a one-sided agenda, the proposed recommendations would only apply to jailhouse witnesses *for the prosecution*. But if the defendant's cellmates are categorically suspect whenever they are called by the prosecution, then surely they are just as suspect when called by the *defense*, since inmates have inherent incentives to help their fellow prisoners and inherent biases against police and prosecutors. Thus, if there were evidence that new statutes and rules for jailhouse witnesses were necessary to ensure reliable verdicts, the appropriate course would be to apply the same laws to both sides.

"Reliability" hearing. The proposed recommendations for jailhouse witnesses also contain a baffling requirement that, in capital cases, the judge first conduct a hearing to determine if the jailhouse witness' testimony is reliable before allowing it to be presented. We describe this proposal as "baffling" because it has no precedent, is entirely unnecessary (as the principal report effectively admits by omitting it in non-capital cases), and received no significant support from *anyone* within the committee.⁶⁸ Once again, the principal report's inclusion of recommendations that are directly contrary to the expressed views of the committee members belie its unsupported claims of "consensus" and call into question the basis and legitimacy of the entire document.

⁶⁸ See, e.g., Meeting Summary, Legal Representation Subcommittee, Jan. 29, 2009, at 5 ("[Subcommittee chair, the Honorable] Bill Carpenter[,] noted that nobody seemed to strongly favor a preliminary hearing [specific to informants]").

Separation of powers. A final problem with the principal report's proposals with respect to jailhouse witnesses is that they frequently recommend legislative intrusions in procedural matters, such as jury instructions and pre-trial discovery, that are exclusively for the courts. As we discussed when addressing the proposed jury instructions in the draft statutes on electronic recording and eyewitness identifications, court procedural rules are the exclusive domain of the judiciary, not the legislature, according the Pennsylvania Constitution. Pursuant to that constitutional separation of powers, it is not for the legislature to dictate procedural matters to the courts.

E. Proposed statute requiring the preservation of biological evidence.

The principal report next proposes a series of statutes that would govern the preservation of biological evidence. We are receptive to this idea as a general matter, but take strong issue with some of the specific aspects of the principal report's draft. In particular, our support is contingent on the existence of a more realistic funding source and the addition of an explicit statutory provision stating that non-compliance with the proposed statutes does not provide an independent ground for relief.

Funding. The principal report's proposal would require that district attorneys use the proceeds of drug forfeitures to comply with the recommendation's enhanced requirements for the preservation of biological evidence. But this is completely unrealistic, and renders the entire proposal an unfunded mandate.

Contrary to popular myth, there is no magic pot of forfeiture money into which prosecutors can dip whenever there is a problem of underfunding in the criminal justice system. Most district attorneys' offices in Pennsylvania are themselves severely underfunded, and no district attorney can anticipate in advance how much money (if any) his or her office will recover through drug forfeitures. Moreover, in counties in which such funds are more frequently recovered, forfeiture funds are often dedicated to pay for essential operating costs, particularly the salaries of the police officers, detectives, and prosecutors who enforce the Commonwealth's drug laws. There is, therefore, no "extra" forfeiture money available to fund new projects. The cost of the proposed rules for preserving biological evidence, like all of the proposed recommendations, would have to be paid for through an appropriation from the General Assembly.

Consequences of non-compliance. Under existing Supreme Court precedent, the destruction or loss of evidence does not provide a basis for relief in any criminal action unless the evidence was materially exculpatory and the prosecution destroyed it in bad faith.⁶⁹ There is nothing in the proposed statute that would change this standard. However, if the statute is adopted, defense counsel can be expected to attempt to rely on it -- potentially with success -- as a basis for motions to suppress, motions to dismiss prosecutions, or petitions for post-

⁶⁹ *Illinois v. Fisher*, 540 U.S. 544 (2004); *Commonwealth v. Snyder*, 963 A.2d 396 (Pa. 2009).

conviction relief. We therefore could not support such a statute unless it made clear, in the statutory text, that -- as is already the law -- non-compliance does not provide an independent ground for relief in any criminal case.

F. Proposed new statute on post-conviction DNA testing.

In 2002, Pennsylvania passed a post-conviction DNA statute that struck a fair balance among the interests of defendants, victims, and law enforcement; and was endorsed by groups ranging from American Civil Liberties Union to the Pennsylvania District Attorneys Association.⁷⁰ Yet the principal report includes a proposal to repeal the current law and replace it with a new proposed law that was created in secret by an unknown author and never shared with or considered by the committee. We vigorously oppose this radical approach. Instead, any proposed changes to the PCRA provision should have been considered in detail by the committee, and made within the framework of the existing statute.

Lack of consideration by the committee. At the subcommittee meetings, only one specific amendment to the post-conviction DNA-testing statute received significant discussion: some members proposed that a guilty plea or confession should not be an absolute bar to DNA testing under the PCRA.⁷¹ We were receptive to an amendment on that point, but the issue was rendered moot by a Pennsylvania

⁷⁰ 42 Pa.C.S.A. § 9543.1.

⁷¹ Meeting Summary, Legal Representation Subcommittee, Dec. 14, 2007, at p. 2.

Supreme Court decision clarifying that, as the Philadelphia District Attorney's Office expressly agreed, the existing statute contains no such bar.⁷² Nevertheless, the principal report goes well beyond this narrow issue, and proposes an entirely new post-conviction DNA statute that is so radically different from the existing PCRA statute or any prior proposal that one must often guess how the statute would operate in practice and why the unknown author has made the changes he did.

Potential to reward guilty defendants for intentional delay. Rather than attempt to piece together the unnecessary jigsaw puzzle that is the principal report's recommendation, we will focus on a straightforward example of how the proposed statute would make proceedings *less* fair and reliable, not more so. As our discussion of the cases of Willie Nesmith and Vincent Moto showed, extreme delays in DNA testing inherently work to the benefit of all defendants, including the guilty, by increasing the chances of unreliable results and making re-prosecution much more difficult. Thus, any reasonable post-conviction testing statute must have a gate-keeping mechanism that prevents defendants from filing petitions in cases in which they previously have made a strategic decision not to seek testing or have waited so long as to prejudice the Commonwealth's ability to retry them. But the proposed recommendation would instead reward intentional delays and

⁷² *Commonwealth v. Wright*, 14 A.3d 798 (Pa. 2011).

gamesmanship by repealing all statutes of limitations and procedural bars for such claims.⁷³

Accordingly, the proposed DNA statute, like the proposed recommendations as a whole, would potentially reward the guilty, and would do so needlessly and without any consideration by the advisory committee. Again, we were receptive to genuine reforms that have been proved necessary, such as the limited amendment discussed above to clarify that defendants who have confessed or even pleaded guilty may nevertheless seek post-conviction DNA testing. What we oppose is the secretive and one-sided nature in which these unnecessary proposals and changes were developed and that they would put proper convictions of the guilty-- and hence the citizens of Pennsylvania -- at risk.

Unanswered questions. Since the principal report's proposed post-conviction DNA testing statute was never considered by the advisory committee or any of its subcommittees, there are many unanswered questions. Among them are:

- What is wrong with the existing post-conviction DNA testing statute, and what problems is the proposed new statute attempting to remedy? Even as basic and fundamental as these questions are, the principal report leaves them unanswered.
- Why is there no requirement that favorable results would demonstrate "actual innocence" before testing will be granted and substantive relief will be awarded? While the proposed statute requires a petitioner to *plead* his factual innocence, it does not require that the results of DNA testing *prove* his factual innocence, even under an evidentiary standard well

⁷³ Proposed 42 Pa.C.S. § 9545(b)(5); Proposed 42 Pa.C.S. § 9583.

below proof beyond a reasonable doubt, before he is released from custody or granted a new trial. The failure to limit relief to cases involving true “wrongful convictions,” *i.e.*, cases in which factually-innocent persons have been convicted of crimes they did not commit, is yet another troubling break from the ostensible purpose of the advisory committee.

- Why would testing be allowed even where the petitioner intentionally delayed his request so as to prevent the Commonwealth from re-trying him? Again, as our discussion of Vincent Moto’s and Willie Nesmith’s cases shows, it is not uncommon for a prisoner to wait so long to request DNA testing that the Commonwealth’s witnesses are unavailable or uncooperative by the time the results are obtained. Where the petitioner has delayed his request so as to prejudice the Commonwealth’s ability to retry him, it would be a perversion of justice and grossly unfair to the victim to reward that improper tactic.
- Why is there no meaningful consequence for petitioners who waste the time and resources of the courts, prosecutors, and police by falsely asserting their factual innocence when requesting post-conviction DNA testing? Once a prisoner has been sentenced for his crime and has exhausted normal avenues for appeal, the proposed statute would do nothing to discourage him from requesting testing even where he knows he is guilty. To the contrary, guilty defendants whose cases involved biological evidence would have every incentive to request DNA testing and then hope for lab error.⁷⁴ To discourage such abusive filings, the statute should have meaningful consequences for false claims. In cases where the post-conviction DNA testing confirms the petitioner’s guilt, he should face new charges for lying, or if such charges would have no practical meaning because he has been sentenced to life imprisonment or death, he should face institutional discipline within his prison.
- Why is there no burden on the defense to examine its own files? The proposed statute places the entire burden of locating evidence and prior DNA results on the Commonwealth, even to the point of forcing the prosecutor to help defense counsel track down evidence in the hands of

⁷⁴ While the proposed statute would allow the Commonwealth to compare the defendant’s DNA to a national database to see if he has committed any other crimes, there is nothing to prevent the Commonwealth from doing that even without the statute. Moreover, it will only be a small subset of even guilty defendants who have left biological evidence at the scene of other, unsolved crimes.

third parties, without any requirement that the defense first examine its own files to see what evidence and results it already has. This provision seems designed to invite lengthy collateral litigation and intrusive discovery requests with respect to the often privileged contents of the Commonwealth's files.

- Why are there no standards for when judges may release petitioners or grant new trials based on the results of DNA evidence? The statute proposes to grant judges sweeping new powers to issue “any order that serves the interest of justice,” including discharging the petitioner from custody, without any standards governing the circumstances under which a judge may issue such an order. This approach is so vague as to be reckless. A judge should not have the power to dismiss charges altogether. And the judge should only have the authority to grant a new trial where the new DNA results satisfied the PCRA's after-discovered evidence standard.⁷⁵
- Why is the Commonwealth not granted an express right of appeal? The proposed statute expressly grants petitioners the right to appeal any order denying a petition, but it never mentions any right of the Commonwealth to appeal a potentially-erroneous order granting the petitioner a new trial or discharging him. In all likelihood, the courts would hold, even in the absence of an express statutory provision, that both the petitioner and the Commonwealth possess such appellate rights, but the principal report's decision to acknowledge the defendant's appeal rights while ignoring the Commonwealth's appeal rights once again shows how one-sided its approach is. At no point does the principal report give more than lip service to the interests of law enforcement and victims, and, after the first few pages of the principal report, it does not even do that much.

G. Proposed “wrongful conviction” compensation statute.

The principal report next recommends a statute that would label defendants like Jay Smith and Timothy Hennis “actually innocent,” and mandate that they receive enormous financial awards whenever they overturn their convictions on

⁷⁵ “The ‘preponderance of the evidence’ is the lowest burden of proof in the administration of justice, and it is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly in one's favor.” *Commonwealth v. Ortega*, 995 A.2d 879, 886 n.3 (Pa. Super. 2010).

appeal, avoid re-prosecution, or prevail at a new trial. This proposed statute is nothing short of preposterous, and outrageously contradicts the principal report's claim that "none of the recommendations in this report present an outlier position."

Necessity. At the outset, the committee was presented with no evidence that legislation opening up a new avenue for lawsuits by criminal defendants claiming to have been "wrongfully convicted" is needed in Pennsylvania. Under existing laws authorizing civil lawsuits by wrongfully prosecuted individuals, Barry Laughman, the only person among the "Pennsylvania Eight" who can be described beyond a reasonable doubt as "actually innocent" received a settlement of \$2.1 million dollars in his civil case.⁷⁶ And even individuals on the principal report's lists of "wrongful convictions" for whom the evidence of innocence is less clear have been amply compensated under existing law. For example, Bruce Godschalk received a settlement of \$2.34 million,⁷⁷ and Nicholas Yarris received \$4 million.⁷⁸

On the other side of the ledger, the principal report has identified *no* cases in Pennsylvania in which defendants who truly were "exculpated" nevertheless were ineligible for compensation under existing law. As the Attorney General's Office

⁷⁶ Debra Erdley, *Lawsuit Awards Against Pennsylvania State Police Costly to State*, Pittsburgh Tribune Review, Jul. 27, 2009.

⁷⁷ *Cleared Man and Township Settle*, The Philadelphia Inquirer, Mar. 22, 2004, at B1.

⁷⁸ Stephanie Farr & William Bender, *Freed by DNA, Paid by Delco*, The Philadelphia Daily News, Jan. 10, 2008, at p.3.

has put it, the proposed compensation statute is simply “a solution in search of a problem.”⁷⁹

Compensation of guilty defendants. Even if the principal report had demonstrated a need for a new legislation on this issue, its specific proposal would still be outrageous and indefensible, as it is designed to force taxpayers to “compensate” even clearly guilty defendants like Jay Smith who manage to overturn their convictions on procedural grounds. That is not simply our characterization. Again, the chairperson of the legal redress subcommittee frankly admitted that her goal was to make Pennsylvania the first state in the nation to enact “a statute ... [that applies] to all wrongfully convicted individuals, not just those determined to be innocent,”⁸⁰ and that is precisely what the principal report would do.

As we have explained above, the proposed compensation statute mis-defines “actual innocence” in such a way as to require payment to any defendant who manages to get his original conviction overturned on grounds that can broadly be

⁷⁹ See Brad Bumstead, Bill Would Compensate the Wrongly Convicted, Pittsburgh Tribune Review, Apr. 22, 2005 (“Attorney General Tom Corbett says such cases are rare in Pennsylvania and remedies are available through lawsuits. ‘Overall, we are not supportive of this legislation,’ Corbett spokesman Kevin Harley said. ‘It’s a solution in search of a problem’”).

⁸⁰ See Legal Redress Subcommittee Meeting Summary, Dec. 11, 2007, at p. 1 (“[Ms. Kohart] said that a statute should apply to all wrongfully convicted individuals, not just those determined to be innocent. She noted that there is not another state that does it this way....”).

described as “consistent with innocence” or who simply escapes re-conviction after a successful appeal. Again, that definition of “actual innocence” is so overbroad that it would force taxpayers to “compensate” not only defendants like Willie Nesmith and Vincent Moto for whom there remains strong evidence of guilt, but also defendants like Jay Smith and Timothy Hennis for whom there is no doubt of guilt.

The difference between the proposed recommendation and serious attempts to draft compensation statutes in other jurisdictions is striking. For example, the most obvious model for such a law, the federal statute authorizing compensation for unjust conviction and imprisonment, requires the person bringing suit to prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction **and**

(2) **He did not commit any of the acts charged or his acts, deeds, or omissions** in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

28 U.S.C. § 2513(a) (emphasis added).

By rejecting this sort of common-sense approach, and omitting any requirement that the defendant establish that he did not commit the charged criminal acts, the principal report would open the floodgates -- intentionally, according to the comments of the subcommittee chairperson -- to scores of guilty

defendants. This is flatly unacceptable to us, as it should be to anyone concerned with both protecting the innocent *and* holding the guilty accountable. Even if we believed that a new compensation statute had been proven necessary, we could not in good conscience endorse a proposal that would force victims, their families, and other taxpayers to pay vicious criminals like Jay Smith for the all-too-short time they spent in prison.

Lack of equal treatment for innocent victims. The proposed compensation statute also reflects the unfair imbalance of the entire report in its lack of regard for innocent victims. Wrongful convictions are not by any stretch of the imagination the only form of “wrongful” outcome in the criminal justice system. Experience shows that it is far more common for defendants who actually committed the crimes with which they were charged to be wrongfully acquitted or wrongfully released. Thus, if we should reward wrongfully convicted defendants on the theory that they were “victims” of the criminal justice, then surely we should also compensate the system’s other innocent victims – the people who are raped, robbed, and murdered by defendants who were wrongly acquitted or wrongly released. Yet, as is true of the principal report as a whole, the proposed compensation statute shows no concern for that time of wrongful outcome or that class of innocent person.

Excessive financial awards. Another remarkable feature of the principal report’s recommendation is its unprecedented generosity with the taxpayers’ money.

The draft compensation statute would establish an initial minimum, tax-free payment of \$50,000 per year of incarceration, plus attorney fees, and would increase the minimum payment every year based on inflation. Moreover, the proposed statute would set no cap whatsoever on the potential size of the award, subjecting the Commonwealth to potential bankruptcy at the hands of a runaway jury.

As best we can tell, the \$50,000-minimum was picked at random, as it has no connection to real-world factors like the defendant's earning potential or any conduct on his part that contributed to his conviction. Further, it far exceeds the state's median per capita income of \$38,788, which does not necessarily increase with inflation.⁸¹

Other jurisdictions do not offer such windfall judgments. To the extent that other states have compensation statutes for wrongful convictions, they typically establish either a maximum award or a flat compensation rate, and do so at amounts below the *minimum* compensation mandated by this draft statute. For example, Illinois sets a maximum compensation rate of less than \$20,000 per year;⁸² New Jersey establishes a maximum award of twice the amount of the defendant's income in the year prior to his incarceration or \$20,000 for each year of

⁸¹ <http://www.census.gov/statab/ranks/rank29.html>.

⁸² See 705 Ill. Stat. § 505/8(c) (“[T]he court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than \$85,350; for imprisonment of 14 years or less but over 5 years, not more than \$170,000; for imprisonment of over 14 years, not more than \$199,150”).

incarceration, whichever is greater;⁸³ and California sets a flat compensation rate of \$100 per day.⁸⁴ Even the federal government, which has far more resources than this Commonwealth, sets a *maximum* payment of \$50,000 per year for most defendants and \$100,000 per year for defendants on death row.⁸⁵

Procedural mischief. A final problem with the principal report’s proposed compensation statute is that it is not a carefully drafted document, and, as a result, would establish troubling procedures if it were somehow enacted. For example, while one might expect litigants in a multi-million dollar lawsuit to abide by standard rules of evidence and civil procedure, the proposed recommendation states that the court hearing the claim “shall emphasize, to the greatest extent possible, informality of the proceedings.”⁸⁶ Not only is this provision unwarranted, since there are allowances for attorneys fees and thus no need for unsophisticated claimants to represent themselves, it is hopelessly vague and thus sure to lead to collateral litigation and appellate claims with respect to procedural rulings that would be uncontroversial in a normal case.

⁸³ N.J. Stat. § 52:4C-5(a).

⁸⁴ Cal. Penal Code § 4904.

⁸⁵ 28 U.S.C. § 2513(e).

⁸⁶ Proposed 42 Pa.C.S. § 8583.

Moreover, the proposed recommendation applies to all defendants (or their dependent heirs) who have ever been convicted in Pennsylvania, gives them two years from the effective date of the law to bring suit, and requires the Pennsylvania Supreme Court to somehow notify them of their eligibility for relief.⁸⁷ Thus, the Supreme Court apparently is expected to research every case over the past several decades (or longer, since heirs can also bring suit), determine whether the defendant might conceivably meet the (extraordinarily overbroad) definition of “actual innocence,” and track him down to provide notice of the new law. And of course when the Supreme Court fails in this impossible task, as it inevitably will, claimants will be able to argue that the statute of limitations is indefinitely tolled.

Simply stated, the proposed compensation statute is so deeply flawed that it cannot be taken seriously, much less supported. The committee was presented with no evidence of the need for such a law; and even if one were necessary, this proposal would be entirely unacceptable because it is not limited to factually-innocent defendants, mandates excessive damage awards, and adopts unreasonable procedures.

H. Proposed “Commission on Conviction Integrity.”

The principal report also proposes the creation of a permanent “Pennsylvania Commission on Conviction Integrity,” which would conduct secret meetings

⁸⁷ Proposed 42 Pa.C.S. §§ 8587, 8588.

“[w]henver the Board of Pardons or a court releases a person based upon a finding of actual innocence.”⁸⁸ We have two fundamental objections this proposal. First, the problems we have already discussed with the procedures of the existing wrongful conviction committee, which essentially has served as a multi-year test program for such a commission, have left us with serious doubts about the ability of such a commission to carry out its charge in an open, organized, and balanced manner.

Second, a commission truly concerned with “conviction integrity” would not limit its study to cases in which defendants were “wrongly convicted.” Whenever the system wrongly *acquits* a *guilty* defendant, it not only fails to achieve justice for the innocent person he has already victimized, it leaves countless more innocent persons at risk of being killed, raped, or robbed. Yet the proposed commission would be given no authority to study cases with that sort of innocent victim, or to propose measures to ensure the “integrity” of the outcome in those cases. Instead, it would be required to take the same misguided approach that dominated this committee, treating increased acquittals as the only form of increased justice.

⁸⁸ Remarkably, the phrase “actual innocence” is not defined in this proposal. Under the plain meaning of the phrase, the proposed commission would rarely meet, since it is almost unheard of for an inmate to obtain his release “based upon a finding of actual innocence” by a court or the Board of Pardons. For example, none of the “Pennsylvania Eight” had that happen in their cases. On the other hand, if “actual innocence” were mis-defined in the manner of the proposed compensation statute, the commission would be charged with conducting a secret hearing almost every time a criminal defendant wins an appeal.

I. Proposed forensic advisory board

The final proposal in the principal report is the creation of a state forensic advisory board, which would recommend ways to improve procedures at forensic laboratories operated by the Commonwealth and municipalities, and investigate allegations of negligence or misconduct at such facilities. We support the basic idea of this proposal, but our ultimate support would require changes to the proposed statute making the selection of members of the board less centralized, and establishing investigative practices more consistent with those of other state forensic advisory boards.

Membership. Under the proposed recommendations, the forensic advisory board would be comprised of thirteen members, ten of whom would be appointed by the governor.⁸⁹ While we have no objection to the governor having significant appointment powers with respect to the board, we believe that the overall membership of the board should reflect a greater diversity of views than would likely be the case if one person were selecting three-quarters of the members. Thus, we submit that the member of the board who is a district attorney should be appointed by the Pennsylvania District Attorneys Association; the member who is a chief of police should be appointed by the Pennsylvania Chiefs of Police Association; the member who is a privately-employed attorney should be appointed by the Pennsylvania Bar Association; and the member who is a forensic scientist employed

⁸⁹ Proposed 61 Pa.C.S. § 6501(c).

by the Pennsylvania State Police's Bureau of Forensic Services should be appointed by the Commissioner of the State Police.

Further, the proposed position for a professor of criminal justice or forensic science strikes us as superfluous, since the board will already include a balanced composition of experts in criminal justice (two prosecutors, two defense attorneys, a police chief, and a judge) and experts in forensic science (two state forensic scientists, two privately-employed forensic scientists, a municipal forensic scientist, and a pathologist).

Investigative practices. The principal report's proposed statute would also establish mandatory, rather than permissive, investigative practices for the forensic advisory board, and thus would not allow for any flexibility on a case-by-case basis.⁹⁰ We consider this approach impractical and unnecessary. The legislature could both avoid artificial requirements and empower the board to conduct precisely the sort of investigation contemplated by the principal report's proposed statute if it instead adopted the following language, which is typical of those governing state forensic advisory boards:⁹¹

An investigation ... [by the board]:

(1) may include the preparation of a written report that identifies and describes the methods and procedures used to identify;

⁹⁰ Proposed 61 Pa.C.S. § 9505.

⁹¹ See, e.g., M.S.A. § 299C.156, Subd. 3 (Minn. Stat. 2006).

- (i) the alleged negligence or misconduct;
- (ii) whether negligence or misconduct occurred; and
- (iii) any corrective action required of the laboratory, facility, or entity; and

(2) may include one or more:

- (i) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and
- (ii) follow-up evaluations of the laboratory, facility, or entity to review:
 - (A) the implementation of any corrective action...; or
 - (B) the conclusion of any retrospective reexamination.

Again, we are willing to work with the Legislature to explore the possibility of creating a forensic advisory board, but we object to some of the details concerning the principal report's proposed membership and investigative practices.

V. OUR PROPOSALS FOR ENSURING RELIABLE AND ACCURATE VERDICTS.

Although the principal report does not consider or represent in any meaningful fashion the views of victims and law enforcement, we have our own plan to further mitigate the risk of wrongful convictions, while also providing justice to victims and protecting the community by ensuring the conviction of the guilty. As we said at the outset, we believe that these measures can achieve broad support among all parties sincerely interested in improving the reliability of verdicts in Pennsylvania, and can thus fulfill the mission of the advisory commission in a way that the flawed proposals in the principal report do not.

A. Reform existing DNA laws to facilitate more DNA testing and more DNA-related investigations prior to trial.

The expanded use of modern DNA evidence is perhaps the best way to avoid wrongful convictions and ensure proper convictions, particularly when DNA evidence is collected and analyzed well *before* the conviction stage so that the true perpetrator is quickly identified and brought to justice. To that end, we strongly support the enactment of Senate Bill 775, which would reform and modernize Pennsylvania's existing DNA laws⁹² to better assist police in excluding innocent individuals who are the subject of criminal investigations or prosecutions, identifying the true perpetrator, and preventing that individual from committing further crimes.

⁹² 44 Pa.C.S. § 2301, *et seq.*

In particular, Senate Bill 775 would allow police to take DNA samples at arrest for all felonies and other serious violent crimes, as they do with fingerprints, so that more DNA profiles are available for comparison with evidence found at crime scenes. Such comparisons have already been critical to identifying and apprehending dangerous offenders in Pennsylvania and nationally, which is why twenty-four states already require the taking of DNA samples upon arrest for certain offenses. Increasing the number of DNA profiles available for comparison in state and national databases will lead to even more cases being solved – and more innocent suspects being cleared – through the most accurate evidence possible.

In addition, Senate Bill 775 would authorize state police to use modified DNA searches in certain cases where crime-scene DNA could belong to a close relative of an offender whose profile is already in the national DNA database. As was shown last year when a familial DNA search allowed the Los Angeles Police Department to finally identify and apprehend the “Grim Sleeper” — a serial killer who had terrorized South Los Angeles for two decades — this technique, too, can lead to successful investigations and accurate convictions that never before would have been possible. Identifying the true perpetrator is the surest means of exonerating the innocent suspect or wrongfully convicted prisoner.

Importantly, Senate Bill 775 would achieve these goals while at the same time addressing legitimate privacy and reliability concerns. The bill would require the automatic purging of DNA records for exonerated individuals, and prohibit the

use of records in the state DNA database for research into genetic markers. And it would also require both that Pennsylvania's forensic DNA testing laboratories be accredited in compliance with national standards, and that the personnel at those laboratories undergo mandatory continuing education.

B. Reform the Wiretap Act to allow for the admission of more electronically-recorded evidence.

The use of electronically-recorded communications, such as audio or video recordings, can also be helpful in ensuring proper convictions, but Pennsylvania's Wiretap Act⁹³ generally prohibits the use of such evidence unless both parties agreed to have their communication recorded. The principal report recognizes this dilemma, and therefore recommends that the Wiretap Act be amended to allow the admission of electronically-recorded interrogations or informant statements where only one party consented to the recording. But limiting the amendment of the Wiretap Act to those two isolated situations would be inconsistent with the principal report's claim that recorded evidence is inherently superior to mere testimony from witnesses.

Instead, *all* electronically-recorded communications should be admissible at criminal trials where one party consented to the recording, as should all civilian wiretaps. The infamous case of the Kathleen Weinstein, a New Jersey teacher and mother who secretly made an audio recording of her own abduction, dramatically

⁹³ 18 Pa.C.S. § 5701, *et seq.*

illustrates the need for this change. When a gun-wielding 17-year old carjacker forced his way into Ms. Weinstein's vehicle and made her drive to a desolate location, she activated a small recorder that she kept in her purse for classroom use, and audio-taped the hellish 24-minute ordeal that culminated in her own brutal murder. This recording, which was admissible in New Jersey as it would have been a majority of other states, led to the swift identification and conviction of her murderer. In Pennsylvania, however, law enforcement could not have used Ms. Weinstein's tape. It would have been illegal and inadmissible under the Wiretap Act, and the investigation and prosecution of this violent criminal would have been severely hampered, if not made impossible.

To be clear, we do *not* propose that it be made legal for civilians to tape each other without consent. The prohibition and penalties for illegal wiretapping by civilians should be left intact by this amendment. What should be permitted is the *use* of such recordings by law enforcement to identify and convict the guilty, and thus clear the innocent.

C. Begin a pilot program to study whether and how to implement electronic recording of interrogations.

We are receptive to the idea that the expanded use of electronically-recorded communications should include the expanded use of electronically-recorded police interrogations. But, as we said above (*supra* at 40-46), we have serious reservations about the way the principal report would achieve this goal. While the principal report proposes an immediate and mandatory state-wide recording requirement,

with an adverse jury instruction in cases where the interrogation is not recorded, this approach would ignore the consensus of the committee and create the serious practical and legal problems we discussed above.

Instead, we would recommend that the Pennsylvania Commission on Crime and Delinquency (PCCD) fund a pilot program to study whether and how the electronic recording of interrogations can be implemented in a fair, reliable, and cost-effective manner. This approach would allow the PCCD to study and report whether victims, witnesses, and suspects are as willing to participate in police interviews if they know or believe they are being recorded; whether and how recording does or should change police practices; how such evidence is used and considered by lawyers, judges, and juries; what additional training and equipment is required for police; and what the statewide cost and impact on verdicts would likely be. Only when these critical questions have been answered can we know whether statewide recording is the right solution for Pennsylvania, or whether each local police department should retain the flexibility to use its own judgment on this issue.

D. Expand police training on non-suggestive identification procedures.

As we said above (*supra* at 46-48), we do not agree with the principal report's unsupported belief that police investigators in Pennsylvania have been obtaining identifications by suggesting to witnesses, either intentionally or through incompetence, which members of lineups and photo arrays are the suspects. We

believe it much more likely that, if officers who have investigated a case tend to be more successful than outside officers at obtaining identifications, it is for the entirely legitimate reason that the investigating officer has time to develop a relationship with frightened and reluctant witnesses, making the witnesses feel safe and invested in the identification process.

Nevertheless, we are committed to ensuring that Pennsylvania has the best-trained law enforcement personnel in the country, and that our police officers are kept abreast of the latest research and techniques for identifying the guilty and clearing the innocent. To that end, we recommend that the Municipal Police Officers' Education & Training Commission (MPOETC) make instruction on non-suggestive identification procedures a component of the annual in-service training curriculum it provides to all certified police officers.

E. Establish a properly-funded system for preserving biological evidence.

As we explained above (*supra* at 58-60), we support the principal report's goal of enacting a new law to ensure the preservation of biological evidence, but we take issue with the principal report's specific proposals in two respects. First, contrary to the principal report's suggestion, it would not be possible to fund this new law through forfeiture money, and the cost of the proposed rules for preserving biological evidence, like all of the proposed recommendations, therefore would have to be paid for through an appropriation from the General Assembly. Second, the

statute should expressly state that -- as is already the law -- non-compliance does not provide an independent ground for relief in any criminal case.

F. Establish an independent forensic advisory board with appropriate investigative protocols.

As is also explained above (*supra* at 73-75), we are open to the creation of a state forensic advisory board as well, though we again disagree with the principal report on some of the technical points. In particular, we believe that the selection of members of the board should be less centralized than would be the case under the principal report's proposal, and that the board should not be subject to some of the impractical requirements and restraints on its investigations that the principal report would impose. With those modest changes, which we have set forth in more detail above, we believe the creation of a forensic advisory board could be a worthwhile initiative.

VI. CONCLUSION.

As we said at the outset, we would have welcomed any process that involved a balanced and open-minded attempt to make Pennsylvania's criminal justice system even more fair and reliable than it already is. But that is not how the advisory committee was conducted, nor is it what the principal report's recommendations represent.

The committee consistently engaged in one-sided procedures designed to force through a pre-determined agenda to benefit the criminal defense bar, conducted no independent study of alleged wrongful convictions in Pennsylvania, and failed to tailor its recommendations to any demonstrated problems that have caused such convictions. As a direct consequence of those structural and procedural flaws, the principal report offers a series of proposals that, for the most part, would only serve to *reduce* the fairness and accuracy of verdicts in Pennsylvania.

We submit that our own proposals are better tailored to improve the reliability of verdicts in Pennsylvania by both reducing the risk of wrongful convictions *and* increasing the likelihood of *proper* convictions. Accordingly, we urge the General Assembly, PCCD, and MPOETC to adopt the measures recommended in this independent report.

SUPREME COURT OF NEW JERSEY
A-8-08 September Term 2008

STATE OF NEW JERSEY,

Plaintiff- Appellant

v.

LARRY R. HENDERSON,

Defendant-Respondent

Paula T. Dow, Attorney General, attorney for appellant
(John McNamara, Jr., Special Deputy Attorney General,
and Deborah Bartolomey, Deputy Attorney General, of
counsel)

Yvonne Smith Segars, Public Defender, attorney for
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Stephen A. Saltzberg, George C. Thomas III and D.
Michael Risinger filed an amicus curiae brief pro se

REPORT OF THE SPECIAL MASTER

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Format of the Hearing and the Record

In its remand orders of February 26 and May 4, 2009, the Supreme Court declared that the trial court record in this matter is inadequate to "test the current validity of our state

law standards on the admissibility of eyewitness identification" and directed that a plenary hearing be held

to consider and decide whether the assumptions and other factors reflected in the two-part Manson/Madison test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence.

As the Court ordered, the State, the defendant and amici Innocence Project and Association of Criminal Defense Lawyers of New Jersey (ACDL) participated in the remand proceedings. Given the nature of the inquiry, the proceedings were conducted more as a seminar than an adversarial litigation. At an initial conference, it was agreed that all participants would submit and exchange whatever published scientific materials they chose and would also disclose the names and areas of proposed testimony of all expert witnesses. More than 200 published scientific studies, articles and books were ultimately made part of the record. At the evidentiary hearings, which extended over ten days, seven expert witnesses testified:

Gary L. Wells, Distinguished Professor of Liberal Arts and Sciences, Department of Psychology, Iowa State University, called by the Innocence Project. IP2.

James M. Doyle, Director, Center for Modern Forensic Practice, John Jay College of Criminal Justice, CUNY, called by the Innocence Project. IP50.

John Monahan, John S. Shannon Distinguished Professor of Law, University of Virginia School of Law, called by the Innocence Project. IP86.

Steven Penrod, Distinguished Professor of Psychology, John Jay College of Criminal Justice, CUNY, called by defendant. D2.

Jules Epstein, Associate Professor of Law, Widener University School of Law, called by defendant. D100.

Roy Malpass, Professor of Psychology, University of Texas, El Paso, called by the State. S28.

James M. Gannon, former Deputy Chief of Investigations, Office of the Morris County Prosecutor, called by the State. S34.

At the conclusion of the hearings, the parties prepared extensive proposed findings of fact and conclusions of law, which were thoroughly argued on the record. The tentative findings and conclusions of the Special Master were later distributed to counsel and discussed in final on-the-record conferences. The findings and conclusions set forth below are those of the Special Master alone.

Because of the nature and size of the record thus developed, it is presented, with the approval of the Supreme Court Clerk, on a single DVD. A guide to the record and the manner in which it can be accessed is attached at the end of this Report.

The Manson/Madison Test and Related New Jersey Caselaw

In State v. Madison, 109 N.J. 223 (1988), this Court addressed the question of "whether the out-of-court photographic identification procedures used by the police were 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" Id. at 225. Reciting that "[w]e have consistently followed the [United States] Supreme Court's analysis on whether out-of-court and in-court identifications are admissible," the Court adopted the "two-prong" admissibility test set forth in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d. 140 (1977). Id. at 233. Justice Garibaldi described that test as follows:

[A] court must first decide whether the procedure in question was in fact impermissibly suggestive. If the court does find the procedure impermissibly suggestive, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." [Citations omitted.] In carrying out the second part of the analysis, the court will focus on the reliability of the identification. If the court finds that the identification is reliable despite the impermissibly suggestive nature of the procedure, the identification may be admitted into evidence. "Reliability is the linchpin in determining the admissibility of identification testimony." [Citations omitted.]

* * * * *

The United States Supreme Court has established that the reliability determination is

to be made from the totality of the circumstances in the particular case. This involves considering the facts of each case and weighing the corruptive influence of the suggestive identification against the "opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the time of the confrontation and the time between the crime and the confrontation." [Citations omitted.]

[109 N.J. at 232-33, 239-40.]

In applying that rule, the defendant bears the burden of proving by a preponderance of the evidence that a pretrial identification procedure was so suggestive as to result in a substantial likelihood of misidentification; in the absence of such a showing, no evidentiary hearing as to reliability is required. State v. Hurd, 86 N.J. 525, 548 (1981), abrogated on other grounds by State v. Moore, 188 N.J. 182 (2006); State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div. 1985). If the defendant makes a sufficient showing of undue suggestiveness, the State has the burden of proving by clear and convincing evidence that the identification has a source independent of the police-conducted identification procedures. Madison, 109 N.J. at 245.

That remains the core New Jersey test of admissibility of an eyewitness identification. See, e.g., State v. Adams, 194 N.J. 186 (2008); State v. Herrera, 187 N.J. 493 (2006). However,

this Court and the Appellate Division have ruled on several related matters concerning the procedural handling and substantive assessment of eyewitness testimony:

State v. Delgado, 188 N.J. 48 (2006), ordered that, as a condition to the admissibility of out-of-court identifications, the police preserve a record, to the extent feasible, of all dialogue between witnesses and police during any identification procedure.

State v. Herrera, supra, 187 N.J. at 509, recommended that, in appropriate cases, the trial court consider, in addition to the five Manson reliability factors, "the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly."

State v. Robinson, 165 N.J. 32 (2000), reaffirmed the obligation of the trial court under State v. Green, 86 N.J. 281 (1981), to explain the Manson/Madison identification factors to the jury in the context of the facts of the case.

State v. Cromedy, 158 N.J. 112 (1999), reviewing the scientific and legal findings that eyewitnesses suffer "cross-racial impairment" when identifying members of another race, ordered that, in certain circumstances, a jury be specially instructed as to the unreliability of cross-racial identifications.

State v. Romero, 191 N.J. 59 (2007), declined to require a special jury instruction with respect to "cross-ethnic" identifications, but ordered the drafting of a model jury charge cautioning that a witness's level of confidence, standing alone, may not be an indication of reliability of the identification.

State v. Michaels, 136 N.J. 299 (1994), finding that the State's conduct in interrogating alleged victims of child sexual abuse undermined

the reliability of the children's recollections of the alleged crimes, ordered that an evidentiary hearing be held to determine whether their testimony was sufficiently reliable to warrant admission at trial, and instructed that expert testimony be allowed regarding the capacity of the interrogations to skew the children's memories.

State v. Earle, 60 N.J. 550 (1972), directed that law enforcement agencies retain the photo array employed in every photo identification procedure; State v. Janowski, 375 N.J. Super. 1 (App. Div. 2005), held that Earle does not require recording or preserving all photographs in mug-shot books used to develop a suspect.

State v. Chen, 402 N.J. Super. 62 (App. Div. 2008), certif. granted 197 N.J. 477 (2009) (argued September 29, 2009), held that although Manson provides no constitutional basis for exclusion of identification evidence influenced by suggestive procedures in which the government played no part, the Manson/Madison test should nevertheless be applied to determine the admissibility of identifications impacted by the conduct of private actors.

State v. Gunter, 231 N.J. Super. 34 (App. Div. 1989), held that inquiry into the reliability of an eyewitness identification can encompass all factors that affect perception and memory, not just suggestive police procedures, and that expert testimony is appropriate as to all such matters.

Foundations and Methodologies of the Scientific Studies

While it has long been recognized, both in New Jersey and elsewhere, that eyewitness identifications are inherently suspect and criminal convictions are all too frequently based on misidentifications (see, e.g., Romero, 191 N.J. at 72-75; Delgado, 188 N.J. at 61; Herrera, 187 N.J. at 501), intensive

research into the causes and extent of misidentification did not commence until the 1970s, just before the United States Supreme Court decided Manson. 16T 59; D4. The volume of that research has been remarkable: over two thousand studies on eyewitness memory have been published in a variety of professional journals over the past 30 years. 14T 40-41; 16T 60; 22T 44-45; IP6 at 581-82. Indeed, Monahan testified that of "all the substantive uses social science in law . . . nowhere is there a larger body of research than in the area of eyewitness identification." 29T 39-40. Even more remarkable is the high degree of consensus that the researchers report in their findings.

The study of eyewitness identification relies in the first instance on precepts drawn from the broader studies of human memory. Those studies, pioneered by Dr. Elizabeth Loftus, demonstrate that eyewitness performance depends on many variables. 18T 10-11; IP52 at 93. See generally IP114; IP115; IP117; IP135; IP141. The central precept is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event. 15T 5-6; 26T 14-18; IP143 at 171. Memory is, rather, a constructive, dynamic and selective process. 15T 7; 26T 14-15.

Memory is comprised of three successive mental processes: encoding, which occurs when the witness perceives the event; storage, which is the period between the event and the witness's

attempt to recall it; and retrieval, which is the process through which the witness attempts to reconstruct the event. IP51 at 13; IP141 at 21. At each of those stages, the information ultimately offered as "memory" can be distorted, contaminated and even falsely imagined. 20T 52; 26T 15-18; IP141 at 21-22. The witness does not perceive all that a videotape would disclose, but rather "get[s] the gist of things" and constructs a "memory" on "bits of information ... and what seems plausible." 15T 7-8. The witness does not encode all the information that a videotape does (26T 14-15; 28T 21, 50; IP141 at 22); memory rapidly and continuously decays (15T 13; 17T 45-46; 26T 17; D4 at 102-04; IP91; D48); retained memory can be unknowingly contaminated by post-event information (IP141 at 22; D65 at 134; see also IP114; IP115; IP117; IP135); the witness's retrieval of stored "memory" can be impaired and distorted by a variety of factors, including suggestive interviewing and identification procedures conducted by law enforcement personnel. 22T 9-10; 23T 92; IP91 at 5; S6b at 230-31; IP93/D50.

Because the reliability of any reported "memory" is subject to so many influences, the researchers commonly recommend that eyewitness identifications be regarded as a form of trace evidence: a fragment collected at the scene of a crime, like a fingerprint or blood smear, whose integrity and reliability need

to be monitored and assessed from the point of its recovery to its ultimate presentation at trial. 15T 3-4; 18T 31-32, 51; 20T 51-52; 26T 16-17; IP23 at 2; IP51 at 243; IP146 at 622-23; IP52 at 98-99; IP154 at 726-28. Professor Hugo Munsterberg stated the reasoning as far back as 1907:

[W]hile the court makes the fullest use of all the modern scientific methods when . . . a drop of dried blood is to be examined . . . , the same court is completely satisfied with the most unscientific and haphazard methods . . . when . . . the memory report of a witness[] is to be examined. No jurymen would be expected to follow his general impressions . . . as to whether the blood on the murderer's shirt is human or animal. But he is expected to make up his mind as to whether . . . [witness] memor[ies] . . . are objective reproductions of earlier experience or are mixed up with associations and suggestions.

[IP124 at 36-37.]

Although suggestive police procedures are not the only contributors to misidentifications, they have been the principal object of the research studies, largely for pragmatic reasons: "real-life" mistaken identifications are difficult to verify or analyze (in the absence of exculpatory DNA evidence), but the incidence of mistaken identifications can be reduced before they occur by implementing improved police procedures. 14T 44-48; 22T 20. The researchers thus distinguish between "system variables" and "estimator variables," the former being variables that affect eyewitness identification accuracy over which the justice system has control (e.g., lineup procedures) and the

latter being those that inhere in the witness, the perpetrator and the witnessed event and are beyond control of the justice system (e.g., the witness's eyesight, the perpetrator's brandishing of a gun, the lighting conditions). 14T 46-47, 60-61; 17T 21-22, 52; IP5/D109. The researchers agree, however, that both system and estimator variables must be considered in assessing the reliability of any identification. 14T 60-61; 17T 74; 23T 88.

The published scientific literature identifying and analyzing those variables is of three kinds. First, archival studies, which are relatively few in number, examine police and court records of past investigations and prosecutions. Second, field experiments and studies, also relatively few, are based on direct observation of "real life" events as they occur. Third, and the vast majority (14T 61-62), are "laboratory" studies that report controlled experiments designed and conducted by academic researchers to isolate and manipulate particular variables for study. See 16T 22-66; 28T 60-62; IP161 at 27-35. An important and much cited subset of the literature is comprised of meta-analyses, which evaluate the methodologies and findings of multiple published reports of experiments in a given area of inquiry. 14T 27-28; 16T 61; 21T 120-23; IP111 at 15-16; IP161 at 35-36; D31 at 535-51. The strength of meta-analyses is dependent, of course, on the strength of the underlying studies,

but because of their breadth, meta-analyses are generally regarded as offering the most reliable statements of the scientific findings. 14T 26-27; 16T 61-62; 21T 120-23; D31 at 535-56; S3 at 200; S4 at 2; S6a; IP111 at 15-16; IP161 at 35-36; see also IP223 (listing meta-analytic studies included in the present record).

The primary utility of the experimental research is that it permits the researcher to draw cause-and-effect conclusions: "[A] well-conducted experiment can tell us that using a specific identification procedure will cause an improvement [or reduction] in identification accuracy." 16T 24-26; IP51 at 4. The basic method used in laboratory experiments over the past 30 years is to stage and videotape an event, which is shown to large numbers of persons who do not then know that they are about to be "witnesses" to a criminal event. 14T 38-40; IP161 at 28. The "perpetrator" is a stranger to the witnesses; system and estimator variables will have little impact on a witness with a prior "deep" memory of the suspect. 21T 113; 28T 21, 51. Each witness is separately shown a photo lineup, composed of five or more "fillers" (known innocents) and either the perpetrator (target-present array) or a known innocent suspect (target-absent array). The researcher, having staged the event, knows the identity of the perpetrator and thus knows whether a witness's identification is accurate or inaccurate. 14T 38-39.

The researcher accordingly can manipulate and control individual variables to determine their impact on eyewitness accuracy: witness characteristics, instructions given before viewing a lineup, blind or non-blind lineup administration, simultaneous or sequential lineup, nature of the witnessed event, presence of a weapon and the like. 14T 38-40; 16T 24-26; IP22 at 4-6.

While the remand record does not include all of the published literature, it does contain all that the parties have proffered as important, reliable and persuasive. The literature demonstrates a broad consensus as to the variables that can affect the reliability of eyewitness identifications. But it is also uniformly recognized that the studies show only that the variables have the capacity or tendency to affect the reliability of identifications. Other than in the DNA exculpation cases, science cannot say whether any identification in any real-life case is accurate or inaccurate; nor can science know how strongly a given variable may have influenced a particular witness in an actual case or what variable or variables may have caused or contributed to any real-life misidentification. 21T 113; 25T 58-59; 28T 10-21; 29T 50; S5 at 25; S6a. Those realities play a large role in the parties' disagreements as to whether and how the Manson/Madison rule should be revised.

The Incidence of Misidentification

The published studies offer some data as to the frequency with which misidentifications occur in various settings. Their findings are not comprehensive but are fairly consistent. 14T 65-67; 16T 70-71; 28T 48; D23 at 16; D31; D89; IP22 at 69-70. Archival studies conducted in the United Kingdom, using fragmentary data, showed that 39% of some 3100 line-up witnesses identified the person suspected by the police, while 21% identified fillers; since only 60% of the witnesses made an identification, the misidentifications represent at least 35% of the positive identifications. 16T 27-35; D4 at 23-24; IP64/D12; IP66/D13; IP65/D14; D15; D17; IP22 at 69-70. Other compilations of the archival studies similarly indicate that, in real cases, at a minimum almost one-third of witnesses who make identifications are wrong. See 16T 32; IP22 at 69-70 (citing IP 62/D18; IP63/D19; IP64/D12; IP65/D14; IP66/D13; IP19).

Comparable error rates have been shown in field experiments. Examining a group of four field experiments involving over 500 unwitting store clerk and bank teller witnesses who observed staged events, Penrod found that in target-present lineups 42% identified the suspect, 41% identified a foil and 17% made no identification; almost half of the positive identifications thus were mistaken. In target-

absent line-ups, 36% picked a foil. 16T 66-67; D4 at 42; D26; D27; D28; D29.

The laboratory experiments, which report witness errors resulting from the particular variable under investigation, also show similar results. For example, a 2001 meta-analysis of 30 studies involving a total of 4145 witnesses designed to compare error rates arising from simultaneous and sequential photo arrays shows foil identifications of 24% and 19% in target-present arrays, 51% and 28% in target-absent arrays, and no choices ranging from 26% to 72%. 16T 62-65; IP61/D25; D4 at 40. The error rate derived from any given experiment depends, however, on the particular variable under study (14T 68-69) and the literature commonly does not offer any quantification of the probability of identification error resulting from any given variable in actual cases. As Monahan testified, the science supports judgments about the direction and size of contaminating influences, but does not permit a conclusion, for example, that "because this identification was cross-racial, therefore, the witness has a 73% greater chance of being erroneous." 29T 57, 71.

Finally, the compilation of DNA exculpation cases made by the Innocence Project shows that as of May 13, 2010, 254 wrongfully convicted persons had been exculpated by DNA evidence; 75% of those convictions involved erroneous eyewitness

identifications. See Innocence Project, Facts on Post-Conviction DNA Exonerations, www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited June 7, 2010). An analysis of the first 239 DNA exonerations found that over 250 witnesses misidentified innocent suspects; in 38% of the misidentification cases, multiple eyewitnesses identified the same innocent person; and in 50% of the misidentification cases, the eyewitness testimony was uncorroborated by confessions, forensic science or informants. See www.innocenceproject.org/Content/2080.php (last visited June 6, 2010); D7; D8; IP157; IP158; IP84/D6; IP153; IP229; Barry Scheck et al., Actual Innocence (2003) (available on request). No overall rate of misidentification can be drawn from DNA exculpation figures, for DNA evidence is recovered, preserved and tested in only a minority of criminal investigations. 16T 24-26.

While the literature does not dispute the data reported by such studies, questions have been raised as to whether the witness error rates reported in the experimental studies may be higher than those in real cases with real witnesses, perpetrators and suspects. The experiments are commonly conducted with college or graduate students who are paid for their participation as "witnesses" and know that the exercise has no real-life consequences to anyone in the line-ups; the suggestion is that students are not good or representative

witnesses, that the greater stress and intensity of feeling of real witnesses leave stronger memory traces, and that real witnesses are likely to be more cautious in making their identifications. See 14T 63; IP22 at 15-17.

Despite those questions, the consensus view appears to be that "perception and memory processes do not work in one way under one [testing setting] and in quite another way [under] ... a different [testing setting]." IP111 at 13. Meta-analyses indicate, in fact, that the impact of system and estimator variables on eyewitness performance is more profound in real-life circumstances than in the laboratory setting. 16T 72-74; D4 at 49; D31 at 550-51. College students are regarded as among the best eyewitnesses; their general health, visual acuity, memory abilities and alertness are exceptional. 14T 63. Studies indicate no significant differences in identification accuracy between witnesses who knew the "crime" and lineup procedure were staged and those who believed otherwise. 14T 64-65; 16T 67-68; D30 at 8-9. The archival studies and the DNA exoneration cases, 75% of which involved at least one mistaken identification, evidence the fact that real-life witnesses are not predictably cautious. 14T 65-69. And memory studies show that stress and intense feelings in fact have a negative impact on memory. See infra, p. 43.

The Scientific Findings

System Variables

Lineup administration. The scientific literature and expert testimony show a broad consensus that the reliability of eyewitness testimony is highly dependent on the police procedures used in conducting lineups. 14T 47.

The lineup - live or photographic - appears to be the most commonly used police identification procedure. A lineup is essentially a memory experiment. 14T 49-60; IP21. Police conducting lineups have been likened to scientists in that they test a hypothesis (the suspect is the perpetrator) by conducting an experiment (placing the suspect among a group of fillers) in which the group is presented to one or more persons (eyewitnesses) in order to gather data to test the validity of their hypothesis. 14T 50-52; IP21; IP22 at 12-13.

Scientific experiments commonly call for double-blind (sometimes called blind) test procedures, a "staple of science." 15T 54-55. Wells characterized double-blind lineup administration as "the single most important characteristic that should apply to eyewitness identification." 15T 74. Double-blind testing requires that the neither the test administrator nor the subject know the "correct" or "desired" answer; the best known example is the testing of new drugs, in which neither the medical administrator nor the patient knows whether the patient

received the experimental drug or a placebo. 15T 55-56, 74; IP30. The purpose of blind testing is to prevent unintentional verbal and non-verbal influence on the test subject; studies have shown that, in the absence of blind testing, the experimenter's expectations tend to influence the outcome of the experiment. 15T 55-56, 69-70; 20T 42. Indeed, a 1978 meta-analysis analyzing 345 studies concluded that there is less than one chance in a million that a non-blind test administrator has no influence on the behavior of the subject. 15T 55-56, 69-70; IP22 at 36; IP30. The studies also report that while the effect of administrator influence is quite strong, neither the administrator nor the witness is ordinarily aware of either the unintentional suggestions or their impact; accordingly, neither is in position to report or dissipate the taint. 15T 55-56, 67-68; 17T 68-72; D4 at 134; IP14; IP22 at 39; IP8/D63/S13; D62.

The means by which a lineup administrator's expectations can be unwittingly communicated are many and diverse: words, gestures, hesitations, smiles and the like can be and are picked up by witnesses as suggesting what the administrator wants or expects to hear. 15T 57-60, 63-66; IP14; IP15; IP16; IP17; IP18/D63/S13. A number of studies demonstrate the influence of lineup administrators on witness choices. See 15T 62-73; 17T 68-72; IP8/D63/S13; IP9; IP14; IP15; IP16a/b; IP22 at 39; D4 at 133. Wells testified that the diagnosticity, or probative

value, of identifications produced by a blind procedure - i.e., the ratio of accurate to inaccurate identifications - is twice that of those produced by a non-blind procedure. 15T 66; IP22 at 39. The studies are relatively few, for further study of double-blind experimentation "would be like beating a dead horse." 20T 43.

Wells also noted that, if "blind" police personnel are not available for a needed identification procedure, administrator influence can be minimized by the use of a "blinded" administrator, that is, one who knows who the suspect is but presents to the witness what is, to the administrator, a random and unobserved, i.e., "blind", shuffle of photographs. 15T 53-54; 20T 28-29; D115 at 17-19.

Instructions to the witness. Equally uncontroversial in the literature and testimony is the proposition that the witness should be instructed that the perpetrator may or may not be present in the lineup and that the witness should not feel compelled to make an identification. 15T 20; 17T 55; 22T 25-26; 23T 16; 26T 46-49; D54; IP54; IP225; S22 at 196; S33. The experts also advise that the witness be instructed that the lineup administrator is blind, i.e., does not know who in the array, if anyone, might be a suspect; that instruction is designed to inform the witness not to look for or intuit hints,

suggestions or confirmations in any of the administrator's words or conduct. 15T 60; 28T 27.

Research has shown that the failure to give such a pre-lineup instruction substantially increases the risk of misidentification. 17T 60-61; 22T 25-26; D4 at 118; D54. A study published by Malpass in 1981 reported that, in the absence of such an instruction, 78% of witnesses viewing a target-absent lineup mistakenly identified fillers, while fillers were identified by only 33% of witnesses who had been instructed. 26T 44; S33.

The studies identify two related dangers that such witness instructions mitigate. First, witnesses understandably infer that police would not conduct a lineup without a suspect, that the suspect is in the array, and that it is their job to pick the right person.. 25T 24-25. Second is what the scientists call the relative judgment process: that eyewitnesses tend to select the person who looks most like the perpetrator relative to the other members of the lineup. 15T 15-19; IP29; IP57. Some member of the lineup will always look more like the perpetrator than the other members of the lineup do, even when the actual perpetrator is not in the lineup. 15T 14-21; 16T 17; IP22 at 22-29; IP29.

In illustration of the relative judgment process, Wells described a study in which he videotaped a staged crime that he

showed to 200 "witnesses." To 100 of those witnesses, he showed a photo lineup including the perpetrator; to the other 100, he showed a lineup absent the perpetrator. In the perpetrator-present lineup, 54% of the witnesses correctly identified the perpetrator, 25% incorrectly identified a filler, and 21% made no identification at all. In the perpetrator-absent lineup, while one might expect that some 75% (i.e., 54% and 21%) would have made no identification, only 32% did so; 68% identified a filler, including 38% who identified a filler resembling the absent perpetrator who had been identified by only 13% of the witnesses shown the perpetrator-present lineup. 15T 16-19; IP22 at 23-28; IP57. The conclusion to be drawn, Wells proffered, is that the increase in incorrect identifications evidenced the witnesses' resort to relative judgment to inculcate an innocent person. 15T 16-19.

Witness instructions are regarded as one of the most useful techniques for enhancing the reliability of identifications. 26T 49. Meta-analyses confirm that the recommended instructions are effective in deterring the impact of the relative judgment process by directing witnesses to focus not on the "closest resemblance" but on their memory of the perpetrator. 22T 25-26; 26T 44-45; 28T 35-37; D54; IP225. Witness instructions do result in fewer correct identifications as well as misidentifications, which some experts attribute to fewer "lucky

guesses," but the effect is far greater in reducing false identifications. 25T 26; D54. A 1997 meta-analysis showed that in target-present arrays correct identification rates were constant with or without witness instructions, but in target-absent lineups the absence of instructions significantly increased the frequency of misidentifications. 17T 60-61; D4 at 118; D54; IP225.

Construction of the lineup array. The scientific literature supports and explains the common-sense understanding that biased lineups reduce the reliability of eyewitness identifications. 26T 50-51; D92 at 604; IP189. The central finding is that mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup. 16T 83; 22T 8-9; 26T 50-51; IP129 at 155-56. Lineups can be biased irrespective of the intent of the person constructing the lineup. The most common means by which a suspect can be made to stand out include placing more than a single suspect in the lineup, using an insufficient number of fillers, and using fillers who do not fit the witness's description of the perpetrator. 14T 54-56; 17T 62-63; D92 at 630-35; IP119 at 60-63; IP127 at 287; IP146 at 623. Studies indicate that bias toward the suspect is not unusual in real cases, occurring two to three times above chance levels. 17T 64-66; D56; D113; D58; D59; D4 at 127. A biased lineup not only

increases the likelihood that an innocent person will be identified, but also inflates the witness's confidence in his or her identification and memory. 22T 9-10; 26T 30; D92 at 608.

Embedding only a single suspect among known innocent fillers is essential to a scientifically sound test: if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of "lucky" guesses is magnified. 22T 6-8. The ordinary and accepted practice among law enforcement agencies is to present an array embedding the suspect among at least five fillers. 22T 7; S20; IP23 at 29. However, "mock witness" experiments conducted by a variety of researchers demonstrate that the "functional" or "effective" size of the array may be substantially smaller than its numerical size. 22T 12-17; 17T 62-65; IP22 at 33; IP109; IP118 at S1-S3; IP129 at 157-58; IP130; IP151; D4 at 120-25; D17; D56; D57; D58. In those experiments, "mock witnesses" are provided only with the verbal description of the perpetrator given by the real eyewitness; they are then shown photos of the lineup that the real eyewitness had seen and are asked to report, based on the eyewitness description, which person they think is the suspect. 22T 12. If the lineup is entirely unbiased, the mock witness identifications will tend to be equally spread among all members of the lineup. 22T 13. But if, say, of 120 mock witnesses, 60

identify the suspect and the other 60 spread their choices among the five fillers, the researchers, dividing the number of mock witnesses by the number of suspect identifications, calculate the "functional size" of the array as reduced from 6 to 2.

Ibid. If mock witnesses correctly guess the suspect at a rate greater than chance on the basis of the description alone, the reliability of the lineup as a scientific test is impugned. See generally 22T 12-23; 26T 51-52; IP22 at 30-33; IP109; IP129 at 161; IP130; IP151; D17 at S65.

The calculation of "effective size," a somewhat different statistical construct later devised by Malpass, leads to similar conclusions. 22T 12-16; IP109; IP22 at 33. Both Wells and Malpass testified that, if photo or videotape records are preserved, the functional and effective sizes of a lineup can later be readily (and inexpensively) evaluated to assist the court and jury in assessing the fairness of the array. 22T 18-22; 26T 50-55.

Although little research has been done on the issue (S3 at 212), the consensus view appears to be that the fairness of a lineup, and the reliability of a resultant identification, are also diminished if the array is not composed of fillers who fit the description given by the witness prior to the lineup and are sufficiently similar to the suspect so that the suspect does not otherwise stand out. 22T 8; 26T 58-59; IP22 at 55; IP85; S3.

Selecting fillers who fit the witness's description lessens the likelihood that the suspect will more closely resemble the perpetrator than any of the fillers. 15T 20; IP22 at 29; D83 at 212. A witness is likely to disregard any filler who does not meet the witness's own description, thus effectively reducing the size and fairness of the array. 17T 55, 62-64. The experts also agree that if a significant feature of a suspect's appearance, e.g., a mustache, does not match the witness's description, bias in the array is reduced if the fillers match the suspect, not the description, in that respect. 22T 8.

The pre-lineup description is also needed in order to evaluate the reliability of an identification: does the description reasonably match the person identified? 22T 8-9; IP160 at 20-22; IP170. If the lineup is composed without first obtaining the witness's description, the post-lineup description will commonly begin to fit the person identified in the lineup rather than the one observed at the scene. 15T 10-12, 97-98.

Multiple identification procedures. The administration of multiple lineup procedures to a single witness also can undermine the reliability of any resulting identifications. See 17T 52-58; 22T 67-74; 26T 61-64; IP85 at 217-20; D51. The problem is that successive views of the same person create uncertainty as to whether an ultimate identification is based on memory of the original observation or memory from an earlier

identification procedure. 17T 52-56; 22T 41, 68-69; 26T 61-63; IP85 at 217-18. If, on a first lineup, the witness makes no identification and the police present the subject in a second lineup with a different set of fillers, the subject stands out as familiar to the witness and thus is more likely to be remembered as the perpetrator. 17T 52; 22T 67-68; 26T 61-63; IP85 at 218. The danger of misidentification is heightened if the suspect is the only person common in the procedures, for he will be the only person familiar to the witness. 22T 68.

Research has shown that innocent persons misidentified in an initial procedure are more likely to be misidentified in a later procedure. 17T 56-67; 22T 68-69; D4 at 114; D51. Among the empirical studies is a 2006 meta-analysis of 32 experiments, which reported that 15% of witnesses made mistaken identifications upon an initial photo viewing, but 37% made misidentifications if they had previously seen a mug shot of the innocent person. 17T 57-58; D51; D3 at 114. The psychological processes at play are known as "mug shot exposure" and "mug shot commitment." Mug shot exposure occurs when a witness initially reviews a collection of photographs without making an identification; the reliability of a positive identification made at a second procedure is undermined. 17T 57-58; 22T 67-72; D4 at 114; D96. Mug shot commitment occurs when the witness has made an identification from a photograph and that person or

photograph is included in a lineup procedure: the likelihood is enhanced that the witness will remain committed to that identification. Ibid.

Showup procedures. A showup is an identification procedure in which just a single suspect is presented to the witness. 15T 77. There appears to be no dispute within either the law enforcement or scientific communities that the showup is a useful -- and necessary -- technique when used in appropriate circumstances. But it does carry its own risks of misidentification.

The most obvious concern is that a one-person display is inevitably suggestive. See 17T 17; 22T 59-60. The research shows, in fact, that the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours: the benefits of a fresh memory seem to balance the risks of undue suggestion. 23T 39-40; IP67. The likelihood of misidentification of innocent persons substantially increases thereafter. Ibid. Data reported in a 1996 study shows that an immediate showup produced 18% misidentifications and an immediate lineup a comparable 16%, while a 24-hour delay produced misidentification rates of 53% for showups and 14% for lineups. 23T 39-40; IP22 at 74; IP67/D34. Some researchers accordingly recommend that, if a showup cannot be conducted within two hours but probable cause

to arrest exists, the suspect be arrested and a lineup thereupon be conducted. 23T 40-41; IP22 at 75; IP23; IP76.

A 2003 meta-analysis comparing lineups and showups across 3013 witnesses (without regard to the timing of the procedures) found that lineups produce half as many false identifications as showups. 16T 99; D4 at 65; D36. While both procedures produced comparable correct identification rates in target-present conditions (45% for lineups, 47% for showups), showups produced more false identifications of similar-looking innocent suspects (23%) than fair lineups (17%). 16T 99-100; D4 at 66; D36 at 532-33. A further factor noted but not assessable by the scientists is that their experiments cannot simulate real-life showup conditions -- the presence of police officers, squad cars, a handcuffed suspect, and the like -- that can make the showup peculiarly suggestive. 17T 12-13, 17; D36; D37 at 283; D4 at 66, 71-74. In showups there is also a particular danger that witnesses will base identifications more on similarity of the clothing worn by the perpetrator and the suspect than similarity of facial features. 17T 7; D4 at 68; IP145; IP67/D34; IP176.

Feedback to witnesses. An extensive body of studies demonstrates that the memories of witnesses for events and faces, and witnesses' confidence in their memories, are highly malleable and can readily be altered by information received by

witnesses both before and after an identification procedure.
See generally 15T 34-43; 17T 93; 18T 53; 26T 26; IP7; IP19;
IP35; IP36; IP37/D76; IP138; IP39; IP40; IP41; IP42; IP43; IP44;
IP45; IP46/D59; IP47; IP114; IP115; IP117; IP135; IP141; D4 at
151; S5 at 25.

(i) **Pre-identification feedback.** In one of a series of early experiments of memory malleability, Elizabeth Loftus showed students films of a simulated automobile accident on a country road. Half of the group was asked simply to estimate the speed of the car; the other half was asked the speed when the car passed "the barn." The film did not show any barn along the road, but almost 20% of the students who had been asked the false "barn" question reported that they had seen a barn. IP114 at 566. In another experiment involving a staged automobile accident, Loftus asked for speed estimates, but varied her language in questioning individual witnesses: what were the speeds when the cars "contacted," "bumped," "hit," "collided" or "smashed." The witnesses asked about the "smashed" cars estimated higher speeds than those who were given the other descriptors. IP115 at 586. Similarly, to the extent police thus ask leading or suggestive questions during an interview, there is a risk that eyewitness memories will be contaminated. IP211 at 54-55; IP212 at 740.

Following upon studies showing that "police make systematic, avoidable errors that limit the amount of information they elicit" (IP6 at 582) and "lead[] to ineffective communication and poor memory performance" (IP119 at 55), researchers have developed and tested a hypothesis that a witness's ability to recall encoded memory can be enhanced by so-called "cognitive interview" techniques. 21T 91-92; 28T 66-76; IP119 at 55; IP213. Designed for use before any identification procedure, those techniques consist of a relatively specific set of rules representing the best ways to interrogate persons about their memories, e.g., tell the witness the type and detail of information necessary for the investigation, ask no leading or suggestive questions, volunteer no information, ask open-ended questions, instruct the witness not to guess and to report any doubt or uncertainty, avoid interrupting the witness, reinstate the context of the witnessed event, develop rapport with the witness, have the witness recall in both forward and backward directions, and the like. 28T 76; IP6 at 582-84; IP119 at 55-57; IP211 at 58-63; IP214. Cognitive interview techniques are now widely used by law enforcement agencies. IP119 at 59; IP211 at 55-57.

Experimental and field studies generally show that cognitive interviews elicit significantly more correct detail with no increase in proportion of incorrect detail (IP211 at 65,

IP119 at 57; IP215 at 726; IP222 at 193-96), although some studies report some increase in incorrect recall. IP169 at 22. The studies also indicate that cognitive interview techniques enhance accurate recall of details of the event but not recognition of participants in the event. 28T 41-42; IP119; IP169; IP211; IP215. Enhanced recall of details through a cognitive interview is nevertheless important and useful: the witness's description of the perpetrator and his actions, the duration of the observation, the viewing conditions, the degree of attention paid and similar matters all aid a full evaluation of the reliability of any identification. 28T 79; IP23 at 13-16, 21-26; IP152 at 7-23, 53-54. A cognitive interview, moreover, may protect an eyewitness from potentially contaminating information acquired after the interview. IP211 at 69.

(ii) Post-identification feedback. A number of studies have demonstrated that witnesses' confidence in their identifications, and their memories of events and faces, are readily tainted by information that they receive after the identification procedure. See 26T 26-28; 15T 25-36; IP7; IP19; IP22 at 47-48; IP35; IP36; IP37/D76; IP38; IP39; IP40; IP41; IP42; IP 43; IP44; IP45; IP46/D59; IP47. Witness confidence is of concern because the research shows that the persuasiveness of an eyewitness identification is closely linked to the certainty

expressed by the witness in his or her identification. 15T 22-24; IP25; IP26; IP27. As Wells put it:

Mistaken identifications per se do not result in the conviction of innocent people. Convictions of the innocent occur when eyewitnesses are both mistaken and certain.

[IP22 at 42; see 15T 23-24.]

The Manson/Madison test explicitly adopts "the level of certainty demonstrated at the time of the confrontation" as one of the five factors determining whether an identification is reliable notwithstanding the use of suggestive police procedures. Madison, 109 N. J. at 239-40. (In his Manson dissent, Justice Marshall argued that "the witness's degree of certainty ... is worthless as an indicator that he is correct." 432 U.S. at 130, 97 S.Ct. at 2261, 53 L.Ed. 2d at 164.) A number of meta-analyses show, however, that witnesses' pre-identification confidence in their ability to make an identification has no correlation to the accuracy of the identifications they then make (17T 76-77; D4 at 140; D64) and that confidence expressed immediately after making an identification has only a low correlation to the accuracy of the identification. 17T 77; 20T 8; 25T 59-69; 26T 35-36; D4 at 141; D65; D66; D67; S7/D68. The studies do show that witnesses expressing post-identification high confidence (e.g., 90-100%) are in fact highly accurate (e.g., 90%), but only a small

fraction of witnesses report such levels of confidence and even 10% of them make incorrect identifications. 17T 81-90; 26T 36; D4 at 144; D73; D74; IP62/D18; D94. The studies conclude, in short, that a witness's self-report of confidence, whether given before or after the identification, is not a reliable indicator of accuracy. A more reliable indicator, experimental studies suggest, is the speed with which the witness makes an identification: Wells testified that true recognition is "an automatic, rapid process" and an identification made within 10 to 12 seconds is more likely reliable, but beyond that time the witness is "struggling" and perhaps resorting to relative judgment. 23T 70-72; see also IP81/D81; IP128.

The methodology and findings of the studies of confirming feedback are exemplified in a 1998 Wells and Bradfield report of one of the original laboratory experiments. 15T 27-34; IP7; IP22 at 44-47. Participant "witnesses" were shown a staged and videotaped criminal event and then were presented with a photo lineup that, unbeknownst to them, did not include the "perpetrator." 15T 27-28; IP7 at 363. All identifications made by the witnesses thus were mistaken. Ibid. The control group of witnesses who made identifications got no feedback from the lineup administrator, but the others were given some form of confirmatory feedback, e.g., "Good, you identified the suspect." 15T 28; IP22 at 44; IP7 at 363. The participants were then

individually asked not only about their certainty as to the accuracy of their identifications, but also about their view of the videotaped event and perpetrator, the attention they paid to the perpetrator, the details of the perpetrator's face, the ease or difficulty of their identification and the soundness of the basis they had for making an identification. 15T 29; IP22 at 45; IP7 at 366. Only 15% of the control group reported high confidence in their identifications while 43% of the witnesses receiving confirmatory feedback reported high confidence; the effect of the feedback was even more magnified in the witness self-reports concerning their viewing conditions and level of attention. 15T 29-32; IP22 at 46; IP7 at 374. Comparable findings concerning the creation and impact of false certainty are consistently reported in the literature. See 15T 11-12, 36; IP22 at 48.

The research also shows the effect of confirming feedback on witness memories of the observed event. Thus, in the 1998 Wells and Bradfield study, where the "witnesses" had intentionally been given a poor view of the perpetrator, over 25% of those who had been told they had correctly identified the suspect reported that they had a clear view, 20% said they were able to make out facial details, 35% said the identification was easy, and 33% said they had a strong basis for making their identification; the reports of the witnesses without feedback

were, respectively, 4%, 3%, 4% and 5%. 15T 31-33; IP7 at 374; IP22 at 46. A 2006 meta-analysis reported similar results. See 15T 18-41; IP19; IP37/D76; IP38; IP39; IP40; IP41; IP42; IP43; IP44; IP45; IP46/D59; IP47.

The studies offer a number of other significant findings concerning feedback. Neither witnesses nor lineup administrators are generally aware of either the occurrence or the effect of confirming feedback (15T 35-36, 55, 67; 22T 34; 19T 35; IP7 at 373; IP22 at 47); disconfirming feedback tends to lower witness self-reports of certainty and opportunity to view (15T 35); contaminating feedback can come from non-state actors (15T 32, 22T 34; 19T 35; 26T 32-33); information can be planted in a witness's memory by speaking with or in the presence of another witness (22T 43; 26T 74-75; IP 44; IP 92; IP93; IP94/D50; IP95; IP122; IP226; D4 at 149-50; D75); information about the evidence against, or the prior record of, the suspect is particularly influential on witness certainty (15T 27-34; 22T 33-34); a witness who knows another witness's identification is more likely to make the same identification (22T 43-47; IP44; IP92; IP94; IP 95; IP122); feedback can inflate confidence whether given immediately or days later and is a lasting effect (15T 31-35; IP41; IP47).

In light of all those findings, the scientists commonly recommend that, immediately upon the conclusion of the

identification procedure -- and whether or not the witness makes an identification, or identifies a known foil -- the law enforcement personnel make a full record, on tape or otherwise but in the witness's own words, of the witness's self-reports concerning confidence, ability to view, and degree of attention. Such a record would not only be uncontaminated by post-identification feedback but would also mitigate the effects of any later feedback, as well as provide court and counsel with information essential to test the reliability of any identification in a future prosecution. 15T 39-42; 17T 93-94; 22T 32-33; 26T 34-38; IP22 at 55; IP23 at 38; IP37/D76 at 865; IP96 at 69; IP46 at 631; D68/S7 at 324; D92 at 635. Blind administration of the lineup goes far to avoid the feedback problem, for the blind administrator does not have the information that could elicit unwitting feedback. 22T 30-31; 26T 30-32.

Use of composites. The research on composites has addressed both traditional hand-produced systems (PhotoFit) and computer-based systems (Identi-Kit, FACES) that present on a screen a great variety of foreheads, hairstyles, eyes, noses, chins, lips and the like, from which a technician, with input from the witness, undertakes to compose a likeness of the perpetrator. See IP98. The broad consensus within the scientific community is that composites produce poor results.

23T 22-47; 26T 68-70; IP22 at 77-84; IP98 at 7-8; IP209 at 894; IP227 at 64; D52 at 235-36, 244-45. The studies show that different witnesses create quite different, and often unrecognizable, pictures of the same person. Ibid. In one study, in which students prepared composites of their teachers and fellow students, only 3 of the 500 composites were correctly identified by other students of the same schools. D4 at 116; D52; 17T 50. The problem, the researchers suggest, is that people recognize others holistically, not feature-by-feature in the manner composites are constructed. 23T 51-52; 26T 69-70; IP98 at 9; IP99 at 194. In addition, a composite tends to contaminate the witness's memory: the memory becomes more like the composite, which sets the stage for a later misidentification. 23T 54-55; 26T 71; IP75a at 26; IP100. A few studies suggesting that preparing a composite can solidify a witness's memory are regarded as statistical outliers. 17T 58-59; IP100 at 148. The literature does show, however, that composites constructed by multiple witnesses can be "morphed" or averaged to produce a composite that is a better representation than any of the individual composites. 23T 44-54; IP22 at 85-88, IP98 at 8; IP99; IP209.

Simultaneous/sequential lineups. The traditional lineup presented all members of the array to the witness simultaneously. 22T 63-64; IP22 at 58; IP59. A substantial

amount of research has been, and continues to be, conducted to determine the impact on identification reliability, if any, of showing the members of the array individually and sequentially. See IP11; IP59/D95; IP61/D25; IP77; IP78; D23; D60; D61/S24; S4; S26. The research broadly confirms the research hypothesis that an innocent person is at greater risk of being misidentified in a simultaneous lineup than in a sequential lineup. 22T 77-78; 16T 65, 81; 23T 28; D4 at 40; IP22 at 65-66. The consensus explanation appears to be that sequential viewing of the lineup inhibits the witness's resort to relative judgment, i.e., choosing the person who looks most like the perpetrator. 16T 81-85; 22T 63-65; IP61/D25 at 459-60.

The studies show that a sequential procedure reduces both accurate and inaccurate identifications, but there is dispute as to the rate of reduction of accurate identifications as compared to the well-established rate of reduction in inaccurate identifications. 16T 83-85; 23T 28; 28T 3; D4 at 55. A 2001 meta-analysis reviewing 30 studies with a total of 4145 witnesses concluded that while accurate identifications fell from 50% in simultaneous lineups to 35% in sequential lineups, foil identifications in target-absent arrays fell to a greater extent, from 51% in simultaneous lineups to 28% in sequential lineups. 16T 62-65, 87; 22T 84-85; IP61/D25; IP22 at 65.

The scientists have also raised questions as to the effect of particular elements of a sequential procedure: Where does the suspect appear in the sequence? Does the witness know the number of persons available for viewing? Does the sequential showing terminate upon a positive identification, tentative or firm? Is the witnesses allowed to go back over the array? Questions have also been asked as to whether a reduction of correct identifications in sequential lineups can be attributed to fewer "lucky guesses" by witnesses properly applying more cautious standards for choosing. 16T 83-85; 21T 109-11; 22T 75-76; 25T 87-89; 28T 3; S17; D4 at 55.

The simultaneous/sequential debate intensified following the 2006 report of a field study conducted in Chicago, Joliet and Evanston, Illinois (the "Mecklenburg study"), which concluded that simultaneous (but not double-blind) procedures produced both more suspect picks and fewer filler picks than did sequential procedures. 23T 3-5; D22/S9; IP22 at 67. The methodology of that study, which was never published in a peer-reviewed professional journal, has been widely criticized and its conclusions have been given little credence by the scientists. See, e.g., 16T 41-45; 23T 3-28; IP22 at 68; IP48; IP49; D22/S9; S26. The simultaneous/sequential controversy continues (see, e.g., S3; S4; S5; S17), focusing on whether and to what extent accurate identifications might be sacrificed by

using the more conservative sequential procedure. 28T 3-4. A series of field studies concerning the issue are presently being conducted in Tucson AZ, San Diego CA and Austin TX by a consortium including the American Judicature Society, John Jay College of Criminal Justice, Cardozo School of Law, the Police Foundation and the Innocence Project. 23T 29-35.

In-court identifications. Wells testified, without contradiction, that an in-court identification will simply repeat any error that infected a pretrial identification procedure. 28T 63-64; S15 at 880. The social scientists find it a "schizophrenic kind of notion" and "bizarre" that an unfairly suggestive pretrial identification might be allowed to be replicated in an in-court confrontation: "The residual of that suggestion just simply carries over to the in-court identification." 28T 64.

Estimator variables

The literature defines estimator variables as factors that can undermine the accuracy of eyewitness identifications but derive from the particular characteristics of the events, witnesses and perpetrators and are beyond the control of law enforcement personnel and procedures. IP22 at 11; IP5/D109. Estimator variables are as significant as system variables in their effects on the reliability of an identification. 14T 46-47; 17T 74; 23T 64-65; D4 at 171.

Eyewitness stress level. The scientific literature reports that, while moderate levels of stress improve cognitive processing and might improve accuracy (IP161 at 40), an eyewitness under high stress is less likely to make a reliable identification of the perpetrator. 14T 69-71; 17T 22-27; 26T 89-92; D4 at 80; D38; D44; S15 at 878; IP60/D43. Stress and fear ensure that the witness will not forget the event, but they interfere with the ability to encode reliable details. 14T 70. A 2004 meta-analysis of 27 independent studies involving a total of 1727 participants showed that 59% of witnesses in low-stress settings made correct identifications while only 39% of high-stress witnesses did so. 17T 26-28; 26T 90-91; D38; D4 at 84.

The effect of stress is illustrated in a 2004 field study involving 500 active-duty military personnel in a survival-school program, who were subjected to 12 hours of confinement followed by two 40-minute interrogations, one under high stress with physical confrontation and the other under low stress, conducted by different interrogators. 17T 27-28; IP60/D43 at 267-69. When asked the following day to identify their interrogators, the participants correctly identified the high-stress interrogator at only half the rate they identified the low-stress interrogator; some, indeed, were even unable to identify the high-stress interrogator's gender. 14T 70-71; 17T 27-28; 26T 92; IP60/D43; S32.

Weapon focus effect. Similarly, the presence of a weapon at the observed event has been demonstrated to impair eyewitness memory and identification accuracy. 17T 22-25; 23T 81-83; 26T 83-84; IP69/D41. The studies find that the visible presence of a weapon diverts a witness's attention away from the face of the perpetrator and reduces the witness's ability to encode, describe and identify the face. 23T 82; 17T 22-24, 32; 26T 84; S15 at 878; D41; D42; D80; IP159. A 1992 meta-analysis reviewing 19 studies involving 2082 participants shows an average difference in accuracy of approximately 10%. 17T 24; IP69/D41. The effect is particularly strong during crimes of short duration (23T 83; IP69/D41 at 421) and when combined with the effects of stress. 26T 86-88; D38.

Duration of the witnessed event. The scientific studies demonstrate that the reliability of an identification is related to the duration of the witness's exposure to the perpetrator: while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure. 17T 22-23; 26T 104; 18T 39-40; 28T 49; D4 at 80; S15 at 877. In their self-reports, however, witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful. 18T 39-40; 23T 57-58; 26T 105; IP79; IP80; IP97.

Distance and lighting. Vision researchers have long known that clarity of vision decreases with distance and poor lighting conditions. 23T 62; 26T 93-99; IP20 at 43; IP123; IP160 at 8; IP220; S33 at 485. More recent studies specifically addressing the ability to identify faces at particular distances have demonstrated that, even with 20/20 vision and excellent lighting conditions, face perception begins to diminish at 25 feet, nears zero at about 110 feet, and faces are essentially unrecognizable at 134 feet. 23T 61-66; 26T 96-99; IP4 at 9-10; IP20 at 63; IP22 at 88-94. Witness self-reports of distances are not highly reliable. 23T 57-58; 26T 93-94; IP22 at 88; IP81; IP123; IP131; IP132. Low levels of illumination also decrease recall and identification accuracy. IP220 at 354; IP60 at 8-9; IP166 at 368.

Memory decay. Researchers have long studied the process of memory decay and in recent years have examined the association of retention intervals and forgetting once-seen faces. A 2008 meta-analysis examining 53 of those studies shows that memory quality declines by 20% after two hours, by 30% within the first day and by 50% one month after the observation. 17T 45-46; D4 at 101-04; D49. Longer retention intervals are associated with fewer correct identifications. 15T 13; D40. As memory decays, the impact of suggestive procedures and other memory-

contaminating variables grows. 28T 22. Memory decay is irreversible: memory never improves. 15T 13; 22T 34.

Unconscious transference. A positive identification indicates that the person identified is familiar to the witness, but the familiar person may not be the culprit. As discussed above(p. 27), multiple identification procedures can produce a misleading familiarity with a face. 17T 53-56; 26T 61-62; D4 at 115; D38. That process, known as "unconscious transference," can also occur when a witness confuses a person seen at or near the crime scene with the actual perpetrator. 17T 53-58; D4 at 115; D51 at 289, 306. The familiar person is at greater risk of being identified as the perpetrator simply because of his or her presence at the scene. Ibid. This "bystander error" most commonly occurs when the observed event is complex, i.e., involving multiple persons and actions, but can also occur when the familiarity arises from an entirely unrelated exposure. 17T 52-58; D4 at 115; D51; D96.

Age. A witness's age also bears on the reliability of an identification. 17T 38-39; 28T 74; D4 at 94; D45; IP127 at 280; IP138; IP175. Studies show that witness accuracy is at its height at ages 18-19, that it declines consistently over time, that between ages 60 and 72 witness accuracy is only half of what it was at 18-19 (17T 37-38; 28T 74; D45; D4 at 94) and that memory for crime-related information is generally worse in

persons over 70. IP175 at 332. On the other hand, identifications made by witnesses below the age of 18 have been found to be less reliable than those made above 18; the younger the child, the less reliable the identification. 17T 8; 28T 74; D4 at 70; D34; IP138.

Alcohol. Studies of the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications; low alcohol intake produces fewer misidentifications than high alcohol intake. 17T 40-41; D46; D4 at 95; IP160; IP221.

Distinctive faces, disguises, facial changes. Experimental studies demonstrate that distinctive faces are more readily remembered and accurately identified. 17T 42; D57. Disguises (e.g., hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications. 17T 42-43; 26T 100-01; D4 at 97-98; D47. Changes to perpetrators' facial appearance (e.g., appearance or disappearance of facial hair) between initial exposure and identification procedure also impair identification accuracy: one study found that correct identifications dropped by 50% (to almost the equivalence of chance) with such changes of facial appearance. IP207 at 410; 17T 42. Dissimilarity between a perpetrator's appearance in the event and in a later lineup reduces the positive effects of longer initial exposures during the event. IP207; IP208; D40.

Own-race bias. Several meta-analyses published over the past 20 years consistently show that other-race recognition is poorer than same-race recognition. IP68; IP120; IP133; IP134; IP216. One of those studies, reviewing 39 research articles involving 5000 witness/participants, found that a mistaken identification was 1.56 times more likely in other-race conditions, and participants were 2.2 times as likely to accurately identify own-race faces as other-race faces. IP68/D39 at 15. The reality and impact of own-race bias were recognized by this Court in State v. Cromedy, supra, 158 N.J. 112, which mandates that, in certain circumstances, a jury be specially instructed as to the unreliability of cross-racial identifications.

Lay Knowledge and Intuitions

Studies examining whether and to what extent jurors (or potential jurors) know or correctly intuit the findings reported in the eyewitness identification literature report that laypersons are largely unfamiliar with those findings and often hold beliefs to the contrary. 24T 13-14; IP10; IP51; IP112; IP136; IP137; IP138; IP155; D77; D85; D103; D104.

One such study, published by Benton et al. in 2006 (D104), drew on the 2001 Kassin survey (D78; see discussion below at pp. 50-51) which reported the level of expert acceptance of the research findings concerning system and estimator variables.

The 2006 study, comparing juror acceptance of the same research findings (24T 57-62), found that jurors were substantially less receptive to such concepts as cross-race bias (90% acceptance by experts, 47% by jurors), weapons focus (87% by experts, 39% by jurors), weak correlation between confidence and accuracy (87% by experts, 38% by jurors), and memory decay (83% by experts, 33% by jurors). 24T 57-58; D104 at 120-22. The Benton study also compared the acceptance rates of a small group of volunteer judges, with comparable but less dramatic results. Id.; 24T 77-78.

Similar findings of juror beliefs have been reported in other surveys. See, e.g., D102; D103. In a 2007 article Benton et al. described the literature as showing that jurors underestimate the importance of proven indicators of accuracy (e.g., lineup instructions, memory retention interval, lighting conditions, cross-race identification, weapon presence), tend to rely heavily on factors that the research finds are not good indicators of accuracy (e.g., witness confidence), and tend to overestimate witness accuracy rates. 24T 40-45; 26T 16-29; IP136 at 475-87; IP10. Penrod reported that his studies indicated that expert testimony tended to sensitize mock jurors to the variables that affect eyewitness reliability. 20T 23-30.

The scientists agree that jurors are not able to distinguish accurate eyewitnesses from inaccurate witnesses.

14T 44-45; 24T 69-75; D106; IP25; IP26; IP27. Indeed, Wells testified that neither he nor any other expert in the field can separate accurate from inaccurate witnesses simply by watching them testify: "[T]here's just no good markers for the error." 14T 45. That inability flows in part from the fact that mistaken eyewitnesses are not lying but are honestly reporting, often with great confidence, what they believe they saw. IP25; IP26; IP27. For that same reason, Epstein testified, cross-examination is of limited utility to either the jury or the defendant. 24T 10-23. What jurors primarily rely on in assessing identification accuracy is the confidence expressed by the witness in the identification, although, as previously discussed, the literature demonstrates that the confidence/accuracy correlation is weak at best and that confidence is highly malleable. See 15T 22-24; 20T 15-18; 26T 38-39; IP22 at 41; D4 at 158; D77; IP119 at 65; IP25, IP26, IP27.

Responses of Interested Communities to the Scientific Findings

A wide variety of interested communities and agencies have expressed themselves and taken action in response to the scientific findings reported by the researchers.

Expert witnesses. In 2001, Kassin et al. published a survey of 64 experts, mostly cognitive or social psychologists and university professors, who previously had been asked to

testify concerning eyewitness identification on a total of 3370 occasions and actually testified in 960 cases. 20T 32-33; D4 at 162-63; D78. With respect to the scope and content of their proposed and actual testimony, 90% or more reported that they found reliable the scientific findings concerning suggestive wording, lineup instruction bias, own-race bias, confidence malleability, alcohol intoxication, mugshot-induced bias and child suggestibility; 70% to 87% of the experts found reliable the scientific findings as to weapon focus, showups, biased lineups, memory decay, the accuracy/confidence correlation, child-witness accuracy, description-matched lineups and sequential presentation. 20T 33-35; D4 at 164-65; D78. Penrod reported similar findings resulting from an unpublished survey he conducted with two graduate students of 71 expert witnesses who had testified at least 2719 times. 20T 35-37; D4 at 166; D79.

Law enforcement and reform agencies. In recent years, a number of national, state and local entities have organized working groups and task forces to examine the accumulating scientific findings concerning eyewitness identifications and to devise ameliorative procedures. The reports issued by those groups vary in scope and detail, but all substantially accept the scientific studies as reliable.

United States Department of Justice

Nat'l Inst. of Justice, 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 (1996). IP153.

In 1996 the National Institute of Justice (NIJ), a research and development arm of the Department of Justice, appointed a Technical Working Group on Eyewitness Evidence to establish national guidelines for law enforcement regarding the best ways to collect and preserve eyewitness identification evidence. The group included law enforcement officers from across the nation, prosecutors, defense attorneys (including James Doyle), and social scientists (including Gary Wells and Roy Malpass).

Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999); Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Trainer's Manual for Law Enforcement (2003). IP23; IP152.

In 1999, based on the work of the Technical Working Group, the NIJ published its Guide of best practice recommendations for law enforcement, which was followed in 2003 by the Training Manual. Both Guide and Manual were distributed to law enforcement agencies nationwide. Wells co-chaired the Eyewitness Identification Police Training Manual Writing Committee.

American Bar Association

Am. Bar Ass'n, Adopted by the House of Delegates (2004); Ad Hoc Innocence Comm. to Ensure the Integrity of the Criminal Process, Am. Bar Ass'n, Achieving Justice: Freeing the Innocent, Convicting the Guilty (2006). IP12; IP167.

In 2004, the American Bar Association House of Delegates adopted a Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures, which set forth guidelines for administering lineups and photo arrays. In a report of its Ad Hoc Innocence Committee, the ABA resolved that federal, state and local governments should be urged to adopt a series of principles consistent with those contained in its resolution, incorporating scientific advances in research.

New Jersey

Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (2001). S20.

New Jersey was the first state to officially adopt the NIJ recommendations when the Attorney General promulgated the Guidelines for use by all law enforcement agencies statewide.

California

Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendations Regarding Eyewitness Identification Procedures (2006). IP13.

The Commission, comprised of key criminal justice stakeholders from across California, offered numerous recommendations including double-blind and sequential identification procedures, videotaping or audiotaping lineup procedures and photo displays, providing cautionary instructions to witnesses, documenting witnesses' statements of certainty, and not providing confirming feedback to witnesses prior to obtaining witnesses' certainty assessments.

New York

Task Force on Wrongful Convictions, N.Y. State Bar Ass'n, Final Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009). IP185.

The Task Force, comprised of judges, prosecutors, defense counsel, legal scholars and criminal justice experts, proposed the adoption of double-blind administration, cautioning witnesses that the perpetrator may or may not be present, choosing fillers who fit the witnesses' descriptions of the perpetrator, and recording witnesses' assessments of certainty.

Illinois

Governor's Comm'n on Capital Punishment, State of Ill., Report of the Governor's Commission on Capital Punishment (2002). IP165.

The Report recommended reforms including double-blind and sequential procedures, warnings to witnesses that the perpetrator might not be in the array and instructions that they should not feel compelled to make an identification. In 2003, the Death Penalty Reform Bill was enacted, requiring that witnesses be warned that the suspect may not be in the lineup. IP106.

North Carolina

N.C. Actual Innocence Comm'n, Recommendations for Eyewitness Identification (2003). IP74.

The Actual Innocence Commission, established by the North Carolina Chief Justice, recommended eyewitness identification procedures, including blind administration. The recommendations became statutory law in 2008. IP105.

Wisconsin

Office of the Attorney Gen., Wis. Dep't of Justice, Model Policy and Procedure for Eyewitness Identification (2005). IP75a.

In 2005, the Wisconsin Attorney General's Office followed New Jersey's lead and issued this similar set of policies for statewide use, which also mandated the "blind-sequential" reform package.

Santa Clara, CA

Police Chiefs' Ass'n of Santa Clara County, Line-up Protocol for Law Enforcement (2002). IP172.

The Police Chiefs' Association here amended its lineup procedures, calling for double-blind and sequential administration, warnings to witnesses prior to identification procedures, recording witnesses' certainty assessments in the witnesses' own words, and documenting any non-identifications.

Denver, CO

Denver Police Dep't, Operations Manual § 104.44 (2006); Denver Police Dep't, Photographic Lineup Admonition/Photo Identification Report (2009). IP108; IP186.

The Denver Police Department here issued lineup procedures calling for double-blind and sequential administration, warnings to witnesses prior to identification procedures and documentation of any non-identifications.

Boston, MA

District Attorney's Office, Suffolk County, Report of the Task Force on Eyewitness Evidence (2004). IP24.

The Boston Police Department and the Suffolk County District Attorney's Office formed the Task Force to reform the county's eyewitness identification procedures. The Task Force produced a set of guidelines -- now followed by the county, including Boston -- on how to obtain and preserve eyewitness identification evidence, which included double-blind and sequential administration and admonitions to witnesses prior to an identification procedure.

Boston Bar Assoc. Task Force, Boston Bar Assoc., Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts (2009). IP181.

The Task Force, charged with identifying reforms to reduce the risk of convicting innocent people, recommended procedures in the areas of eyewitness identifications and suspect/witness interviews including double-blind lineups, witness warnings, sequential lineups and taking certainty statements following any identification procedure.

Northampton, MA

Ken Patenaude, Improving Eyewitness Identification, Law Enforcement Tech., Oct. 2003, at 178; Kenneth Patenaude, Police Identification Procedures: A Time for Change, 4 Cardozo Pub. L. Pol'y & Ethics J. 415 (2006). IP148; IP147.

Patenaude, Captain of the Northampton Police Department (now retired), was a member of the National Institute of Justice's Technical Working Group that authored Eyewitness Evidence: A Guide for Law Enforcement in 1999. See IP23. In 2005, the Northampton department adopted enhanced

identification procedures, requiring double-blind and sequential administration, warnings to witnesses prior to identification procedures, selecting fillers who match the witnesses' descriptions, recording witnesses' certainty assessments in the witnesses' own words, and documenting any non-identifications. Northampton Police Dep't, Administration & Operations Manual ch. O-408 (2005). IP107.

St. Paul and Minneapolis, MN

Amy Klobuchar & Hilary Lindell Caligiuri, Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification, 32 Wm. Mitchell L. Rev. 1 (2005); Amy Klobuchar et al., Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project, 4 Cardozo Pub. Pol'y & Ethics J. 381 (2006). IP78; IP77.

Under the directive of then County Attorney Klobuchar, the Hennepin County Attorney's Office adopted a new lineup protocol including double-blind and sequential presentation, warnings to witnesses that the perpetrator may or may not be in the lineup, the documentation of witness confidence statements, and improved lineup composition. Hennepin County then partnered with Dr. Nancy Steblay on a pilot project to assess the efficacy of the new protocol as compared with prior procedures. These two publications conclude that the new procedures "will help improve police investigations, strengthen prosecutions and better protect the rights of innocent people while convicting those who are guilty." IP78 at 14.

Susan Gaertner & John Harrington, Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol, Police Chief, Apr. 2009, at 130. IP11.

After reviewing the social scientific research, as well as other "best practices" embraced throughout the country, Ramsey County adopted double-blind and sequential lineup procedures and participated in a pilot project comparing the procedures with the earlier non-blind and simultaneous formats. Susan Gaertner, Ramsey County Attorney, published this article endorsing the procedures.

Letter from Office of the Ramsey County Attorney to Conference Participants (October 26, 2009). IP180.

This conference, titled "Improving Eyewitness Identification Procedures: Bringing Together the Best in Science, Technology and Practice," was presented by the Office of the Ramsey County Attorney, the Minnesota Bureau of Criminal Apprehension, and the Minnesota County Attorneys for law enforcement professionals to provide practical, policy, and scientific perspectives on the existence and implementation of improved eyewitness identification procedures in Minnesota.

Dallas, TX

Dallas Police Dep't, Dallas Police Department General Order § 304.01 (2009); Dallas Police Acad., Roll Call Training Bulletin No. 2009-04, Blind Sequential Photographic Line-up (2009); Dallas Police Dep't, Photographic Line-up Admonition Form (n.d.); Dallas Police Acad., Roll Call Training Bulletin No. 2008-27, One Person Show-up (2008). IP182; IP183; IP184; IP76.

In 2009, the Dallas Police Department reformed its identification procedures to require double-blind and sequential administration, warnings to witnesses prior to identification procedures, selecting fillers who match the witnesses' descriptions, and recording witnesses' certainty assessments in the witnesses' own words. The Department also adopted new showup procedures in 2008, which included requiring warnings to the witness that the person shown may or may not be the perpetrator, prohibiting multiple showups in cases involving multiple witnesses after one witness makes an identification from a showup, requiring the police to obtain a detailed description from the witness prior to the identification procedures, ensuring that the suspect fit the witness's detailed description, and requiring law enforcement to avoid making suggestive statements to witnesses.

American Psychology-Law Society

Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603 (1998). D92.

In 1996, the Executive Committee of the American Psychology-Law Society created a subcommittee to review contemporary scientific research on eyewitness identification and to make recommendations for improving the reliability of identification evidence. The

collaboration produced this first "white paper" ever published by the Society.

International Association of Chiefs of Police

Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification (2006). IP113.

The Training Key reports that "of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification" (IP113 at 5) and endorses a number of key reforms, including blind administration, recording the procedure, instructing the witness and obtaining a confidence statement.

Police Executive Research Forum

James M. Cronin et al., Promoting Effective Homicide Investigations (2007). IP171.

The Police Executive Research Forum, a national membership organization of police executives from the largest city, county and state law enforcement agencies, here recommends double-blind and sequential lineup administration, warning witnesses that the perpetrator may or may not be present, selecting fillers who fit witnesses' descriptions of the perpetrator, documenting witnesses' statements of certainty, and recording with specificity the outcome of the identification procedure, including non-identifications and identifications of fillers.

Commission on the Accreditation of Law Enforcement Agencies

Stephen Saloom, Improving Eyewitness Identification Procedures, CALEA Update (Comm'n on Accreditation for Law Enforcement Agencies, Fairfax, Va.), Oct. 2009, at 26. IP168.

The Commission on the Accreditation of Law Enforcement Agencies, a credentialing authority created by national law enforcement membership associations, adopted eyewitness identification standards that require agencies seeking accreditation to create written eyewitness lineup and showup procedures addressing, among other issues, filler selection, lineup instructions to witnesses, complete recordation and documentation of the procedure, including witnesses' confidence statements, and avoiding giving confirming feedback to witnesses.

Legislation. Several states have enacted legislation implementing procedures recommended in the scientific studies.

Georgia

H.R. 352, 149th Gen. Assem., Reg. Sess. (Ga. 2007); Ga. Police Acad., Ga. Pub. Safety Training Ctr., Witness Identification Accuracy Enhancement Act: Participant Guide (2008). IP173; IP187.

Created a study committee to study best practices for eyewitness identification procedures and evidentiary standards for admissibility of eyewitness identifications. Though the committee failed to recommend further legislation, the Georgia Peace Officers Standards and Training Council instituted statewide training which includes blind administration.

Illinois

725 Ill. Comp. Stat. Ann. 5/107A-5 (West 2009) (enacted 2003). IP106.

Requires lineups to be photographed or otherwise recorded; that eyewitnesses sign a form acknowledging that the suspect may not be in the lineup, that they are not obligated to make an identification, and that they should not assume that the administrator knows which photograph is that of the suspect; and that suspects in the lineup not appear substantially different from fillers, based on the eyewitness' previous description of the perpetrator, or on other factors that would draw attention to the suspect.

Maryland

Md. Code Ann., Pub. Safety § 3-506 (LexisNexis 2009) (enacted 2007). IP104.

Requires each law enforcement agency in the state to adopt written policies related to eyewitness identification that "comply with the United States Department of Justice standards on obtaining accurate eyewitness identification."

North Carolina

N.C. Gen Stat. § 15A-284.50-.53 (2009). IP105.

Mandates blind administration, specific instructions to the witness, appropriate filler selection, obtaining confidence statements, sequential presentation, recording the procedure when practicable, and necessary training. The legislation also fixes legal remedies for law enforcement's noncompliance with the statute.

Ohio

S. Sub. S.B. No. 77, 128th Gen. Assembly (2010). D115.

Mandates blind or blinded lineup administration, sequential displays of the array, witness warnings, recording of all identification and nonidentification results and confidence statements made immediately upon an identification; requires trial courts to consider any failure to fulfill statutory mandates in adjudicating any suppression motion; requires that juries be instructed that they may consider noncompliance with mandated procedures in determining reliability of an identification.

Vermont

2007-60 Vt. Adv. Legis. Serv. (LexisNexis). IP174.

Established a committee to study best practices relating to eyewitness identification procedures and audio and audiovisual recording of custodial interrogations. Matters to be addressed include: federal and state models and developing best practices; whether other statewide policies on eyewitness procedures should be adopted in Vermont; current policies in local jurisdictions.

West Virginia

W. Va. Code § 62-1E-1 to -3 (2008) (enacted 2007). IP103.

Mandates several reforms, including providing lineup instructions to witnesses, obtaining confidence statements, and creating a written record of the entire procedure, and creates a task force to study and identify additional best practices for eyewitness identification.

Wisconsin

Wis. Stat. §175.50 (2007-08) (enacted 2005). IP75b.

Requires law enforcement agencies to adopt written policies for eyewitness identification. The Attorney General's office offers a series of best practices for agencies to follow, including blind administration, specific instructions to the witness, appropriate filler photo usage, obtaining a confidence statement from witnesses, and sequential presentation.

Courts. Those state and federal appellate courts that have taken note of the post-Manson scientific findings have commonly acknowledged their authority and have incorporated them in rulings as to police procedures, record-keeping, allowance of expert testimony, necessity and propriety of jury instructions and like matters.

United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009), cert. denied, ___U.S.____, 130 S.Ct. 1137, ___L.Ed.2d.____(2010).

In reviewing a trial court's rejection of proffered identification expert testimony, the Court of Appeals for the Seventh Circuit said:

"An important body of psychological research undermines the lay intuition that confident memories of salient experiences ... are accurate and do not fade with time unless a person's memory has some pathological impairment. ... The basic problem about testimony from memory is that most of our recollections are not verifiable. The only warrant for them is our certitude, and certitude is not a reliable test of certainty." Id. at 906.

The question that social science can address is how fallible, and thus how deeply any given identification should be discounted. That jurors have beliefs about this does not make expert evidence irrelevant; to the

contrary, it may make such evidence vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions. Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct. Many people believe that identifications expressed with certainty are more likely to be correct; evidence that there is no relation between certitude and accuracy may have a powerful effect." Ibid.

United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006). IP56.

The Third Circuit Court of Appeals held that the district court erred in excluding expert testimony on confidence/accuracy, time delay, postevent suggestion, and showups.

"The recent availability of post-conviction DNA tests demonstrate that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications. ... Even more problematic, 'jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable.' Thus, while science has firmly established the 'inherent unreliability of human perception and memory,' this reality is outside 'the jury's common knowledge,' and often contradicts jurors' 'commonsense' understandings." Id. at 141-42.

Newsome v. McCabe, 319 F.3d 301 (7th Cir. 2003), cert. denied, 539 U.S. 943, 123 S.Ct. 2621, 156 L.Ed.2d 630 (2003). IP31b

In sustaining the admission of expert testimony regarding eyewitness reliability, the Seventh Circuit Court of Appeals credited functional size tests conducted by Gary Wells on the lineup arrays used in the prosecution.

"[Wells's] testimony was based on sufficient data, [] his methods were reliable by the standards of the field, and [] he applied these methods reliably to the facts of Newsome's case. Experiments of the kind that Wells performed are the norm in this branch of science and have met the standard for scholarly publication and acceptance." Id. at 306.

United States v. Hall, 165 F.3d 1095 (7th Cir. 1999), cert. denied, 527 U.S. 1029, 119 S. Ct. 2381, 144 L.Ed.2d 784 (1999).

The Seventh Circuit Court of Appeals upheld the district court rejection of defendant's proffered expert testimony on reliability of eyewitness identifications. In a concurring opinion, Judge Easterbrook suggested that courts utilize social science research to draft instructions that inform jurors about social science findings and to prohibit prosecutors from arguing that witness certainty suggests witness accuracy.

"Jurors who *think* they understand how memory works may be mistaken, and if these mistakes influence their evaluation of testimony then they may convict innocent persons. A court should not dismiss scientific knowledge about everyday subjects. Science investigates the mundane as well as the exotic. That a subject is within daily experience

does not mean that jurors know it *correctly*. A major conclusion of the social sciences is that many beliefs based on personal experience are mistaken. The lessons of social science thus may be especially valuable when jurors are sure that they understand something, for these beliefs may be hard for lawyers to overcome with mere argument and assertion." Id. at 1118.

"[A] judge, recognizing the main conclusions of the scholarly study of memory--that 'accuracy of recollection decreases at a geometric rather than arithmetic rate (so passage of time has a *highly* distorting effect on recollection); accuracy of recollection is *not* highly correlated with the recollector's confidence; and memory is highly suggestible --people are easily 'reminded' of events that never happened, and having been 'reminded' may thereafter hold the false recollection as tenaciously as they would a true one',--could block a lawyer from arguing that a given witness is sure of his recollection, and therefore is more likely to be right. The judge could inform jurors of the rapid decrease of accurate recollection, and the problem of suggestibility, without encountering the delay and pitfalls of expert testimony. Jurors are more likely to accept that information coming from a judge than from a scholar, whose skills do not lie in the ability to persuade lay jurors (and whose fidgeting on the stand, an unusual place for a genuine scholar, is

apt to be misunderstood). Altogether it is much better for judges to incorporate scientific knowledge about the trial process *into* that process, rather than to make the subject a debatable issue in every case. ... [T]he subject is vital to a judicial system that seeks to improve the accuracy of the trial process, and thus as time passes more of the findings of modern social science research should be incorporated into legal rules about proper trial tactics and arguments." Id. at 1120 (citation omitted)(Easterbrook, J., concurring).

State v. Chapple, 660 P.2d 1208 (Ariz. 1983). IP194.

The Arizona Supreme Court held that the trial court erred in barring expert testimony regarding the forgetting curve, the effects of stress upon perception, the phenomenon of unconscious transference, and the effects of exposure to inaccurate information on a witness's memory.

"[I]t is difficult to tell whether the ordinary juror shares the law's inherent caution of eyewitness identification. Experimental data indicates that many jurors 'may reach intuitive conclusions about the reliability of [such] testimony that psychological research would show are misguided.'" Id. at 1220.

People v. McDonald, 690 P.2d 709 (Cal. 1984), overruled on other grounds, 4 P.3d 23 (Cal. 2000). IP193.

Holding that the trial court abused its discretion in excluding expert testimony on psychological factors affecting the accuracy of eyewitness testimony, the California Supreme Court noted:

"[Ninth Circuit] Judge Hufstedler has declared that [the] premise [that eyewitness identification is generally reliable is] 'at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable.' And with his characteristic vigor, [D.C. Circuit] Chief Judge Bazelon has called on the courts to face up to the reliability problems of eyewitness identification, to inform themselves of the results of scientific studies of those problems, and to allow juries access to that information in aid of their factfinding tasks." Id. at 717.

"In the dozen years since Judge Bazelon's appeal, empirical studies of the psychological factors affecting eyewitness identification have proliferated, and reports of their results have appeared at an ever-accelerating pace in the professional literature of the behavioral and social sciences. No less than five treatises on the topic have recently been published, citing and discussing literally scores of studies on the pitfalls of such identification. ... The consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice." Id. at 718.

"It is doubtless true that from personal experience and intuition all jurors know that an eyewitness identification can be mistaken, and also know the more obvious factors that can affect its accuracy, such as lighting, distance, and duration. It appears from the professional literature, however, that other factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most." Id. at 720.

State v. Marquez, 967 A. 2d 56 (Conn.), cert. denied, ___U.S.____, 130 S. Ct. 237, 175 L.Ed.2d 163 (2009). S19.

While declining to condition admissibility of eyewitness identifications on the use of particular police procedures, the Connecticut Supreme Court stated that "we believe that the scientific research and common sense suggest that the employment of double-blind procedures, whenever reasonably practicable" Id. at 85.

State v. Ledbetter, 881 A.2d 290 (Conn. 2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). IP54.

Under its supervisory authority, the Supreme Court of Connecticut mandated that trial judges instruct juries on the risks of misidentification in cases where the administrator of an identification procedure fails to tell the witness that the suspect may or may not be included in the array or the line-up.

"There is good empirical evidence to indicate that eyewitnesses tend to identify the person from the lineup who, in the opinion of the eyewitness, looks most like the

culprit relative to the other members of the lineup. ...' G. Wells, M. Small & S. Penrod et al., supra, 22 Law & Hum. Behav. 613. ... There are numerous empirical observations that lead to the conclusion that the relative judgment process exerts a significant influence in eyewitness identifications. ...

Research suggests that the administrator of an identification procedure may be able to reinforce the tendency to engage in the relative judgment process. ... Research also suggests that the administrator of an identification procedure may be able to negate, at least to some degree, the tendency to engage in the relative judgment process by warning that the perpetrator might or might not be present in the identification procedure." Id. at 316.

Benn v. United States, 978 A.2d 1257 (D.C. 2009).

The District of Columbia Court of Appeals held that the trial court erred in excluding eyewitness identification expert testimony:

"[A] theory, initially untested, unrecognized, and unsupported by evidence, over time might receive widespread recognition and the support of experts in the respective field of social science research. Courts have taken cognizance of such developments in social science, which has led to changes in the law of evidence. The state of social science research with respect to the reliability of eyewitness testimony has developed in recent years to the point where it can credibly be argued by defense counsel that it has reached that critical juncture. Whereas once we could only speculate as to the inaccuracy of an eyewitness identification, now there is published scientific research that questions its accuracy when made under certain conditions and exonerations, based on DNA evidence, that confirm what previously were only suspicions." Id. at 1278-79.

Brodes v. State, 614 S.E.2d 766 (Ga. 2005). IP70.

The Georgia Supreme Court held that trial courts should not inform jurors that they may consider a witness's level of certainty when instructing them on the factors that may be considered in deciding the reliability of an identification.

"In light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification, and the critical importance of accurate jury instructions as 'the lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict,' we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification." Id. at 771.

State v. Warren, 635 P.2d 1236 (Kan. 1981).

The Kansas Supreme Court concluded that an appropriate instruction on eyewitness identification should have been given in view of the factual circumstances:

"In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it. The trouble is that many judges have assumed that an 'eyeball' witness, who identifies the accused as the criminal, is the most reliable of witnesses, and, if there are any questions about the identification, the jurors, in their wisdom, are fully capable of determining the credibility of the witness without special instructions from the court. Yet cases of mistaken identification are not infrequent and the problem of misidentification has not been alleviated." Id. at 1241.

Bomas v. State, 987 A.2d 92 (Md. 2010).

The Maryland Court of Appeals held that expert testimony on eyewitness identification should be allowed if it would be of "real appreciable help" to the trier of fact. Id. at 101.

"We appreciate that scientific advances have revealed (and may continue to reveal) a novel or greater understanding of the mechanics of memory that may not be intuitive to a layperson. Thus, it is time to make clear that trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert

testimony in a particular case. Nonetheless, some of the factors of eyewitness identification are not beyond the ken of jurors. For example, the effects of stress or time are generally known to exacerbate memory loss and, barring a specific set of facts, do not require expert testimony for the layperson to understand them in the context of eyewitness testimony. In recognition of this, we believe, consistent with our past holdings, that a flexible standard that can properly gauge the state of the scientific art in relation to the specific facts of the case is best." Id. at 112.

"Indeed, it might be an appropriate time for the Maryland Criminal Pattern Jury Instruction Committee to evaluate whether its current rule on witnesses (MPJICr 3:10) should be modified in light of the studies about eyewitness testimony, and the scientific advances in this area." Id. at 113.

Commonwealth v. Silva-Santiago, 906 N.E.2d 299 (Mass. 2009). S18.

Sustaining the admission of an identification, the Massachusetts Supreme Judicial Court stated that in the future it would "expect" police to employ a protocol "making clear to the eyewitness, at a minimum that: he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight, head, and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification." Id. at 312.

Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997). IP125.

The Massachusetts Supreme Judicial Court held that jury instructions on eyewitness testimony may no longer include a statement that the jury may take into account the witness's report of certainty in determining accuracy.

"[T]he challenged instruction has merit in so far as it deals with the testimony of a witness who expressed doubt about the accuracy of her identification, whether that identification was made during her testimony, or at a 'showup' or lineup. Where, however, the witness has expressed great confidence in her identification of the defendant, the challenged instruction may pose a problem because ... there is significant doubt about whether there is any correlation between a witness's confidence in her identification and the accuracy of her recollection." Id. at 1121.

People v. LeGrand, 867 N.E.2d 374 (N.Y. 2007). IP71.

The New York Court of Appeals held that where the case turns on eyewitness identification and there is little or no corroborating evidence, it is an abuse of discretion to exclude expert testimony on (1) the lack of correlation between confidence and accuracy; (2) the effect of postevent information on accuracy; and (3) confidence malleability, as there was general acceptance of these phenomena. However, the court did not find general acceptance of the scientific findings concerning the effect of weapons focus.

"Although there may be risks associated with allowing an expert to apply research findings from experiments on the reliability of eyewitness identifications to real-life identifications, these findings -- produced through sound, generally accepted experimentation techniques and theories, published in scholarly journals and subjected to peer review -- have over the years gained acceptance within the scientific community." Id. at 377.

State v. Copeland, 226 S.W.3d 287 (Tenn. 2007). IP192.

The Tennessee Supreme Court discarded its per se exclusion of eyewitness identification expert testimony and held that it was an abuse of discretion to exclude testimony of an eyewitness identification expert concerning cross-racial identifications and confirming feedback.

"It is the educational training of the experts and empirical science behind the reliability of eyewitness testimony that persuades us to depart from the Coley rule

[of per se exclusion of expert testimony]. Times have changed. Today, many scholarly articles detail the extensive amount of behavioral science research in this area. There are literally hundreds of articles in scholarly, legal, and scientific journals on the subject of eyewitness testimony. ... Scientifically tested studies, subject to peer review, have identified legitimate areas of concern." Id. at 299 (citations omitted).

State v. Clopten, 223 P.3d 1103 (Utah 2009). IP195.

In holding that the trial court erred in excluding eyewitness expert testimony, the Utah Supreme Court found expert testimony more effective than jury instructions or cross-examination in conveying social science findings to jurors.

"The phenomena that eyewitness experts seek to explain have been reviewed and replicated many times in recent decades. In addition, this court recognized in State v. Rimmasch that it was appropriate to take judicial notice of 'general acceptance' of those principles in the community of researchers that specialize in the study of eyewitness identification." Id. at 1114.

"All of these factors were present here [stress, disguises, darkness, length of exposure, weapon focus, cross-racial identification, suggestive comments by the police during the identification procedure, witnesses filling in gaps in their memory with postevent information, and confidence inflation], and thorough testimony by a qualified expert as to their nature would have significantly assisted the jury in evaluating the accuracy of the State's most important witnesses." Id. at 1117.

State v. Long, 721 P.2d 483 (Utah 1986). IP126.

The Utah Supreme Court held that trial courts must give cautionary instructions on eyewitness identifications if requested by the defense.

"The literature is replete with empirical studies documenting the unreliability of eyewitness identification Yet despite judicial recognition of the documented unreliability of eyewitness identification, courts have been slow both to accord the problem the attention it deserves and to fashion ways of minimizing the potentially

unjust effects. The fault probably lies with the narrowness of the vision of most lawyers and judges. We tend to comfortably rely upon settled legal precedent and practice, especially when long-settled technical rules are concerned, and to largely ignore the teachings of other disciplines, especially when they contradict long-accepted legal notions." Id. at 491.

"Even though the United States Supreme Court has recognized the fundamental problem posed by eyewitness testimony, its much-quoted articulation of how one should approach the evaluation of the credibility and admissibility of eyewitness identification is a fair example of the lag between the assumptions embodied in the law and the findings of other disciplines. ... [S]everal of the criteria listed by the Court [in Manson] are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies [W]e conclude that in the area of eyewitness identification, the time has come for a more empirically sound approach." Id. at 491.

"[W]e do consider ourselves compelled by the overwhelming weight of the empirical research to take steps to alleviate the difficulties inherent in any use of eyewitness identification testimony" Id. at 492.

State v. Ramirez, 817 P.2d 774 (Utah 1991). IP198.

The Utah Supreme Court crafted its own criteria for assessing the reliability of suggestive identifications, finding "some of [the Manson] criteria to be scientifically unsound." Id. at 780.

The court excised from its reliability criteria the witness's level of certainty, and added the spontaneity and consistency of the identification, whether it was the product of suggestion, the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly (including whether the event was ordinary in the mind of the observer and whether there was a cross-racial identification). Id. at 781. See also State v. Hunt, 69 P.3d 571 (Kan. 2003), where the Kansas Supreme Court adopted the reliability criteria announced by the Utah Supreme Court. IP203.

State v. Dubose, 699 N.W.2d 582 (Wis. 2005). D91.

The Wisconsin Supreme Court held that evidence from an out-of-court show-up is not admissible unless, based on the totality of circumstances, the procedure was necessary.

"Over the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible for us to ignore. ... In light of such evidence, we recognize that our current approach to eyewitness identification has significant flaws." Id. at 591-92

Findings and Conclusions

The scientific evidence. The scientific evidence accumulated since Manson was decided in 1977 is voluminous, comprehensive and consistent. It is described in great detail in the testimony of the expert witnesses and reported in the hundreds of peer-reviewed studies and meta-analyses discussed in the record. The soundness and reliability of that evidence are indisputable. As Professor Monahan put it:

Eyewitness identification is the gold standard in terms of the applicability of social science research to the law. 29T 49.

I think that of all the substantive uses of social science in law, none has been more subjected to scientific scrutiny, none has used more valid research methods, none is more directly generalizable, and nowhere is there a larger body of research than in the area of eyewitness identification. 29T 39-40.

The science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the

influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications. The expert witnesses all confirmed and endorsed those findings. The wide recognition of the science by the social scientists, forensic experts, law enforcement agencies, law reform groups, legislatures and courts powerfully confirms its soundness. See State v. J.Q., 130 N.J. 554, 572 (1993); State v. Kelly, 97 N.J. 178, 210 (1984). The scientific findings, in short, are reliable, definitive and unquestionably fit for use in the courtroom.

It is equally clear, however, that the impact of the system and estimator variables on eyewitness reliability is only probabilistic (except perhaps for the impact of viewing distance, which, as discussed above at p. 45, can sometimes be subject to scientific proof). Experimental studies can isolate and study particular variables and assess their influence. But in the absence of DNA exculpation, neither science nor scientists can say, at least at present, whether a real-life identification is accurate or not, much less whether or how any system or estimator variable - or combination of variables -- may have affected a real-life identification. Nor can science calculate the degree of enhanced risk of misidentification arising from any given variable. The science has simply identified variables that have an unquantifiable capacity or

tendency to impair or contaminate memory and thus bring into question the reliability of a real-life eyewitness identification.

The State suggests that, for those reasons, the science offers little useful guidance to the judicial system. According to the State, the science surrounding eyewitness identification is not "particularly complex or counterintuitive" (S40 at 69); the only guidance jurors need is provided by voir dire, cross-examination, jury charges and their "life experience." S40 at 71. And, the State says, jurors can adequately educate each other: "Even if only 50% of jurors were aware [e.g.] that a confident witness may be incorrect, that means that six jurors have this information and presumably will share it during deliberation." Ibid.

The science does not deserve to be so dismissed. As explained by Professor Monahan, social science research is widely and productively used in the courts to assist in the resolution of empirical disputes by informing judges and juries about matters they might not know or correcting misimpressions they might have. 29T 33-34; IP53; IP87; IP88. The studies show that distinguishing accurate from inaccurate eyewitnesses is uncertain at best and that laypersons often have little knowledge and mistaken intuitions about eyewitness accuracy. There is no reason to sweep aside the teachings of science

concerning the influences at play as worthless to those who must assess an eyewitness identification. Whether the science confirms commonsense views or dispels preconceived but not necessarily valid intuitions, it can properly and usefully be considered by both judges and jurors in making their assessments of eyewitness reliability. See, e.g., State v. P.H., 178 N.J. 378, 395-98 (2004); Cromedy, 158 N.J. at 133.

The State offers other cautions about judicial reliance on the scientific findings: experimental studies do not capture real-world experience, certain questions have not been asked, certain issues have not been studied adequately or at all. Those doubts, which perhaps could be raised against all social science findings, are not supported by any proofs in the record. Indeed, they were expressly rejected by the expert witnesses, including the State's witness Professor Malpass, all of whom testified that the experimental results were sound and generalizable. In any event, even if indulged, the doubts raised by the State would call for consideration by judge and jury, not wholesale disregard of the science.

The State also questions whether mistaken identifications and wrongful convictions are a significant problem in New Jersey. Although it does not challenge the archival and field studies documenting the frequency of misidentification or the DNA exculpations demonstrating convictions based on mistaken

identifications, the State asserts that recent New Jersey experience is to the contrary. It is undisputed, however, that of five DNA exculpations recorded in New Jersey, three - including Cromedy - are associated with mistaken identifications. While it may be true -- indeed, one would hope -- that the promulgation of the Attorney General Guidelines in 2001 has resulted in fewer wrongful convictions, nothing in the record suggests that New Jersey has thereby solved, or even substantially alleviated, the problem of mistaken identifications. See Romero, 191 N.J. at 72-75.

In sum, the scientific findings can and should be used to assist judges and juries in the difficult task of assessing the reliability of eyewitness identifications.

Inadequacies and flaws of Manson/Madison. The Manson/Madison test does not provide that needed assistance. Designed to make reliability the "linchpin" of judicial examination of eyewitness testimony, Manson/Madison falls well short of attaining that goal, for it neither recognizes nor systematically accommodates the full range of influences shown by science to bear on the reliability of such testimony. Only bits and pieces of the science have found their way into the New Jersey courtrooms. See, e.g., Cromedy, 158 N.J. at 132-33 (mandating, in limited circumstances, a jury instruction concerning cross-racial identifications); Romero, 191 N.J. at 76

(mandating a jury instruction that witness confidence may not indicate reliability). Judges and juries alike are commonly left to make their reliability judgments with insufficient and often incorrect information and intuitions.

The specific inadequacies and flaws of the Manson/Madison test are patent:

- The first prong of the test addresses only suggestive police procedures, i.e., system variables. The existence and impact of estimator variables are ignored unless the court finds "unnecessary suggestion" on the part of state actors.
- Manson/Madison allows a defendant to challenge an identification only upon making an initial showing of unduly suggestive police procedures. That protocol fails to assure that a defendant is able to discover and expose all of the facts and factors that bear on the reliability of an identification.
- Judges must decide whether suggestive police procedures created a "very substantial likelihood of irreparable misidentification" and juries must make their reliability determinations "from the totality of the circumstances," but both are

largely left to their own intuitions to decide what is suggestive, what the impact of any perceived suggestion might be or what "circumstances" are relevant to or probative of reliability. The New Jersey model jury charges are appropriately cautionary but similarly lacking in specifics.

- The sole remedy available under Manson/Madison for improper police procedures is suppression of the proffered eyewitness identification. The available evidence indicates that judges rarely impose that draconian remedy: research of court and counsel reveals only one New Jersey appellate decision (unreported) that applies Manson/Madison to suppress an eyewitness identification. See State v. Harrell, 2006 WL 1028768 (N.J. Super. Ct. App. Div. Apr. 20, 2006). Because the test allows (indeed, invites, see Madison, 109 N.J. at 244-45) a finding of reliability notwithstanding impermissible suggestiveness, it appears to be of little value in weeding out unreliable identifications.
- Manson/Madison sets forth five factors that may be found by a court or jury to demonstrate

reliability notwithstanding a unfairly suggestive procedure, including the "level of certainty demonstrated" by the witness at the identification and the witness's self-reports of his or her degree of attention and opportunity to view the perpetrator at the time of the crime. But the studies uniformly show, and the experts unanimously agree, that confidence is not closely correlated to accuracy, that confidence is easily enhanced by suggestive procedures and post-identification feedback, and that witness self-reports concerning degree of attention and opportunity to view are inflated in tandem with inflated confidence. Thus the science shows that three of the five "reliability" factors are themselves unreliable, for they are strengthened by the suggestive conduct against which they are to be weighed.

The short answer to the Court's question whether the Manson/Madison test and procedures are "valid and appropriate in light of recent scientific and other evidence" is that they are not.

Remedies. The position of the State is that, notwithstanding the scientific findings, "[a]mple reason exists

to believe that jurors, after voir dire, testimony of prosecution and defense witnesses on direct- and cross-examination, arguments of counsel and jury instructions, can and do assess the shortcomings of identification testimony." S40 at 79. The State suggests but one possible supplementation to existing practice: where an uncorroborated identification of a stranger resulted from a lineup procedure at which the administrator indicated to the witness that a suspect was present or failed to warn that the perpetrator may not be in the array, the State acknowledges that the jury should be charged - if the defendant so requests - that the probability of a misidentification may be increased. S40 at 93.

The Public Defender and amicus ACDL propose that an admissibility hearing be required in every identification case, at which the State would bear the burden of establishing the admissibility of the identification. They urge that law enforcement officers be required to comply with "the minimum affirmative guidelines" incorporated in the Attorney General Guidelines and that failure to so comply "should result in a finding of suggestiveness and require suppression of the identification at issue." D114 at 85. As counsel explained, "we're advocating in essence [that] the Guidelines be turned into rules." 32T 20. The Public Defender and ACDL also propose that showup identifications be inadmissible absent a showing of

exigent circumstances requiring an immediate identification procedure.

Amicus Innocence Project abjures any such bright-line rule of suppression and instead urges that, among other procedures, the State be required to produce evidence, in a pretrial hearing at which the eyewitness would "ordinarily" testify, as to the integrity of the eyewitness's memory "just as if it were trace evidence"; that all of the system and estimator variables be open for exploration at that hearing; that to suppress an identification the defendant be required to prove "a substantial probability of a misidentification"; that, in the absence of suppression, the trial court give "appropriate jury instructions" derived from the scientific findings, including "carefully tailored and strongly worded" instructions about any failure by law enforcement to follow the Attorney General's Guideline procedures. IP237 at 18-19. The Public Defender and ACDL endorse that regimen as a less-favored alternative to their preferred remedy of bright-line mandatory suppression rules.

The State's argument that Manson/Madison should remain essentially unchanged appears to be bottomed on a view that the scientific findings over the past thirty years, being only probabilistic in nature, have nothing useful to contribute to judicial decision-making. That view contrasts, of course, with the State's endorsement of the science in the Attorney General

Guidelines, which expressly "incorporate more than 20 years of scientific research on memory and interview techniques." S20 at 1. The science should similarly be harnessed to assist the judicial system. There is no sound reason or policy why the judicial branch should disregard the scientific evidence, continue to focus exclusively on police suggestiveness, ignore other factors bearing on witness reliability, and seek no innovative means to inform judges and juries about the vagaries of eyewitness memory and identification.

The Public Defender and ACDL offer two rationales in support of a mandatory rule of suppression upon a showing of police suggestiveness. First, since courts and juries cannot reliably distinguish between accurate and inaccurate identifications, bright-line rules are the only effective means to suppress false identifications and reduce the incidence of wrongful convictions. Second, they urge, mandatory suppression would have the prophylactic benefit of deterring police resort to suggestive procedures.

It is indeed reasonable to believe that fewer wrongful convictions would occur if improper police procedures mandated suppression of identifications. However, because the actual impact of improper procedures on a given witness in a real-life setting is unknowable, it is equally likely that such a rule would also suppress an unknown number of accurate

identifications, particularly if suppression were mandated, as argued here, for any and every violation of the Attorney General Guidelines. Those benefits and costs of a bright-line suppression rule are not quantifiable. (Professor Penrod's analysis (apparently neither peer-reviewed nor published) showing just a 6% loss of accurate identifications is interesting, but highly speculative. See 20T 55-72.) Bright-line suppression rules thus avoid, rather than enhance, individual assessments of eyewitness reliability. Manson cited those very concerns in rejecting a mandatory suppression rule. 432 U.S. at 112-13, 97 S. Ct. at 2252, 53 L.Ed.2d at 152-53. Mandatory suppression rules have accordingly been imposed only in a few jurisdictions. See Commonwealth v. Austin, 657 N.E.2d 458 (Mass. 1995); Commonwealth v. Johnson, 650 N.E.2d 1257 (Mass. 1995) (IP197); People v. Adams, 423 N.E.2d 379 (N.Y. 1981); State v. Dubose, 699 N.W.2d 52 (Wis. 2005) (D91).

As for deterrence of improper police conduct, that is a worthy goal, but it does not seem to necessitate the remedy of mandatory suppression. If judges and juries are allowed to learn and apply the science concerning improper police conduct in their assessments of eyewitness testimony, their findings could be equally effective in discouraging law enforcement agencies from using improper procedures.

The remedy proposed by the Innocence Project, entitled "The Renovation of Manson: A Dynamic New Legal Architecture For Assessing and Regulating Eyewitness Evidence", is wide-ranging, multifaceted and highly detailed (see IP237); evaluation of its many elements is beyond the call of the present Report. But its design is sound: to maintain the Manson/Madison principle that reliability is the linchpin of the inquiry, to expand that inquiry to include all the variables unaddressed by Manson/Madison and to assure that judges and jurors are informed of and use the scientific findings that bear on reliability. Two core elements of that design are of critical importance.

First, it would be both appropriate and useful for the courts to handle eyewitness identifications in the same manner they handle physical trace evidence and scientific evidence, by placing at least an initial burden on the prosecution to produce, at a pretrial hearing, evidence of the reliability of the evidence. Such a procedure would broaden the reliability inquiry beyond police misconduct to evaluate memory as fragile, difficult to verify and subject to contamination from initial encoding to ultimate reporting. That would effectively set at naught both the Manson/Madison rule that reliability is to be examined only upon a prior showing of impermissible suggestion on the part of state actors and the Ortiz rule, 203 N.J. Super. at 522, that requires the defendant to make, and the prosecution

to overcome, an initial showing of such suggestion. But New Jersey law has long placed on the proponent of physical trace evidence and scientific evidence at least the initial burden to produce evidence in support of its reliability. See, e.g., State v. Chun, 194 N.J. 54, 92_(2008); State v. Harvey, 151 N.J. 117 (1997); State v. Morton, 155 N.J. 383, 446 (1998), cert. denied, 532 U.S. 931, 121 S.Ct. 1380, 149 L.Ed.2d 306 (2001); State v. Brunson, 132 N.J. 377, 393 (1993); State v. Brown, 99 N.J. Super. 22, 27 (App. Div.), certif. denied, 51 N.J. 468 (1968); N.J.R.E. 104 (a), (b). Application of those accepted evidentiary rules to eyewitness testimony would be scientifically proper and procedurally wise.

Second, it would be appropriate and useful for this Court to take all available steps to assure that judges and juries are informed of and guided by the scientific findings. New Jersey law is familiar and comfortable with what Professor Monahan calls "social framework" evidence: scientific research findings, accepted in the scientific community and generalizable to the question at issue, that judges and juries use to determine specific facts. See, e.g., Cromedy, 158 N.J. at 133 (requiring jury instruction concerning cross-racial identifications); Romero, 191 N.J. at 76 (requiring, in limited circumstances, jury instruction concerning confidence and accuracy of eyewitness identifications); cf. State v. J.Q., 130 N.J. 554,

581-82 (1993) (noting the "vital role" of expert testimony, in sexual abuse prosecution, concerning child sexual abuse accommodation syndrome); State v. Kelly, 97 N.J. 178, 210 (mandating admission of expert testimony concerning battered women's syndrome in domestic abuse prosecution). The judicial system should systematically and explicitly adopt and broadly use the scientific findings: in opinions setting standards and procedures for their use; in deciding admissibility issues; in promulgating jury instructions addressing specific variables; in broadening voir dire questioning; and in allowing appropriate expert testimony in all phases of the litigation.

Those two procedures - mandatory pretrial hearings to evaluate eyewitness identifications as trace evidence and judicial adoption and implementation of the scientific findings - would remedy the flaws and inadequacies of Manson/Madison and would appropriately expand and improve the assessment of eyewitness reliability by judges and jurors alike.

Respectfully submitted,

Geoffrey Gaulkin, P.J.A.D.
(retired and temporarily assigned
on recall), Special Master

Dated: June 18, 2010

GUIDE TO THE RECORD

The entire record of the remand proceedings is contained on a single DVD. The folders and subfolders on the DVD are as follows:

Report of the Special Master

Proposed findings submitted by parties.

Note that the Innocence Project's proposed findings are two separate documents, one for the science, one for the law.

Exhibits

Subfolder labeled "Exhibits (all parties by number)" contains all exhibits submitted by all parties, organized by party and exhibit number and, within each party's submissions, by exhibit number. Note that all "D" exhibits were submitted on behalf of both defendant and amicus Association of Criminal Defense Lawyers of New Jersey.

Each party's list of exhibits.

Subfolder labeled "Exhibits (by topic)" contains all of the scientific articles submitted by the Innocence Project and many but not all submitted by defendant/ACDLNJ and the State, organized by topic. Within this folder is IP Exhibit #224, a topical list of these exhibits. Innocence Project exhibits can be searched for specific words or phrases in the document.

A "Cross Listings of Exhibits" document, listing exhibits submitted by more than one party.

Transcripts

Subfolder containing all transcripts organized by date.

Subfolder containing the transcripts organized by witness.

Note that witnesses Wells, Penrod and Epstein used PowerPoint slides in testifying, which are marked as exhibits IP22a (Wells), D4 (Penrod) and D99 (Epstein).

A "Transcript List," a one-page reference sheet containing the transcript citations with its corresponding witness, date, and time. All transcripts can be searched for specific words or phrases.

Subfolder containing transcripts with clarifying "comments" for Innocence Project witnesses Wells and Doyle. These additional transcripts include clarifying comments regarding the specific PowerPoint slides and exhibits referenced in the testimony. These clarifications are in the form of small, lined yellow comment boxes that appear next to where the slide or exhibit is referred to in the transcript. To view the "comment," simply place the cursor over the comment and/or click on it.

Meta-Analytic Reviews

Subfolder containing all of the meta-analytic reviews.

Meta-analytic review list.

Courts' Responses to Social Science

Subfolder containing documents related to the Innocence Project memo on courts response to the social science research.

Innocence Project memo on courts' responses to the social science.

The State's fifty-state survey.

National Response to Social Science

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Justices Mull Having Expert Testimony About Eyewitnesses

If Pennsylvania allows expert witnesses to offer opinion on circumstances where research shows that eyewitnesses may be unreliable, investigators would have to take extra steps to ensure that they have adequate evidence to convict a suspect beyond a reasonable doubt, state Supreme Court Justice Seamus P. McCaffery said during oral argument Wednesday.

Amaris Elliott-Engel

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If Pennsylvania allows expert witnesses to offer opinion on circumstances where research shows that eyewitnesses may be unreliable, investigators would have to take extra steps to ensure that they have adequate evidence to convict a suspect beyond a reasonable doubt, state Supreme Court Justice Seamus P. McCaffery said during oral argument Wednesday.

McCaffery, a former homicide detective, said that no investigator wants uncertainty that he or she may have arrested the wrong person.

The state Supreme Court is being asked to allow trial courts to permit expert scientific testimony on human memory and perception in criminal cases involving eyewitness testimony.

According to a brief from the Defender Association of Philadelphia, research has shown that eyewitnesses are especially likely to be inaccurate in four circumstances: when witnesses to a crime focus on a weapon instead of on their assailant; when witnesses are making identifications of assailants of another race; when witnesses are making identifications after being under the high stress and trauma of a crime; and when investigating police officers fail to advise eyewitnesses that a perpetrator may or may not be in a police lineup or photo array.

The brief was signed by Nyssa Taylor, Karl Baker and Ellen T. Greenlee of the Defender Association.

"Pennsylvania should no longer preclude the defense or the prosecution from introducing scientifically

sound, expert testimony as to how the mind functions. ... Such testimony will assist the ordinary juror in understanding and evaluating eyewitness identifications and should no longer be considered an inappropriate comment on a witness' credibility," the Defender Association's brief said.

Amicus briefs were filed in favor of the Defender Association's position by the Innocence Network, the Pennsylvania Innocence Project, the American Psychological Association and the Pennsylvania Association of Criminal Defense Lawyers.

Prosecutors Peter Carr, Hugh J. Burns Jr., Ronald Eisenberg, Edward F. McCann Jr. and R. Seth Williams of the Philadelphia District Attorney's Office countered in their brief that "this court has held in no fewer than three prior cases that expert testimony on the reliability of eyewitness identification is unfairly prejudicial, and thus inadmissible, because it tends to give the expert an unwanted appearance of authority on the subject of witness credibility. ... An analysis of every psychological study conducted on this issue shows that expert testimony on eyewitness reliability is more than twice as likely to cause unfair prejudice to the prosecution as it is to fairly help the jury."

Allowing such expert testimony would be especially key in cases in which there is not any other physical evidence and in which the crime victim and the defendant do not know each other, Taylor argued in court Wednesday.

Juries have "overbelief and overestimation of the reliability of eyewitness evidence," Taylor said.

Pennsylvania is one of four states that prohibit the testimony of experts about the reliability of eyewitness testimony altogether, Taylor said. Louisiana, Kansas and Nebraska are the other states, the Defender Association's brief said.

Pennsylvania Chief Justice Ronald D. Castille and Justices Debra Todd, Thomas G. Saylor and J. Michael Eakin all asked questions about drawing a distinction between experts testifying about the circumstances in which research shows eyewitness testimony is less reliable and experts testifying in a fashion that directly impugns the credibility of eyewitnesses to alleged crimes.

Taylor argued that expert testimony would not be commentary on the "eyewitness' ability or disability to observe" but instead would be summarizing the science. Otherwise, the expert would be invading the province of the jury, she said. Trial judges should be the gatekeepers on whether such expert testimony would be helpful to a jury, she said.

In contrast, Carr of the Philadelphia District Attorney's Office argued, "I do see a very significant evil" to criminal prosecution if such expert testimony were to be allowed.

There would not be an absence of wrongful convictions but an increase of wrongful acquittals, Carr said.

Carr made his argument in response to a question by Justice Max Baer if, as a matter of policy, any "evil" would be done if the blanket ban were to be lifted on allowing experts on eyewitnesses to testify.

If an expert testifies that, as a class, eyewitnesses are less reliable in certain circumstances, juries won't make any meaningful distinction between the generalities of an expert's testimony about the lack of reliability of eyewitnesses in certain circumstances and the testimony of the specific eyewitnesses in that criminal case, Carr said.

When Saylor asked Taylor if such expert testimony should be allowed in cases in which eyewitnesses were not threatened by a gun or were not identifying a perpetrator of another race, Taylor responded that in her six-and-a-half years as a trial lawyer that there have only a few cases in which she would have liked to be able to call an expert about factors that can make eyewitness evidence unreliable.

Later in the argument, Taylor pointed out that, in a North Dakota case, the prosecution was able to call an

expert to testify that eyewitness testimony identifying a defendant was more reliable because it did not involve the factors of high stress and the use of a weapon.

Other jurisdictions that do allow such expert testimony have different rules of evidence, Baer said. Other jurisdictions only require that expert testimony be helpful to jurors, while Pennsylvania requires that experts have specific knowledge beyond what jurors would know, Baer said.

When Baer asked if the rule requested by the Defender Association and amici would require changing Pennsylvania rules of evidence, Taylor said it would not.

Only Justice Joan Orie Melvin did not ask questions during the oral arguments in *Commonwealth v. Walker*.

Benjamin Walker was convicted of the 2005 robbery of two University of Pennsylvania students but acquitted of the 2005 robbery of three Drexel University students, according to court papers.

Walker was convicted despite the fact that a female crime victim "had never seen Mr. Walker before, despite the fact that she was white and he was black, despite the fact that she had consumed three drinks the evening the robbery occurred, despite the fact this occurred in the middle of the night, despite the fact that she described her attacker as 5-foot-9 to 5-foot-10 and Mr. Walker is only 5-foot-6, despite the fact that her attacker almost immediately struck her in the head and she fell to the ground cradling her head and covering her face," the Defender Association's brief said.

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Time for High Court to Update Eyewitness Identification Protocols

BY THE YL EDITORIAL BOARD

Special to the Legal

A person is walking down the street alone at night and is suddenly attacked by a stranger and robbed of their personal belongings. An iPhone, some cash and jewelry are all taken during an encounter that lasts only a matter of seconds. The police are quick to respond and get a description from the victim. They search the area for the perpetrator and find a man matching the description of the assailant. The alleged criminal is brought back in handcuffs to the location where the victim is still being interviewed by the police. The victim identifies the man in custody as the person who jumped him and took his belongings. The man is quickly arrested and prosecution begun. There's only one problem: The iPhone, cash and jewelry are never recovered and there is no evidence other than the eyewitness identification to connect the defendant to the crime. The man is convicted and sent to prison based solely on the eyewitness testimony of the victim.

While this scenario is not based on a real case, it is illustrative of the significant problem that eyewitness identification plays in the conviction of criminal defendants. Every

year, more than 75,000 eyewitnesses identify suspects in criminal investigations. Of those identifications, a voluminous amount of studies suggest that about a third are mistaken. These flawed identifications lead to wrongful convictions. Of the first 250 convictions that were overturned because after-acquired DNA evidence exonerated the convict, 190 involved eyewitness identifications that were incorrect. A recent book, "Convicting the Innocent" written by Brandon L. Garrett, a law professor at the University of Virginia, documents these first 190 wrongful convictions and outlines the major problems with eyewitness identifications.

As far back as the late 1800s, experts have known that eyewitness identification is susceptible to error, and that scientific study should guide reforms for identification procedures. In 1907, Hugo Munsterberg published "On the Witness Stand," in which he questioned the reliability of eyewitness identification. When Yale law professor Edwin Borchard studied 65 wrongful convictions for his pioneering 1932 book, "Convicting the Innocent," he found that eyewitness misidentification was the leading cause of wrongful convictions. Since then, hundreds of scientific studies (particularly in the last three decades) have affirmed that eyewitness

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identification is often inaccurate; and that it can be made more accurate by implementing specific identification reforms.

The most common problems with mistaken eyewitness identification include that witnesses may feel pressured to identify a perpetrator even when that person is not

in the lineup, or that witnesses read cues from the official guiding them through the identification procedure as to who should be identified as the perpetrator. In addition to the issue of witnesses making an innocent mistake because of coaching, whether intended or unintended, is the quality of the identification made, including the environmental conditions under which the witness observed the perpetrator, how much time the witness had to observe the perpetrator and the witness' own state of being, including any intoxication or drug influence, both at the time of seeing the perpetrator or making the identification. Once the problems with eyewitness identification are acknowledged, protocols tailored to address them can and have been developed.

The New Jersey Supreme Court recently acknowledged a "troubling lack of reliability in eyewitness identifications," and issued sweeping new rules making it easier for defendants to challenge eyewitness identifications in court. The court's chief justice, Stuart J. Rabner, wrote in the unanimous 134-page opinion in *State v. Henderson* (and a companion case *State v. Chen*) that the test for reliability of eyewitness testimony as set out 34 years ago by the U.S. Supreme Court

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in *Manson v. Brathwaite* should be revised.

The court's decision stems from the 2004 conviction of Larry Henderson, a Camden man who received an 11-year prison sentence for reckless manslaughter and weapons possession related to a fatal shooting in January 2003. He appealed the photo lineup procedure because officers failed to follow the New Jersey Attorney General's Guidelines, issued in 2001, for conducting identification procedures. The appeals court agreed and ordered a new hearing on the admissibility of the photographic identification of Henderson. Before that could occur, the state appealed, and the New Jersey Supreme Court decided that an extensive inquiry into witness identification procedures currently used by law enforcement was necessary.

The New Jersey Supreme Court appointed a special master to review the legal standard for the admissibility of eyewitness testimony known as the "*Manson test*," and fully embraced by 48 out of 50 states, including New Jersey in 1988 in *State v. Madison*. In addition to the parties to the litigation, the court invited the Innocence Project and the Association of Criminal Defense Lawyers of New Jersey to participate in an inquiry by the special master who considered over 200 scientific studies and heard from some of the nation's most respected experts on eyewitness identification before issuing findings to the court in June 2010.

In the *Henderson* case, the court found that

the detectives' participation in the identification was suggestive, even though they merely encouraged the witness to pick a photo and did not try to influence his choice. As the court explained, just by urging the witness to make an identification, the detectives intimated that there was an identification to be made. This could have influenced the witness to make an identification, even though he had been instructed that the lineup might not include the perpetrator. While the defendant had already received a pretrial hearing, the court concluded that he was entitled to an expanded hearing considering all of the relevant variables, and not just the five factors previously recognized as affecting reliability. In particular, the court noted that the hearing "should consider [the witness's] drug and alcohol use immediately before the confrontation, weapon focus and lighting."

The court's decision requires judges to more thoroughly scrutinize the police identification procedures and many other variables that affect an eyewitness identification. The court noted that this more extensive scrutiny will require enhanced jury instructions on factors that increase the risk of misidentification. These factors include:

- Whether the lineup procedure was administered "double blind," meaning that the officer who administers the lineup is unaware who the suspect is and the witness is told that the officer doesn't know.
- Whether the witness had multiple opportunities to view the same person, which would make it more likely for the witness to choose this person as the suspect.
- Whether the witness was under a high level of stress.

• Whether a weapon was used, especially if the crime was of short duration.

• How much time the witness had to observe the event.

• How far the witness was from the perpetrator and what the lighting conditions were.

• Whether the case involved cross-racial identification.

The New Jersey Supreme Court has taken the first major step in ensuring that innocent people are not wrongly convicted based solely on eyewitness identification. As hundreds of scientific studies have demonstrated over the past 30 years, eyewitness evidence is many times wrong and unreliable.

The U.S. Supreme Court is about to take up the issue on its own. In November, the Supreme Court will hear argument in the case of *Perry v. New Hampshire*. It is time that the Supreme Court recognizes the large body of research that has been generated on the issue since its holding in *Manson v. Brathwaite* and require new protocols, similar to New Jersey's, to ensure that defendants are not wrongly convicted based solely on the unreliable memory of a victim who may have misremembered what he saw when under the stress of being a victim of a crime. Juries need to be instructed that eyewitness evidence can be unreliable and take this into consideration when they weigh the evidence.

Remember that our system of criminal justice is built on the belief that it is better to let 100 guilty persons go free than to send one innocent person to jail. It is time that our society remembers this belief and institutes the appropriate safeguards when it comes to eyewitness identifications. •