

# THE GREAT ENGINE THAT COULDN'T: SCIENCE, MISTAKEN IDENTIFICATIONS, AND THE LIMITS OF CROSS-EXAMINATION

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## I. INTRODUCTION

*Cross-examination is the “greatest legal engine ever  
invented for the discovery of truth.”<sup>1</sup>*

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*“I think I can, I think I can . . . .”<sup>2</sup>*

Wigmore’s oft-cited paean to cross-examination is the hallmark of the trial process: cross-examination will winnow out truth from falsehood.<sup>3</sup> It derives from the belief that confronting (i.e., challenging) witnesses with leading questions will disclose testimonial and character weaknesses,<sup>4</sup> which is at the root of the

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\* © 2007, Jules Epstein. All rights reserved. Associate Professor of Law, Widener School of Law (Delaware). This Article was generated by involvement in mistaken identification cases as a defense lawyer and from work as conference planning committee member and panel moderator at the 2005 National Conference on Science, Technology and the Law. The Author thanks Professor John Nivala of Widener School of Law (Delaware) for his critical insights.

1. *Cal. v. Green*, 399 U.S. 149, 158 (1970) (quoting John H. Wigmore, 5 *Evidence* § 1367, at 29 (3d ed., Little, Brown & Co. 1940)).

2. Wally Piper, *The Little Engine That Could* (Philomel 2005).

3. See Wigmore, *supra* n. 1, at § 1367. A March 11, 2006 LEXIS search for the inquiry “greatest w/2 legal w/2 engine w/3 invented w/5 discovery w/2 truth” found 411 “hits” in the state and federal court database.

4. Wigmore’s emphasis on the power of cross-examination to reveal the truth has been critical to numerous confrontation right holdings. See e.g. *Lilly v. Va.*, 527 U.S. 116 (1999) (excluding accomplice’s declaration against penal interest under Confrontation Clause analysis, relying in part on the lack of cross-examination); *Md. v. Craig*, 497 U.S. 836 (1990) (emphasizing cross-examination as a critical component of the right to visually confront, and be confronted by, one’s accuser); *Perry v. Leeke*, 488 U.S. 272, 282 (1989) (upholding denial of right of testifying defendant to consult with counsel during a brief recess because “it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct

Anglo-American adversarial system,<sup>5</sup> at least since the mid-eighteenth century in England.<sup>6</sup> Courts have specifically focused upon cross-examination as a sufficient tool for addressing and uncovering mistaken identifications. In *Watkins v. Sowders*,<sup>7</sup> the Court found identification testimony no different from other categories of proof and cited Wigmore's dictum in holding that cross-examination would suffice to establish or debunk the reliability of the evidence as follows:

[W]hile identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart – the 'integrity' – of the adversary process.

Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification – including reference to

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examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney"); *U.S. v. Owens*, 484 U.S. 554, 559 (1988) (explaining that cross-examination suffices to satisfy the Constitutional guarantee of confrontation even when the witness has no current memory of the event and can only be questioned about his prior statements); *Green*, 399 U.S. at 152 (right to admit prior statements of an uncooperative witness upheld because witness is subject to cross-examination).

5. *Perry*, 488 U.S. at 283 n. 7. In *Perry*, the Court endorsed the concurring opinion in *U.S. v. DiLapi*, 651 F.2d 140, 150–151 (2d Cir. 1981) (Mishler, J., concurring) as to its historical assessment of the importance of cross-examination as follows:

The age-old tool for ferreting out truth in the trial process is the right to cross-examination. "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." The importance of cross-examination to the English judicial system, and its continuing importance since the inception of our judicial system in testing the facts offered by the defendant on direct . . . suggests that the right to assistance of counsel did not include the right to have counsel's advice on cross-examination.

*Id.* (internal citations omitted).

6. John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford U. Press 2003). Professor Langbein dates the origins of approved defense-counsel representation in non-treason cases to the 1730s. *Id.* at 107. Professor Langbein's analysis of why cross-examination by defense counsel became necessary, as a response to the risks of fraudulent evidence and corrupt witnesses, is discussed *infra* notes 165–173 and accompanying text.

7. 449 U.S. 341, 347 (1981).

both any suggestibility in the identification procedure and any countervailing testimony such as alibi.<sup>8</sup>

At least two flaws are manifest in the *Watkins* analysis. Given the significant incidence of mistaken-identification convictions,<sup>9</sup> it is not clear if one can claim that such testimony does not go to the integrity of the adversarial process. Several decades of scientific study<sup>10</sup> raise the question whether cross-examination can in fact secure reliable verdicts in cases of mistaken identification.

This Article posits a substantial divide between scientific findings and the courtroom practice in cases where mistaken identification is alleged. After tracing the chronicity and significance of the phenomenon of mistaken identification, this Article reviews the science of perception and memory and the mixed and decidedly inadequate response of the courts to that body of knowledge and concludes with an assessment of the limits of cross-examination and the need for sophisticated advocacy in cases where eyewitness testimony is at the core of the prosecution theory of guilt. Put most simply, the efficacy of the “great engine” is overstated, and it is less likely to achieve its stated purpose than the little engine that could.

## II. THE RECURRING AND SUBSTANTIAL PROBLEM OF MISTAKEN-IDENTIFICATION CONVICTIONS

It is indisputable that the phenomenon of mistaken identification has gained significance. This has resulted, in significant part, from the phenomenon of DNA exoneration. With the particular weight accorded to freeing the innocent from a sentence of death, and the scientific conclusiveness of the proof of innocence, the DNA exonerations have also led to a retrospective assessment of “what went wrong.” “What went wrong” in a substantial proportion of those cases was a reliance on eyewitness-identification testimony. According to the Innocence Project, sixty-one of the first seventy DNA-exoneration cases involved mistaken-

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8. *Id.* at 348 (internal quotations omitted).

9. *Infra* pt. II.

10. *Infra* pt. III.

identification testimony.<sup>11</sup> As the exonerations grew in number, the role of mistaken-identification testimony retained its prominence. A study of the first 110 exonerations led the Associated Press to report that “[n]early two-thirds were convicted with mistaken eyewitness testimony from victims and bystanders.”<sup>12</sup> The Innocence Project found that mistaken eyewitness identification played a role in the vast majority of the more than 150 mistaken convictions in the United States overturned by DNA evidence.<sup>13</sup>

These numbers, disturbing in and of themselves, do not establish the prevalence of such errors, which can only be the subject of conjecture and projection. Estimates by professors Brian Cutler and Steven Penrod put the error rate at close to 0.5 percent, or 4,500 of the one million convictions a year.<sup>14</sup> Although this thesis is unprovable, it gains some support in the fact of the chronicity of the mistaken-identification-conviction phenomenon. For the century in which this has been studied, reports consistently show that mistaken identifications plague the criminal justice system.<sup>15</sup> An early twentieth century<sup>16</sup> study of wrongful con-

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11. Innocence Project, *Causes and Remedies*, <http://www.innocenceproject.org/causes/index.php> (accessed Sept. 7, 2006). Founded in 1992, the Innocence Project is an organization that assists convicted individuals who could be exonerated by DNA testing. “The Innocence Project’s mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.” To date 205 prisoners have been proven innocent through the work of the organization. (<http://www.innocenceproject.org/about/Mission-Statement.php>).

12. Gary L. Wells, *An Analysis of the 100+ DNA Exoneration Cases*, <http://www.psychology.iastate.edu/faculty/gwells/DNAcasesAPstudy.htm> (accessed Sept. 7, 2006).

13. Innocence Project, *Improving Eyewitness Identification Procedures*, [http://www.innocenceproject.org/docs/Eyewitness\\_ID\\_FactSheet.pdf](http://www.innocenceproject.org/docs/Eyewitness_ID_FactSheet.pdf) (accessed Sept. 7, 2006). As of August 11, 2005, the reported number of DNA exonerations was 161. William Fisher, *DNA Crusaders*, <http://www.zmag.org/content/showarticle.cfm?ItemID=8498> (Aug. 13, 2005).

14. Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 7–8 (Cambridge U. Press 1995). A non-scientific approach suggested a much higher rate. Edward Radin, *The Innocents* 9 (Tower Publications 1964). Edward Radin referenced a federal judge who estimated a five percent error rate in criminal trials.

15. See *infra* n. 35 and accompanying text (summarizing the historic confirmation of the recurrence of mistaken identifications); Jules Epstein, *Tri-State Vagaries: The Varying Responses of Delaware, New Jersey, and Pennsylvania to the Phenomenon of Mistaken Identifications*, 12 *Widener L. Rev.* 327 (2006). This text draws heavily from *Tri-State Vagaries* and is used with permission from Widener Law Review.

16. There are reports of even earlier studies of wrongful convictions. It is contended that

victions found that forty-four defendants out of a case study of sixty-five exonerated individuals were convicted primarily on the basis of mistaken-identification evidence.<sup>17</sup> In 1912, Edwin Borchard, then a Law Librarian of Congress, authored a paper endorsing indemnification for the wrongly convicted.<sup>18</sup> Building upon his earlier work, in 1932 Borchard published, as a Yale law professor, his principal contribution to the field, *Convicting the Innocent*,<sup>19</sup> which documented sixty-five cases of wrongful conviction. Beyond detailing each case<sup>20</sup> and the subsequent exoneration, Borchard theorized the following as to the problem of identification evidence:

Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence . . . . 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 eyewitness 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 . . . is indicated by the fact that in eight of these cases the wrongfully accused person

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the first publication in the U.S. that documented cases of wrongful conviction was a 550-page report in the early 1900s by Nashville attorney, K. T. McConnico. The document detailed cases of innocent people executed prior to 1901. Relying partly on Mr. McConnico's research, a Memphis merchant named Duke Bowers prepared a 97-page memorandum in 1915 titled, *Life Imprisonment vs. The Death Penalty*.

Hans Sherrer, *Why Justice Denied Magazine Is Important: A Historical Perspective*, <http://www.justicedenied.org/jdhistory.html> (Apr. 26, 2000). Sherrer states that the McConnico report is unavailable and that one copy of Bowers' paper is in print. *Id.*

17. Edwin M. Borchard, *Convicting the Innocent*, 13–15 (Garden City Publ. Co. 1932).

18. Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. Rev. 2 (1941).

19. Borchard, *supra* n. 17.

20. In one case, Borchard showed how seventeen witnesses identified the same (and wrong) person as the passer of bad checks. When the real check-fraud perpetrator was caught, it was found that he did not resemble the wrongly accused person. The prosecutor in the case subsequently wrote,

As the two men stood at the bar I wondered how so many persons could have sworn that the innocent man was the one that had cashed the bad checks. The two men were as dissimilar in appearance as could be. There was [a] several inch[ ] difference in height and there wasn't a similarity about them.

*Id.* at 5.

and the really guilty criminal bore not the slightest resemblance to each other . . . .<sup>21</sup>

Judge Jerome Frank echoed and elaborated on Borchard's work in the 1950s. In *Not Guilty*,<sup>22</sup> Judge Frank and his co-authors studied thirty-six cases of wrongful conviction. Seeking a cause for mistaken-identification convictions, Frank posited the risk of error at each of three stages: (1) the perception of events at the time of the crime; (2) the retention in the witness' memory; and (3) the reporting of the event in court.<sup>23</sup> He then concluded that "[t]he great body of honest testimony is subjectively accurate but objectively false . . . . [O]bservation is a complex affair; it is mingled with inferences, judgments [and] interpretations . . . ." What is lost from memory is often replaced by products of the imagination and witnesses who are perfectly honest are in danger of turning inferences into recollections.<sup>24</sup> Studies continued, including the 1987 review of cases of convicted persons subsequently proved to be innocent.<sup>25</sup> Again, researchers concluded that mistaken eyewitness testimony was a substantial causative factor as follows:

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.<sup>26</sup>

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21. *Id.* at 367 (footnote omitted).

22. Jerome Frank & Barbara Frank, *Not Guilty* (Doubleday & Co. 1957).

23. *Id.* at 209.

24. *Id.* at 210–213. This work was echoed in that of Radin's 1964 *The Innocents*, discussed *supra* note 14, which studied more than seventy cases of wrongful conviction and concluded that "mistaken identification is one of the leading causes of miscarriages of justice in the United States." Radin, *supra* n. 14, at 85. Radin emphasized that the mistaken identifications often proved to involve innocent defendants for whom there was a "complete lack of any resemblance" with the actual perpetrator. *Id.* at 86.

25. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21 (1987).

26. *Id.* at 60.

Any doubt as to the persistence of mistaken identification as a cause of wrongful conviction can be set aside by a series of government studies confirming the same. The year 1996 saw the publication of *Convicted by Juries, Exonerated by Science*<sup>27</sup> as well as government acknowledgment of the frailties of eyewitness identification. This study of the importance of DNA evidence as a criminal adjudication tool made unquestionable the claim that eyewitness-identification testimony is flawed. As Professor Imwinkelried's foreword acknowledged,

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.<sup>28</sup>

These findings are echoed in Illinois' 2002 *Report of the Commission on Capital Punishment*,<sup>29</sup> which concluded from its study of wrongful convictions that "[t]here were also several cases where there was a question about the viability or reliability of eyewitness evidence."<sup>30</sup> Finally, the 2005 Canadian Department of Justice *Report of the Working Group on the Prevention of Miscarriages of Justice* contains an accumulation of scholarly and government studies.<sup>31</sup> Reviewing a century of studies in the United States and internationally, the report concludes that there is a "stark reality, and not merely a belief, that wrongful convictions have occurred on a significant scale."<sup>32</sup> In the report's section on

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27. Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* (Nat'l. Inst. of Just. June 1996) (available at <http://www.ncjrs.gov/txtfiles/dnaevid.pdf>).

28. *Id.* at xiv. The following commentary by study participants (and prosecutors) George Clarke and Catherine Stephenson acknowledged as much:

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.

*Id.* at xxiii–xxiv (emphasis in original).

29. Comm'n. on Capital Punishment, *Capital Punishment: Report of the Commission on Capital Punishment* (Apr. 2002) (available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html)).

30. *Id.* at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/chapter\\_01.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_01.pdf) (Apr. 15, 2002).

31. *FPT Heads of Prosecutions Committee Report of the Working Group on the Prevention of Miscarriages of Justice*, <http://www.justice.gc.ca/en/dept/pub/hop/toc.html> (accessed March 25, 2007).

32. *Id.* at § 2 (emphasis in original).

“Eyewitness Identification and Testimony,” the Department of Justice concludes that “[t]he recent commissions of inquiry have determined that misidentification by eyewitnesses has been the foundation for miscarriages of justice.”<sup>33</sup>

One set of statistics from the National Institute of Justice study shows the potential for an extraordinarily high incidence of mistaken identifications—the absolute exoneration of sex-crimes suspects as determined by DNA testing. As the report explains,

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.<sup>34</sup>

Even assuming that *no* inconclusive result corresponded with actual innocence and if only half of the suspects were the subject of police scrutiny because of identifications, the result leaves an astounding ten percent error rate.

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33. *Id.* at § 5.1.

34. Connors, *supra* n. 27.



### III. THE SCIENCE OF MEMORY AND PERCEPTION AND THE PHENOMENON OF MISTAKEN IDENTIFICATION<sup>35</sup>

Although initiated nearly a century ago,<sup>36</sup> the science of perception and memory as it applies to eyewitness identification came into its own after 1970.<sup>37</sup> The initial prominent researcher/popularizer was Robert Buckhout, a professor who gained notoriety when he testified on behalf of Angela Davis when she was charged with participating in a courthouse shoot-out.<sup>38</sup>

Buckhout's testimony in the Davis trial effectively initiated the litigation of the admissibility of expert testimony in mistaken-identification cases.<sup>39</sup> As this continued over a thirty-year period,

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35. Much of the summary of the science of perception and memory set forth here was developed first by this Author. Epstein, *supra* n. 15. It has been updated to report recent developments in science and law. This text draws heavily from *Tri-State Vagaries* and is used with permission from *Widener Law Review*.

36. Hugo Münsterberg, *On the Witness Stand* 52–53 (Clark Boardman Co., Ltd. 1923). The first serious attempt at developing and publicizing a science of perception, memory, and recall was made in the early twentieth century. Münsterberg's book detailed studies of witness observation and recall, including one where a convention of jurists, psychologists, and physicians was interrupted when a clown and a "negro" with a revolver entered the room. *Id.* at 53. The two intruders shouted; one fell to the ground and the other jumped atop him; a shot was heard, and both ran from the room. *Id.* at 53. Asked by the meeting's president to write down what each had seen because the matter would likely go to the courts, the attendees' reports contained errors of substantial dimension in the following two categories: critical facts were omitted *and*

there were only six among the forty which did not contain positively wrong statements; in twenty-four papers up to ten [percent] of the statements were free inventions, and in ten answers—that is, in one-fourth of the papers,—more than ten [percent] of the statements were absolutely false . . . [Although the "negro" had nothing on his head, other than the four who perceived this correctly, the others] gave him a derby, or a high hat, and so on. In addition to this, a red suit, a brown one, a striped one, . . . and similar costumes were invented for him. He wore in reality white trousers and a black jacket with a large red necktie.

*Id.* at 52–53. Münsterberg also reported studies showing no correlation between a witness' declared level of certainty and his or her accuracy. *Id.* at 55.

This Author has found references to one earlier instance of such research. It is reported that in 1896, "Albert Von Schrenk-Notzing testified at the trial of a man accused of murdering three women. Drawing on research into memory and suggestibility he argued that [pretrial] publicity meant that witnesses could not distinguish between what they actually saw and what had been reported in the press." *History of Forensic Psychology* Pt. I, <http://www.all-about-forensic-psychology.com/history-of-forensic-psychology-part-one.html> (accessed Sept. 7, 2006).

37. Münsterberg, *supra* n. 36, at 55.

38. James M. Doyle, *True Witness* 53–59 (Palgrave MacMillan 2005).

39. See Fed. R. Evid. 702 (outlining the circumstances where expert testimony is per-

the study of eyewitness perception, memory, and recall exploded. In a field with many important contributors, two of the most important were professors Elizabeth Loftus and Gary Wells.

Loftus' contributions came in both the research laboratory and the courtroom. In the former, her studies examined and confirmed various weaknesses in perception and memory, such as "weapon focus,"<sup>40</sup> the phenomenon of a crime witness or victim unconsciously directing his or her attention away from the perpetrator's face and toward an actual or perceived weapon. Professor Loftus also brought attention and scientific rectitude to assessing post-crime activity and its impact on degrading memory and demonstrated in particular the impact of post-event questioning on altering memory.<sup>41</sup>

Wells took the study to a new dimension—one remedial in nature. He categorized identification testimony and the mistakes such witnesses make as the result of either *estimator* or *system* variables. The former are those variables that affect the individual perceiver (e.g., the stress attendant to a particular criminal episode, the presence of a weapon, the particular witness' susceptibility to own-race bias, the duration of the crime or event) and the latter encompass those variables that affect the processes of criminal investigation (e.g., the first interview with police, the manner in which a description is elicited, the conduct of a police-

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missible). See e.g. Ebbe B. Ebbesen & Vladimir J. Konecni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, <http://www.psy.ucsd.edu/%7eeebbesen/prejvprob.html> (1996); Michael McCloskey & Howard Egeth, *Eyewitness Identification—What Can a Psychologist Tell a Jury?* 38 *Am. Psychol.* 550 (1983). The controversy over admitting expert testimony will not be addressed here in detail. Its two main bases are that the experts can give no useful information about the individual witness' capacity and memory and that the knowledge being shared is commonly known to jurors and thus unnecessary or, in the terms of the Federal Rules of Evidence, not "helpful" to the trier of fact. As to the first criticism, it is simply noted here that evidence need not be conclusive as to the facts of a particular case to be considered relevant and helpful; and, as is developed *infra* notes 65–72, jurors continue to hold many myths and misperceptions about identification testimony and its strength.

40. Elizabeth F. Loftus, Geoffrey R. Loftus & Jane Messo, *Some Facts about "Weapon Focus"*, 11 *L. & Hum. Behav.* 55–62 (1987).

41. Doyle, *supra* n. 38, at 90–92. See Elizabeth F. Loftus, *Make-Believe Memories*, *Am. Psychol.* 864, 867 (Nov. 2003) (describing her early research on how tainted questioning of a witness can corrupt her/his memory); Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 *J. Experimental Psychol.* 100–104 (Mar. 1989) (explaining how people can come to accept misinformation and adopt it as their own).

crafted identification procedure, and the feedback given to the witness at each stage).<sup>42</sup>

The significance of Wells' approach and his determination to focus on the *system* variables cannot be disputed. Research designed to prevent mistaken identifications (rather than simply to explain the vagaries of memory and perception and, thus, seemingly to benefit only the defense in a criminal trial) led to a constructive dialogue among prosecutors, police, defense counsel, and scientists and prompted institutional change on both the national and state level. Wells himself played a significant role as contributor to the National Institute of Justice's 1999 publication *Eyewitness Evidence: A Guide for Law Enforcement*<sup>43</sup> and the design of the New Jersey Identification Guidelines,<sup>44</sup> both systemic approaches to guiding police investigation and reducing the likelihood of mistaken identification.<sup>45</sup>

Yet, did these individual researchers and their peers project theory or confirm science? Two objective criteria establish the latter. First is the judicial acceptance of such evidence as appropriate expert testimony, a nearly national phenomenon.<sup>46</sup> Second is

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42. Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 30 *J. Personality & Soc. Psychol.* 1546 (1978).

43. Natl. Inst. of Just., *Eyewitness Evidence: A Guide for Law Enforcement* (Oct. 1999) (available at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>).

44. John J. Farmer, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> (Apr. 18, 2001).

45. Similar guidelines have been endorsed by the American Bar Association, which call for the following:

- the person conducting the lineup or photo display to be unaware of who the suspect is;
- instructions to the witness(es) that the perpetrator may or may not be in the display;
- eliciting a statement of the witness' confidence in his or her identification;
- using a sufficient number of foils and ensuring that foils resemble the witness' initial description of the perpetrator; and
- creating a photographic record of the lineup.

ABA, *Report of the American Bar Association, House of Delegates* 5 (Aug. 9–10, 2004) (available at <http://www.abanet.org/leadership/2004/annual/dailyjournal/111f.doc>).

46. A significant number of jurisdictions accept expert testimony in identification cases as admissible, subject to an abuse of discretion standard for review of orders of exclusion. As is discussed below, those decisions do not necessarily require admission, and in many cases trial courts preclude such evidence in an exercise of judicial discretion and instead leave the task of establishing unreliability to the cross-examiner. *Infra* nn. 130–131. Nonetheless, the discretion to admit such proof sustains a finding that it has scientific validity. Federal decisions include the following: *U.S. v. Brien*, 59 F.3d 274 (1st Cir. 1995);

the peer confirmation of this research. By 1995, Cutler and Penrod had identified more than 2,000 articles reporting research in this field,<sup>47</sup> and Kassin, seeking to identify where there was “general acceptance” of principles, found that among well-established researchers there was substantial agreement on numerous principles of psychology as applied to eyewitness testimony.<sup>48</sup> In particular, Kassin sought an evaluation of whether experts accepted the following principles:<sup>49</sup>

- Stress: Very high levels of stress impair the accuracy of eyewitness testimony.
- Weapons Focus: The presence of a weapon impairs an eyewitness’ ability to accurately identify the perpetrator’s face.
- Lineup Instructions: Police instructions can affect an eyewitness’ willingness to make an identification.
- Wording of Questions: An eyewitness’ testimony about an event can be affected by how the questions put to that witness are worded.

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*U.S. v. Harris*, 995 F.2d 532 (4th Cir. 1993); *U.S. v. Moore*, 786 F.2d 1308 (5th Cir. 1986); *U.S. v. Smithers*, 212 F.3d 306 (6th Cir. 2000); *U.S. v. Daniels*, 64 F.3d 311 (7th Cir. 1995), *cert. denied*, 516 U.S. 1063 (1996); *U.S. v. Curry*, 977 F.2d 1042 (7th Cir. 1992); *U.S. v. Kime*, 99 F.3d 870 (8th Cir. 1996), *cert. denied*, 519 U.S. 1141 (1997); *U.S. v. Rincon*, 28 F.3d 921 (9th Cir. 1994); *U.S. v. George*, 975 F.2d 1431 (9th Cir. 1992); *U.S. v. Brown*, 540 F.2d 1048 (10th Cir. 1976).

State courts admitting such evidence include the following: *Ex parte Williams*, 594 So. 2d 1225 (Ala. 1992); *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983); *Jones v. State*, 862 S.W.2d 242 (Ark. 1993); *People v. Campbell*, 847 P.2d 228 (Colo. Ct. App. 1992); *State v. Kemp*, 507 A.2d 1387 (Conn. 1986); *McMullen v. State*, 714 So. 2d 368, 370 (Fla. 1998); *People v. Enis*, 564 N.E.2d 1155 (Ill. 1990); *State v. Gaines*, 926 P.2d 641 (Kan. 1996); *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002); *Commonwealth v. Santoli*, 680 N.E.2d 1116 (Mass. 1997); *White v. State*, 926 P.2d 291 (Nev. 1996); *People v. Mooney*, 559 N.E.2d 1274 (N.Y. 1990); *State v. Gardiner*, 636 A.2d 710 (R.I. 1994); *State v. Whaley*, 406 S.E.2d 369 (S.C. 1991); *State v. Percy*, 595 A.2d 248 (Vt. 1990); *State v. Moon*, 726 P.2d 1263 (Wash. Ct. App. 1986); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991).

A limited number of jurisdictions, as follows, exclude such testimony categorically: *U.S. v. Holloway*, 971 F.2d 675 (11th Cir. 1992); *State v. Goldsby*, 650 P.2d 952 (Ore. Ct. App. 1982); *Commonwealth v. Simmons*, 662 A.2d 621 (Pa. 1995), *cert. denied*, 516 U.S. 1128 (1996); *State v. Wooden*, 658 S.W.2d 553 (Tenn. Crim. App. 1983).

47. Cutler & Penrod, *supra* n. 14, at 68.

48. Saul M. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of Experts*, 56 Am. Psychol. 405, 412 (2001).

49. *Id.* at 407. Kassin tested more than thirty propositions. Those reproduced here are the ones with the highest rate of concurrence among experts.

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*The Great Engine That Couldn't*

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- Confidence Malleability: An eyewitness' confidence can be influenced by factors that are unrelated to identification accuracy.
- Attitudes and Expectations: An eyewitness' perception and memory for an event may be affected by his or her expectations and attitudes.
- Post-event Information: Eyewitness testimony about an event often reflects not only what the witness actually saw, but also, information he or she obtained later on.
- Cross-Race Bias: Eyewitnesses are more accurate when identifying members of their own race.
- Accuracy-Confidence: An eyewitness' confidence is not a good predictor of his or her identification accuracy.

The results demonstrate a remarkably high acceptance of the following propositions:<sup>50</sup>

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50. *Id.* at 412. The polling results on stress as a factor were less conclusive. Sixty percent of the respondents found the statement reliable with only fifty percent willing to testify to this in court. This 2001 data may be less significant in light of new research on the severe impact on identification reliability occasioned by heightened stress. *See infra* nn. 74–76 and accompanying text (discussing C.A. Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered during Exposure to Highly Intense Stress*, 27 *Intl. J. Psychol. & L.* 265, 265–279 (2004)).

## DISCRETE JUDGMENTS/OPINIONS CONCERNING 30 EYEWITNESS TOPICS TESTED

TOPIC	IS IT RELIABLE?	WOULD YOU TESTIFY?	RESEARCH BASIS?	COMMON-SENSE
Wording of Questions	98	84	97	25
Lineup Instructions	98	79	95	39
Confidence Malleability	95	79	95	10
Mug-Shot Induced Bias	95	77	97	13
Post-Event Information	94	83	98	17
Child Suggestibility	94	81	100	73
Attitudes and Expectations	92	70	94	31
Hypnotic Suggestibility	91	76	90	19
Alcohol Intoxication	90	61	76	95
Cross-Race Bias	90	72	97	65
Weapons Focus	87	77	97	34
Accuracy-Confidence	87	73	97	5

As importantly, many of these factors are present in the typical identification case.<sup>51</sup>

Kassin's accumulation of studies and search for consensus make clear that, whether applying the *Frye*<sup>52</sup> or

51. In a study of forty proved cases of mistaken identification, witnesses expressed confidence in their identification in ninety-eight percent of the cases; the crime itself was deemed a traumatic event in the same percentage; cross-racial identification (white victim and black suspect) was presented in thirty-five percent; and at least thirty-five percent involved the presence of a weapon. Edmund S. Higgins & Bruce S. Skinner, *Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Cases with the Psychological Studies*, 30 N. Ky. L. Rev. 471, 482 (2003).

52. *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923) (stating that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs"). The *Frye*

*Daubert*<sup>53</sup> standard for admitting expert testimony, the methodology and conclusions of these experts are sufficiently reliable to be admissible in court.

This is not to say that critics of such science do not exist. The most trenchant critique is that of Professor Ebbesen, who contends that laboratory experiments cannot replicate the reality of a crime and the encounter between a victim or witness and a perpetrator.<sup>54</sup> Ebbesen's position was articulated in court proceedings as follows:

[A] generally accepted *theory* of eyewitness identification that is capable of predicting witness accuracy in a particular real world situation does not exist. Although the science of psychology has developed many useful and interesting models of memory, the fact remains that no theory of memory has been proposed that would allow researchers to predict how accurately people will be able to identify a defendant whom they have seen commit a crime.

. . .

The issues that jurors have to decide in these cases are: [D]o I believe . . . this witness' identification [is] accurate or not[?] They are not trying to decide [if] the effect of stress [is] an inverted u-shaped function[,] or is the forgetting curve a power function, or is the cross-race [e]ffect a [fifteen-percent] effect or a [two-percent] effect. [They are] not interested in that. They want to know, is this witness correct or not; and with regard to those kinds of decisions, that is, what is the overall error rate, we have nothing to say about that in this field. We have no idea how to get an estimate of how accurate witnesses are or not going to be in particular

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test has been applied to admit eyewitness-expert testimony. *People v. McDonald*, 690 P.2d 709, 720 (Cal. 1984).

53. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–593 (1993) (requiring that a court determine whether the expert's "reasoning or methodology underlying the testimony is scientifically valid[,] . . . whether that reasoning or methodology properly can be applied to the facts in issue[,] and whether it is relevant and will assist the trier of fact).

54. Ebbesen & Konecni, *supra* n. 39; McCloskey & Egeth, *supra* n. 39, at 550. A review of the contrasting positions as of 1995 is detailed in Robert Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 *How. L.J.* 237 (1995).

circumstances from the research that's been done. We have no idea how to do that.<sup>55</sup>

This critique, rejected by the court that considered it,<sup>56</sup> has curious echoes in the attack on Münsterberg's research of a century ago.<sup>57</sup> Dean Wigmore castigated the putative science in a law review article written as a mock trial.<sup>58</sup> Wigmore also focused on the inability of the scientist to assess whether *this* witness was inaccurate on *this* occasion.<sup>59</sup> Designed as a cross-examination of the psychologist at a trial for libeling American lawyers, the libel being the claim by Münsterberg that lawyers were unwilling to use the findings of science to enhance fact-finding, Wigmore attacked on the ground that the "science" fails to show whether a particular witness is in fact reliable.<sup>60</sup>

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55. *U.S. v. Burton*, 1998 U.S. Dist. LEXIS 18730 at \*\*37, 40 (E.D. Tenn. Oct. 8, 1998).

56. The court in *Burton* concluded the following:

Dr. Wells should be allowed to offer expert testimony in these limited areas:

- (1) testimony regarding the relation between the level of confidence with which the eyewitness proclaims her identification and the accuracy of the identification;
- (2) testimony that a suggestive photographic lineup can have a substantial impact on the reliability of the identification by the eyewitness;
- (3) testimony that the suggestiveness of the pretrial procedure may further taint later identifications by the eyewitnesses of the individual identified from the earlier photographic and actual lineups; and
- (4) testimony concerning the effect on the reliability of eyewitness testimony where a weapon is present.

It is important to note that the defendant is not seeking leave to put on free ranging expert testimony about the foibles of eyewitness testimony; rather, the defendant has followed the procedures stated in [*Daubert*] and [*Downing*] and has established that Dr. Wells will be testifying to "scientific knowledge" which will assist the trier of fact in judging the credibility of the eyewitness testimony. The defendant has identified four specific areas concerning variables like witness' degree of confidence, "unconscious transference," the "assimilation factor," and "weapons focus" which may well go beyond what an average juror would know as common knowledge. For that reason, the testimony may well assist them in reaching a just verdict. It follows [*a fortiori*] that under such circumstances, such evidence cannot be deemed excludable under [Fed. R. Evid. 403].

*Id.* at \*\*57–58.

57. See generally John H. Wigmore, *Professor Muensterberg and the Psychology of Testimony*, 3 Ill. L. Rev. 399 (1909).

58. *Id.* (reporting on the attack Professor Münsterberg endured when he asserted that courts should consider psychology as a resource).

59. *Id.* at 423.

60. *Id.* Professor Münsterberg conceded the same.



Q: Or suppose that two honest witnesses were to testify, of a man found dead on Thursday morning, that they being together had seen him alive, but one placed it on Wednesday and the other on Tuesday; do you say that this “experimental psychology” which in your words, “can furnish amply everything which the court demands,” can tell the court which witness is correct in his memory?

A: No.<sup>61</sup>

Yet three flaws undermine Ebbesen’s (and Wigmore’s) critique. The first flaw is the failure to acknowledge that expert testimony need not be conclusive but only must “assist” the trier of fact in understanding evidence.<sup>62</sup> Courts have allowed “educational” expert testimony in areas as divergent as organized crime,

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61. *Id.* at 421. Wigmore made the witness accept the statement that “[t]he new psychology cannot by this method obtain a criterion for the truth or error of *individual* witnesses[.]” *Id.* at 423.

62. Fed. R. Evid. 702. The rule further states as follows:

If scientific, technical, or other specialized knowledge 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.

The rule contemplates and approves the admission of expert testimony designed to educate the jury or provide background essential to the understanding of factual testimony.

Under Rule 702 the expert may be used as an advisor to the jury, much like a consultant might advise a business[,] so that the jury can benefit far more from the special knowledge or training of the expert than it has in the past[,] where the expert was simply asked to give one conclusory opinion to one extended hypothetical question.

Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual, Commentary, Rule 702*, [http://www.lexis.com/research/retrieve/frames?\\_m=86b6a8afdc4ead884dce8af85dd0445b&csvc=toc2doc&cform=&\\_fmtstr=FULL&docnum=1&\\_startdoc=1&wchp=dGLbV1b-zSkAA&\\_md5=79c2c22e0babffd3c925962de0d3b9ab](http://www.lexis.com/research/retrieve/frames?_m=86b6a8afdc4ead884dce8af85dd0445b&csvc=toc2doc&cform=&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbV1b-zSkAA&_md5=79c2c22e0babffd3c925962de0d3b9ab).

As Judge Weinstein has explained,

The court will take judicial notice of the general background knowledge—evidential hypotheses—that the trier (1) needs, and (2) has or does not have. The court must decide whether it can confidently assume that the trier brings such background knowledge to the courtroom to be used in conjunction with additional information—adjudicative facts—supplied by evidence. Cf. Fed. R. Evid. 201(a). From the background (evidential hypotheses) and the detailed evidence (adjudicative facts), the jurors can draw necessary conclusions.

In short, the trial is an instructional experience in which the jury learns by drawing inferences and applying specific propositions of fact to general evidential hypotheses—i.e., background knowledge.

*U.S. v. Gallo*, 118 F.R.D. 316, 317 (D.N.Y. 1987).

battered women, and child-sexual-assault complainants.<sup>63</sup> The need for such “education” is paramount in eyewitness-identification cases where juror beliefs stand in radical opposition to scientific understanding.<sup>64</sup> In *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia*,<sup>65</sup> Professor Loftus and two colleagues amassed polling data from a representative pool of prospective jurors and found numerous instances where lay belief conflicted with, and showed no awareness of, clear scientific findings:

**Juror Misunderstandings of Memory in General:** Almost two-thirds of the respondents (66%) thought the statement “I never forget a face” applied “very well” or “fairly well” to them.<sup>66</sup>

**Weapon Focus:** Thirty-seven percent of the respondents actually thought the presence of a weapon would make a witness’ memory for event details *more* reliable, while thirty-three percent of the respondents thought that the presence of a weapon either would have no effect or were not sure of what effect a weapon would have.<sup>67</sup>

**The Presence of Violence and/or Stress:** Thirty-nine percent of the respondents actually thought that event violence would make a witness’ memory for details *more* reliable, while thirty-three percent of the respondents thought that

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63. Gallo, 118 F.R.D. at 317 (discussing organized crime); see generally Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 Duke L.J. 461 (Dec. 1996) (reporting the use of such evidence but urging caution before expanding the use of “group character” proof).

64. *Infra* pt. V. Cross-examination cannot correct many of these misperceptions or provide the needed “education.” *Id.*

65. Elizabeth F. Loftus et al., *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia* (available at <http://www.pdsdc.org/SpecialLitigation/SLDSystemResources/Article%20by%20Dr.%20Elizabeth%20Loftus%20and%20Tim%20Toole.pdf>). For a discussion of the survey findings, see Richard S. Schmechel, Timothy P. O’Toole, Catharine Easterly & Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics J.* 177, 177–214 (2006).

The need for systematic studies of what jurors actually know about perception, memory, and the process of identification has been acknowledged. Jeremy C. Bucci, *Revisiting Expert Testimony on the Reliability of Eyewitness Identification: A Call for a Determination of Whether It Offers Common Knowledge*, 7 *Suffolk J. Trial & App. Advoc.* 1 (2002).

66. Loftus et al., *supra* n. 65, at 6.

67. *Id.* at 8.

event violence either would have no effect or were not sure of what effect event violence would have.<sup>68</sup>

**The Duration of the Incident:** Over 40% percent of the survey respondents either thought that witness time estimates were accurate or were not sure whether such estimates were accurate . . . (several sentences omitted) [A] sizeable portion (about 25%) believed that witnesses *underestimate* the actual time.<sup>69</sup>

**Juror Misunderstanding of Specific Reliability Factors Regarding the Witness Confidence:** Moreover, only 17% of the respondents correctly understood the slight correlation between confidence and accuracy.<sup>70</sup>

**Cross-Racial Impairment:** A large plurality of the survey respondents (48%) thought cross-race and same-race identifications are of equal reliability and many of the other respondents either did not know or thought a cross-racial identification would be more reliable.<sup>71</sup>

Further data showed the respondents' unfamiliarity with the potential suggestivity in show-up and line-up procedures.<sup>72</sup>

The second flaw in Ebbesen's approach is reflected in his contention that the studies relied on are abstract laboratory designs that cannot accurately capture the experience and behavior of actual crime victims and witnesses.<sup>73</sup> To the contrary, studies have mirrored the experience of victimization, most significantly in the area of stress. Morgan and colleagues studied 530 active-

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68. *Id.* at 9.

69. *Id.* at 11.

70. *Id.* at 13. The Third Circuit has concluded that expert testimony is essential "as the only method of imparting the knowledge concerning confidence-accuracy correlation to the jury." *U.S. v. Brownlee*, 454 F.3d 131, 144 (3d Cir. 2006).

71. Loftus et al., *supra* n. 65, at 15.

72. *Id.* at 15–20.

73. Ebbeson & Konecni, *supra* n. 39, at 1. Problems exist as well with regard to studies of actual criminal case witnesses. The accuracy of identifications of suspects is difficult to confirm as there is no independent measure of whether in fact that suspect is the actual criminal. *Id.* "A major problem with archival work is that a certain percentage of real world lineups do not include the perpetrator of the crime." Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 L. & Hum. Behav. 475, 478 (Oct. 2001). Researchers have tried to overcome this problem by evaluating the identification against the strength of independent evidence such as confessions and fingerprints. *Id.*

duty military personnel enrolled in a military survival training program who were tested on their ability to identify their interrogators.<sup>74</sup> The interrogators used either high-stress or low-stress techniques.<sup>75</sup> In either photograph displays or line-ups conducted twenty-four hours after the interrogations, 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 nearly doubled in the high-stress cases.<sup>76</sup>

Finally, archival (real case) studies have been done,<sup>77</sup> and these generally confirm the results of laboratory-based experiments.<sup>78</sup> In particular, the studies confirm the loss of accuracy in identification as time passes between crime and viewing and the separate impact of cross-race bias in reducing the accuracy of identifications.<sup>79</sup> On the issue of weapons focus, the studies of archival events produced mixed results.<sup>80</sup> Mixed results also are found when archival studies examine the relation between witness confidence and accuracy.<sup>81</sup>

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74. C.A. Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered during Exposure to Highly Intense Stress*, 27 *Intl. J. Psychol. & L.* 265, 265–279 (2004).

75. *Id.* at 267.

76. *Id.*

77. Professor Penrod cites to numerous archival studies in *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?* 18 *Crim. Just.* 36 (2003) (available at <http://www.abanet.org/crimjust/spring2003/eyewitness.html>), including Arnold Slater, *Identification Parades: A Scientific Evaluation* (Police Research Award Scheme, Police Research Group, Home Office, 1994) (reported in Tim Valentine & Pamela Heaton, *An Evaluation of the Fairness of Police Line-Ups and Video Identifications*, 13 *Applied Cognitive Psychol.* 59 (1999)); Patricia A Tollestrup et al., *Actual Victims and Witnesses to Robbery and Fraud: An Archival Analysis*, in *Adult Eyewitness Testimony: Current Trends and Developments* 144 (David E. Ross, J. Don Read & Michael P. Toglia eds., Cambridge U. Press 1994); Daniel B. Wright & Anne T. McDaid, *Comparing System and Estimator Variables Using Data from Real Line-ups*, 10 *Applied Cognitive Psychol.* 75 (1996); and Behrman & Davey, *supra* n. 74, at 475. *See also* Higgins & Skinner, *supra* n. 52 at 482 (discussing the significant number of erroneous eyewitness identifications).

78. *See generally supra* n. 73.

79. Behrman & Davey, *supra* n. 73, at 484–485.

80. *Id.* at 485 (evidencing that “support for the weapon focus effect was not evident in the present study. Further, the suspect was chosen more often in the weapon-present group than in the weapon-absent group”); *but see* Tollestrup et al., *supra* n. 77, at 144–160 (corroborating laboratory studies showing the impact of weapons focus as a distractor).

81. *Compare* Behrman & Davey, *supra* n. 73, at 486 (noting that “our findings do indicate that highly confident witnesses are much more prone to choose the suspect in a criminal proceeding than are moderately confident ones”) *with* Higgins & Skinner, *supra* n. 51, at 482 (finding that in a study of forty proved cases of mistaken identification, wit-

#### IV. THE JUDICIAL RESPONSE—AN ADMIXTURE OF ACCEPTANCE AND BENIGN NEGLECT

It is indisputable that the science of perception and memory has infiltrated judicial decisionmaking and criminal investigation policy and technique. Yet the acceptance of scientific knowledge by courts has been mixed, and the acceptance is often either ignored or sacrificed to tradition or to reliance on cross-examination. A survey of the main stages of identification-based prosecutions shows this equivocal and inconsistent pattern.<sup>82</sup> Knowledge of the judicial response to scientific developments is critical to an assessment of whether trial cross-examination can remedy (or help jurors identify) flaws in the identification process.

##### A. Pretrial Procedures—Show-ups, Line-ups, and Photograph Arrays

The Constitution does not give a criminal accused an entitlement to request that he or she be placed in a line-up.<sup>83</sup> It does not bar police from conducting an uncounseled, one-on-one show-up *pre-indictment*;<sup>84</sup> a line-up that must have counsel post-indictment;<sup>85</sup> or a photograph array at any time prior to or even during trial.<sup>86</sup> Other than the limited right to counsel, and in the absence of a Fourth Amendment violation that led to the pre-indictment confrontation,<sup>87</sup> the sole determinant of constitutionality is whether the resulting identification is judged reliable.<sup>88</sup>

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nesses expressed confidence in their identification in 98% of the cases).

82. Epstein, *supra* n. 15. Again, this survey relies heavily on, and updates, that developed by this Author. *Id.* This text draws heavily from *Tri-State Vagaries* and is used with permission from *Widener Law Review*.

83. See *Moore v. Ill.*, 434 U.S. 200, 231 (1977) (explaining in dictum that “[s]uch requests ordinarily are addressed to the sound discretion of the court. . . .”); *U.S. v. King*, 461 F.2d 152 (D.C. Cir. 1972).

84. *Stovall v. Denno*, 388 U.S. 293, 300–304 (1967). The significance of the show-up being pre-indictment is that no right to counsel is implicated for any corporeal display of the accused. Post-indictment, counsel must be present. *Kirby v. Ill.*, 406 U.S. 682 (1972).

85. *U.S. v. Wade*, 388 U.S. 218, 222 (1967) (reasoning that “[w]e have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance”).

86. *U.S. v. Ash*, 413 U.S. 300, 321 (1973).

87. *U.S. v. Crews*, 445 U.S. 463, 471 (1980) (noting that a Fourth Amendment violation can lead to suppression of out-of-court police-generated identification).

88. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The *Manson* standard addresses

It is the manner in which such identification procedures have been conducted that science has examined and questioned. The areas of concern are:

- the instructions given before or at a line-up;<sup>89</sup>
- whether the line-up is a “blind” one, *i.e.*, one where the detective conducting the process is unaware of which person is the suspect, and can therefore avoid inadvertently indicating this to the witness(es);<sup>90</sup>
- whether the line-up is “simultaneous” or “sequential”; and

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suggestivity but offsets it with the following assessment of reliability:

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in *Biggers*. 409 U.S. at 199–200. These include 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.

*Id.*

89. Cutler & Penrod, *supra* n. 14, at 122. The concern with instructions is that the language used may point the witness toward a particular suspect or encourage the assumption that the perpetrator is, indeed, in the line-up. *Id.* When language suggests that the perpetrator is among the persons being displayed, the risk of a false or mistaken identification is increased. *Id.* To avoid this, the National Institute of Justice’s Guidelines on Identification suggest the following advisories be given:

- Advise the witness that he [or] she will be asked to view a group of individuals.
- Advise the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
- Advise the witness that individuals present in the lineup may not appear exactly as they did on the date of the incident, as features such as head and facial hair are subject to change.
- Advise the witness that the person who committed the crime may or may not be present in the group of individuals.
- Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.

Natl. Inst. of Just., *Eyewitness Evidence: A Trainer’s Manual for Law Enforcement* 40–41 (Sept. 2003) (available at <http://www.ncjrs.org/nij/eyewitness/188678.pdf>).

90. Penrod, *supra* n. 77, at 1. “The rationale for this procedure is that blind presentation will eliminate the possibility that police officers administering identification procedures can wittingly or unwittingly communicate something to a witness about which member of an identification parade is the suspect.” *Id.*

- what the witness is told after an identification is made.<sup>91</sup>

Of these four areas, that involving the sequential line-up is the most controversial. The sequential line-up (or photograph display) is one where the witness views each person in isolation, rather than observing a several-person line-up or photograph display at once.<sup>92</sup> The theoretical basis for the sequential procedure is to avoid “relative judgment”—the process by which a witness judges multiple persons to see, and potentially select, who most closely resembles the witness’ memory of the perpetrator.<sup>93</sup> In a sequential line-up or photograph array, the witness compares each individual (shown alone) to the witness’ memory of the perpetrator without the interference of the relative comparison to others in the line-up.<sup>94</sup>

What is the controversy? A meta-study of the research on sequential line-ups demonstrates a significant reduction in false identifications when this process is used.<sup>95</sup> However, the sequen-

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91. Neil Brewer & Anne Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence in Mock Juror Judgments*, 26 L. & Hum. Behav. 353–364 (2002). The concern here is that of inflating the eyewitness’ confidence, a particular problem because jurors weigh as significant a testifying witness’ expression of the confidence (level of certainty) in his or her own identification when determining guilt. *Id.* Where feedback is given, deliberately or inadvertently (and even nonverbally), which suggests the witness picked the “right” person, the confidence is in fact inflated, thus potentially increasing the likelihood of a jury verdict based upon improper or unreliable factors. Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification*, 89 J. Applied Psychol. 334, 336 (2004).

92. Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 L. & Hum. Behav. 459, 460 (2001). For differing views of the psychological underpinnings of this technique, see Scott D. Gronlund, *Sequential Lineups: Shift in Criterion or Decision Strategy*, 89 J. Applied Psychol. 362–368 (2004); Ebbe B. Ebbesen & Heather D. Flowe, *Simultaneous v. Sequential Lineups: What Do We Really Know?* <http://www.psy.ucsd.edu/~ebbesen/SimSeq.htm> (accessed Apr. 3, 2007).

93. Steblay et al., *supra* n. 92, at 459–460.

94. *Id.* at 460.

95. *Id.* at 464. One recent study comparing sequential and simultaneous lineups reached contrary results and found the simultaneous line-up to be more accurate. *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, [http://www.psychology.iastate.edu/FACULTY/gwells/Illinois\\_Report.pdf](http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Report.pdf) (Mar. 17, 2006). However, that study has been roundly criticized for the failure to use “blind” line-up administrators in the simultaneous displays, calling into question the cause of the disparity between sequential and simultaneous line-up results. See e.g. Timothy P. O’Toole, *What’s the Matter with Illinois? How an Opportunity Was Squandered to Conduct an Important Study on Eyewitness Identification Procedures*,

tial line-up also results in fewer *correct* identifications than does the simultaneous line-up.<sup>96</sup> This means the sequential line-up may actually generate an increased “false rejection” rate—the failure to identify an actual perpetrator who would have been identified had the simultaneous procedure been in place.

In sum, the trade-off represents a public policy choice—is it better to catch more criminals but risk a greater number of mistaken-identification convictions? Professor Wells’ following analysis bears consideration here:

[I]t should be noted that the odds of an identification of the suspect being accurate are approximately doubled by the use of the sequential lineup in spite of some loss of accurate identifications. In addition, it seems clear that policy makers should not favor a particular method of conducting lineups merely because it yields more hits. Consider, for instance, a method in which witnesses who claim that they do not recognize anyone are told to guess instead. This guessing method would yield more hits than would a method that dis-

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30 The Champion 18, 19 (Aug. 2006) (identifying “the failure to conduct sequential and simultaneous procedures under like conditions [as] probably the biggest flaw”); Shari Sendman, Ltr. to the Ed., *Police Lineups and Eyewitnesses*, N.Y. Times A18 (Apr. 24, 2006); Gary L. Wells, *Gary L. Wells’ Comments on the Mecklenburg Report*, [http://www.psychology.iastate.edu/FACULTY/gwells/Illinois\\_Project\\_Wells\\_comments.pdf](http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Project_Wells_comments.pdf) (May 2006); Nancy Steblay, *Observations on the Illinois Lineup Data*, [http://www.psychology.iastate.edu/FACULTY/gwells/Steblay\\_Observations\\_on\\_the\\_Illinois\\_Data.pdf](http://www.psychology.iastate.edu/FACULTY/gwells/Steblay_Observations_on_the_Illinois_Data.pdf) (May 2006). Another study of actual police line-ups found the sequential format to be the more successful, with results showing that “[t]he Hennepin County suspect identification rate is comparable to that achieved with simultaneous lineups in the field and is higher than laboratory sequential rates, with a much lower filler choice rate (8%).” Amy Klobuchar, Nancy Steblay & Hillary Caliguiri, *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 *Cardozo Pub. L. Policy & Ethics J.* 381, 383 (2006).

96. Steblay et al., *supra* n. 92, at 464. As Professor Wells has summarized the results, [c]orrect identification rates of the culprit when the culprit is in the lineup are 50% for the simultaneous and 35% for the sequential. So, the sequential yields only 70% of the “hits” that the simultaneous does . . . .

Mistaken identification of an innocent “stand in” for the culprit is 27% for the simultaneous and 9% for the sequential. So, the sequential yields only 33% of the “false alarms” that the simultaneous yields.

Gary L. Wells, *Does the Sequential Lineup Reduce Accurate Identifications in Addition to Reducing Mistaken Identifications? Yes, but . . .*, <http://www.psychology.iastate.edu/faculty/gwells/SequentialNotesonlossoffhits.htm> (accessed Sept. 7, 2006).



couraged guessing, but surely policy makers would not want such a method used.<sup>97</sup>

Notwithstanding this science, courts have been extraordinarily reluctant to mandate the implementation of specific line-up, photograph array, or show-up procedures, leaving their conduct to the discretion of the police.<sup>98</sup> Indeed, only one court has even modified jury instructions to acknowledge the potential impact of non-scientific line-up procedures. Connecticut now requires judges

to incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification, in those cases where: (1) the state has offered eyewitness identification evidence; (2) that evidence resulted from an identification procedure; and (3) the administrator of that procedure failed

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97. Wells, *supra* n. 97, at 1.

98. The general response of courts, with one noted and one modest exception, has been to decline to order new line-up methodologies. *E.g. In re Investigation of Rahim Thomas*, 733 N.Y.S.2d 591, 597 (N.Y. Crim. Ct. Kings Co. 2001). One trial court had ordered a line-up to be held sequentially and “double-blind” even after noting that a simultaneous line-up was constitutional, concluding that it had the discretionary authority to order these conditions. *Id.* at 596. In *People v. Wilson*, 741 N.Y.S.2d 831, 833–834 (N.Y. Sup. Ct. Kings Co. 2002), the trial court had denied a request for a sequential line-up, relying on concerns of a slight decrease in positive identifications with that procedure but did order that the simultaneous line-up be conducted “double-blind.”

These decisions stand in isolation. Another New York court declined to order either condition, emphasizing that it should play no role in the management of the prosecutorial function and instead redress constitutional error (if any) at a suppression hearing. *People v. Aspinall*, 756 N.Y.S.2d 397, 399 (N.Y. Sup. Ct. Richmond Co. 2003); *cf. State v. Osborn*, 705 N.W.2d 105 (Iowa App. 2005) (noting the heightened reliability of sequential photograph displays but holding a simultaneous display to be constitutional); *Commonwealth v. Montgomery*, 799 A.2d 149, 155 (Pa. Super. 2002) (declining to consider the merits of a challenge to the denial of a motion for a modified line-up because the issue, raised on pre-trial appeal, was subject to dismissal under the “collateral order” doctrine); *Davis v. State*, 2006 Tex. App. LEXIS 2111 at \*6 (Tex. App. Mar. 16, 2006) (rejecting a claim of error where police did not “follow the U.S. Department of Justice’s guidelines that recommend a double-blind presentation of the lineup and a sequential presentation of the photographs . . . [because] Davis present[ed] no authority showing that such techniques are required, not merely suggestions”); *State v. Shomberg*, 2004 WL 2864646 at \*2 (Wis. Ct. App. 2004) (holding the exclusion of expert testimony on the superiority of sequential line-ups over simultaneous line-ups to be harmless error); *see generally* Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. Rev. L. & Soc. Change 507 (2001–2002); Michael R. Headley, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 Hastings L.J. 681 (March 2002).

to instruct the witness that the perpetrator may or may not be present in the procedure.<sup>99</sup>

Remedial action has only occurred as the result of legislative or executive branch action, or from local government and police department initiatives.<sup>100</sup> Through guidelines promulgated by its attorney general, New Jersey has mandated state-wide implementation of blind, “sequential” identification procedures “whenever practical”:<sup>101</sup>

- (A) In order to ensure that inadvertent verbal cues or body language do not impact on a witness, whenever practical, considering the time of day, day of the week, and other personnel conditions within the agency or department, the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case. The Attorney General recognizes that in many departments, depending upon the size and other assignments of personnel, this may be impossible in a given case. In those cases where the primary investigating officer conducts the photo or live lineup identification procedure, he or she should be careful to avoid inadvertent signaling to the witness of the “correct” response.
- (B) The witness should be instructed prior to the photo or live lineup identification procedure that the perpetrator may not be among those in the photo array or live line-

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99. *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005).

100. Scott Ehlers, *Eyewitness Identification: State Law Reform*, 29 *The Champion* 32, 34 (Apr. 2005). The jurisdictions that do have institutionalized pretrial identification procedures include New Jersey; most of North Carolina; Santa Clara County, California; Suffolk and Norfolk counties in Massachusetts, which includes Boston; and parts of Hennepin County, Minnesota, including Minneapolis. *Id.* at 33. States with pending legislation to consider or adopt such practices are Hawaii, Massachusetts, Maryland, Missouri, New York, and Rhode Island. Scott Ehlers, *State Legislative Affairs Update*, 29 *The Champion* 32 at 33 (June 2005). In March 2005, the Wisconsin Department of Justice issued eyewitness-identification recommendations. State of Wisconsin, *Model Policy and Procedure for Eyewitness Identification* (Sept. 2005) (available at <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>). Virginia has passed legislation requiring police agencies to adopt written guidelines for identification procedures. Va. Code Ann. § 19.2-390.02 (Lexis 2006). “The Department of State Police and each local police department and sheriff’s office shall establish a written policy and procedure for conducting in-person and photographic lineups.” *Id.*

101. Farmer, *supra* n. 44, at 2.

up and, therefore, they should not feel compelled to make an identification.

- (C) When possible, photo or live lineup identification procedures should be conducted sequentially, *i.e.*, showing one photo or one person at a time to the witness, rather than simultaneously.<sup>102</sup>

To ensure that investigators do not artificially inflate a witness' confidence in his or her identification, the guidelines require that "[i]f an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty."<sup>103</sup> The guidelines also contain procedures for conducting simultaneous displays when the sequential process cannot be used.<sup>104</sup>

#### B. Standards for Suppressing Pretrial Identifications

There may be no greater divide between science and law in identification cases than in the setting of the constitutional standard for establishing the reliability of identification testimony and its admissibility. The federal constitutional standard for admitting testimony concerning a suggestive out-of-court identification is well settled.<sup>105</sup> Suggestivity itself does not preclude admission; rather, any potential corrupting effect of the suggestive procedure must be weighed against

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [the witness'] prior description of the criminal, the level of certainty demonstrated [by the witness] at the confrontation, and the [length of] time between the crime and the confrontation.<sup>106</sup>

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102. *Id.*

103. *Id.* at 6.

104. *Id.*

105. *E.g. Manson*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972).

106. *Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199–200. These five reliability factors are part of the test for admitting suggestive identification testimony commonly referred to as the *Manson* test.

This “reliability” test emerged from one that initially focused on suggestivity. As explained by the Wisconsin Supreme Court, “the test for show[-]ups evolved from an inquiry into unnecessary suggestiveness to an inquiry of impermissible suggestiveness, while forgiving impermissible suggestiveness if the identification could be said to be reliable.”<sup>107</sup> The problem is that the standard is ascientific. As Professor Wells explained,

suggestive identification procedures, even seemingly subtle ones, can be very powerful direct contributors to mistaken identification. . . . [Additionally], four of the five criteria for assessing accuracy in the second prong of the Manson test are self-reports that can actually be distorted by the suggestive procedures present in the first prong of the Manson test.<sup>108</sup>

Professor Wells’ concern arising from the *Manson* criteria<sup>109</sup> being based on the eyewitness’ self-reporting and subject to distorting effect by external influences is well founded. Studies confirm that eyewitnesses overestimate an event’s duration, particularly when stress is elevated<sup>110</sup> and that “the empirical evidence does not show a close correspondence between the description given by the eyewitness and the likelihood that the identification is accurate.”<sup>111</sup> A separate concern is the malleability, if not manipulability, of this test, where judicial discretion can easily and selectively find reliability.<sup>112</sup>

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107. *State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005).

108. Gary L. Wells, *What Is Wrong with the Manson v. Braithwaite Test of Eyewitness Identification Accuracy?* (unpublished working paper) (available at <http://www.psychology.iastate.edu/faculty/gwells/Mansonproblem.pdf>). For a general discussion of the flaws of the *Manson* test and a proposal for a more science-based due process standard, see Timothy P. O’Toole & Giovanna Shay, *Manson v. Braithwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109 (2006).

109. *Supra* n. 108 and accompanying text.

110. Wells, *supra* n. 108, at 7; Thomas J. Feeney, *Expert Psychological Testimony on Credibility Issues*, 115 Mil. L. Rev. 121, 145 n. 154 (1987) (emphasizing observer overestimation of an event’s duration and reporting one study where the overestimation was by a factor of three).

111. Wells, *supra* n. 108, at 7–8. Two other states rejected the *Manson* standard without reliance on the scientific studies, focusing instead on the need to adhere to the suggestiveness test. *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995); *People v. Adams*, 53 N.Y.2d 241 (N.Y. 1981).

112. George C. Thomas, III, *The Warren Court Criminal Justice Revolution: Reflections*

To date, two courts have rejected this standard precisely because of its incompatibility with the now well-developed science of perception and memory. In *State v. DuBose*<sup>113</sup> the Wisconsin Supreme Court returned to the suggestivity standard for determining the admissibility of show-up identifications:

[W]e recognize that our current approach to eyewitness identification has significant flaws. . . . Studies have now shown that approach is unsound, since it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable. . . . Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness.<sup>114</sup>

Similar reasoning drove the Utah Supreme Court to reject the federal standard.<sup>115</sup> Nonetheless, all federal courts and the great majority of state courts adhere to the *Manson* standard.<sup>116</sup>

### C. The Use of Expert Testimony at Trial

It is in the area of *conditional* approval of expert testimony in identification cases that courts have nominally adopted the finding of science while simultaneously extolling and exalting the power of cross-examination. As developed above, the use of experts to educate jurors regarding the psychology of perception, memory, and recall has gained substantial acceptance nationally.<sup>117</sup> Of particular importance is testimony about weapons focus,<sup>118</sup> the lack of a significant correlation between confidence and

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*a Generation Later: The Criminal Procedure Road Not Taken—Due Process and the Protection of Innocence*, 3 Ohio St. J. Crim. L. 169, 192 (Fall 2005) (stating that “[r]ather than manifest any real concern about the risk of false identification, the Court has crafted a ‘totality of the circumstances’ test that is completely malleable. If a trial court wants to admit an identification that came from a suggestive, unnecessary procedure, it can do so.”).

113. 699 N.W.2d 582 (Wis. 2005). Connecticut considered but rejected the *DuBose* approach in *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005).

114. *DuBose*, 689 N.W.2d at 592.

115. *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991).

116. *Wells*, *supra* n. 108, at 2.

117. *Supra* n. 49. The countervailing (and clearly minority) view within the field of psychology that the science is not appropriate for expert testimony is detailed in the text. *Supra* nn. 63–81 and accompanying text.

118. See e.g. *U.S. v. Mathis*, 264 F.3d 321, 338 (3d Cir. 2001) (recognizing the impor-

accuracy,<sup>119</sup> the difficulties inherent in cross-racial identifications,<sup>120</sup> and the impact of stress on diminishing eyewitness accuracy.<sup>121</sup>

The question of admitting expert testimony turns not only on the state of the science and its “fit” in the particular case, but whether such testimony will be “helpful” to the finder of fact.<sup>122</sup> While the “helpfulness” assessment should be based on the knowledge of jurors,<sup>123</sup> which is lacking on the subject of eyewitness accuracy,<sup>124</sup> in these cases courts often deem the scientific testimony unnecessary *unless* the eyewitness testimony is the sole evidence of guilt.

A typical pronouncement in this regard is that of the Florida Supreme Court.<sup>125</sup> While adhering to a rule of “discretionary” ad-

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tance of such testimony even when the identifying witness is a police officer).

119. *Id.*; *U.S. v. Stevens*, 935 F.2d 1380, 1400 (3d Cir. 1991) (approving testimony of the low correlation “[t]o rebut the natural assumption that such a strong expression of confidence indicates an unusually reliable identification . . .”); *Burton*, 1998 U.S. Dist. LEXIS 18730 at \*57 (approving testimony by Dr. Wells “regarding the relation between the level of confidence with which the eyewitness proclaims her identification and the accuracy of the identification”); *but see State v. Guzman*, 133 P.3d 363, 369 (Utah 2006) (finding no due process violation in admitting witness-certainty testimony; the case does not discuss whether expert testimony discounting such testimony is admissible).

120. *U.S. v. Norwood*, 939 F. Supp. 1132, 1137 (D. N.J. 1996) (collecting cases admitting such evidence and approving admission because such testimony would be “helpful” to the jury); *but see U.S. v. Lester*, 254 F. Supp. 2d 602, 613–614 (E.D. Va. 2003) (excluding such testimony as proffered because of a substantial risk of juror confusion).

121. *Lester*, 254 F. Supp. 2d at 613; *but see U.S. v. Nguyen*, 793 F. Supp. 497, 520 (D. N.J. 1992) (excluding such testimony because of the lack of proof that the particular witness was under stress and the resulting lack of “fit” between the expert testimony and the facts of the case). For a discussion of research exploring the relationship between stress and accuracy of identification, see *supra* notes 75–77 and accompanying text.

122. See *e.g.* Fed. R. Evid. 702 (providing for the admission of testimony if it “will assist the trier of fact to understand the evidence or to determine a fact in issue. . .”).

123. *Id.*

124. See *e.g.* Cutler & Penrod, *supra* n. 14, at 195 (surveying numerous studies and concluding that jurors “overbelieve” eyewitnesses, over-rely on witness statements of confidence, and are not attuned to those factors besides confidence that are “arguably better predictors of witness accuracy”); see also *supra* nn. 66–73 and accompanying text (discussing *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia*, which documents inter alia juror misapprehension of how memory works, the impact of the presence of a weapon, the role of own-race bias, and the role of stress in reducing eyewitness accuracy).

125. That limited admission and approval of discretionary exclusion are the norm nationally is clear. See Thomas Dillickrath, Student Author, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. Miami L. Rev. 1059, 1060 (July 2001). Mr. Dillickrath states that

missibility of expert testimony in identification cases, the Court has emphasized that “a jury is fully capable of assessing a witness’ ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of [expert] testimony . . . .”<sup>126</sup> Thus, even when the sole evidence is witness identification, months have passed between the crime and the initial out-of-court identification, and the crime is a cross-racial one, the court has upheld the discretion of the trial judge to exclude expert testimony.<sup>127</sup>

This restrictive approach to admitting expert testimony and placing reliance on cross-examination is not unique to Florida.<sup>128</sup> A survey<sup>129</sup> of recent cases addressing expert testimony on eye-

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while ostensibly following the “majority” [discretionary admission] rule, actual policy of courts so disfavors this type of evidence that many courts are actually operating in a nearly per se exclusionary manner. The courts in many jurisdictions have never overruled the trial judge’s discretionary exclusion of misidentification testimony, thereby sending a message that almost inherently disqualifies this testimony.

*Id.*

126. *McMullen v. State*, 714 So. 2d 368, 371 (Fla. 1998).

127. *Id.* at 369. The Florida Court’s emphasis on jury instructions as a source of guidance to jurors is without foundation, as that state’s Standard Jury Instructions (Criminal) offer no instruction on eyewitness testimony. The general instruction on witnesses is limited as follows:

### 3.9 WEIGHING THE EVIDENCE

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

- (1) Did the witness seem to have an opportunity to see and know the things about which the witness testified?
- (2) Did the witness seem to have an accurate memory?
- (3) Was the witness honest and straightforward in answering the attorneys’ questions?
- (4) Did the witness have some interest in how the case should be decided?
- (5) Does the witness’ testimony agree with the other testimony and other evidence in the case?

Fla. Stand. Jury Instrs. Crim. § 3.9 (5th ed. 2005).

128. *See e.g.* Dillickrath, *supra* n. 125, at 1060 (describing the majority rule nationally as “allowing the trial judge to exercise great discretion in admitting expert testimony regarding eyewitness identification” but positing that “while ostensibly following the ‘majority’ rule, actual policy of courts so disfavors this type of evidence that many courts are actually operating in a nearly per se exclusionary manner”).

129. The dates ran from 2004 to the present. A LEXIS search of the combined federal and state court databases using the search terms “expert w/7 identif! w/11 discretion and date aft 1/1/2004” was conducted on June 14, 2006.

witness identification in jurisdictions where admissibility is discretionary shows a recurring pattern of affirmances of trial courts' exclusion and a deference to the power of cross-examination to elucidate the weaknesses inherent in eyewitness testimony.<sup>130</sup> This has held true even when the issue on which expert testimony is sought is that of cross-racial identification as follows: "[T]his is an area in which counsel may alert the jury to the likelihood of erroneous cross-racial identifications during cross-examination and summation."<sup>131</sup> Courts have held that the exclusion of eyewitness-expert testimony does not constitute a due process violation given the power of cross-examination and current juror knowledge.<sup>132</sup> Although courts also focus on inadequate offers of proof<sup>133</sup> and the absence of need for expert testimony because the

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130. *U.S. v. Martin*, 391 F.3d 949, 954 (8th Cir. 2004) (emphasizing that "deficiencies or inconsistencies in an eyewitness's testimony can be brought out with skillful cross-examination" (internal quotation omitted)).

[T]he defense in this case had an opportunity to thoroughly cross-examine all of the eyewitnesses. In fact, Welch's counsel took full advantage of this opportunity by extensively cross-examining Steven Austin, Lorraine Cook, and Judith Welch regarding how well they knew Welch, why they became more certain of their identifications either over time or after they were granted immunity from prosecution, and the fact that the clothes worn by the bank robber were not unique.

*U.S. v. Welch*, 368 F.3d 970, 974 (7th Cir. 2004); see *Farris v. State*, 818 N.E.2d 63, 68 (Ind. App. 2004) (holding "the concept that eyewitness identification is flawed or subject to serious question in a particular instance may be placed within the jury's realm of understanding by careful cross-examination and by counsel's argument to the jury" (internal quotation omitted)); *State v. Shomberg*, 709 N.W.2d 370, 375-376 (Wis. 2006) (elucidating that in a bench trial, "[t]he factors that Shomberg's lawyer offered [including the relative reliability of sequential versus simultaneous lineups, relative judgment, transference, the absence of a reliable relationship between confidence of the witness and the accuracy of the identification] were . . . ones that could be adequately explored by cross-examining a testifying witness, and in opening statements and closing arguments"); cf. *State v. Werner*, 851 A.2d 1093, 1101 (R.I. 2004) (finding the offer of proof inadequate but also emphasizing that "the issues raised [in the expert proffer] easily could be addressed on cross-examination and through jury instructions").

131. *People v. Carrieri*, 777 N.Y.S.2d 627, 628-629 (N.Y. Misc. 2d 2004). The Court in *Carrieri* emphasized that "cross-examination exposes falsehoods and elicits the truth of a criminal case." *Id.* No discussion was had as to the limits of cross-examination when confronting the *mistaken* witness. The inability of cross-examination to highlight and remedy the problem of "own-race bias" is discussed *infra* notes 215-221 and accompanying text.

132. *Gurry v. McDaniel*, 149 Fed. Appx. 593, 594 (9th Cir. 2005) (commenting "[w]e are not persuaded that the testimony of Gurry's expert on eyewitness identification, which would have supplemented defense counsel's cross-examinations and jurors' common experiences, was so 'critical to the defense' that its exclusion rendered the trial fundamentally unfair").

133. *U.S. v. Stokes*, 388 F.3d 21, 27 (1st Cir. 2004) (positing "[w]ithout any information regarding the reliability and helpfulness of the proposed expert testimony and without any



identification was “corroborated,”<sup>134</sup> reliance on cross-examination remains central to appellate affirmance when eyewitness-expert testimony is excluded. As the Tenth Circuit explained,

outside . . . specialized circumstances, expert psychological testimony is unlikely to assist the jury—skillful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial. . . . Jurors, assisted by skillful cross-examination, are quite capable

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indication of the existence of a special circumstance, the district court could not conclude that the proposed expert testimony would assist the trier of fact to understand the evidence” (internal quotation omitted); *Werner*, 851 A.2d at 1100 (explaining that “[t]he so-called offers of proof defendant submitted were not sufficient to alert the trial justice to any specific scientific theories that required explanation by an expert, thus triggering the need for an evidentiary hearing”); *Shomberg*, 709 N.W.2d at 375–376 (stating that “[c]ounsel for Shomberg was unable to articulate satisfactorily for the circuit court the basis upon which the factors influencing the reliability of eyewitness identifications would assist the trier of fact”).

134. The emphasis on the reasonableness of excluding expert testimony when there is *some* corroboration is pervasive. *Martin*, 391 F.3d at 954 (“corroborating evidence provided by Martin’s co-conspirators further supports the district court’s decision to exclude Dr. Geiselman’s testimony”); *Hager v. U.S.*, 856 A.2d 1143, 1149 (D.C. 2004) (explaining that “in cases where such corroboration of identification exists, the exclusion of the proffered expert testimony by the trial court generally does not constitute an abuse of discretion”); *Farris*, 818 N.E.2d at 67–68 (requiring that when two eyewitnesses give partial corroboration, identification “was not the primary issue. Farris’ alibi defense was also a central issue. . . . [T]he circumstances necessitating expert eyewitness identification testimony were not present”). Additionally where an appellate court has found error because expert testimony was excluded, the primary reason is the absence of corroboration. *State v. Palmer*, 2006 Iowa App. LEXIS 168 at \*4 (Mar. 1, 2006) (emphasizing that “the only evidence implicating Palmer was Parkhurst’s eyewitness identification” in finding an abuse of discretion).

Although beyond the scope of this Article, it must be noted that conditioning the admissibility of probative-defense evidence on the strength of the prosecution case may run afoul of the due-process guarantee of the right to present a defense. *Holmes v. S.C.*, 126 S. Ct. 1727, 1734–1735 (2006) (finding a due-process violation where South Carolina conditioned admissibility of proof of third-party guilt on the relative weakness of the prosecution’s evidence). As well, studies of the early DNA-exoneration cases showed that many had corroboration in addition to eyewitness testimony. See e.g. Connors et al., *supra* n. 27, at 25 (noting that many of the DNA-exoneration cases used “non-DNA analyses of blood or hair” to supplement identification testimony to secure the conviction); Rob Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row—An Analysis of Wrongful Convictions since Restoration of the Death Penalty following Furman v. Georgia*, Center on Wrongful Convictions, Northwestern U. Sch. L., <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Research/eyewitnessstudy1.htm> (last modified Oct. 23, 2003) (showing that a study of forty-six DNA exoneration involving eyewitness testimony at trial found that thirteen of the cases, or twenty-eight percent, involved some degree of corroboration—accomplice testimony, jail-house informants, or a false confession). Thus, the utility of using corroboration as a determining factor on whether to admit expert testimony is dubious.

of using their common-sense and faculties of observation to make this reliability determination. . . . Nonetheless, we remain cognizant that while cross-examination is often effective, expert testimony, when directed at complex issues, may provide a more effective tool for rebutting an eyewitness' testimony.<sup>135</sup>

This Article demonstrates the fallacy of the claim that cross-examination is the "more effective tool" for testing the reliability of an eyewitness at trial.<sup>136</sup>

#### D. Cross-Racial Identification<sup>137</sup>

The United States Supreme Court has acknowledged that race "counts" in making accurate identifications.<sup>138</sup> Psychological research has persuasively demonstrated a heightened risk of mistaken identification when the victim or witness and the perpetrator are of different races.<sup>139</sup> A compounding problem is that the limited social science studying popular belief shows that a signifi-

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135. *U.S. v. Rodriguez-Felix*, 450 F.3d 1117, 1125 (10th Cir. 2006).

136. *Infra* nn. 211–229 and accompanying text.

137. Although this issue arises in the context of both the admissibility and scope of expert testimony and the content of jury instructions, it is addressed here separately as it also implicates jury selection, opening statements, and closing argument practices and is an area developing its own jurisprudence.

138. *Manson*, 432 U.S. at 115. "Glover himself was a Negro and unlikely to perceive only general features of 'hundreds of Hartford black males. . . ." *Id.*

139. See generally 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. Policy & L. 3–35 (Mar. 2001); see also Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Annual Rev. of Psychol. 277, 280–281 (2003) ("the evidence is now quite clear that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group."); Otto H. MacLin et al., *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 Psychol. Pub. Policy & L. 134, 134 (2001) (stating that a proportionally greater number of misidentifications occurred across racial lines); Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. Rev. 1821, 1821–1834 (2003) (showing people are better at recognizing their own race).

In *State v. Cromedy*, 727 A.2d 457, 461–462 (N.J. 1999), discussed *infra* notes 144–146, the New Jersey Supreme Court surveyed the literature available to that date and maintained that the science was not conclusive but did reflect a substantial risk of such misidentifications, especially in identifications made by Caucasian witnesses of African-American suspects. *Id.* A more recent decision concluded that there is strong consensus among researchers conducting both laboratory and field studies on cross-racial identification that some witnesses are more likely to misidentify members of other races than their own. *Smith v. State*, 880 A.2d 288, 296 (Md. 2005).

cant portion of the public is unaware of or rejects this proposition.<sup>140</sup>

Nationally, the judicial response to this problem has been mixed. Several states have approved of defense closing arguments that emphasize the problems inherent in cross-racial identification.<sup>141</sup> As to the right to a jury instruction on the potential problems inherent in cross-racial identification cases, there is no consensus. Several courts approve of such instructions,<sup>142</sup> while others reject their use outright or approve of them only in limited circumstances.<sup>143</sup>

After an extensive review of scientific studies, national case-law, and a report by a court-appointed commission, the New Jer-

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140. A survey of approximately 1,000 potential jurors in the District of Columbia showed that “[o]ver 55 percent of potential jurors questioned . . . mistakenly thought that cross-racial identifications are as reliable or more reliable as same-race identifications when given a concrete scenario.” Timothy P. O’Toole et al, *District of Columbia Public Defender Survey: What Do Jurors Understand about Eyewitness Reliability? Survey Says . . .*, 29 *The Champion* 28, 31 (Apr. 2005). As two justices of the Massachusetts Supreme Court concluded, “the unreliability of cross-racial identification is a subject beyond the ordinary experience and knowledge of the average juror.” *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 344 (Mass. 2004) (Cordy, J. concurring) (internal quotation omitted).

141. *People v. Sanders*, 905 P.2d 420, 435 (Cal. 1995); *State v. Wiggins*, 813 A.2d 1056, 1059 (Conn. App. 2003) (“closing argument may be employed to demonstrate the problems that might arise as a result of cross-racial identification”); *Smith*, 880 A.2d at 299 (confering a limited right, depending on the facts of the particular case, for defense counsel to argue the frailties of cross-racial identification); *State v. Cunningham*, 863 S.W.2d 914, 923 (Mo. App. 1993) (noting that counsel may discuss the problems with cross-racial identification in closing argument); *State v. Patterson*, 405 S.E.2d 200, 207 (N.C. App. 1991); *Carrieri*, 777 N.Y.S.2d at 629.

142. As the New Jersey Supreme Court summarized,

[o]mission of such a cautionary instruction has been held to be prejudicial error where identification is the critical or central issue in the case, there is no corroborating evidence, and the circumstances of the case raise doubts concerning the reliability of the identification. See *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990) (calling for cross-racial identification instruction when requested by counsel and when cross-racial identification is a “primary issue”); *People v. Wright*, 45 Cal.3d 1126, 755 P.2d 1049, 248 Cal.Rptr. 600 (Cal. 1988); *People v. West*, 139 Cal.App.3d 606, 189 Cal.Rptr. 36, 38–39 (Ct. App. 1983); [*Cmmw.*] *v. Hyatt*, 419 Mass. 815, 647 N.E.2d 1168 (Mass. 1995); *State v. Long*, 721 P.2d 483 (Utah 1986).

*Cromedy*, 727 A.2d at 464.

143. *Lenoir v. State*, 72 S.W.3d 899 (Ark. App. 2002) (holding that due process is not violated by court’s refusal to give cross-racial instruction); *Wiggins*, 813 A.2d at 1058–1059 (finding no abuse of discretion in denying such an instruction but noting that “trial courts may, in the proper exercise of discretion, weigh the unique facts of a particular case in relation to an appropriate charge and conclude that an instruction on cross-racial identification is appropriate”); *Miller v. State*, 759 N.E.2d 680, 684 (Ind. App. 2001) (court properly refused to give jury instruction on cross-racial identification where requested instruction singled out eyewitnesses’ testimony).

sey Supreme Court concluded in 1999 that “[a] cross-racial instruction should be given only when . . . identification is a critical issue in the case, and an eyewitness’ cross-racial identification is not corroborated by other evidence giving it independent reliability.”<sup>144</sup> The jury charge developed, as a result of *State v. Cromedy*,<sup>145</sup> provides as follows:

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’ 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.<sup>146</sup>

Nonetheless, as noted above,<sup>147</sup> the belief that cross-examination can effectively address and redress this concern prevails.

#### E. The Right to an Identification Jury Instruction

There is no constitutional requirement that courts give a specific charge on the issue of identification,<sup>148</sup> and many courts have held that state law does not require such an instruction.<sup>149</sup> None-

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144. *Cromedy*, 727 A.2d at 467.

145. 727 A.2d 457.

146. N.J. Pattern Jury Instr. 2C(8)(199), <http://www.judiciary.state.nj.us/criminal/charges/non2c012.pdf> (accessed Sept. 7, 2006).

147. *See supra* n. 131 and accompanying text (discussing *Carrieri*, 777 N.Y.S.2d at 628–629).

148. *U.S. v. Boyd*, 620 F.2d 129, 131–132 (6th Cir. 1980) (stating that there is no right to identification instruction, which is left to discretion of court, and no need to give instruction except where there is a chance of misidentification due to a lack of corroboration); *U.S. v. Johnson*, 848 F.2d 904, 906 (8th Cir. 1988) (arguing that no specific identification instruction is necessary where nothing points to unreliability of identification); *U.S. v. Smith*, 41 F.3d 1565, 1568 (D.C. Cir. 1994) (finding that lack of specific instruction on the issue of eyewitness identification did not preclude defendant from a full and fair presentation of defense where the court did charge that identity had to be proved beyond reasonable doubt); Comm. Jury Instrs., *Manual of Model Criminal Jury Instructions for the Ninth Circuit*, Commentary at Instr. 4.14 (2003 ed.) (recommending against giving an eyewitness jury instruction; instructions on witness credibility and the government burden to prove identity are sufficient).

149. *Hopson v. State*, 940 S.W.2d 479, 481 (Ark. 1997); *Weems v. State*, 491 S.E.2d 325, 327 (Ga. 1997); *State v. Vinge*, 916 P.2d 1210, 1217–1218 (Haw. 1996); *Hopkins v. State*, 582 N.E.2d 345, 353 (Ind. 1991); *State v. Hohle*, 510 N.W.2d 847, 849 (Iowa 1994); *State v.*

theless, several federal courts<sup>150</sup> and some state courts<sup>151</sup> have developed instructions for cases where there has been some challenge to the identification's validity. This requires jurors to scrutinize identification evidence and treat it with caution. Circumstances that may warrant such an instruction include the following: the witness' limited opportunity to observe, a description at variance with the defendant's appearance, or a failure to positively identify the suspect at a photograph display or line-up. New Jersey requires an identification instruction whenever identification is a "key" issue (*i.e.* when it is the "major thrust of the defense, . . . even when [a] defendant's misidentification argument is 'thin'").<sup>152</sup> In Massachusetts, a cautionary instruction is also required when there is no corroboration in a one-witness identification case.<sup>153</sup> Most recently, the Connecticut Supreme Court imposed a requirement that jurors must receive a cautionary instruction where an identification procedure occurred but the wit-

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*Hall*, 797 P.2d 183, 190 (Mont. 1990); *State v. Dodd*, 412 S.E.2d 46, 49 (N.C. 1992); *State v. Simmons*, 417 S.E.2d 92, 94 (S.C. 1992); *Satcher v. Commonwealth*, 421 S.E.2d 821, 843 (Va. 1992) (holding that if the jury is instructed on presumption of innocence and the need for proof beyond a reasonable doubt, there is no right to special identification instruction).

150. *U.S. v. Barber*, 442 F.2d 517, 528 (3rd Cir. 1971); *U.S. v. Telfaire*, 469 F.2d 552, 558–559 (D.C. Cir. 1972); Pattern Jury Instr. Crim. 7.11 (2005); 7th Cir. Pattern Jury Instr. Crim. 3.06 (1999); 8th Cir. Pattern Jury Instr. Crim. 4.08 (2003); Pattern Jury Instr. Crim., Special Instr. No. 3 (2003).

151. See *State v. Cerilli*, 610 A.2d 1130, 1134 (Conn. 1992) (holding there is a right to cautionary instruction in cases where there are inconsistencies and the defense is mistaken identification); *State v. Noriega*, 932 P.2d 940, 946 (Kan. 1997) (explaining cautionary instruction should be given in cases where identification testimony is critical to prosecution case and there is serious question about reliability); *Gunning v. State*, 701 A.2d 374, 380–382 (Md. 1997) (asserting that cautionary instruction is generally left to the discretion of the trial court, but it is necessary in some cases); *Commonwealth v. Ashley*, 694 N.E.2d 862, 869 (Mass. 1998) (upholding the right to a cautionary instruction on possibility of mistaken identification if facts support such claim); *Commonwealth v. Gibson*, 720 A.2d 473, 481 (Pa. 1998) (affirming the right to instruction where identification is not positive and unequivocal); *State v. Cribbs*, 967 S.W.2d 773, 779 (Tenn. 1998) (granting a right to jury instruction whenever identification is a "material" issue); *State v. Maestas*, 984 P.2d 376, 380 (Utah 1999) (recognizing a right to cautionary instruction in any case where identification is a central issue); *State v. Waites*, 462 N.W.2d 206, 209 (Wis. 1990) (trial court's determination of whether to give a cautionary instruction is subject to the abuse of discretion standard, but such instruction is appropriate in some identification cases).

152. *State v. Cotto*, 865 A.2d 660, 665–666 (N.J. 2005). The failure to give such an instruction will be plain error unless the state presents "overwhelming corroborative evidence . . ." *Id.* at 666.

153. *Commonwealth v. Monteiro*, 747 N.E.2d 721, n. 8 (Mass. App. 2001).

ness was not advised that the perpetrator might *or might not* be in the line-up or array.<sup>154</sup>

Even when required by law, the instructions rarely provide insight into the psychology of memory and perception. At its most general, the instruction may inform jurors that identification, like an element of the offense, need be proved beyond a reasonable doubt.<sup>155</sup> Some states make optional the provision of additional information such as the list of reliability factors derived from *Neil v. Biggers*<sup>156</sup> and *Manson v. Braithwaite*,<sup>157</sup> including, inter alia, the witness' opportunity to observe the criminal, the witness' degree of attention during the episode, and the witness' degree of certainty.<sup>158</sup> As noted below, New Jersey law mandates a cautionary instruction in cases of cross-racial identification.<sup>159</sup>

The instruction approved in *United States v. Telfaire*<sup>160</sup> is typical and advises jurors to consider issues such as:

- how long or short a time was available, how far the witness was, . . . [and] whether the witness had had occasion to see or [to] know the person in the past;
- the strength of identification;

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154. *Supra* n. 99 and accompanying text.

155. Delaware, for example, requires only that jurors be told that they must be satisfied "beyond a reasonable doubt that the defendant has been accurately identified" and that an acquittal is required "if there is any reasonable doubt about his identification. . . ." Del. Stand. Jury Instr. CR.JI.4F (1974). New jury instructions are in the process of being drafted but as of September 2005 have not been published. Requests for more detailed instructions, focusing jurors on suggestive identification procedures or the viewing conditions at the time of the offense, have been rejected. *Stones v. State*, 1996 Del. LEXIS 123 at \*7 (Del. Feb. 23, 1996); *Jackson v. State*, 1994 Del. LEXIS 222 at \*7 (Del. June 30, 1994) (adding that "special instructions on identification are not necessary, even if requested, where the instructions correctly state the law on identification").

156. 409 U.S. 188, 190 (1972).

157. 432 U.S. 98, 114 (1977).

158. *Supra* n. 106. Although permitting the jurors to be told that a witness' confidence is an appropriate consideration, New Jersey law recognizes the unreliability of this factor. *State v. Madison*, 536 A.2d 254, 263 (N.J. 1988) (stating that "a witness' feeling of confidence in the details of memory generally do not validly measure the accuracy of the recollection. . . . In fact, witnesses frequently become more confident of the correctness of their memory over time while the actual memory trace is probably decaying" (internal quotation marks omitted)).

159. *Cromedy*, 727 A.2d at 467.

160. 469 F.2d 552 (D.C. Cir. 1972).

- if the identification may have been influenced by the circumstances under which the defendant was presented to him for identification; and
- the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see [the] defendant.<sup>161</sup>

As the Court's language shows, jurors remain uninformed about significant estimator and system variables.<sup>162</sup>

Thus, the scientific findings have only moderately penetrated courtroom practice in traditional form, such as jury instructions, the teaching role of experts, and the pretrial determination of eyewitness testimony's reliability. Given the lack of juror knowledge of the mechanisms and frailties of perception, memory, and recall, the sole source for this information may be the defense attorney's cross-examination. This Article now turns to the origins of cross-examination and its limited efficacy in this role.

#### V. CROSS-EXAMINATION: A TOOL TO EXPOSE DISHONESTY, NOT MISTAKEN IDENTIFICATION

##### A. The Genesis of Cross-Examination and the Adversarial System of Trials

From its earliest treatment in treatises and commentary, cross-examination has been extolled for its capacity to expose untruths. According to Bentham, "Against erroneous or mendacious testimony, the grand security is cross-examination[.]"<sup>163</sup> This was echoed, with the emphasis exclusively on the "mendacious," in the 1857 encomium hailing cross-examination as "the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of mortals."<sup>164</sup> Professor Langbein tracked the

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161. *Id.* at 558.

162. Estimator variables include the absence of a meaningful correlation between certainty and accuracy, the phenomenon of own-race bias, the degradation of memory, and the risk of other factors that can influence or corrupt memory; system variables refer to the role of sequential line-ups and "relative" judgment, the impact of line-up instructions, and non-blind administration variables.

163. Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice*, vol. 5, n. 212 (Hunt & Clarke 1827).

164. Anonymous, *Of the Disqualification of Parties as Witnesses*, 5 Am. L. Register 257, 263-264 (1857).

transition from “[t]he oath-based system [that] presupposed the witness’s fear that God would damn a perjurer . . . [to] the new order [that] substituted its faith in the truth-detecting efficacy of cross-examining lawyers.”<sup>165</sup> It is from these skeins that Wigmore’s endorsement of cross-examination as the “greatest legal engine ever invented for the discovery of truth”<sup>166</sup> is woven.

Yet these accolades also show the limits of cross-examination and its inutility in confronting the truthful but mistaken witness, or in demonstrating the lessons of the science of perception, memory, and recall. A tool designed from its inception to root out *liars* is ill-suited for the task of exposing the risk or reality of *mistaken* identification.

It is indubitable that cross-examination emerged as a response to the risk of perjury. In his exceptional tracing of the history of adversary cross-examination, Professor Langbein found it a necessary (if, in his view, ill-desired<sup>167</sup>) response to three occurrences in the English trial system:

- (1) the growing use of lawyers to present prosecutions in both the investigative and trial stages;
- (2) the reward system, which offered bounties to those who provided testimony establishing that a crime reached the severity (or degree of financial loss) to qualify as a felony; and
- (3) the prosecution technique of using accomplice testimony in gang crimes which created greater risks of perjured testimony.<sup>168</sup>

Professor Langbein dates the acceptance or institutionalizing of defense cross-examination to the 1730s.<sup>169</sup> The concern over the pervasiveness of perjury was so great that a 1786 meeting of judges proposed to punish that offense capitally.<sup>170</sup>

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165. Langbein, *supra* n. 6, at 246.

166. *Supra* n. 1.

167. Professor Langbein viewed the two-party adversary system as a “poor proxy for truth-seeking.” Langbein, *supra* n. 6, at 332.

168. *Id.* at 4.

169. *Id.* at 107.

170. *Id.* at 148 n. 205 (citing James Oldham, *The Mansfield Manuscripts and the*



Of the three rationales posited by Langbein, the second and third speak to the content, structure, and focus of cross-examination—exposing false testimony.<sup>171</sup> The reward system, initiated in the late 1600s and extant until its abolition in 1818, offered pecuniary compensation (statutory awards, occasionally supplemented by specific awards authorized by proclamation) for witnesses who facilitated the prosecution of felons.<sup>172</sup> The “crown prosecution” system used a different “reward,” but one equally prone to inducing false testimony—the grant of immunity to one accomplice to secure the conviction of others.<sup>173</sup>

Contemporaneous with these legal developments was the unintended creation of a historic record of the courts' response: the Old Bailey Sessions Papers.<sup>174</sup> Essentially lay accounts of the proceedings at London's Old Bailey courts, available in sheets and broadsides, the Sessions Papers provided a daily account of trials and the transition from the no-counsel proceeding to a defense counsel and cross-examination adversary system. Langbein uses these records to track the inception of the right to counsel to respond to the clearly perceived risk of convictions based on perjured testimony:

By allowing defense counsel to cross-examine prosecution witnesses, the judges of the 1730s undertook to correct for the imbalance that had opened between the unaided accused and a criminal prosecution that increasingly reflected the hand of lawyers [(prosecutors)] and quasi-professional thieftakers. The bench was tacitly acknowledging that prosecu-

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*Growth of English Law in the Eighteenth Century* 1066 (U.N.C. Press 1992)).

171. See *supra* n. 168 and accompanying text (describing Langbein's three rationales). The first rationale, to provide a counter to the professionalization of the prosecution, does not undercut this thesis as it addresses the need for a person learned in the law to stand with, and argue on behalf of, the accused. That role does not speak to the nature or scope of cross-examination, except when it is designed to show a deficiency in the proof or to secure the concession of a fact essential to the defense. This is of limited utility when confronting the honest but mistaken witness, the prototype in an identification case. As is demonstrated *infra* Part V(C), identification cases have numerous categories of fact that a witness cannot know and cannot (or will not) concede.

172. Langbein, *supra* n. 6, at 148–158.

173. *Id.* at 155.

174. Procs. Old Bailey, *Old Bailey Session Papers* (available at <http://www.oldbaileyonline.org>) (accessed Sept. 12, 2006) (containing accounts of more than 100,000 London criminal trials from 1674 to 1884).

tion evidence needed probing of a sort that itinerant trial judges processing huge caseloads were not able to do.<sup>175</sup>

What occurred in England was transported largely wholesale to the United States and its predecessor colonies. Cross-examination, at the time of the adoption of the Constitution, was viewed as attendant to the right of an accuser vis-à-vis the state and as a method of bringing out the “whole truth.”<sup>176</sup>

For example, “Brutus,” in discussing how evidence should be taken in the proposed courts concluded, “it is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross[-]examining them in order to bring out the whole truth . . . .”<sup>177</sup>

The confrontation right of cross-examination reflected the ascendance and acceptance of the role of lawyers in American colonial and early post-independence trials as follows:

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175. Langbein, *supra* n. 6, at 168. Langbein wrote of the expansion of cross-examination into all facets of the criminal trial to “develop discrepancies between the pretrial statement and the trial testimony; [and] to shake the identification of persons or property. . . .” *Id.* at 294. Yet the case cited by Langbein as one where cross-examination proved successful in “shak[ing] the identification of persons”—the trial of Elizabeth Robinson—is not a case of identification. Rather, Robinson admitted being in a particular shop, but denied removing an item therefrom; the cross-examination focused on how clearly the shopkeeper could see Ms. Robinson, not on whether the witness was mistaken as to identity. *Procs. Old Bailey, Elizabeth Robinson, alias Bateman, alias Bentley, Theft: Specified Place 27 October 1790*, <http://hri.shef.ac.uk/luceneweb/bailey/highlight.jsp?ref=t17901027-76> (accessed Sept. 12, 2006). Langbein’s research into the Old Bailey trials does not purport to show cross-examination as a successful tool for confronting the honest but mistaken eyewitness.

176. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 116–120 (1995).

177. *Id.* at 120 (citing Essay of Brutus XIV at 435). In addition, the state of Maryland, in its 1776 Declaration of Rights, provided that “[i]n all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him, . . . [and] to examine the witnesses for and against him on oath . . . .” *The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins* 403 (Neil H. Cogan ed., Oxford U. Press 1997). Indeed, a recognition of the importance of cross-examination was developed in French criminal justice theory in the late sixteenth century writings of Pierre Ayrault, who emphasized the desirability of cross-examination as a complement to the face-to-face rendering of an accuser’s testimony. Pierre Ayrault, *Ordre, Formalité et Instruction Judiciaire* 1.5 (Paris 1588), quoted in Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Intl. L. 481, 541–542 (1994).

The suggestion here is that America had adopted an adversary system, with defense cross-examination at its core, by the time of the Bill of Rights. This contention is supported by the transformation defense counsel brought to English criminal procedure, America's early acceptance of a full right to counsel, and America's creation of a public prosecutor. An adversary system was also consistent with new American concepts about crime, a government of checks-and-balances, and how society should be ordered.<sup>178</sup>

It is indisputable that cross-examination had become a signal feature of trials in the late colonial and early post-Revolution period.<sup>179</sup> As one scholar explained in the early nineteenth century,

The Law never gives credit to the bare assertion of any one, however high his rank, or pure his morals; but always requires the sanction of an oath: It further requires his personal attendance in Court, that he may be examined and cross[-]examined by the different parties . . . ; for the relation of one who has no other knowledge of the subject than the information he has received from others, is not a relation upon oath; and moreover the party against whom such evidence should be permitted, would be precluded from his benefit of cross[-]examination.<sup>180</sup>

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178. Jonakait, *supra* n. 176, at 108. The importance of the role of counsel in defining the intent of the confrontation right is also accepted by Professors Friedman and McCormack as follows:

[T]he Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial.

Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1206–1207 (2002).

Enactment of the Sixth Amendment occurred just as evidence law was rapidly developing . . . . It is likely, however, that because they were acting in the midst of a century in which the adversary system was expanding on many fronts, the Framers were looking forward to a doctrine with the right of cross-examination preeminent. . . . [A]n emphasis on cross-examination was ascending.

Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691, 742 (1993) (citations omitted).

179. Wigmore, *supra* n. 1, at § 1367, 32.

180. Thomas Peake, *A Compendium of the Law of Evidence* 7–8 (Garland Publ., Inc. 1979) (originally published 1801). Peake further explains that after a witness' direct examination

Assessing this historical record, Dean Wigmore viewed cross-examination as the essence of the trial and truth-seeking process in the United States.<sup>181</sup> He viewed its capabilities more broadly, presuming it capable of serving two ends: proving untruths *and* completing the story by eliciting facts that “remain[ed] suppressed or undeveloped” on direct examination, including “the remaining and qualifying circumstances of the subject of testimony, *as known to the witness.*”<sup>182</sup> Where Wigmore’s construct dissolves is in the presumption, one inapplicable to identification witnesses, that there are remaining facts *known to the witness*.

### B. Cross-Examination and the Identification Witness: The “Experts” Speak

Given the heavy reliance placed on cross-examination as the tool both necessary and sufficient to guarantee accurate results in identification cases,<sup>183</sup> one would expect that the major instructional texts on the “art and science” of cross-examination would provide guidance and illustrations of how to succeed in this endeavor. Consistently, however, they are silent.<sup>184</sup> More significantly, the few texts written specifically for cross-examination in

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[t]he counsel retained on the other side, next cross-examines the witness, and the witness not being supposed so friendly to his client as to the party by whom he is called, he is not restrained to any particular mode of examination . . .

*Id.* at 135–136.

181. Wigmore, *supra* n. 1, at § 1368, 36–37.

182. *Id.* (emphasis added).

183. See e.g. *Watkins*, 449 U.S. at 348 (“Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification. . . .”); *supra* nn. 129–135 and accompanying text (collecting and discussing national caselaw approving the exclusion of expert testimony because of the efficacy of cross-examination).

184. E.g. Paul Bergman, *Trial Advocacy in a Nutshell* (3d ed., West 1997); Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* (2d ed., Natl. Inst. Tr. Advoc. 1997); Frances L. Wellman, *The Art of Cross-Examination* (4th ed., Collier-McMillian 1970); but see Michael E. Tigar, *Examining Witnesses* (2d ed., ABA 2003). Tigar devotes three pages to the cross-examination of eyewitnesses but advocates abandoning leading questions because “[n]either [the witness] nor the jury will appreciate your trying to ‘control’ every response.” *Id.* at 238. Tigar presumes that open-ended questions will suffice “because the indicia of eyewitness unreliability are well established.” *Id.* at 240. Nowhere does Tigar validate his claim that these indicia are well known, and the illustrations of his proposed light-touch methodology (e.g., asking the witness to close her eyes for the duration of the crime to establish its brevity) presume a compliant witness. *Id.* at 238. Tigar never advocates the “great engine” model for use with eyewitnesses.

identification urge caution and propose limited goals for the questioning of the eyewitness.

*Eyewitness Testimony: Challenging Your Opponent's Witness*<sup>185</sup> begins with the following cautionary warning:

Cross-examining a neutral, credible, and confident eyewitness is a challenge for even the most experienced and successful attorneys. The likelihood that a committed eyewitness will recant his position (or fall apart on the stand) is so minimal that it is hardly worth considering.<sup>186</sup>

Professor Cutler urges the practitioner toward the “more conservative and attainable goal” of exposing “the factors that can make eyewitness memory less reliable.”<sup>187</sup> He suggests that the examiner elicit those factors that might have impacted perception or memory (the latter including the police-investigation process),<sup>188</sup> but emphasizes the danger in then challenging the witness directly:

Do not ask the eyewitness how any or all of these factors may have influenced his memory. . . . Chances are that if you ask, the eyewitness will respond with “I got a good enough look.” . . . [D]o not remind the jury that the eyewitness is confident in her testimony.<sup>189</sup>

Yet Cutler's conservative approach has its own risks. Eliciting evidence about the stress of the event or the presence of a weapon may actually enhance juror perception of the witness' credibility. Although science has demonstrated the deleterious impact of each of these conditions on eyewitness accuracy,<sup>190</sup> jurors often find them to be enhancing factors.<sup>191</sup> Additionally, Cutler urges counsel to seek the admission of expert testimony to ex-

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185. Brian L. Cutler, *Eyewitness Testimony: Challenging Your Opponent's Witness* (Natl. Inst. Tr. Advoc. 2002). Professor Cutler is a psychologist with extensive research and publications concerning eyewitness reliability.

186. *Id.* at 97.

187. *Id.*

188. *Id.* at 100–106.

189. *Id.* at 101.

190. See text accompanying *supra* n. 40 (addressing “weapons focus”) and *supra* n. 81 (dealing with the negative impact of high levels of stress).

191. See Loftus et al., *supra* n. 65, at 8–9 (showing that jurors find the presence of a weapon or the increase in stress as factors likely to improve eyewitness perception).

plain the significance of those factors that examination of the eyewitness(es) has disclosed.<sup>192</sup>

A more frequently cited<sup>193</sup> text is *Eyewitness Testimony: Civil and Criminal* by Elizabeth F. Loftus and James M. Doyle.<sup>194</sup> Although relied on in at least one instance<sup>195</sup> by an appellate court's approval of the preclusion of expert testimony because of the book's proclaimed endorsement of the efficacy of cross-examination, the text speaks to the contrary. It counsels caution, suggests that lawyers have minimal expectations for cross-examination in eyewitness-identification cases, and warns repeatedly of the potential and severe pitfalls. The book suggests that careful strategizing can make the cross-examiner's situation "less hopeless than it seems"<sup>196</sup>—hardly a ringing endorsement.

The authors warn, first, that cross-examiners start at a disadvantage because of jurors' "nearly religious faith in the accuracy of eyewitness accounts."<sup>197</sup> Because the eyewitness is testifying honestly (*i.e.*, sincerely), he or she will not display the demeanor of the dishonest or biased witness.<sup>198</sup> The text advises lawyers not to "shuffle" the order of cross-examination, as such a tactic may be resented by jurors when applied to an apparently honest, unbiased witness.<sup>199</sup> Most significantly, the book iterates that there will be no "knock-out punch" in cross-examination resulting in an admission that the witness is wrong.<sup>200</sup> Overall, the prescription is to take the following cautious approach: "[T]he cross-examination should be designed to hold the risks to an absolute minimum."<sup>201</sup>

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192. Cutler, *supra* n. 185, at chs. 10–12.

193. A June 2006 search of the combined federal and state caselaw database of LEXIS found more than twenty decisions released after 2004 citing to and relying on this text.

194. Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* (3d ed., Lexis 1997).

195. *Rodriguez-Felix*, 450 F.3d at 1125 (noting that "[j]urors, assisted by skillful cross-examination, are quite capable of using their common-sense and faculties of observation to make this reliability determination."); *see generally* Loftus & Doyle, *supra* n. 194, at §§ 10-1–10-30 (detailing the process to most effectively cross-examine an eyewitness).

196. Loftus & Doyle, *supra* n. 194, at §§ 10-1.

197. *Id.*

198. *Id.* at § 10-1(a).

199. *Id.* at § 10-1(b).

200. *Id.* at § 10-2.

201. *Id.* at § 10-8.

The caution expressed by Loftus and Doyle was seemingly transformed to pessimism by 2005 in Professor Doyle's *True Witness*.<sup>202</sup> Using the Ronald Cotton conviction and exoneration as a template or paradigm, Doyle demonstrated conclusively that cross-examination, even by a skilled practitioner, could not overcome the jurors' acceptance of eyewitness testimony.<sup>203</sup> As Doyle explained, defense counsel for Ronald Cotton, through cross-examination, established that

- The eyewitness victim, who wore eyeglasses, did not have them on during the assault; and
- The witness, Jennifer Thompson, had chosen two men from an initial photospread who "looked like the robber."<sup>204</sup>

Not mentioned in *True Witness*, but a fact established at trial, was the virtual absence of light in the room where the assault occurred.<sup>205</sup> As Thompson explained years later, after Cotton's exoneration by DNA:

. . . I was able to use light sources such as coming through my blinds and my bedroom window, a night light that I had. At one point he bent down and turned on my stereo and a blue light came off of the stereo and it shined right up to his face.<sup>206</sup>

Doyle attributes this failure of cross-examination to jurors' "implicit faith in eyewitnesses."<sup>207</sup> He noted in particular the fixation of jurors on witness certainty, drawing support for this contention from numerous studies.<sup>208</sup> Coupled with this was the following daunting statistic also derived from an experiment: when mock juries witnessed the cross-examination of an eyewitness by beginning lawyers and skilled cross-examiners, "[t]here was no

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202. Doyle, *supra* n. 38.

203. *Id.* at 40.

204. *Id.*

205. *Id.*

206. *What Jennifer Saw*, <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/thompson.html> (accessed Sept. 6, 2006).

207. Doyle, *supra* n. 38, at 40.

208. *Id.* at 41.

significant difference in the results obtained by the tyros and those obtained by the pros.”<sup>209</sup> In sum, the reliance of courts on the power of cross-examination, both on its own and as a sufficient substitute for expert testimony, has no support in the literature.<sup>210</sup>

### C. The Inutility of Cross-Examination Demonstrated

The disconnect between judicial reasoning and expert writing on the efficacy of cross-examination is not merely a disagreement between “reasonable people” with each side entitled to its view and with each drawing support from demonstrations and anecdotal experience. It is, rather, conclusory on one side, the judicial, and substantiated on the other, the experts. The failure of cross-examination can be demonstrated concretely by examining several of the criteria shown to undercut eyewitness reliability. In each category, cross-examination fails to establish witness unreliability (or even call the identification testimony into question).<sup>211</sup>

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209. *Id.* (citation omitted).

210. See also Lisa Steele, *Trying Identification Cases: An Outline for Raising Eyewitness ID Issues*, 28 *The Champion* 8, 10 (Nov. 2004).

Cross-examination . . . is not as good as one would hope at uncovering the effects of suggestion and assumption on an honest but mistaken witness. . . . Cross-examination tends to focus on the witness' confidence, a very misleading indicator. Wrong, and impeached, a confident witness is still likely to be believed.

*Id.* Expert psychologists have also noted the inutility of cross-examination as a tool for ensuring reliable verdicts in eyewitness-based prosecutions. *E.g.* Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 *Am. Psychol.* 581, 588 (2000) (stating that “[c]onsiderable empirical evidence, however, indicates that cross-examination is not effective for revealing memory errors and that people, including judges, do not adequately understand the influence of biased lineups.”); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *L. & Hum. Behav.* 1, 6 (1998); Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implication for Triers of Fact*, 66 *J. Applied Psychol.* 688, 688–696 (1981).

211. Cross-examination is further hampered by occurring in a circumstance where jurors are unduly predisposed to accept direct eyewitness evidence regardless of circumstance. See Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 *Mich. L. Rev.* 241, 244 (2006) (observing that “jurors dramatically *undervalue* circumstantial evidence and just as dramatically *overvalue* direct evidence.” (emphasis in original)).



### 1. *Cross-Racial Identifications (Own-Race Bias)*

Race remains one of the most sensitive issues in American society and discourse.<sup>212</sup> Yet the impact of race on identification cases remains strong, and cross-racial identifications remain prone to error.<sup>213</sup> Yet how does one establish racial identification error by cross-examination? Consider the following two scenarios:

**Q:** Sir, isn't it true that you are better at identifying people of your own race than African-Americans?

or

**Q:** Ma'am, are you aware that studies show that people have an "own-race bias" that makes it harder for them to identify persons of other races?

The first inquiry will palpably offend the witness, and quite likely the jury, and opposing counsel may object, arguing that the question lacks foundation. Even if permitted, there is no controlling the witness' answer, one that will almost certainly be "no."<sup>214</sup> Additionally, asking the question violates the canon of cross-examination—never ask a question to which the answer is unknown.<sup>215</sup>

The second inquiry has its own problems. It asks a witness to speak to "qualifying circumstances"<sup>216</sup> not known to the witness herself,<sup>217</sup> and thus goes beyond the reach of cross-examination.

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212. The effect of race in the criminal law process, and in particular in capital case decisionmaking, has been amply documented. *E.g.* David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DePaul L. Rev. 1411 (2004); William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant Is Black and the Victim Is White*, 53 DePaul L. Rev. 1497 (2004).

213. *Supra* pt. IV(D).

214. Even worse, the witness might respond "Sir, I don't know about other Black people, but when your client put that gun in my face it burned his image in my mind."

215. *See e.g.* Bergman, *supra* n. 184, at 188 (noting that "[a] question is highly safe if your desired answer is consistent with a witness' provable prior statement."); Lubet, *supra* n. 184, at 95 (advising to "[n]ever ask a witness a question simply because you want to find out the answer. Rather, cross examination must be used to establish or enhance the facts that you have already discovered.").

216. *See* Wigmore, *supra* n. 1, at § 1368, 36–37 (explaining that one of the two functions of cross-examination is to elicit facts that "remain[ed] suppressed or undeveloped [on direct examination, including] . . . the remaining and qualifying circumstances of the subject or testimony, as known to the witness . . ." (emphasis added)).

217. The phenomenon also remains unknown to many jurors, so the mere asking of the

The answer will probably be, “I don’t know what you’re talking about.” Absent the remarkable occurrence of a very insightful witness *aware of* and willing to disclose his or her “own-race bias,” there can be no effective cross-examination on the phenomenon of cross-racial bias. The judicial contention<sup>218</sup> that questioning can fulfill the expert’s role on this issue is baseless.

## 2. Weapons Focus

The entire premise of weapons focus is that it is often a subconscious phenomenon—without realization of the occurrence, the witnesses’ eyes are drawn toward the weapon. It is precisely the extent to which the witness is unaware of the diverted attention that cross-examination proves ineffective. Again, reverting to Wigmore’s standard, it is a quest to elicit information of “qualifying circumstances”<sup>219</sup> not known to the witness herself.

This is not to say that an artful cross-examination cannot establish weapons focus in some cases. The tactic of “indirection,” getting the witness to discuss topic A without realizing she is really talking about topic B, is most useful here, as is illustrated by the exchange below:

**Q:** Are you certain the robber had a gun?

**A:** Yes, I saw it.

**Q:** It was a real gun, and not a fake?

**A:** Definitely.

**Q:** Tell the jury how you know that.

**A:** I could see the barrel, and the way the man was holding it, the weight of the gun, it was real.

**Q:** Tell the jury how he was holding it—with which hand.

**A:** I could see it in his right hand.

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question does not serve as a reminder to the venire persons of a criterion they know and should apply. See Loftus et al., *supra* n. 65, at 14–15 (noting that in a study of more than 1,000 prospective jurors, forty-eight percent of those surveyed believed there was no difference in reliability between same-race and cross-racial identifications).

218. See *supra* n. 131 and accompanying text (discussing *Carrieri*, 777 N.Y.S.2d at 628–629).

219. Wigmore, *supra* n. 1, at § 1368, 36–37.

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**Q:** Ma'am, I will hold out my hand with this pencil as if the pencil were a weapon. I am holding it at my waist, pointing forward. Is that the way the man held it?

**A:** A little higher.

**Q:** Okay, I am holding it out at my chest, pointing forward. Am I demonstrating this correctly?

**A:** Yes.

**Q:** And, if I understand this correctly, that's how the man held the gun the entire incident. Is that correct?

**A:** Yes

While such a tightly constructed examination will provide material for the defense closing-argument assertion that “she was looking at the gun, not the man’s face,” there is no guarantee that this will succeed. Many jurors believe that the presence of a weapon *increases* attention overall and enhances eyewitness reliability,<sup>220</sup> so the questioning can actually result in facts deemed supportive of the identification. Further, the witness may resist the questioning, precisely because the witness may perceive the goal of the “indirection” and continue to insert assertions of having looked at the perpetrator’s face. At best, cross-examination offers a limited tool for establishing the mistaken identification when weapons focus is at issue.

### 3. *Stress*

The *fact* of stress is easily proved by cross-examination. It is natural to inquire, and not discomfoting for the witness to admit that a criminal event was “stressful,” “scary,” and “a time of anxiety.” Yet such a cross-examination again fails to establish the *consequence* of stress—that as anxiety is heightened, reliability diminishes. The cross-examiner is confounded by Wigmore’s dilemma—the examiner must then try and elicit information of “qualifying circumstances” not known to the witness herself.

Here, the questioning is more problematic than that involving cross-racial identification. Not only will the witness be unaware of

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220. See text accompanying *supra* n. 67 (reporting that polling shows that “37% thought the presence of a weapon makes a witness’ memory *more* reliable”).

the studies showing that reliability diminishes as stress increases beyond moderate levels, but she will use the fact of the stress to endorse and validate her identification:

**Q:** Ma'am, you've told us that being robbed was a highly stressful event, correct?

**A:** Yes.

**Q:** And you must know that the higher the stress, the more memory and perception get distorted. In other words, the more stress, the more it is likely that people make mistakes. You know that science has proved this, don't you?

**A:** Look, I don't know about studies. But I sure know what I saw. That man did it—this event was a powerful one, I'll never forget it.

Simply, there is no guaranteed method of using cross-examination to educate jurors as to the *impact* of stress. In addition, as stress is seen by many lay persons as enhancing reliability,<sup>221</sup> questioning on the subject can unwittingly increase the perceived reliability of the eyewitness testimony.

#### 4. *Memory Retention and Drop-Off, and the Confidence-Accuracy Disconnect*

The paradigmatic testimony of an eyewitness is the claim that "I'll never forget that face."<sup>222</sup> To question this confident witness about the drop-off in memory, a cliff-effect phenomenon showing significant memory loss within several hours of an event,<sup>223</sup> or the absence of a significant correlation between confi-

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221. See text accompanying *supra* n. 68 (noting that polling of potential jurors showed that "39% thought violence in a crime *enhanced* reliability, and 33% either found this to be a neutral factor or were uncertain of its impact").

222. *U.S. v. Dowling*, 855 F.2d 114, 123 (3d Cir. 1988). This is the typical proclamation of a crime victim or witness describing his/her memory of the perpetrator's features. "I could be dead and born again, and I will never forget that face. It's that gentleman sitting over there. I would never forget those eyes. I would never forget those looks." *Id.*

223. See *e.g.* Ebbesen & Konecni, *supra* n. 39 (determining that "[m]ost people would agree that memory fades with time and most experts agree that it fades faster immediately after exposure but then tends to level off."); Hermann Ebbinghaus, *Memory: A Contribution to Experimental Psychology* ch. 7, §§ 26–29 (1885) (showing that the greatest memory loss occurs within the first hour, continues for roughly nine hours, and then levels

dence (already asserted by the witness) and accuracy can lead to no useful response (and perhaps will instead generate a cautionary instruction<sup>224</sup> to the jurors that “remember, questions are not evidence; answers are”).

The questions in this area, whether explicit or indirect, are likely to fail the cross-examiner:

**Q:** Sir, isn't it true that you, like many people, forget many details of an incident within hours of its occurrence?

**A:** Not me, buddy. And not this robbery.

. . .

**Q:** Ma'am, you know, don't you, that the fact that someone says, “I'm one-hundred percent sure” does not mean that the person can't be making a mistake, correct?

**A:** Sure, and that's why I would never say it unless I was certain of the facts.

. . .

**Q:** Sir, isn't it true that sometime an event happens and within hours you can't remember many of the details?

**A:** Sure, if the event isn't a biggie. But when it is serious, it sticks with me.

Such questioning accomplishes only one end—allowing the witness to reaffirm her identification testimony.

### 5. *System Variables*

Cross-examination can establish the *occurrence* of many imperfect identification procedures but not their *significance*.<sup>225</sup> A

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off); David C. Rubin & Amy E. Wenzel, *One Hundred Years of Forgetting: A Quantitative Description of Retention*, 103 *Psychol. Rev.* 734, 737 (1996) (discussing whether there is one retention function that can describe all memory).

224. See generally *U.S. v. Cooper*, 2004 U.S. Dist. LEXIS 3470 at \*31 (D. Kan. Feb. 10, 2004) (noting that “[t]he court gave a similar instruction in the final set and further instructed that a lawyer's question is not evidence, for ‘it is the witnesses' answers that are evidence, not the questions.’”).

225. Cross-examination cannot establish whether the person conducting the line-up was a “blind” administrator, i.e., a person to whom the identity of the prime suspect was

witness can readily admit that she saw a one-person (show-up) rather than a multi-person line-up, or that he was not told that “the line-up you are about to view may or may not contain the perpetrator”; or that the line-up or photograph display occurred simultaneously rather than sequentially (“You were shown the people in the line-up all at once, standing all in a row, rather than one at a time, correct?”). However, that same witness has a deficit of knowledge as to *why* these are preferred practices and why the failure to utilize them may diminish accuracy or increase the likelihood of a mistake during the identification process:

**Q:** You know, don’t you, that looking at six people in a row results in comparative judgment, while being shown six people one at a time requires absolute judgment. Isn’t that correct?

**A:** Huh?

The same is largely true when the witness under examination is the police investigator responsible for the identification procedure. She can be questioned about what protections were not utilized, but the significance of these omissions will remain an unknown:

**Q:** Detective, you did not instruct the witness, before the line-up, that the perpetrator of the crime “might or might not” be in the array, correct?

**A:** That’s right, I simply said “Please look at the line-up and tell me if you recognize anyone you saw at the crime.” This is the standard question used in every line-up our department conducts.

**Q:** You know, don’t you, that the language I mentioned reduces the risk of a mistaken identification?

**A:** I’ve never heard that.<sup>226</sup>

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not known. This will have to be established when/if that police witness testifies.

226. Defense counsel may attempt to use a government publication, such as the National Institute of Justice’s Trainer’s Manual for Law Enforcement, *supra* note 89, to question regarding best practices. However, unless the investigator has read them, he or she will simply answer “I am not aware of that.” As well, the *reasoning* behind the recommen-

Cross-examination regarding system variables is the ultimate example of what Wigmore acknowledged cross-examination cannot accomplish—the securing of information of “qualifying circumstances” not known to the witness herself.<sup>227</sup>

### *6. Is There No Effective Cross-Examination?*

The skilled cross-examiner can always make some headway with an eyewitness. Careful preparation, a visit to the crime scene, the study of the witness' prior statements—all of these can provide material for the skilled examiner to establish inconsistencies or a reduced opportunity to observe. Of particular importance is the technique of “time-framing”—the art of breaking the event or crime into a series of discrete acts, each in isolation:

- Q: You were walking along.
- Q: The man grabbed you from behind, pulling on your purse.
- Q: You looked to see what had grabbed your purse.
- Q: You saw the man's hand.
- Q: You spun toward him.
- Q: That's when he punched you in the face.
- Q: And as you fell you lost the grip on your purse.
- Q: And that's how the robber got your purse free.
- Q: And then he ran north on 17th Street.

The virtues of such a cross-examination are several. Questions in this format provide a clearer vision of how the crime progressed and permit a meaningful estimation of the event's duration; they also establish the limits of the opportunity to observe. Yet none of these questions can explain the impact of most of the psychological factors described in this Article. Their construction is dependent on the examiner knowing and being able to imple-

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dations of the Trainer's Manual will never be made known to the jury.

227. *Supra* n. 216 and accompanying text.

ment the art of cross-examination *specific to eyewitness/mistaken witness cases*. In addition, this is the ultimate flaw in judicial reliance on cross-examination to establish that the claim of identification is a mistaken one—it presumes a skill that requires substantial training and, perhaps, some degree of innate talent.<sup>228</sup> Wigmore himself recognized that the value he saw in cross-examination was contingent on the skills of the practitioner, noting the following:

A lawyer can do anything with a cross-examination—if he is skillful enough not to impale his own cause upon it.<sup>229</sup>

#### VI. CONCLUSION—ARE THERE AVAILABLE REMEDIES?

No one systemic response can significantly reduce the risk of mistaken-identification convictions. Yet an acknowledgment of the high risk<sup>230</sup> of such judgments is a critical first step. While improvements in police-evidence gathering (the interview, show-up, photograph array, and line-up processes) can all mitigate the risk, in the end it is the fact-finder who must make an informed decision on whether identity has been accurately proved beyond a reasonable doubt.

While some have proposed remedies as extreme as banning all one-witness prosecutions,<sup>231</sup> the more appropriate response is within the grasp and means of the judiciary: to ensure that the

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228. Anecdotal evidence shows that even the most experienced trial lawyer may not understand the art and technique of a mistaken identification cross-examination. The Appendix to this Article reproduces a preliminary hearing identification cross-examination. It was conducted by a preeminent defense attorney (and former prosecutor) in Pennsylvania. The examination fails in every aspect—it does not timeframe the event, use leading questions, or succeed in showing the limited opportunity for observation. The defendant in this case was ultimately exonerated when another person confessed to the crime and provided police with the weapon.

229. Wigmore, *supra* n. 1, at § 1367, 32. Wigmore cites approvingly the caveat uttered by Wendell Phillips that “[y]ou can do anything . . . with a bayonet—except sit upon it” as the metaphor for the potency and potential risk of cross-examination. *Id.*

230. See *supra* pt. II (suggesting an incidence as high as ten percent).

231. See Noah A. Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, <http://law.bepress.com/expresso/eps/1113> (accessed Sept. 7, 2006) (proposing the preclusion of eyewitness-only stranger cases in serious felonies). The problem with this solution is that it is over-inclusive as it would ban such prosecution regardless of the opportunity to observe and the speed with which arrest and identification follow the crime.



fact-finder truly has the *facts* concerning identification. Two mechanisms to achieve this are available.

First, increase the utilization of expert testimony, particularly by recognizing that discretion is abused in excluding such proof merely because there is *some* corroborating evidence. Corroboration has been present in too many cases in which juries convicted and DNA subsequently exonerated an accused.<sup>232</sup> Exclusion based on the presence of corroboration is an inappropriate judicial predetermination of what evidence jurors will actually believe and, thus, what remaining information they will need.

In lieu of expert testimony, a detailed jury instruction from the court specifying those psychological factors and police practices pertinent to the specific case may be designed and presented in every identification-based prosecution. This is occurring sporadically and incrementally with a focus on discrete issues.<sup>233</sup> But the efficacy of a comprehensive instruction has been demonstrated, at least as to introducing caution into juror deliberations,<sup>234</sup> and can significantly inform juror evaluation of eyewitness testimony.

Although not itself remedial, judges and lawyers must disabuse themselves of the notion that cross-examination's great engine has the efficacy to redress and prevent the recurrence of mistaken identifications. Application of an "I think it can, I think it

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232. See *supra* n. 140 (documenting the high proportion of mistaken-identification (DNA-exoneration) cases where corroborating evidence was presented to jurors).

233. See e.g. *Burrous*, 934 F. Supp. at 530–531 (disallowing expert testimony but incorporating facts about weapons focus into the jury charge and explaining that "[s]cientific studies have amply demonstrated the dangers of mistake in human perception and identification"); *Cromedy*, 727 A.2d at 461–468 (requiring a cross-racial jury instruction when "cross-racial identification is not corroborated by other evidence"); *Ledbetter*, 881 A.2d at 316 (requiring an advisory warning to jurors that there is a risk of misidentification where an identification procedure occurred and the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure); cf. *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) (rejecting a jury instruction telling jurors to weigh an eyewitness' stated confidence in determining the reliability of that witness' identification).

234. See Cutler & Penrod, *supra* n. 14, at 257 (summarizing an experiment with jurors receiving no identification instruction; an instruction on general identification principles; and an instruction with both general identification principles and a summary of psychological findings on eyewitness perception and memory). Jurors in the last group had "significantly fewer predeliberation guilty verdicts," indicating that the psychological information caused an enhanced evaluative process or a greater skepticism concerning eyewitness testimony. *Id.* at 257.

can” approach is counter to experience and science; ongoing reliance on cross-examination as a great engine will, sadly, contribute to the continued phenomenon of wrongful convictions based on eyewitness testimony.