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The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses

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By Bennett L. Gershman

Eyewitnesses make mistakes. We know this empirically, anecdotally, and intuitively.[1] An eyewitness who makes an in-court identification of a defendant is probably the most unreliable of witnesses.[2] The inherent weakness of eyewitness identification is confirmed by the more than 200 post-conviction DNA exonerations, and supported by an increasingly powerful body of social science research.[3] Indeed, misidentification by eyewitnesses is claimed to be the largest single source of wrongful convictions and may in fact be responsible for more wrongful convictions than all other causes combined.[4]

Yet despite its inherent weakness, the testimony by an eyewitness has a powerful impact on juries. One commentator has noted, "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[5] Undeniably, eyewitnesses are critical to solving crimes. Nevertheless, the recognition that some of these witnesses have later been proved wrong makes it imperative that the principal participants in the criminal justice system – judges, prosecutors, defense lawyers, and police – develop new approaches to ensure the accuracy of eyewitness testimony and reduce the incidence of courtroom misidentifications.

The Need for Protection Beyond *Wade v. United States*

Since the landmark case of *Wade v. United States*,[6] the Supreme Court has provided modest constitutional protections against the most blatantly unfair kinds of police identification procedures. Although *Wade* was a Sixth Amendment right-to-counsel case, the Court has most often invoked the guarantees of due process to ensure that pre-trial identification procedures employed by law enforcement are not so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[7] As the Court noted, it is the "likelihood of misidentification that violates . . . due process,"[8] and suggestive identification procedures increase that likelihood.[9] Since "reliability is the linchpin in determining the admissibility of identification testimony,"[10] the Court has enumerated several factors that must be considered by trial courts in weighing the extent to which the "corrupting effect of the suggestive identification" tainted the witness's ability to make a reliable courtroom identification.[11] These factors include (1) the witness's opportunity to view the defendant, (2) the degree of attention by the witness, (3) the accuracy of the description given to the police, (4) the witness's level of

certainty, and (5) the lapse of time between the crime and the confrontation.[12]

The due process guarantee offers only limited constitutional protection, however. Highly suggestive identification procedures often do not rise to the level of a due process violation. Accordingly, given the seriousness of the problem of eyewitness misidentification, judges, prosecutors, police, and defense lawyers need to think creatively and adopt policies and protocols that go beyond the minimal protection afforded by due process. For the trial judge, this means adopting special procedural safeguards that would enable juries to make a more careful evaluation of the eyewitness's testimony.[13] For the prosecutor, this means evaluating the eyewitness's identification with greater care and not proceeding with a case that rests on the uncorroborated testimony of an eyewitness, unless the prosecutor is personally satisfied beyond any reasonable doubt that the eyewitness is making a reliable identification.[14] For the police, this means employing pre-trial identification procedures that have been demonstrated by a powerful body of scientific literature to ensure that identification procedures are administered in such a way as to enhance the accuracy of the witness's identification, and to avoid procedures that are more likely to produce mistaken identifications.[15] And for defense counsel, this means aggressively investigating the eyewitness's background, account of the crime, and encounters with the police; presenting all available and accessible independent evidence of the client's innocence; and conducting an effective cross-examination that is likely to expose deficiencies in the eyewitness's testimony.[16] The following sections elaborate on the special responsibilities of each of these participants.

The Role of the Trial Judge

Trial courts traditionally have viewed the testimony of eyewitnesses as no different from the testimony of any other kinds of witness. In general, these courts have allowed the jury to evaluate the credibility of an eyewitness without any special instructions and have refused to allow experts to assist the jury in understanding the way in which perception and memory affect the reliability of an eyewitness's identification. In light of the recent explosion of scientific research and findings on perception and memory, however, and the increasing acknowledgment by courts and commentators that eyewitnesses are often mistaken, it seems only reasonable that trial courts should be open to new approaches to help jurors better evaluate eyewitness credibility.

A trial judge can ensure that a jury is equipped to analyze the testimony of identification witnesses, first, by giving the jury a special instruction that cautions the jurors to evaluate rigorously and carefully the courtroom identification by an eyewitness, and, second, by allowing experts to explain to the jury the kinds of factors that may impair an eyewitness's ability to make an accurate and reliable identification.

Jurors generally are unaware of the inherent weakness of eyewitness identifications.[17] When identification is a critical issue in a trial, courts should routinely respond to the dangers of mistaken identification by formulating special cautionary jury instructions emphasizing the fallibility of an eyewitness's identification and requiring the jury to find beyond a reasonable doubt that the eyewitness's identification is trustworthy. Such instructions should focus the jury's attention on well-documented factors, noted below, that affect the reliability of an eyewitness's identification.[18]

Several courts have formulated special cautionary instructions on identification testimony. One such instruction, modeled after *United States v. Telfaire*,[19] emphasizes the importance of the issue of identification, the government's burden of proof, and the kinds of factors that the jury should consider in evaluating the reliability of the identification. Many of these factors have been cited by courts and commentators as critical to the evaluation of the identification testimony and are contained in pattern criminal jury instructions.[20] Such instructions should include: (1) whether the witness knew the offender before the crime took place; (2) whether the witness had a good opportunity to observe the offender; (3) whether the witness was paying careful attention; (4) whether a description given by the witness was close to the way the offender actually looked; (5) the use of any suggestive or non-suggestive identification techniques; (6) the lapse of time between the occurrence and the witness's next opportunity to see the accused; and (7) whether the witness failed to make an identification or made an identification inconsistent with the identification he or she made at trial.[21]

When a witness's identification is weak or equivocal, a stronger instruction is called for that emphasizes the unreliability of eyewitness identifications and specifically directs the jury to scrutinize the identification testimony with great care and caution.[22] Many appellate courts, while recommending that a special identification instruction be given in such a case, typically leave the matter to the trial court's discretion.[23] Those courts that have adopted this approach have indicated that it is unreasonable to impose a rigid requirement that the specific instruction be given or an automatic reversal will result, particularly when the identification testimony is credible.[24] Nevertheless, this more flexible approach almost certainly would require that the issue of the reliability of the eyewitness's identification be fairly presented to the jury, and that the jury at a minimum be instructed to consider the credibility and reliability of the identification witness.[25] When identification is a critical issue at trial, however, the failure to give any guidance to a jury on the issue of identification is likely to be found an error.[26]

In addition to giving the jury special cautionary instructions on the dangers of eyewitness identification, courts have also been asked to allow experts to testify to the kinds of factors that have been found by scientific research to contribute to mistaken eyewitness identifications. The kinds of subjects about which experts have testified include: (1) the diminished accuracy of cross-racial identifications;[27] (2) the diminished accuracy when a weapon is present;[28] (3) the presence of extreme levels of stress, which can impair memory;[29] (4) the weakening effect on memory of the passage of time;[30] (5) the influence of the initial identification on later identifications;[31] (6) the lack of correlation between the confidence of a witness and the accuracy of the witness's identification;[32] (7) the impact of suggestive pre-trial identification procedures on the reliability of the eyewitness identification;[33] (8) the tendency of eyewitnesses to identify the person from the lineup who in their opinion looks most like the perpetrator;[34] and (9) the lack of correlation between the amount of time that a witness viewed the perpetrator and the witness's memory and retention of the event.[35]

Many courts disfavor expert testimony regarding the reliability of eyewitness identifications, believing it not helpful to a jury, and potentially confusing.[36] This is particularly true in cases in which the eyewitness identification evidence is compelling, or other evidence of guilt corroborates the eyewitness's testimony.[37] Nevertheless, the unmistakable trend, particularly among state courts, has been to allow experts to testify on the reliability of eyewitness identifications.[38] Such testimony typically addresses the well-documented factors, noted above, that can render an eyewitness's identification untrustworthy.[39] In addition, the testimony of experts may be necessary to counter many widely held misconceptions about the supposed reliability of identifications, and to apprise the jury of factors that might contribute to an inaccurate identification.[40] Experts most often are permitted to testify when the identification evidence is weak, and convictions have been reversed when trial courts have unreasonably excluded such proof.[41]

When courts are asked to allow experts to testify to novel scientific theories, they must assume the role of "gatekeeper" to determine whether a sufficient foundation has been laid for the introduction of such testimony. The federal courts, and many state courts, apply the foundational test of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[42] under which scientific expert testimony is admissible if the evidence (1) is based on "scientific knowledge," and (2) will "assist the trier of fact to understand or determine a fact in issue."[43] As noted above, courts that refuse to allow expert testimony on the fallibility of eyewitness identifications claim that such testimony is unnecessary and confusing, and may usurp the function of the jury in deciding questions of witness credibility. If an indigent defendant makes a proper request for an expert on eyewitness identification, the failure of a court to provide funds for the retention of the expert is likely an error if the defendant can demonstrate that a reasonably competent attorney for a paying client would have sought the assistance of the expert, and that the defendant was prejudiced by the lack of expert assistance.[44]

The Function of the Prosecutor

Many prosecutors view their role not simply as that of a partisan bent on obtaining a conviction, but as a neutral advocate who has a responsibility to assemble the evidence of guilt, place that evidence before a jury fairly and effectively, and allow the adversary system to produce an acceptable result. Thus, as one local prosecutor stated following the dismissal of a murder case in which an innocent defendant spent eight years in jail, based on mistaken identification: "We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time."[45] Another prosecutor made the following remark: "If the [alleged rape victim] came in and said she could not identify her assailants, then we don't have a case. If she says, yes, it's them, or one or two of them I have an obligation to put that to a jury."[46]

These comments present the question starkly: Did these prosecutors have an "obligation" to place these cases before a jury? Or did the prosecutors have an obligation to make an impartial and objective determination of the quality of the witnesses' identification before asking a jury to convict? The approach by the prosecutors in the above cases may well be incompatible with a prosecutor's constitutional and ethical responsibility to serve the cause of justice and to protect innocent persons from erroneous convictions.[47]

Prosecutors' responsibility to serve truth and justice requires them to make an independent evaluation of the credibility of the witnesses, the reliability of the evidence, and the truth of the defendant's guilt before putting the case before a jury. With respect to eyewitnesses, there is little doubt that an experienced prosecutor is much better qualified than a jury at judging their reliability.[48] A prosecutor has more information about the background of the witness, has spent more time studying the evidence, is familiar with the relevant literature on eyewitness credibility, and has acquired courtroom experience in prosecuting other cases involving eyewitness identifications.

A prosecutor's informal evaluation of an eyewitness's reliability is more trustworthy than that of a jury because a prosecutor can more readily maintain a neutral and objective view of the evidence. A jury's view of the evidence, particularly the testimony of an eyewitness, is typically influenced by a variety of prejudicial, non-evidentiary factors.[49] And, ironically, a prosecutor, even one who entertains a reasonable doubt about the reli-

ability of his or her witnesses, may impress a jury with the strength of the case merely by virtue of the decision to prosecute. Juries trust prosecutors; they are impressed by the prosecutor's prestige and expertise.[50] Indeed, jurors may reasonably assume that the prosecutor would not have brought the case in the first place if he or she harbored any doubt, and the jury may further assume that additional evidence probably exists to support the hypothesis of guilt. The danger of letting a jury decide a questionable case involving weak eyewitness testimony is that juries usually reach a verdict, and that verdict usually is guilty.[51]

eyewitnesses in the murder trial of Randall Dale Adams, memorialized in the film documentary *The Thin Blue Line*,[55] offers a dramatic commentary on the susceptibility of juries to powerful but false identification testimony offered by a venal prosecutor. The film presents these identification witnesses as having given their testimony confidently, even with bravado, under circumstances in which they almost certainly knew that their testimony was false.[56]

Apart from an affirmative responsibility to promote the truth, a prosecutor has a corresponding duty not to engage in conduct that disserves the truth. Some prosecu-

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Where the testimony of an eyewitness is determinative of guilt, the prosecutor should approach the case with a healthy skepticism, a willingness to subject the hypothesis of guilt to rigorous testing, and the courage to decline prosecution if he or she entertains a reasonable doubt of the defendant's guilt. A prosecutor's evaluation of the reliability of eyewitnesses should be influenced by the quality of the police investigation. Thus, a prosecutor's determination of the accuracy of the eyewitness should depend to a very large extent on prior encounters between the witness and the police. A prosecutor should be vigilant in learning whether the police employed suggestive techniques in obtaining a pre-trial identification from an eyewitness.

A prosecutor should be alert to any motive a witness might have to falsify. One of the difficulties in evaluating the credibility of eyewitnesses is that they typically have no motive to make a false identification. In such cases, the question that is frequently encountered is whether the eyewitness is simply making a mistake – whether the witness's confidence in the identification is justified.[52] In other cases, however, an eyewitness may be deliberately falsifying an identification, and a prosecutor has a responsibility to scrutinize carefully the background of that witness.

In one highly publicized wrongful conviction case, the defendant spent eight years in jail for a double murder he did not commit, based on the uncorroborated testimony of an alleged eyewitness.[53] In that instance, the prosecutor was negligent in failing to investigate his witness's background. Had he done so, he would have learned that the witness was a psychopathic liar who was in prison in another state at the time he claimed to have witnessed the double murder.[54] Similarly, the testimony of several

tors, either consciously or unconsciously, try to "adjust" or "polish up" the testimony of their identification witness to strengthen the probative force of their identification. Through various kinds of coaching, some prosecutors overtly, covertly, or unintentionally elicit from eyewitnesses additional facts that "adjust" the witness's memory and thereby improve the testimony, as well as create an artificial aura of certainty and confidence.[57] This "coaching" process is exemplified by the testimony of key identification witnesses in three recent Supreme Court cases – *Banks v. Dreke*,[58] *Strickler v. Greene*,[59] and *Kyles v. Whitley*.[60] The eyewitness's testimony in each of these cases was confident and convincing. Yet there is every reason to believe that their testimony was embellished – even contrived – as a result of coaching by the prosecutors. Moreover, as the above cases indicate, the courts have not been especially vigilant about suggestive interviewing techniques of witnesses, leaving it up to the adversary process to expose weaknesses and improprieties. And even assuming highly skilled defense counsel able to test the accuracy and truthfulness of the eyewitness – a basic postulate of the adversary system's effectiveness – the process necessarily malfunctions when the prosecutor is able to control and shape the information, and eliminate or polish up information detrimental to his or her case. To the extent that the above cases exemplify the process of eyewitness preparation by careless or even venal prosecutors, they provide a devastating commentary on the artificiality of courtroom testimony by eyewitnesses, the corresponding difficulty of the criminal justice system in reducing jury mistakes that produce miscarriages of justice, and the need for new approaches to lessen the instances of misidentifications.[61]

Police Procedures

When a crime is reported, the police usually make the initial contact with victims and witnesses. When the perpetrator is unknown, the police employ a variety of procedures to attempt to identify a suspect.[62] These procedures typically seek to minimize suggestiveness by having the witness view a lineup containing several individuals standing together or having the witness view an array of photographs.[63] To be sure, there may be occasions when the police believe it is necessary to have the witness view a suspect in isolation or show the witness a single photograph. These latter encounters – denominated "show-ups" – are inherently suggestive and may violate due process.[64]

> Recording the details of the identification during or immediately after the process is critical.

The manner in which the police administer an identification procedure also may violate due process. The Supreme Court in *United States v. Wade*[65] described the kinds of suggestive procedures that contribute to mistaken identifications. The police might suggest to the witness the identity of the perpetrator or that the perpetrator is in the array; they might create a lineup in which a particular characteristic of one person in the array would likely draw the viewer's attention, or where one person in the array was dramatically different in appearance from the others in the group; or the police might allow several witnesses to view the lineup together.

The police can minimize suggestiveness in identification practices in several ways. Police probably are aware that when they present an eyewitness with a lineup, show-up, or photographic array, the eyewitness reasonably assumes that the police consider one of the persons to be the suspect.[66] The eyewitness in such a case might feel obligated to identify a person in the group who in the opinion of the eyewitness looks most like the perpetrator relative to the other members of the group. This phenomenon – known as the "relative judgment process" – has been borne out by scientific research.[67] The police may be able to neutralize this relative judgment process by affirmatively advising the eyewitness that the perpetrator might or might not be present in the identification procedure. Guidelines published by the National Institute of Justice suggest that, prior to a lineup, the witness should be instructed "that the person who committed the crime may or may not be present in the group of individuals."[68]

The police also can neutralize the relative judgment process by using what is known as a "sequential lineup." A sequential lineup involves showing the persons in the group – including a suspect and any fillers – one at a time rather than employing the customary practice of showing them all together. The benefit of a sequential lineup is that the viewer makes an identification based on a recollection of the incident and compares the person being viewed with the person he or she recalls as being involved in the incident.[69] The extent to which sequential lineups represent an important prophylactic against mistaken identifications is unclear, however. Experts claim that sequential lineups may reduce false identifications but also may reduce correct identifications.[70]

Another innovation advocated by researchers is the practice of using a "double-blind" lineup, where the officer conducting the lineup has no knowledge of the facts of the investigation and does not know whether any suspect is present in the lineup. Commentators claim that this practice reduces the chance that a police officer involved in the investigation may consciously or unconsciously telegraph cues regarding a particular individual. Double-blind testing traditionally has been a universally accepted methodology in scientific research and there is no reason why it should not become an accepted practice when police administer any type of lineup procedure.

Finally, the police should make every effort to record the details of the identification procedure, regardless whether it results in a positive identification, a non-identification, or a "near miss" or "near hit" where the identification is tentative, uncertain, and inconclusive.[71] Clearly, any dialogue between the police officer administering the lineup and the witness may be critical to understanding the level of confidence or uncertainty of the witness, and whether any suggestive cues occurred during the lineup procedure.[72] Recording the details of the identification during or immediately after the process is critical; it is likely that neither the officer nor the witness will accurately recall the details of the process after a lapse of time. Thus, guidelines must be issued that would require the lineup administrator to record in writing or, where feasible, electronically, the identification procedure employed. This should include a complete and accurate record of any resulting identification and non-identification, in the witness's own words, and indicate the witness's level of confidence, as well as a verbatim account of any exchange between the witness and the police.[73]

The Task of Defense Counsel

Representing a client who claims that he or she is innocent and has been wrongly identified poses one of the most daunting challenges to any defense lawyer. The lawyer knows from experience that the traditional truth-testing tools that might expose a witness's motive to lie are usually ineffective in the case of an eyewitness.

Demonstrating that an eyewitness is mistaken is extraordinarily difficult, particularly when the witness appears to be a sympathetic crime victim who has no motive to falsely accuse the defendant, and who insists that the identification is correct. Some attorneys are not up to this challenge, and a failure to effectively confront the prosecution's evidence is a significant cause of wrongful convictions.[74]

A lawyer representing a criminal defendant operates within a constitutional framework that requires the lawyer, at a minimum, to provide reasonably competent assistance.[75] To be sure, when misidentification is a critical issue, an attorney must become familiar with the legal and scientific literature on the "vagaries of eyewitness identification."[76] Moreover, again at a minimum, an attorney who represents a client who claims he is the "wrong man" must travel several roads in an effort to undermine the identification. The lawyer must aggressively investigate the background of the eyewitness, challenge the circumstances of the initial viewing of the accused, intelligently confront the eyewitness's testimony in court, and produce independent evidence proving that the client has been wrongly accused.

An attorney has a duty to attempt to locate and interview witnesses, including alibi witnesses who the defendant claims possess knowledge concerning the defendant's actions.[77] An attorney also has a duty to learn the physical details of the place where the crime occurred, and the physical, emotional, or psychological infirmities of the eyewitness, for use in cross-examination.[78] Indeed, inasmuch as cross-examination is claimed to be the most important adversarial safeguard to discovering the truth,[79] defense counsel should thoroughly prepare an effective strategy to challenge the eyewitness's identification, including an inquiry into the kinds of factors that may affect the eyewitness's memory and perception, and conduct an effective cross-examination.[80] Courts must afford defense counsel a meaningful opportunity to probe the reliability of an identification witness's testimony.[81] Defense counsel should also seek out a scientific expert who could testify about the way memory and perception affect the reliability of an eyewitness's identification, as well as the kinds of factors that contribute to misidentifications.[82] Assuming that defense counsel has made a sufficient offer of proof, he or she should be prepared to support the offer of proof at a pre-trial *in limine* evidentiary hearing.[83]

Convinced of their client's innocence, some defense lawyers may decide to approach the prosecutor with representations of that innocence. Many prosecutors are alert to a defense attorney's representations that the client is innocent, especially when the appeal comes from a defense attorney whom the prosecutor trusts.[84] Such claims probably are made sparingly so as not to impair an attorney's credibility. When given reason to doubt the eyewitness's accuracy, a prosecutor may take a "second look" at the case and possibly subject the eyewitness to a vigorous interrogation of the kind that might be expected from a skilled defense counsel at trial. Some prosecutors use polygraph examinations to clear innocent suspects or as a basis for further examination.[85] When a defense attorney represents that his or her client is innocent and that the client is willing to take a lie detector test, it would appear that a prosecutor incurs no significant disadvantage in administering such a test.

Finally, there may be opportunities for defense counsel to protect his or her client from an unfair courtroom identification by devising techniques to challenge the eyewitness inside the courtroom with a simulated identification procedure. Thus, counsel might request that the court allow an in-court line-up with other persons of similar description or have the defendant sit in the spectators' gallery or place more than one person at counsel table. Such a strategy obviously carries the risk that the witness will make a correct identification of the defendant. Defense attorneys have also devised questionable ploys to trick witnesses into misidentifying a defendant, such as substituting an individual at the counsel table who looks like the defendant, and who sits there while the prosecution's eyewitness misidentifies the stand-in as the perpetrator.[86]

Conclusion

Reducing the incidence of wrongful convictions based on eyewitness mistakes poses a difficult challenge to the criminal justice system. There is near-unanimity among courts and commentators that eyewitness mistakes account for more erroneous convictions than any other type of proof. It is therefore incumbent on every key participant in the criminal justice system – judge, prosecutor, police, and defense counsel – to use every available tool to protect an accused from being mistakenly identified by an eyewitness. For the judge, protecting the accused requires a willingness to give the jury special instructions on eyewitness identification and a willingness to allow the use of experts to inform the jury of the issues concerning the reliability of eyewitnesses. For the prosecutor, protecting the accused requires a willingness to undertake an objective and impartial investigation of the reliability of his or her eyewitnesses, and to refuse to present such witnesses when the prosecutor entertains a reasonable doubt about the accuracy of identifications. For the police, protecting persons from mistaken identifications requires the employment of new techniques that are capable of preventing the kinds of suggestiveness that taint the witness's in-court identification and create the potential for an unjust conviction of an innocent defendant. And for the defense attorney, protecting the client means more than simply providing constitutionally competent representation but, in addition, being willing

to aggressively challenge the prosecutor's evidence to minimize the chance that the client will be wrongly convicted. ■

1. *See* Brian L. Cutler & Steven D. Penrod, Mistaken Identification 3-36 (1995) (describing numerous instances of misidentifications); Gary Wells, Eyewitness Identification (1988); Jennifer L. Davenport, Steven D. Penrod & Brian L. Cutler, *Eyewitness Identification Evidence*, 3 Psychol. Pub. Pol'y & L. 338 (1997) (noting that "both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identification").

2. *See United States v. Wade*, 388 U.S. 218, 228–29 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

3. *See* Innocence Project, http://innocenceproject.com.

4. *See* Jim Dwyer et al., Actual Innocence 41–77 (2000) (documenting cases of wrongful convictions based on eyewitness mistakes); Edwin M. Borchard, Convicting the Innocent (1932) (documentation of 62 American and three British cases of convictions of innocent defendants); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 Law & Hum. Behav. 289–92 (1988) (describing a study of more than 200 felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of cases that had one main cause). *See also State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006) ("Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country.").

5. Elizabeth Loftus, Eyewitness Testimony 19 (1979). *See also United States v. Langford*, 802 F.2d 1176, 1182 (9th Cir. 1986) ("[J]uries almost unquestioningly accept eyewitness testimony.").

6. 388 U.S. 218 (1967).

7. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

8. *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

9. The Court has considered on several occasions the scope of the due process protection against the admission of evidence derived from, for suggestive identification procedures. *See Stovall v. Denno*, 388 U.S. 293 (1967) (totality of circumstances is test to determine whether suggestive show-up violates due process); *Simmons*, 390 U.S. 377 (initial identification by suggestive photographic array did not violate due process); *Foster v. California*, 394 U.S. 440 (1969) (procedures used to obtain identifications violated due process); *Coleman v. Alabama*, 399 U.S. 1 (1970) (pre-trial procedures used did not taint in-court identification); *Neil*, 409 U.S. 188 (discussing factors to be considered in evaluating likelihood of misidentification); *Manson v. Brathwaite*, 432 U.S. 98 (1977) (applying factors in *Biggers* to find no violation of due process).

10. *Manson*, 432 U.S. at 114.

11. *Id.*

12. *Neil*, 409 U.S. at 199–200.

13. *See infra* "The Role of the Trial Judge."

14. *See infra* "The Function of the Prosecutor."

15. *See infra* "Police Procedures."

16. *See infra* "The Task of Defense Counsel."

17. *State v. Long*, 721 P.2d 483, 490 (Utah 1986) ("jurors do not appreciate the fallibility of eyewitness testimony").

18. *See infra* notes 27–35, and accompanying text.

19. 469 F.2d 552, 558–59 (D.C. Cir. 1971).

20. *See* Pattern Criminal Jury Instructions, Federal Judicial Center 44–45 (1988); Comment at 45 ("For cases where such an identification will be determinative, a careful detailed instruction should be given to minimize any chance of misidentification.").

21. *Id.*

22. *See United States v. Barber*, 442 F.2d 517, 525 n.8 (3d Cir. 1971) (advising jury that "identification must be scrutinized with great care").

23. *See United States v. Johnson*, 848 F.2d 904 (8th Cir. 1988); *United States v. Thoma*, 713 F.2d 604, 607–08 (10th Cir. 1983); *People v. Whalen*, 59 N.Y.2d 273, 464 N.Y.S.2d 454 (1983).

24. *See United States v. Luis*, 835 F.2d 37, 41 (2d Cir. 1987) ("because the trial judge is in the best position to evaluate whether this charge is needed in the case before it, adopting a rigid requirement cuts back on the trial court's discretion in the conduct of the trial without any assurance that the fair administration of justice is thereby enhanced").

25. *See United States v. Miranda*, 986 F.2d 1283, 1285–86 (9th Cir. 1993) ("general instructions on the jury's duty to determine the credibility of witnesses and the burden of proof are fully adequate").

26. *See United States v. Fernandez*, 456 F.2d 638, 644 (2d Cir. 1972) (error to refuse any identification instruction).

27. *See United States v. Stevens*, 935 F.2d 1380, 1397 (3d Cir. 1991); *United States v. Smith*, 736 F.2d 1103, 1106 (6th Cir. 1984). *But see State v. Valentine*, 785 A.2d 940 (N.J. Super. 2001) (requirement that juries be instructed on the weaknesses of cross-racial identifications does not apply to cross-ethnic identifications).

28. The phenomenon is known as "weapon focus." *See Stevens*, 935 F.2d at 1396–97; *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985).

29. *See United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985).

30. The phenomenon is known as the "forgetting curve." *See Sebetich*, 776 F.2d at 419; *Downing*, 753 F.2d at 1230–31.

31. The phenomenon is known as "relation back." *See Stevens*, 935 F.2d at 1399–1400. *See also United States v. Wade*, 388 U.S. 218, 229 (1967) ("it is matter of common experience that once a witness has picked the accused at the line-up, he is not likely to go back on his word later on").

32. *See State v. Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) (citing numerous scientific studies suggesting that "a weak correlation, at most, exists between the level of certainty by the witness at the identification and the accuracy of that identification").

33. *See United States v. Norwood*, 939 F. Supp. 1132, 1139–40 (D.N.J. 1996).

34. The phenomenon is known as the "relative judgment process." *See Ledbetter*, 881 A.2d at 314 (citing empirical studies supporting this phenomenon).

35. *Norwood*, 939 F. Supp. at 1138.

36. *See United States v. Welch*, 368 F.3d 970 (7th Cir. 2004) (upholding exclusion of expert testimony as not capable of assisting jury); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996) ("minimal probative value of the proffered expert testimony is outweighed by the danger of juror confusion"); *United States v. Serna*, 799 F.2d 842, 850 (2d Cir. 1986) ("expert's testimony would have done nothing but "muddy the waters"); *United States v. Sims*, 617 F.2d 1371, 1375 (9th Cir. 1980) ("the admissibility of this type of expert testimony is strongly disfavored by most courts").

37. *See, e.g., United States v. Curry*, 977 F.2d 1042, 1052 (7th Cir. 1992) (eyewitness testimony supported by much other evidence).

38. *See, e.g., State v. Cheatam*, 81 P.3d 830 (Wash. 2003) (en banc); *State v. DuBray*, 77 P.3d 247 (Mont. 2003); *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002); *People v. Lee*, 96 N.Y.2d 157, 726 N.Y.S.2d 361 (2001); *Johnson v. State*, 526 S.E.2d 549 (Ga. 2000).

39. *See supra* notes and accompanying text.

40. *See People v. Mooney*, 76 N.Y.2d 827, 560 N.Y.S.2d 115 (1990) (dissenting opinion) ("The notion that jurors are generally aware from their everyday experience of the factors relevant to the reliability of eyewitness observation and identification has not only been properly condemned as 'makeshift reasoning' . . . but has been refuted by research demonstrating a number of common and widely held misconceptions on the subject among laypersons").

41. *See Stevens*, 935 F.2d 1380 (excluding expert testimony regarding correlation between accuracy and confidence in eyewitness identifications was abuse of discretion); *Downing*, 753 F.2d 1224 (excluding expert testimony on reliability of eyewitness identification because court believed it could never be helpful to jury was abuse of discretion); *People v. LeGrand*, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007) (excluding expert testimony on reliability of eyewitness identification when there was no evidence corroborating the witness's identification testimony was abuse of discretion).

42. 509 U.S. 579 (1993). *Daubert* superseded *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which remains the standard is several states. Under *Frye*, expert testimony on novel scientific evidence is admissible if "the thing from which the deduction is made [is] sufficiently established to have gained general acceptance in the particular field to which it belongs." *Id.* at 1014. However,

"[t]here is rapidly growing dissatisfaction among courts and commentators with the *Frye* test." *Mooney*, 76 N.Y.2d at 830 (dissenting opinion).

43. *Daubert*, 509 U.S. at 591. *Daubert* provided trial judges with a series of "general observations" to determine whether a theory or technique is based upon "scientific knowledge" and is reliable. Such factors include (1) whether the expert's theory or technique can be, and has been, tested; (2) whether the methodology has been subjected to peer review and publication; (3) the frequency by which the methodology leads to erroneous results; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the methodology has been generally accepted in the scientific community. *Id.* at 593–94. *See also* Fed. Rule Evid. 702.

44. *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996) ("it is unlikely that a reasonably competent attorney would have incurred the expense of hiring an eyewitness identification expert."); *State v. Reynolds*, 639 P.2d 461 (Kan. 1982) (no abuse of discretion in refusing to authorize services of expert on eyewitness identification).

45. *See* Jim Yardley, *Man Is Cleared in Murder Case After Eight Years*, N.Y. Times, Oct. 29, 1998, at B1.

46. *See* David Barstow & Duff Wilson, *Charges of Rape Against 3 at Duke Are Dropped*, N.Y. Times, Dec. 23, 2006.

47. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("The prosecutor's] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). *See also* Model Rules Of Professional Conduct Rule 3.8, Comment 1 (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Model Code of Professional Responsibility EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); ABA Standards For Criminal Justice, The Prosecution Function Standard 3-1.2(c) (3d ed. 1993). *See also* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309, 314–15 (2001) ("prosecutor has the overriding [constitutional and ethical] responsibility not simply to convict the guilty but to protect the innocent").

48. *See, e.g.*, Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395, 446 (1987) ("There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases.").

49. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, Inside the Jury 232 (1983) (discussing how inadmissible evidence and stricken testimony has impact on juror's decision making).

50. *See United States v. Young*, 470 U.S. 1, 18–19 (1985) ("prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence").

51. *See* Harry Kalven & Hans Zeisel, The American Jury 55–63 (1966).

52. *See State v. Ledbetter*, 881 A.2d 290, 311 (2005) ("a weak correlation, at most, exists between the level of certainty demonstrated by the witness and the accuracy of that identification").

53. *See* Jim Yardley, *Man Is Cleared in Murder Case After Eight Years*, N.Y. Times, Oct. 29, 1998, at B1.

54. *See* Kristin Choo, *Perjury With Conviction: Lawyers Can Use Strategic Tactics at Trial to Expose Pathological Liars on the Witness Stand*, A.B.A.J., June, 1999, at 71 (discussing wrongful prosecution of Jeffrey Blake, convicted of a double murder based on testimony of Dana Garner, a psychopathic liar whose bizarre and uncorroborated eyewitness testimony should have been more carefully scrutinized by prosecutor).

55. Miramax Films (1988).

56. *See* Bennett L. Gershman, Film Review, The Thin Blue Line*: Art or Trial in the Fact-Finding Process?*, 9 Pace L. Rev. 275, 287–94 (1989).

57. *See* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 846 (2002).

58. 540 U.S. 668, 677, 685, 705 (2004) (stating that a suppressed transcript of pretrial practice sessions shows how the prosecutor "intensively coached" and "closely rehearsed" the testimony of witnesses).

59. 527 U.S. 263, 272–75 (1999) (eyewitness initially told police she had only "muddled memories" of event but after series of extensive interviews with police and prosecutor gave an astonishingly detailed account of the event, claiming "I have an exceptionally good memory").

60. 514 U.S. 419, 443 & n.14, 454 (1995) (finding a clear implication of witness coaching from suppressed evidence as well as fact that testimony at subsequent trial was much more precise than at an earlier trial).

61. It should be noted that the prosecutor in each of the above cases not only engaged in impermissible witness-coaching but also withheld exculpatory evidence that would have severely discredited the witnesses' testimony. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. Tex. L. Rev.685 (2006).

62. Police often create a composite sketch of the perpetrator prepared by the victim and the police artist in order to reflect the witness's recollection. *See People v. Maldonado*, 97 N.Y.2d 522, 526, 743 N.Y.2d 389 (2002) (composite sketches are "critical investigative tools" in the way they "winnow the class of suspects from the infinite down to a lesser number of people" but are inadmissible as hearsay to prove a defendant's guilt unless they are used to rebut a charge of recent fabrication).

63. Given the practical difficulties of assembling a live lineup containing a fair sampling of persons resembling the perpetrator, it may be less suggestive to create a fair array through use of a photographic spread obtained from a computer that has been programmed to produce pictures of persons that are similar to the defendant. For an discussion of the comparative suggestiveness of a live lineup and a photo-spread, see *People v. Burrowes*, N.Y.L.J., Oct. 25, 2004, p. 21, col. 1 (Sup. Ct., Kings Co.).

64. *See, e.g., United States v. Rogers*, 387 F.3d 925 (7th Cir. 2004) (placement of one narcotics offender in same cell as person whom he had earlier been unable to identify and whom he later identified was unnecessarily suggestive and tainted reliability of in-court identification).

65. 388 U.S. 218, 229–34 (1967).

66. *See State v. Ledbetter*, 881 A.2d 290, 314 (Conn. 2005).

67. *Id.*

68. *See* National Institute of Justice, *Eyewitness Identification: A Guide for Law Enforcement*, U.S. Dept. of Justice Pub. No. NCJ 1788240 (1999), at 32.

69. A substantial body of empirical data supports the reliability of sequential lineup procedures. Guidelines issued by the United States Department of Justice and the Attorney General of the State of New Jersey endorse the sequential lineup procedure. *See In re Wilson*, 191 Misc. 2d 224, 741 N.Y.S.2d 831 (Sup. Ct., Kings Co. 2002). The first reported case to use the sequential lineup is *State v. Armstrong*, 329 N.W.2d 386 (Wis. 1983).

70. *Compare In re Thomas*, 189 Misc. 2d 487, 733 N.Y.S.2d 591 (Sup. Ct., Kings Co. 2001) ("scientific community is unanimous in finding that sequential lineups are fairer and result in more accurate identification") *with Wilson*, 191 Misc. 2d 224 ("researchers have noted that in cases involving multiple perpetrators or child witnesses sequential lineups may be inferior to simultaneous lineups.").

71. *See State v. Delgado*, 902 A.2d 888 (N.J. 2006).

72. *Id.* at 894. *See also United States v. Ash*, 413 U.S. 300, 318–19 (1973) (selection of person other than accused or inability of witness to make any selection is useful to defense).

73. *See Delgado*, 902 A.2d at 895–97.

74. *See* Dwyer et al., *supra* note 4, at 183. *See also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. Times, Feb. 5, 2000, at A1.

75. *See Strickland v. Washington*, 466 U.S. 668 (1984).

76. *United States v. Wade*, 388 U.S. 218, 228 (1967)

77. *See Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005) (deficient performance in failing to present adequate alibi defense); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000) (counsel fails to contact or produce critical alibi witnesses); *Lawrence v. Armontrout*, 900 F.2d 127 (8th Cir. 1990) (duty to pursue alibi defense); *Demarest v. Price*, 905 F. Supp. 1432 (D. Colo. 1995) (complete failure to investigate state's case and interview witnesses), *vacated by* 130 F.3d 922 (10th Cir. 1997). *But see DeLuca v. Lord*, 77 F.3d 578, 588 n.3 (2d Cir. 1996) (alibi defense need not be investigated if counsel believes it is improbable).

78. *See Helton v. Sec'y of Dep't of Corr.*, 233 F.3d 1322 (11th Cir. 2000) (failure to investigate or present physical evidence regarding victim).

79. 5 John Henry Wigmore, Evidence § 1367, at 32 (J. Chadbourne rev. ed. 1974) (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth").

80. *See Berryman v. Morton*, 100 F.3d 1089, 1098 (3d Cir. 1996) ("Counsel had in his hands material for a devastating cross-examination of [complainant] on the critical issue in the case. Because of his failure to confront her with her prior sworn testimony, the jury did not learn that she had previously described the height of her attackers under oath, that she had previously recanted prior testimony given under oath and that her prior descriptions were much different from her testimony at the trial."); *Driscoll v. Delo*, 71 F.3d 701, 710–11 (8th Cir. 1995) ("[T]here is no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a state's eyewitness whose testimony, as the district court points out, took on such remarkable detail and clarity over time.").

81. *Harper v. Kelly*, 916 F.2d 54 (2d Cir. 1990) (court's preclusion of defense attorney's inquiry into victim's emotional state during robbery infringed harmfully on defendant's Sixth Amendment right to confront his accuser.).

82. *See supra* "The Role of the Trial Judge."

83. *United States v. Downing*, 753 F.2d 1224, 1241 (3d Cir. 1985) (*in limine* hearing the most efficient procedure that court can use in making determination of reliability); *State v. Gunter*, 554 A.2d 1356, 1357 (N.J. Super. 1989) ("[T]he question of the admissibility of the [expert's] evidence proffered here could only have been resolved by a hearing . . . to determine its scientific reliability and the extent to which, if at all, it would have assisted the jury in its understanding of the relevant matters beyond the common knowledge of human experience.").

84. *See* Lief H. Carter, The Limits of Order 85 (1974) ("[T]he prosecutor adjusts to cues from the defense attorney, the most important of which is the defense attorney's trustworthiness.").

85. *Id.* at 123 (describing policy in one prosecutor's office of "willingness to dismiss a case when polygraph examination indicated the suspect's innocence," and agreement between prosecutors and defense counsel "that if suspect failed the test he would plead guilty rather than take the case to trial.").

86. *See United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981); *People v. Simac*, 641 N.E.2d 416 (Ill. 1994); *Miskovsky v. State ex rel. Jones*, 586 P.2d 1104 (Okla. App. 1978). *See also* ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 914 (1966) (unethical conduct for attorney to participate in substitution of other persons for true defendants).