Tripartite Solution to Eyewitness Error, A

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A TRIPARTITE SOLUTION TO EYEWITNESS ERROR

RICHARD A. WISE, KIRSTEN A. DAUPHINAIS & MARTIN A. SAFER*

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

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I. INTRODUCTION

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

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

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

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

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

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

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

The circumstances of this case are not unusual.

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

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

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

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

II. EYEWITNESS ERROR’S ROLE IN WRONGFUL CONVICTIONS

A. THE NUMBER OF WRONGFUL CONVICTIONS

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

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

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

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

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

7 Id.
8 Donald A. Dripps, Miscarriages of Justice and the Constitution, 2 BUFF. CRIM. L. REV. 635, 638-39 (1999) (citing CONNORS ET AL., supra note 6, at xxx, 20). Since DNA evidence was first introduced into the criminal justice system, it has exonerated more than 340 people who were wrongfully convicted of crimes. Samuel R. Gross et al., Exonerations in the United States 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005). Sixty-four percent of the exonerations involved at least one eyewitness misidentification. Id. at 542. Eighty-eight percent of the rape exonerations involved eyewitness misidentification. Id. at 530; see also Gary L. Wells & Elizabeth A. Olson, Eyewitness Testimony, 54 ANN. REV. OF PSYCHOL. 277, 278 (2003) (stating that more than 100 prisoners have been exonerated by DNA evidence).
10 See Dripps, supra note 8, at 639 (“In short, the sample of persons tested is pretty close to a sample of persons who would, in the absence of DNA evidence, have gone to trial.”).
11 Richard A. Wise & Martin A. Safer, A Survey of Judges’ Knowledge and Beliefs About Eyewitness Testimony, 40 CT. REV. 6 (2003); see also Dripps, supra note 8, at 638-39 (“None of these explanations seems very powerful.”). In other words, the DNA cases are representative of criminal cases where DNA testing is not possible.
12 See Dripps, supra note 8, at 639:
13 Wise & Safer, supra note 11, at 6; see also Dripps, supra note 8, at 638-39 (“None of these explanations seems very powerful.”). In other words, the DNA cases are representative of criminal cases where DNA testing is not possible.
defendant was eyewitness testimony. However, science is increasingly revealing that a significant percentage of eyewitness testimony is wrong. “Erroneous eyewitness testimony . . . no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system.” In one study of 340 convictions, eyewitness error played a role in 64% of wrongful convictions. In the first 180 DNA exoneration cases, eyewitness error was a cause of the wrongful conviction in 75% or more of the cases.

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

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

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


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

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

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

Similarly, Brigham and Bothwell wrote, 

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

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

A. THE UNITED STATES SUPREME COURT’S RESPONSE

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

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


\textsuperscript{21} Id. at 20.

\textsuperscript{22} Id.

\textsuperscript{23} See Brigham et al., supra note 5, at 14; Wells et al., supra note 18, at 624.

\textsuperscript{24} 388 U.S. 218 (1967).

\textsuperscript{25} 388 U.S. 263 (1967).

\textsuperscript{26} 388 U.S. 293 (1967).

\textsuperscript{27} 388 U.S. at 237-38.

\textsuperscript{28} Id. at 240.

\textsuperscript{29} Id. ("The State may then rest upon the witnesses’ unequivocal courtroom identifications, and not mention the [post-indictment] pretrial identification as part of the State’s case at trial.").
In *Gilbert*, the Supreme Court held that the State is not entitled to show that eyewitness testimony which was the direct result of an illegal post-indictment lineup could be substantiated by an independent source. Instead, the trial court must grant the defendant a new trial if such testimony was presented at the guilt stage, or grant appropriate relief if the testimony was presented at the penalty stage, unless it is determined that the admission of the eyewitness’s identification was harmless error beyond a reasonable doubt.

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

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

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30 388 U.S. at 272-73.
31 Id. at 274.
33 Id. at 302. The defendant in *Stovall* was convicted of murder and sentenced to death. Id. at 295. One day after the murder, the police brought the defendant in handcuffs to a hospital room so the victim’s wife, who had been seriously injured during the murder, could identify him. Id. After observing the defendant and hearing him speak, the victim’s wife identified the defendant as her husband’s murderer. Id. The defendant asserted on appeal that his showup in the hospital was unconstitutional because, among other reasons, its suggestiveness violated due process. Id. at 295-96.
34 Id. at 302.
35 Id.
36 Id.
38 Id. 381. In *Simmons*, the defendant was convicted of robbing a bank. Id. The day after the bank robbery, FBI agents showed five bank employees some photos consisting mostly of group pictures of the defendant and others. Id. After viewing the photos, the bank employees all identified the defendant as one of the bank robbers. Id. At a later date, the FBI interviewed the bank employees for a second time and showed them other photos that included the defendant’s photo. Id. They once again identified the defendant as a perpetrator of the crime. Id.
identifications would be permissible, notwithstanding the use of suggestive photographs, as long as their use was necessary and the in-court identifications were reliable.39

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

In Neil v. Biggers47 and Manson v. Brathwaite,48 the Supreme Court rendered its final major decisions on suggestive identification procedures. The Court ruled that such identification procedures, even those from unnecessarily suggestive procedures, were admissible provided they were

39 Id. at 385-86.
41 Id. at 689.
42 413 U.S. 300 (1973).
43 Id. at 317.
44 Id.
45 See Dripps, supra note 8, at 656-57.
46 See id.
47 The Court’s focus on the Bill of Rights . . . undermined even the modest protection supplied by the Wade rule. Given the Fifth Amendment privilege, suspects can be questioned only before the right to counsel attaches. Therefore it was imperative that the right to counsel attach late enough in the process for the police to get a crack at the suspect under the Miranda rules. Fairly supported by the language of the Sixth Amendment, the Court held that the ‘prosecution’ does not commence until formal charges are filed. Thus by delaying accusation until after the lineup, the police can entirely circumvent the Wade rule.
48 Id.; see also Rudolf Koch, Note, Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony, 88 CORNELL L. REV. 1097, 1109 (2003) (“The application of the Sixth Amendment to certain identifications has thus proved to be a somewhat hollow victory for defendants.”).
The Court further held that this reliability is to be determined by the "totality of the circumstances," a standard first mentioned in Stovall, and delineated five eyewitness factors that the trier of fact must consider when making this determination: (1) the eyewitness's opportunity to view the perpetrator during the crime; (2) the length of time between the crime and the subsequent identification; (3) the level of certainty demonstrated by the witness at the identification; (4) the accuracy of the eyewitness's prior description of the criminal; and (5) the eyewitness's degree of attention during the crime [hereinafter "the Supreme Court eyewitness factors"]. In summary, Supreme Court decisions, taken together, are supportive of the admissibility of eyewitness testimony, even where highly suggestive identification techniques are used, provided the identification is deemed reliable.

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

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

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


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


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

54 Id. at 17-19.

55 Id. at 17-18. Witnesses with a better opportunity to observe the criminal, such as under better lighting, with a closer view, or a longer viewing time, are more likely to make accurate identifications. Id. Second, the length of the retention interval, which is the time between the crime and the identification, is generally related to accuracy. Id.
For example, the first Supreme Court eyewitness factor is the eyewitness’s opportunity to view the perpetrator of the crime.\textsuperscript{56} While the Court was correct in stating that eyewitnesses who have a better opportunity to observe the perpetrator of a crime\textsuperscript{57} are more likely to make accurate identifications than eyewitnesses who view crimes under poor conditions,\textsuperscript{58} scientific study has revealed that post-event information, such as a lineup administrator’s comment that the eyewitness has identified the suspect, can distort the eyewitness’s memory of how good his or her view of the crime was.\textsuperscript{59}

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

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

\textsuperscript{56} Manson, 432 U.S. at 114; Neil, 409 U.S. at 199.
\textsuperscript{57} Eyewitnesses may have a better opportunity to observe the perpetrator of the crime due to such factors as better lighting, close proximity to the crime, and duration of the crime. Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 161 (1995).
\textsuperscript{58} Bradfield et al., supra note 15, at 112.
\textsuperscript{59} Id. at 113.
\textsuperscript{60} Brigham et al., supra note 5, at 17.
\textsuperscript{61} Id.
\textsuperscript{64} D. Stephen Lindsay et al., Witnessing-Condition Heterogeneity and Witnesses’ Versus Investigators’ Confidences in the Accuracy of Witnesses’ Identification Decisions, 24 Law & Hum. Behav. 685, 695 (2000). The results of studies on eyewitness confidence generally indicate that highly confident eyewitnesses are only somewhat more likely to make accurate identifications than less confident eyewitnesses. Gary L. Wells & Donna M. Murray, Eyewitness Confidence, in Eyewitness Testimony: Psychological Perspectives 155, 155-70 (Gary L. Wells & Elizabeth F. Loftus eds., 1984). Although some recent studies show that eyewitness confidence may have significantly greater probative value in predicting eyewitness accuracy in certain circumstances than earlier studies indicated, as one researcher cautioned:
Court's reliance on this factor is particularly troubling because scientific research has shown that it is the single most important factor that determines whether jurors believe that an eyewitness has made an accurate identification.65

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

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

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


67 Id.

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

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

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

69 Deffenbacher, supra note 66, at 386-87.
eyewitness's memory of the crime and cause him or her to overestimate the amount of attention he or she paid to the perpetrator.  

The Supreme Court eyewitness factors are also deficient because they are incomplete. Scientific study shows the importance of considering such factors as the wording of questions, lineup instructions, confidence malleability, mugshot-induced bias, post-event information, child suggestibility, attitudes and expectations, alcoholic intoxication, cross-race bias, weapons focus, forgetting curve, exposure time, presentation format, unconscious transference, stress, age, and disguise.

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70 Wells & Bradfield, supra note 65, at 374.
A confirming-feedback remark not only inflates eyewitnesses' recollections of how confident they were at the time, it also leads them to report that they had a better view of a culprit, that they could make out details of the face, that they were able to easily and quickly pick him out of a lineup, that his face just "popped out" to them, that their memorial image is particularly clear, and that they are adept at recognizing faces of strangers.

Id.


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

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

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

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

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

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

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

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

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

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

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

83 "Witnesses are more likely to misidentify someone by making a relative judgment when presented with a simultaneous (as opposed to sequential) lineup." Id.
In summary, the Supreme Court’s decisions on eyewitness identifications fail to incorporate scientific research on eyewitness testimony and therefore permit many preventable eyewitness errors.

C. THE RELUCTANCE OF AMERICAN COURTS TO INSTITUTE NEW SAFEGUARDS

Both the Supreme Court and other United States courts have failed to demonstrate adequate flexibility and innovation in dealing with the eyewitness problem, instead restricting their response to the use of traditional safeguards, such as motions to suppress identifications, voir dire, cross-examination, closing argument, and juror instructions to deal with the problem of eyewitness error.\(^8\) Unfortunately, these safeguards are not effective in preventing eyewitness error.\(^9\) Ironically, courts have been reluctant to permit expert eyewitness testimony even though it is the only traditional legal safeguard that has shown any efficacy in mitigating eyewitness error.\(^10\) The ability of American courts to cope with the problem of eyewitness error has, in the past, also been hampered by the traditional standard employed to rule on the admissibility of scientific evidence.\(^11\) A brief review of the landmark cases on the admissibility of scientific evidence in the United States is revealing.

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\(^{84}\) "Eyewitnesses sometimes identify as a culprit someone they have seen in another situation or context." Id.

\(^{85}\) "Very high levels of stress impair the accuracy of eyewitness testimony." Id.; see also Deffenbacher, supra note 66, at 388.

\(^{86}\) Deffenbacher, supra note 66, at 391.

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


\(^{89}\) Berman & Cutler, supra note 15, at 170.

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

\(^{91}\) See Leippe, supra note 88, at 912-13.
In *Frye v. United States*, the United States Court of Appeals for the District of Columbia ruled that "novel" scientific evidence is admissible in a case only if the principles and methodology through which the scientific evidence is collected have received the "general acceptance" of the experts in the field. This strict standard excluded much necessary, valid scientific evidence merely because it had not yet achieved general acceptance in the scientific community.

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

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92 293 F. 1013 (D.C. Cir. 1923).
93 Id. at 1014; see also Kassin et al., supra note 71, at 406 (examining *Frye*).
94 Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 Hastings L.J. 681, 689 (2002) ("This stringent standard excluded a great deal of testimony based on methodologies whose value was subject to debate in the relevant scientific field.").
96 Id. at 589.
97 But, as of 2001, seventeen states continued to use the *Frye* test. See Kassin et al., supra note 71, at 406.
99 Id. at 594-95; Brigham et al., supra note 5, at 19.
100 *Daubert*, 509 U.S. at 592. The Supreme Court's decision in *Daubert* requiring trial judges to determine the validity of scientific evidence creates difficulties because, as empirical data indicates, judges frequently possess insufficient knowledge of the scientific method to accurately assess the validity of expert testimony. See, e.g., Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 Brook. L. Rev. 1121, 1167-73 (2001) (discussing this dilemma).
(1) Can it be empirically tested, and if so, has it been empirically tested?
(2) Has it been published in scientific journals that are subject to peer review?
(3) What are its known or potential error rates?
(4) Is it generally accepted in the scientific community? \( ^{101} \)

The voluminous research on eyewitness testimony satisfies this balancing test. \( ^{102} \)

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

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

\( ^{101} \) *Daubert*, 509 U.S. at 593-94.


\( ^{103} \) 526 U.S. 137 (1999).

\( ^{104} \) Id. at 141.

\( ^{105} \) Id.

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

\( ^{107} \) Dillickrath, *supra* note 102, at 1065. However, Dillickrath suggests that this fact can be a "sufficient rationale" for the exclusion of expert testimony. *Id.* at 1066.


\( ^{109} \) Id. at 143.

\( ^{110} \) Id. at 142.
conclusion is supported by the facts of the case? Second, is the eyewitness expert’s testimony relevant to the case? In other words, will the testimony "assist the trier of fact to understand the evidence or determine a fact in issue"? Third, is the probative value of the eyewitness expert’s testimony substantially outweighed by its prejudicial value? Finally, in jurisdictions that still follow Frye, courts ascertain whether the principles and methods employed by the eyewitness expert have gained “general acceptance” in the scientific community.

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

IV. THE TRIPARTITE SOLUTION

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

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112 Id. (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993)).
113 Fed. R. Evid. 403.
114 Fishman, supra note 111, at § 14:77 n.83.
115 See Berman & Cutler, supra note 15, at 170; see also Dillickrath, supra note 102, at 1060.
116 See Dillickrath, supra note 102, at 1060.
117 Daniel Goleman, supra note 3, at C7 (quoting interview with Stephen Penrod).
A. FIRST COMPONENT OF THE TRIPARTITE SOLUTION: PERMITTING EXPERT TESTIMONY WHEN THE PRIMARY OR SOLE EVIDENCE AGAINST THE DEFENDANT IS EYEWITNESS TESTIMONY

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

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

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

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118 Leippe, supra note 88, at 910.
119 Brian L. Cutler et al., The Eyewitness, the Expert Psychologist, and the Jury, 13 LAW & HUM. BEHAV. 311, 312 (1989) (internal citation omitted).
120 Headley, supra note 94, at 692; see also James M. Doyle, No Confidence: A Step Toward Accuracy in Eyewitness Testimony, THE CHAMPION, Jan.-Feb. 1998, at 12 (noting that "hostility to expert testimony on eyewitness identification remains strong . . . ").
121 For a discussion of the reasons courts generally give for excluding eyewitness expert testimony, see FISHMAN, supra note 111, at § 14:78; Leippe, supra note 88, at 912; and Gregory G. Samo, Annotation, Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony, 46 A.L.R. 4th 1047, § 3(a) (1986). Judges appear to be hostile to the admission of eyewitness expert testimony for several reasons. First, they are not knowledgeable about eyewitness testimony, and therefore do not realize that the effect of many eyewitness factors on identification accuracy is not a matter of common sense. They also appear to be concerned about the time and expense that would result from permitting expert testimony. Finally, they seem to believe that jurors will perfunctorily follow the opinion of the expert resulting in guilty defendants going free. See Brigham et al., supra note 5, at 25; Wells et al., supra note 17, at 48; Wise & Safer, supra note 11, at 13.
122 See, e.g., United States v. Daniels, 64 F.3d 311, 315 (7th Cir. 1995) (quoting United States v. Larkin, 978 F.2d 964, 971 (7th Cir. 1992)) ("[B]ecause it addresses an issue of which the jury already generally is aware . . . it will not contribute to their understanding of the particular factual issue posed.").
are sufficient to guard against eyewitness error;\(^ {123} \) (c) the eyewitness expert’s testimony would prejudice the jury or usurp its discretion;\(^ {124} \) (d) eyewitness expert testimony is unnecessary when the eyewitness is a law enforcement officer or someone else trained to make accurate identifications in stressful situations;\(^ {125} \) (e) pursuant to Federal Rule of Evidence 704 and other authorities, the prejudicial value of eyewitness expert testimony substantially outweighs its probative value because it will cause jurors to become unduly skeptical of eyewitness testimony.\(^ {126} \) The validity of each of these reasons for excluding eyewitness expert testimony is discussed below.

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

Federal Rule of Evidence 702 requires that expert testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.”\(^ {127} \) Using a variety of methods to test jurors’ knowledge of eyewitnesses, researchers have found that: (1) jurors have limited knowledge of the factors that influence eyewitness accuracy,\(^ {128} \) such as the effects of the perpetrator wearing a hat\(^ {129} \) or using a weapon\(^ {130} \) on identification accuracy;

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

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

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

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

\(^ {127} \) Dillickrath, supra note 102, at 1063 (citing Fed. R. Evid. 702).

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

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

\(^ {130} \) Elizabeth Loftus et al., Some Facts About “Weapons Focus,” 11 LAW & HUM. BEHAV. 55, 55-62 (1987); see also Kassin et al., supra note 71, at 412; Nancy Mehrkens
(2) jurors rely on factors which are not good indicators of eyewitness accuracy, such as eyewitness confidence, memory for minor or trivial details, and inconsistencies in eyewitness testimony; (3) jurors overestimate the ability of eyewitnesses to make accurate identifications; and (4) jurors in mock trials cannot distinguish accurate from inaccurate eyewitnesses. In short, scientific research shows that jurors have limited knowledge of eyewitness factors and cannot determine whether an eyewitness has made an accurate identification.

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

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

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


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


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

139 Wise & Safer, supra note 11, at 13.
at trial\textsuperscript{140} and whether jurors can distinguish accurate from inaccurate eyewitnesses.\textsuperscript{141} Many judges appeared to be unfamiliar with simultaneous lineups,\textsuperscript{142} the forgetting curve,\textsuperscript{143} and with studies indicating that half or more of all wrongful felony convictions are due at least in part to eyewitness error.\textsuperscript{144} The judges were both less knowledgeable\textsuperscript{145} and more likely than eyewitness experts to believe the average juror would know the correct answer to the items on the survey.\textsuperscript{146} For the judges, experience, both legal and judicial, had no bearing on their knowledge of eyewitness factors.\textsuperscript{147}

In a follow-up study, undergraduates and law students answered the same eyewitness questionnaire as the judges.\textsuperscript{148} This study found that the judges were no more knowledgeable about eyewitness factors than undergraduates and slightly less knowledgeable than the law students,\textsuperscript{149} despite the judges’ average of fourteen years of law practice\textsuperscript{150} and twelve years on the bench,\textsuperscript{151} and the experience of 76\% of them as a prosecutor, defense attorney, or both prior to becoming a judge.\textsuperscript{152} In sum, when judges exclude eyewitness experts due to their belief that jurors are knowledgeable about eyewitness testimony, their rulings do not have a sound basis in scientific fact.\textsuperscript{153}

\textsuperscript{140} Id.; see also discussion supra note 64 (explaining the role of eyewitness confidence).
\textsuperscript{141} Wise & Safer, supra note 11, at 13.
\textsuperscript{142} See discussion infra Part IV.B.2.b.vi (providing that all the members of a lineup are all presented at the same time in simultaneous lineup).
\textsuperscript{143} Wise & Safer, supra note 11, at 11; see also supra note 81.
\textsuperscript{144} Wise & Safer, supra note 11, at 14.
\textsuperscript{145} See, e.g., id. at 9-11.
\textsuperscript{146} Id. at 12. But see Kassin et al., supra note 138, at 1097.
\textsuperscript{147} Of the 160 judges surveyed, 142 were state judges, 10 were federal, 7 were retired, and 1 was an Indian tribal judge. Wise & Safer, supra note 11, at 7. There were 146 trial judges, 6 appellate, and 8 (presumably including the retired judges) who did not indicate their current position. Id. On average, the judges had practiced law for 13.96 years and had been on the bench for 12.48 years. Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 7.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} See also Brigham & Bothwell, supra note 20, at 29 ("In conclusion, the... data refute the claim that expert psychological testimony on eyewitness identifications would not tell the jury members anything they do not already know. Not only do jury members overestimate the accuracy of eyewitness identifications in target-present lineups, they also appear unaware, to some extent, of the sources of error associated with this type of evidence.


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

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

i. Voir Dire

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

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

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

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

155 Id.
156 Id.
157 See id.
158 Id. at 724-25.
159 Id. at 725.
160 Id. at 727 (“No evidence was found for a significant relation between attitudes toward eyewitnesses and juror perception of culpability.”).
attorneys play in the process.\textsuperscript{161} In sum, voir dire does not prevent eyewitness error.\textsuperscript{162}

ii. Cross-Examination

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

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

\begin{footnotesize}
\begin{enumerate}
\item[161] \textit{Id.} at 728.
\item[162] \textit{Id.}
\item[163] Berman & Cutler, \textit{supra} note 15, at 170. Dillickrath asserts that there are identifiable weaknesses to cross-examination as a safeguard:

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

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

Dillickrath, \textit{supra} note 102, at 1094.
\item[164] \textbf{Cutler} & \textbf{Penrod}, \textit{supra} note 57, at 144.
\item[165] \textit{Id.}
\item[166] \textit{Id.}
\item[167] \textit{Id.}
\item[168] \textit{Id.} at 157.
\item[169] \textit{Id.} at 145.
\item[170] \textit{Id.}
\end{enumerate}
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eyewitnesses are unwilling to speak to a defense attorney about a crime.\footnote{171} Moreover, though defense attorneys can obtain copies of police reports, they will often be useless since officers who prepare the reports are not typically knowledgeable about eyewitness factors.\footnote{172} Furthermore, officers are generally reluctant to put damaging information about the eyewitness in a police report.\footnote{173} Finally, defense attorneys are usually not present at identification procedures,\footnote{174} making it difficult to determine if a procedure was suggestive.\footnote{175} Because defense attorneys do not have a sufficient opportunity in criminal cases to gather information about problems that may have affected eyewitness accuracy, cross-examination is not an effective safeguard against eyewitness error.

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

\footnote{171} This assertion is based on Richard Wise’s six years of experience as a criminal prosecutor.

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

\footnote{173} See generally Penrod & Cutler, supra note 90, at 89-118.

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

\footnote{175} \textit{Cutler \& Penrod, supra} note 57, at 156.

\footnote{176} Id. at 167; \textit{see also} Devenport et al., \textit{supra} note 137, at 340-43.

\footnote{177} Leippe, \textit{supra} note 88, at 923 (stating that attorneys concentrate on “destroy[ing] belief in the eyewitness, [rather than] illuminat[ing] his or her likely level of accuracy”).

\footnote{178} Id.

\footnote{179} Id.

\footnote{180} Id.

\footnote{181} Wise \& Safer, \textit{supra} note 11, at 8 (“Memory for minor or peripheral details is inversely related to eyewitness accuracy, because an eyewitness who attends to peripheral
Finally, even if defense attorneys were able to muster a cross-examination that addressed the relevant psychological eyewitness factors, as previously discussed, it is still unlikely that an effective examination would alert juries and judges to the threat of eyewitness error. This is likely to occur because most judges and jurors have limited knowledge of eyewitness factors and thus are unlikely to give the risk of error proper consideration during instructions and deliberations. In sum, “[f]or even the most skilled lawyer, cross-examination by itself is probably insufficient to attack the problems of eyewitness identification.”

iii. Closing Argument

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

iv. Jury Instructions

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

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

182 See CUTLER & PENROD, supra note 57, at 168.
183 Dillickrath, supra note 102, at 1096.
184 Leippe, supra note 88, at 923.
185 See Dillickrath, supra note 102, at 1096.
186 See CUTLER & PENROD, supra note 57, at 186.
188 CUTLER & PENROD, supra note 57, at 255 (citing United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972)); see also Ramirez et al., supra note 187, at 35.
189 469 F.2d 552.
affirmed. Nonetheless, the United States Court of Appeals for the District of Columbia ruled that a trial court must give a jury special instructions on eyewitness testimony when the only evidence against the defendant is a single eyewitness, even if the defense attorney has not requested such an instruction. The appellate court then took the opportunity to inform the trial court what instructions should be used in the future for eyewitness testimony.

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

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190 Id. at 558.
191 Id. at 555.
192 The Telfaire instructions primarily discuss the eyewitness factors that the United States Supreme Court enumerated in Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Brathwaite, 432 U.S. 98 (1977), for assessing eyewitness accuracy. Telfaire, 469 F.2d at 558-59.
193 See Ramirez et al., supra note 187, at 34.
194 Id. at 31.
195 Id. at 36.
196 Id. at 38.
197 Id.
198 Id. at 39.

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

Id.

199 Id. There were four groups. One received the instructions at the beginning and end of the trial, another only at the beginning, another only at the end, and a last control group received no instructions at all. Id. at 37-38.
The results of the first experiment showed that the Telfaire instructions either did not affect or even decreased the participant’s sensitivity to the witnessing and identification conditions in the simulated trials, no matter when they were given to the participants.\textsuperscript{200} Furthermore, the participants recalled on average only 31% of the elements of the Telfaire instructions, even when they heard them twice.\textsuperscript{201} Ramirez concluded: “[I]t appears that Telfaire is not a reliable alternative to eyewitness expert testimony.”\textsuperscript{202}

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

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

\textsuperscript{200} Id. at 45.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 48. In the original experiment, the participants found the instructions to be “too long, boring, repetitious, confusing, and hard to remember.” Id. at 44.
\textsuperscript{204} Id. at 46-47.
\textsuperscript{205} Id. at 56.
\textsuperscript{206} Id. at 57.
\textsuperscript{208} Ramirez et al., supra note 187, at 58.
misconceptions. Accordingly, they concluded that "[g]iven this state, the cross-examination of expert witnesses may be the best thing going." 

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

v. Motions to Suppress Eyewitness Identifications

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

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209 Id.
210 Id.
212 Id.
213 Greene, supra note 14, at 261 (internal citations omitted).
214 CUTLER & PENROD, supra note 57, at 264.
215 Veronica Stinson et al., How Effective Is the Motion-to-Suppress Safeguard? Judges' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures, 82 J. APPLIED PSYCHOL. 211 (1997); Stinson et al., supra note 174, at 64.
216 Stinson et al., supra note 174, at 64.
217 Id. at 66-67. Originally 161 assistant public defenders were contacted to participate in the study. A total of 109 public defenders agreed to participate in the study, but because of various difficulties only 97 public defenders actually completed the study.
218 Id. at 67.
219 Id. at 65-67.
eyewitness’s descriptions of the perpetrator of the crime on no more than two of five characteristics. In the lineups that had presentation bias, the lineup members were presented simultaneously rather than sequentially. After watching a videotaped lineup, the attorneys rated the suggestiveness of the foils, instructions, presentation, and the overall fairness of the lineup.

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

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

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

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220 Id.
221 Id. at 66-67. In a simultaneous lineup, the members are all presented to an eyewitness at the same time. Id. at 66. In a sequential lineup, the members are presented individually.
222 Stinson et al., supra note 174, at 67-68.
223 Id. at 72.
224 Id.
225 Id.
226 See discussion infra Part IV.B.2.b.vi.
227 See Stinson et al., supra note 174, at 71.
228 Id. at 67.
229 Id. at 68.
230 Id. at 71.
be convinced of the inaccuracy of eyewitness identification or the suggestiveness of the lineup. The results of the study showed that not only do attorneys have a limited knowledge of the biases that affect the suggestibility and fairness of lineups, but that they also frequently believe judges will disregard their concerns of bias.

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

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

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231 Id. at 72.
232 Id. at 71-72.
233 Stinson et al., supra note 215, at 216.
234 Id. at 214.
235 Id.
236 Id.
237 Id.
238 Id.
239 Id. at 215. Although judges and attorneys demonstrated awareness of the foil bias in the Stinson studies, it should not be assumed that they would demonstrate this awareness in all circumstances. Foil bias is a complex phenomenon. See Wells et al., supra note 18, at 626-27. A small number of judges also indicated that they routinely deny motions to suppress identifications and leave it to the jury to determine whether the identification procedure was suggestive. Stinson et al., supra note 215, at 219.
240 Stinson et al., supra note 215, at 219.
241 Id. at 218.
242 Id. at 213-19.
identification procedures are photo arrays and pre-indictment lineups.\textsuperscript{243} As was stated previously, defendants do not have a right to have an attorney present during these identification procedures.\textsuperscript{244} Consequently, even if most attorneys were knowledgeable about the factors that create biased lineups, their ability to remedy them would still be significantly impaired because they are generally not present during most identification procedures.\textsuperscript{245}

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

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

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

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

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

\textsuperscript{244} Id. at 218-19.

\textsuperscript{245} Id. at 211.

\textsuperscript{246} Wells et al., supra note 18, at 604.

\textsuperscript{247} Vidmar & Diamond, supra note 100, at 1174.

\textsuperscript{248} See id.
have been. They generally leave it to the jury to apply the relevant eyewitness factors in evaluating the accuracy of a specific eyewitness.

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

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

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

With regard to jury prejudice, researchers primarily confront the issue of whether expert testimony merely increases jurors' skepticism of eyewitness testimony or increases their sensitivity to eyewitness testimony.
Sensitivity consists of two elements: knowledge and integration. Knowledge is defined as “awareness of the manner in which a factor influences eyewitness memory, including the direction and magnitude of the effect for a given factor.” Integration “refers to the ability to render decisions that affect knowledge.” In other words, even though jurors may know how an eyewitness factor affects eyewitness accuracy, they may not incorporate that knowledge into their evaluation of eyewitness accuracy.

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

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

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

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257 Cutler et al., supra note 119, at 312.
258 Id. at 313.
259 CUTLER & PENROD, supra note 57, at 217.
260 Id.
261 Cutler et al., supra note 119, at 311.
262 Id. at 318.
263 Id. at 316.
264 Id. at 317.
265 Id.
266 Id.
267 Id. at 316-17.
268 Id. at 317.
269 Id.
270 Id.
271 Id. at 325.
made an accurate identification. It also caused the mock jurors to place less reliance on eyewitness’s confidence when making inferences about eyewitness credibility and the strength of the prosecution and defense cases.

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

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

Penrod and Cutler concluded in their most recent article:

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

\(^{272}\) Id.

\(^{273}\) Id. at 323-24.


\(^{275}\) Id. at 220.

\(^{276}\) Id.

\(^{277}\) Id. at 223.

\(^{278}\) Id.

\(^{279}\) Id.

\(^{280}\) Id. The experienced jurors and undergraduates did not differ significantly in their responses to expert testimony or to the absence of expert testimony. Id.

\(^{281}\) Penrod & Cutler, supra note 90, at 115.
The results of several other studies on the effect of expert testimony, however, indicate that, in some circumstances, expert testimony fails to sensitize jurors to the effects of eyewitness factors and only produces increased juror skepticism about eyewitness testimony. For example, Leippe and his colleagues conducted two experiments on the effects of expert testimony. In their first experiment, college students read a trial transcript of a robbery/murder case. The trial transcript included opening and closing arguments, judges’ instructions, and direct and cross-examination of the witnesses, including the only eyewitness to the crime. In the different versions of the trial, the strength of the prosecution’s case was manipulated to make the prosecution’s case either moderately strong or moderately weak.

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

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

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

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283 *Id.* at 529, 535.
284 *Id.* at 529.
285 *Id.*
286 *Id.*
287 *Id.*
288 *Id.*
289 *Id.*
290 *Id.* at 534.
291 *Id.*
292 *Id.* at 535.
asymmetry), even when it perhaps should not (i.e., an otherwise strong prosecution case)."

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

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

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

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

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

\begin{footnotes}
\item[293] Id.
\item[294] Id.
\item[295] Id.
\item[296] Id. at 535-36.
\item[297] Id. at 538.
\item[298] The Supreme Court requires the State to pay for expert testimony for indigent defendants where the denial of such assistance would otherwise violate his or her due process rights. Ake v. Oklahoma, 470 U.S. 68, 87 (1985).
\item[299] Wells et al., \textit{supra} note 18, at 609.
\end{footnotes}
eyewitness testimony is the sole or primary evidence against a defendant. In other cases, admission of expert testimony should be left to the discretion of the trial judge. When eyewitness testimony is the sole or primary evidence against the defendant, the admission of expert testimony is necessary because it is in these cases that the risk of wrongful conviction is highest, and it makes jurors aware of the many factors that affect eyewitness accuracy. It is also needed because the effect of many eyewitness factors on identification accuracy is not a matter of common sense.

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

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

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

1. Interviewing Techniques

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

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

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

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

a. Techniques Which Promote Incomplete Recollection

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

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

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303 Fisher, supra note 301, at 732.
304 Id. at 735.
305 See id.
307 Id.
308 See id.
309 Id. at 17.
of a crime.\textsuperscript{310} As will be discussed, such assistance could take the form of employing mnemonic devices from the cognitive interview that enhance recall,\textsuperscript{311} or could simply involve the officer lending sympathy and support to a distraught witness.\textsuperscript{312} Numerous studies show that the "aroused" eyewitness, or the eyewitness who feels personally threatened by the crime, has reduced accuracy.\textsuperscript{313}

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

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

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

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

\textsuperscript{310} Gary L. Wells et al., \textit{From the Lab to the Police Station: A Successful Application of Eyewitness Research}, 55 AM. PSYCHOLOGIST 581, 583 (2000).
\textsuperscript{311} See id. at 745-47; see also discussion infra Part IV.B.1.d.
\textsuperscript{312} Deffenbacher, \textit{supra} note 66, at 388.
\textsuperscript{313} Id.
\textsuperscript{314} Fisher, \textit{supra} note 301, at 735.
\textsuperscript{315} Id.; Wells et al., \textit{supra} note 310, at 583.
\textsuperscript{316} Fisher, \textit{supra} note 301, at 747.
\textsuperscript{317} Id.
\textsuperscript{318} See id. at 736.
\textsuperscript{319} See id. at 740.
of the crime or to the perpetrator’s appearance. Post-event information will often seem credible to eyewitnesses, and can alter their subsequent responses to questions about an event they witnessed. When this occurs, eyewitnesses’ later responses to questions are likely to incorporate the false presuppositions of the earlier questions. For instance, eyewitnesses tend to incorporate another eyewitness’s erroneous description of a person’s face into their own description, even when reconstructing the suspect’s face with an Identi-kit. Moreover, post-event information not only affects eyewitnesses’ memory of the crime but also their ability to recognize the perpetrator of the crime.

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

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320 Brigham et al., supra note 5, at 14 (“Such ‘post-event suggestions’ may come from overhearing the recall of other witnesses or from questioning by field officers investigating the crime, and may involve aspects of the situation or facial characteristics of the suspect.”).
321 See Fisher, supra note 301, at 740.
323 See id. at 867-68. In other words, when law officers, prosecutors, and others ask an eyewitness a question that contains incorrect information, the incorrect information in the question can alter the eyewitness’s memory of the crime and ability to correctly identify the perpetrator of the crime.

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

Id. at 325-26. Deffenbacher has opined that Identi-kit identifications might be especially prone to difficulty because “they require the witness to retrieve from memory isolated facial features, a particularly difficult task, given that faces are quite likely stored as integrated wholes.” Deffenbacher, supra note 66, at 385.
325 Loftus & Greene, supra note 324, at 333 (“The verbal expressions and other postevent information to which a witness is exposed will not only appear in the verbal reports of witnesses but will also influence future recognition of persons who have been seen before.”).
326 Robert E. Christiaansen et al., Influencing Eyewitness Descriptions, 7 Law & Hum. Behav. 59, 64 (1983).
327 Id. at 64-65.
precise records of all our experiences, but rather it is a highly malleable and reconstructive process.\textsuperscript{328}

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

Post-event information distorts an eyewitness's memory of the crime\textsuperscript{338} and also increases his or her confidence in the accuracy of that

\begin{itemize}
\item \textsuperscript{328} Brigham & Bothwell, supra note 20, at 20 ("[R]esearch has demonstrated that prior knowledge affects the ways by which information is encoded and retrieved, often resulting in distortions in recall arising from constructive processes at time of acquisition and/or from reconstructive processes at the time of recall.").
\item \textsuperscript{329} Judges, supra note 302, at 247. Judges cites a law enforcement officer as an example of a highly credible source. \textit{Id.}
\item \textsuperscript{330} \textit{Id.}
\item \textsuperscript{331} \textit{Id.}; see also Lynn Garrioch & C. A. Elizabeth Brimacombe, \textit{Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence}, 25 \textit{Law & Hum. Behav.} 299, 306 (2001) ("We suggest that informational social influence can explain our results. To reduce the uncertainty surrounding the choosing of a lineup member, witnesses may have looked to their interviewer to help them decide if they were correct and then used the interviewer's reaction to their lineup choice to gauge their identification confidence.").
\item \textsuperscript{332} Judges, supra note 302, at 247.
\item \textsuperscript{333} \textit{Id.}
\item \textsuperscript{334} \textit{Id.} at 248.
\item \textsuperscript{335} \textit{Id.}
\item \textsuperscript{336} \textit{Id.}
\item \textsuperscript{337} Bradfield et al., supra note 15, at 119. Such feedback could be verbal or as simple as a smile. Garrioch & Brimacombe, supra note 331, at 300.
\item \textsuperscript{338} Judges, supra note 302, at 266; see also Bradfield et al., supra note 15, at 119 (finding that confirming feedback "distorted participants' recollection of events that occurred before feedback was given").
\end{itemize}
Scientific studies show that post-event information has its greatest impact on an eyewitness's confidence for inaccurate information. Post-event information also significantly compromises the trier of fact's ability to ascertain the truth in a criminal trial.

c. Systemic Pressures That Either Motivate Law Officers to Gather Evidence with a Pro-Prosecution Bias or Charge the Least Experienced Officers with Gathering the Most Important Evidence

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

The final systemic factor that interferes with law officers' effective interviewing of eyewitnesses is that novice patrol officers responding to
emergencies conduct the initial interview of most eyewitnesses. Not only do these officers lack training and experience in interviewing eyewitnesses, but they also conduct the interviews under poor conditions.

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

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

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

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

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346 Id. at 756.
347 Id. ("[T]heir interviews are conducted under the worst conditions imaginable: general confusion and background noise, high witness arousal, severe time pressure, etc. They are pressed by their superiors to file their reports quickly, even if at the cost of diminished information.").
348 See id. at 757 (discussing difficulty in changing interview habits of experienced but improperly trained police). Fisher further comments that he finds it easier to teach cognitive interviewing skills to his research assistants than experienced police detectives. Id.
349 See id. at 757-58.
350 Id. at 754-55.
351 Id. at 754.
352 Id. at 755.
353 See Wells et al., supra note 310, at 583.
354 Id. at 582-83.
"cognitive interview" was based on principles of cognitive and related fields of psychology. The purpose of the cognitive interview is to improve the standard law enforcement interview in three ways. First, the cognitive interview takes into consideration the social dynamics of the interviewing process by encouraging the law officer to establish rapport with and show empathy for the eyewitness. Further, it enhances the eyewitness's memory of the crime and the interviewer's recall of the contents of the interview by applying basic principles of memory, using mnemonic devices, and by recording the interview. Finally, it improves communications between the eyewitness and the interviewer by such means as asking open-ended questions and not interrupting the eyewitness in his or her account of the crime.

To maximize the amount of information they obtain, law officers need to develop rapport and show empathy for eyewitnesses because eyewitnesses are frequently traumatized by the crimes they observe. Rapport and empathy also facilitate eyewitness cooperation, comfort, and ease in disclosing information.

The cognitive interview accomplishes these tasks by requiring the interviewer to express sympathy and concern for the eyewitness, personalize the interview to the witness's unique needs, use frequent open-ended questions, and not interrupt the eyewitness. The cognitive interview emphasizes the importance of maintaining rapport with an eyewitness throughout the entire criminal process and not just at the initial interview.

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

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355 Id.
356 Id.
357 Id.
358 Id.
359 See Fisher, supra note 301, at 745.
360 See Wells et al., supra note 310, at 582-83.
361 See id.
362 See id. (advocating the establishment of rapport with witnesses to allow them to talk freely about their experiences). See also Fisher, supra note 301, at 756 ("As a means of combating the stereotype of the aggressive person as the ideal, police should attempt to promote values of the compassionate person or the good companion as the ideal police officer, at least for those whose primary role is to conduct interviews with cooperative witnesses.").
363 See id. (discussing common errors in a normal police interview).
364 See also Nat'l Inst. of Justice, supra note 306, at 15, 18, which is based in large part on the cognitive interview where it emphasizes rapport building at every stage of the interviewing process.
with the encoded event."

Second, "[t]hat information not accessible with one retrieval cue may be accessible with a different cue."

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

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

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

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

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

368 Id.

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


372 Wells et al., *supra* note 310, at 584 (citation omitted).
eyewitnesses of real crimes, also demonstrated that the cognitive interview produces significantly more information than the standard law enforcement interview. The cognitive interview, unlike the standard law enforcement interview, has the added benefit of not artificially increasing eyewitness confidence.

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

2. Identification Procedures

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

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373 Id. (by 55% in the United States and 35% in England).
374 Fisher, supra note 301, at 752.
375 For an excellent discussion of the history of these efforts, see Wells et al., supra note 310, at 581-82. The efforts culminated, to some extent, in 1999 with the Department of Justice’s publication of the “Guide,” the first national guidelines. In testimony to the importance of using scientific research in formulating guidelines for the collection of eyewitnesses, the Guide stated:

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


376 See Wells et al., supra note 310, at 582.
377 See, e.g., Mark R. Phillips et al., Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias, 84 J. APPLIED PSYCHOL. 940, 940 (1999) (“Legal psychologists have long recognized the potential for bias in such a procedure, which has made eyewitness identification one of the most-studied and best-understood areas in all of applied psychology.”).
a. The Scientific Principles Relevant to Fair Identification Procedures

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

Koehnken, Malpass, and Wolgater emphasized that:

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

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

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

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

\(^{379}\) Wells et al., *supra* note 310, at 585-86.
\(^{380}\) Id. at 585.
\(^{381}\) Id. at 586.
\(^{382}\) See Koch, *supra* note 46, at 1104-05.
\(^{383}\) See Wells et al., *supra* note 18, at 630.
\(^{384}\) Brigham et al., *supra* note 5, at 15.
feel like a failure. Thus, the witness will be looking to make an affirmative identification and will select the lineup member who is closest to her recollection of the perpetrator. "Those who reported using a relative judgment process were more likely to have made a false identification than were those who reported using an absolute judgment process." 

iii. The Lineup-as-Experiment Analogy

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

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

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

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

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

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385 Koehnken et al., supra note 378, at 208-09.
Under these circumstances, an "ideal" witness would realize that he or she cannot remember any more and therefore, cannot recognize any of the individuals present in the line-up. Unfortunately, we are not always dealing with ideal witnesses. A witness may want to present him or herself as a "good," constructive person, who can help the police catch the offender and thereby solve the crime. Sometimes witnesses feel themselves to be "failures" when they cannot recall what the offender looked like.

Id.

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

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

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

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

390 Id. at 617.

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

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

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

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

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

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

Id.

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

395 See id. at 618-19.

396 See id. at 619.

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

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

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

*Id.* at 618-19.

397 *Id.* at 619.

398 *Id.*

399 *Id.* at 620.

400 *Id.* at 625-26.

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

*Id.* at 626.


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

403 *Id.*

404 See discussion *supra* Part III.B.
b. Guidelines for Conducting Identification Procedures

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

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

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

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

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

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

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

408 Id. at 289-90.

409 See id.


411 Id.
generate leads in a case should not also be used to establish a defendant's guilt at trial.\footnote{See id.}

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

Prior to conducting an identification procedure, it is important to ascertain if an eyewitness has seen the suspect before or after the crime.\footnote{Koehnken et al., supra note 378, at 217.} If this has occurred, the nature of the prior viewing of the eyewitness should be determined,\footnote{Id. at 218.} as well as the outcome of any earlier identification procedure.\footnote{Id.} These determinations are vital because prior exposure of an eyewitness to a suspect, such as in a mug book, substantially increases the likelihood that an eyewitness will later identify that suspect in a subsequent identification procedure, even if the suspect did not commit the crime.\footnote{Evan Brown et al., Memory for Faces and the Circumstances of Encounter, 62 J. APPLIED PSYCHOL. 311, 311-18 (1977); see also Koehnken et al., supra note 378, at 217.}

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

Many lineups in the United States contain more than one suspect, even when there is only one perpetrator who committed the crime.\footnote{Wells et al., supra note 310, at 593.} Research has shown that the use of multiple suspects in identification procedures significantly increases the risk of erroneous identifications.\footnote{Wells et al., supra note 310, at 593. “Although some lineups may be composed entirely of suspects, the opinions of legal experts and psychologists clearly argue against such practices. The advantages of having known-innocent foils in lineups are numerous, and single-suspect lineups are therefore the state-of-the-art model . . . .” R.C.L. Lindsay & Gary L. Wells, Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation, 70 J. APPLIED PSYCHOL. 556, 557 (1985) (citations and internal quotations omitted).} This increased risk occurs because multiple suspects decrease the proportion of
In the lineup and increase the number of correct responses. Putting more than one suspect in a lineup significantly increases the probability that an eyewitness will choose an innocent suspect.

iv. The Number of Lineup Members Should be Increased

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

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

420 Id.

421 Id.


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

423 Id.

424 Id.

425 Id.
procedures used in the United States have too few members to prevent erroneous identifications, even when they are otherwise fair.\textsuperscript{426}

\textit{v. The Suspect in an Identification Procedure Should Not Stand Out from the Foils}

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

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

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

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{426} Levi and Lindsay state that increasing lineup size from six to twelve members could potentially reduce false identification rates by 50\% in the United States. \textit{Id.} at 780.
\item \textsuperscript{427} Wells et al., \textit{supra} note 18, at 627.
\item \textsuperscript{428} \textit{Id.}
\item \textsuperscript{429} \textit{Id.} at 630.
\item \textsuperscript{430} See \textit{id.}
\item \textsuperscript{431} Wells et al., \textit{supra} note 310, at 585. See Wells et al., \textit{supra} note 18, at 632-34, for procedures in selecting fillers when the suspect does not match the eyewitness’s description, the suspect has unique non-described features, the suspect has common non-described features, the eyewitness description of the perpetrator is unique, or there is more than one eyewitness.
\item \textsuperscript{432} See Wells et al., \textit{supra} note 18, at 639.
\item \textsuperscript{433} \textit{Id.}
\item \textsuperscript{434} "A showup refers to the observation of a single suspect by a witness in the field, typically at the crime scene." Bruce W. Behrman & Sherrie L. Davey, \textit{Eyewitness Identification in Actual Criminal Cases: An Archival Analysis}, 25 \textit{LAW \& HUM. BEHAV.} 475, 477 (2001).
\end{itemize}
\end{footnotesize}
Accordingly, the use of showups is only appropriate in circumstances where less suggestive identification procedures cannot be used.436

vi. Law Officers Should Use Sequential Identification Procedures

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

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

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

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

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

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

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

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

It should be noted that a recent study by Sherry L. Mecklenberg conducted on behalf of the State of Illinois criticized the use of sequential lineups. Sherry L. Mecklenberg, Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures 6 (2006), available at http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Report.pdf ("Surprisingly, the Illinois data did not bear out the research experiments that sequential, double-blind lineups produce a lower rate of known false identifications. Instead, the sequential, double-blind procedures resulted in an overall higher rate of known false identifications than did the simultaneous lineups.").

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

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


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

Id. at 4.

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

The State of Wisconsin also recently declined to alter its new eyewitness procedures in response to the Illinois report, stating that "the design of the program does not seem to support [the] inference or conclusion [that the higher rate of filler identification is due to the sequential procedure]." Bureau of Training and Standards for Criminal Justice, Wis. Dep't
preventing erroneous identifications has been demonstrated in experiments in the United States, Canada, the United Kingdom, South Africa, Germany, and Australia, making it one of the most highly verified findings in all of the scientific literature on eyewitness testimony.\textsuperscript{440}

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

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

\begin{flushright}
\textsuperscript{440} Wells et al., supra note 310 at 586.
\textsuperscript{441} Wells et al., supra note 18, at 627.
\textsuperscript{442} Bradfield et al., supra note 15, at 118 ("A lineup administrator who is invested in the outcome of a witness’s identification cannot be expected to have the same reaction (verbally or nonverbally) to a filler identification that he or she has to an identification of the suspect. Even if investigators are cautioned against giving feedback to eyewitnesses, involuntary reactions to a witness’s selection are difficult to conceal."). "Despite research findings showing its benefits, police are resistant to using double-blind testing because they perceive it as a loss of control and as a suggestion that they cannot conduct fair lineups." Ryann M. Haw & Ronald P. Fisher, Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy, 89 J. APPLIED PSYCHOL. 1106, 1106 (2004).
\textsuperscript{443} Wells et al., supra note 18, at 627-29.
\textsuperscript{444} Bradfield et al., supra note 15, at 112.
\textsuperscript{445} Garrioch & Brimacombe, supra note 331, at 306. The Illinois study also criticized the use of the double-blind method. However, it has been refuted by such scholars as Wells and Steblay and rejected by the State of Wisconsin. See discussion supra note 439.
\end{flushright}
viii. Eyewitnesses Should Be Given Cautionary Instructions

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

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

ix. All Identification Procedures Should Be Videotaped

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

446 Wells et al., supra note 18, at 629.
447 Id.
448 Id.
449 Id.
451 Wells et al., supra note 310, at 585.
453 Id. at 650.
procedure was conducted so that juries, judges, and attorneys can evaluate the procedure’s fairness.\textsuperscript{454} Without such a record, all the other safeguards for conducting fair identification procedures would be meaningless.\textsuperscript{455}

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

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

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

\textsuperscript{454} Id.
\textsuperscript{455} See id. at 652.
\textsuperscript{456} Wells & Bradfield, supra note 65, at 361.
\textsuperscript{457} Id.
\textsuperscript{458} Id. at 362.
\textsuperscript{459} Id.
\textsuperscript{460} See id. at 375 (“Even if the confidence-prophylactic effect is short-lived, at the very least the confidence statement taken at the time of the identification can then be a matter of record and subject to usual discovery procedures so that any later inflation in confidence can be noted for the trier of fact and perhaps discounted accordingly.”).

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

Klobuchar et al., supra note 439, at 390.
accuracy can be controlled, implementation of the guidelines enumerated above is one of the most potent means available to the criminal justice system to reduce eyewitness error. However, improvements in eyewitness evidence gathering and identification procedures can only be effective if the principal participants in the criminal justice system are educated about their importance and use.

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

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

1. Introduction

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

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

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462 Wise & Safer, supra note 11, at 7.
463 Id. at 13.
464 Id.
465 Id.
These beliefs were not associated with the number of years a judge had practiced law or been on the bench. They were also not associated with judicial position or whether a judge had practiced criminal law. The study suggests that legal and judicial experience do not ensure that judges will have the beliefs necessary to reduce eyewitness error significantly. Well-designed education programs about eyewitness testimony may be beneficial in helping judges develop those beliefs.

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

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

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

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

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

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

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

3. Means to Educate Principal Participants About Eyewitness Testimony

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

479 See discussion supra Part IV.A.1.b.i-v.
legal education programs could educate law students, law officers, judges, and attorneys about eyewitness testimony. Jurors could be educated about eyewitness testimony when they are called for jury duty. Psychology and criminal justice courses in high schools and colleges could also be used to educate the general public about eyewitness testimony. Given the high social cost of wrongful convictions, the time and money invested in education would be well spent.

V. PROCEDURAL DUE PROCESS CONCERNS AND CONCLUSION

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

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

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

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

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

Dripps, supra note 8, at 649-50.

481 Dripps, supra note 8, at 653.

482 Headley, supra note 94, at 696. Indeed, the Supreme Court has found due process violations in some suggestive lineup procedures, such as in Foster v. California, 394 U.S. 440, 442 (1969). In most cases, however, the Court has held that suggestive identification procedures do not violate due process. Headley, supra note 94, at 697-98.
necessary to determine what procedural safeguards are required to achieve
this constitutionally mandated level of eyewitness accuracy.

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

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

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

483 See discussion supra Part II.A.
484 Id.
485 See discussion supra Part IV.A-B.
486 See discussion supra Part IV.B.1.
488 Haw & Fisher, supra note 442, at 1110.
489 See discussion supra Part IV.A.1.a.
490 Id.
491 See discussion supra Part III.A.
They assume that at trial eyewitnesses can accurately recall the eyewitness factors that the Supreme Court has enumerated for assessing eyewitness accuracy and that it can be determined whether an eyewitness identification from a suggestive procedure is accurate.\footnote{See Koehnken et al., \textit{supra} note 378, at 208.}

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

In short, current procedural safeguards for preventing eyewitness error violate due process because they create an unreasonable risk that a defendant will be wrongfully convicted because of eyewitness error. They also violate procedural due process because they fail to incorporate scientific procedures for reducing eyewitness error, which could be implemented without imposing an unreasonable financial or administrative burden on the legal system.\footnote{See id.; see also Klobuchar et al., \textit{supra} note 439, at 390.}

Dripps opines that, to truly honor procedural due process, protocols designed to avert eyewitness error like the tripartite solution should be converted into "\textit{Miranda}-like rules of constitutional law."\footnote{See, e.g., Headley, \textit{supra} note 94, at 700. Klobuchar states: Overall, police chiefs and investigators alike found the pilot project [for implementing double-blind sequential lineup procedures] to be easier to implement and less work than anticipated. Implementation was extremely efficient. . . . The pilot project also involved minimal cost. From an administrative perspective, the police chiefs initially wondered whether the need for blind administrators would significantly increase work-hours. As Minnetonka police chief Joy Rikala noted, however, "There [are] no cost implications of this. It's negligible." Klobuchar, \textit{supra} note 439, at 409 (internal citations omitted).} Thus, we could effectively reduce erroneous eyewitness testimony to levels that comport with procedural due process by instituting the tripartite solution to eyewitness error proposed in this article. By admitting eyewitness expert testimony in appropriate circumstances and by educating the principal participants in the criminal justice system about eyewitness testimony, the legal system will insure that triers of fact can competently assess the accuracy of eyewitness testimony. Requiring law enforcement agencies to use the cognitive interview will significantly increase the amount of accurate information that is obtained from eyewitnesses and prevent them from contaminating eyewitnesses' memories of crimes. Implementing the guidelines for conducting identification procedures delineated in this article\footnote{Dripps, \textit{supra} note 8, at 658-59.}
will significantly reduce the number of erroneous identifications and give
triers of fact an objective standard for determining if an identification
procedure is fair.

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

496 Wise & Safer, supra note 11, at 16.
497 Goleman, supra note 3, at C7 (quoting interview with Gary Wells).