SB 200

<TARGET><BILL>SB 200</BILL><SUBJECT>SB 200</SUBJECT><COMM>SJUD27</COMM></TARGET>

Senator Hollis French
Alaska State Legislature

State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

716 West 4th Avenue, Suite 420
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SB 200 Eyewitnesses and Lineups
Sponsor Statement

Evidence provided by eyewitnesses is a vital part of many criminal investigations. According to the International Association of Chiefs of Police, some 77,000 people nationwide go to trial each year because eyewitnesses have picked them out of lineups or photo arrays. Eyewitness testimony is arguably some of the most powerful evidence presented at a trial.

Since 1989, however, DNA technology has resulted in over 230 exonerations of people who, on average, had served 12 years in prison, and 75% of those convictions involved misidentifications by eyewitnesses. When innocent people are convicted, not only do they suffer an enormous injustice, but the real perpetrator is never caught and taken off the street.

Organizations such as the American Bar Association, The Police Foundation and the National Institute of Justice have identified procedures that improve the accuracy of eyewitness identifications. Senate Bill 200 will require law enforcement agencies to adopt specific procedures for conducting photo and live line-ups. It will require the Department of Public Safety to create and administer a training program for law enforcement officers on scientific findings and the use of appropriate methods when interviewing eyewitnesses to crimes. I urge your support for this important step toward ensuring that perpetrators are caught, and innocent people are screened out during eyewitness processes.

CS FOR SENATE BILL NO. 200(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR FRENCH

A BILL

FOR AN ACT ENTITLED

"An Act establishing certain requirements and procedures related to the identification of suspects by eyewitnesses to criminal offenses."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 12.50 is amended by adding new sections to read:

Article 4. Identification of Persons by Eyewitnesses.

Sec. 12.50.300. Eyewitness identification proceedings. (a) A law enforcement agency conducting eyewitness identification proceedings shall adopt specific procedures for conducting photo and live lineups, including at a minimum, a requirement that

(1) before a photo or live lineup, a law enforcement officer shall record as compete a description as possible of the perpetrator provided by the eyewitness, in the eyewitness's own words; the statement must include relevant information regarding the conditions under which the eyewitness observed the perpetrator, including location, time, distance, obstructions, lighting, weather conditions, any

impairments relating to the vision of the eyewitness, or other impairments; and

(2) an independent administrator shall conduct the lineup; however, when it is impracticable for an independent administrator to conduct a photo or live lineup,

(A) a blinded administrator shall conduct the lineup; or

(B) the administrator shall use a procedure that achieves neutral administration of the lineup and that consists of simultaneous presentation of the lineup.

(b) The admissibility of an eyewitness identification as evidence is not precluded by the failure of an agency to adopt procedures under or to satisfy requirements of (a) of this section.

Sec. 12.50.310. Training of law enforcement officers. The Department of Public Safety shall create, administer, and conduct a training program for law enforcement officers and recruits in the requirements, methods, technical aspects, and scientific findings related to eyewitness identification proceedings under AS 12.50.300 - 12.50.399.

Sec. 12.50.399. Definitions. For the purposes of AS 12.50.300 - 12.50.399,

(1) "administrator" means the person conducting the lineup;

(2) "blinded administrator" means an administrator who might know who the suspect is, but does not know which lineup member is being viewed by the eyewitness; "blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or substantially similar system;

(3) "eyewitness" means a person whose identification by sight of another person may be relevant in a criminal investigation;

(4) "independent administrator" means an administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect;

(5) "law enforcement agency" means a public agency that performs as one of its principal functions an activity relating to crime prevention, control, or reduction or relating to the enforcement of the criminal law; "law enforcement agency" does not include a court;

(6) "law enforcement officer" means an employee of a law enforcement agency;

(7) "live lineup" means a procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime;

(8) "photo lineup" means a procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime;

(9) "suspect" means the person believed by law enforcement to be the possible perpetrator of the offense.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

MEMORANDUM

Explanation of Changes CSSB 200\I

On page 1, on line 12, added the word "relevant" to clarify that information listed need not be collected if it isn't relevant to the conditions under which the eyewitness made his/her observations.

On page 2, added a new subsection (b) at lines 9-11, to clarify that the admissibility of eyewitness identification as evidence is not precluded by the failure of an agency to adopt procedures or to satisfy the requirement under subsection (a).

Technical changes were also made in Section 1, subsection (a)(2) on page 2 to clarify provisions about administrators of tests.

27-LS1136\I
Wayne/Gardner
3/13/12

CS FOR SENATE BILL NO. 200(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
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Sponsor(s): SENATOR FRENCH

A BILL

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(B) the administrator shall use a procedure that achieves neutral administration of the lineup and that consists of simultaneous presentation of the lineup.

(b) The admissibility of an eyewitness identification as evidence is not precluded by the failure of an agency to adopt procedures under or to satisfy requirements of (a) of this section.

Sec. 12.50.310. Training of law enforcement officers. The Department of Public Safety shall create, administer, and conduct a training program for law enforcement officers and recruits in the requirements, methods, technical aspects, and scientific findings related to eyewitness identification proceedings under AS 12.50.300 - 12.50.399.

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(9) "suspect" means the person believed by law enforcement to be the possible perpetrator of the offense.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595

Senate Judiciary Committee

MEMORANDUM

March 12, 2012

TO: Leg Legal

FROM: Cindy Smith

RE: CS for SB 200 LS1136\B

Please draft CS that makes these three changes to SB 200 Eyewitnesses and Lineups:

On page 1, at line 12, after the word "include", insert the word "relevant"

On page 2, at line 2 after the word lineup, insert the word "or"

On page 2, after line 6, insert the following: "The failure or inability to meet the requirements listed in (1) through (3) above does not preclude the admission of eyewitness identifications into evidence".

Thanks! We need this for a committee that meets on Friday, March 16th --

The failure or inability to meet the requirements listed in (1) through (3) above does not preclude the admission of eyewitness identifications into evidence.

Sec. 28.33.033. Presumptions and chemical analysis of breath or blood.

(a) Upon the trial of a civil or criminal action or proceedings arising out of acts alleged to have been committed by a person operating a commercial motor vehicle while under the influence of an alcoholic beverage in violation of AS 28.33.030, the following rules apply with regard to the amount of alcohol in the person's blood or breath at the time alleged:

(1) if there was less than 0.04 percent by weight of alcohol in the person's blood, or less than 40 milligrams of alcohol per 100 milliliters of the person's blood, or less than 0.04 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to a presumption that the person was or was not under the influence of an alcoholic beverage, but that fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage;

(2) if there was 0.04 percent or more by weight of alcohol in the person's blood, or 40 milligrams or more of alcohol per 100 milliliters of the person's blood, or 0.04 grams or more of alcohol per 210 liters of the person's breath, it is presumed that the person was under the influence of an alcoholic beverage.

(b) For purposes of this chapter, percent by weight of alcohol in the blood is based upon milligrams of alcohol per 100 milliliters of blood.

(c) The provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of an alcoholic beverage.

(d) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to ~~obtain~~ adjust procedures or to obtain, meet requirements listed in (1) an additional test by a person does not preclude the admission of evidence relating to ~~the test taken at the direction of a law enforcement officer~~ eyewitness identification; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable to do so, is likewise admissible in evidence.

(e) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or person's attorney.

AMERICAN CIVIL LIBERTIES UNION of ALASKA

AMERICAN CIVIL LIBERTIES UNION OF ALASKA FOUNDATION
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

March 16, 2012

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801
via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: SB 200: Improved Eyewitness Identification
ACLU Review

Dear Chair French and Vice-Chair Wielechowski:

Thank you for the opportunity to provide written testimony with respect to Senate Bill 200, which improves the procedures for eyewitnesses to identify criminal suspects.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, **we support this legislation.**

This Bill Improves the Reliability of Eyewitness Identification to Strengthen Prosecutions and Minimize False Convictions

The proper goal of the criminal justice system is to convict the guilty and acquit the innocent while respecting individuals' constitutional rights. Mistaken eyewitness testimony frustrates this aim. As Chair French articulated in his sponsor statement, eyewitness identification, while powerful, is not infallible. Indeed, it is its confluence of persuasiveness and fallibility that has led to hundreds of false convictions. This bill is an important step to mitigate the risk of false prosecutions and convictions,

which will protect Alaskans by increasing the odds that the guilty will be convicted and the innocent will be spared.

The ACLU of Alaska supports this bill because it limits the likelihood that an eyewitness will be influenced, intentionally or not, by police. It helps to protect Alaskans' constitutional right to be free from improper prosecution and it enhances the accuracy of legitimate prosecutions.

We are pleased that the Judiciary Committee is considering Senate Bill 200 and we hope that it passes without significant amendment. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us

john m. murtagh
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Anchorage, Alaska 99501

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February 27, 2012

Senator Hollis French
State Capitol Room 417
Juneau AK, 99801
e-mailed to Cindy_Smith@legis.state.ak.us

Re: Senate Bill Establishing
Certain Procedures Related to the
Identification Suspects by
Eyewitnesses to criminal offenses

Dear Senator French,

Thank you for taking the time to address a very important issue. The problems with suggestive identification techniques have resulted in the convictions of many individuals who were later exonerated by unquestionable DNA evidence. The courts in Alaska are often presented with questions regarding the accuracy of identification procedures. There is no doubt that standardization of the procedures and incorporating the latest scientific knowledge will help assure the accuracy of fact finding as well as providing the courts with guidance.

Although I am sure you are familiar with the case of **Tegoseak v. State,** 221 P.2d 345 (Alaska App., 2009), I would recommend it to others interested in this issue. In that case, the Alaska Court of Appeals did a thorough survey of the current science and law. Many of those concerns are addressed in this draft bill.

I would, however, request that the bill be amended to require "sequential" presentation of the images, rather than a "simultaneous presentation". Science teaches us that with the simultaneous presentation of an array of photos, the witness often picks the photo "least unlike" the offenders. When the photos are presented individually and sequentially, the witness does not engage in the often erroneous comparison process.

Sequential viewing is the procedure adopted by the Wisconsin Attorney General, the California Commission of the Fair Administration of Justice, and by North Carolina (see discussion at page 359 of *Tegoseak.)*

There is now a wealth of science showing, perhaps contrary to common belief, that eyewitness testimony is fraught with error.

Based on my 39 years of criminal defense practice, I can assure you that this bill is an excellent starting point to use science to reduce that potential. I am not able to be the hearing today due to a court conflict so I hope that this letter may be considered instead.

Sincerely yours,

John M. Murtagh
Attorney at law

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version **SB 200**
Fiscal Note Number
Publish Date

Identifier (file name) SB200-DOC-OC-02-24-12
Title "An Act establishing procedures for eyewitness identification"
Sponsor Senator French
Requester Senate Judiciary

Dept. Affected DOC
Appropriation Administration and Support
Allocation Office of the Commissioner
OMB Component Number 694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by Leslie Houston, Director
Division Department of Corrections - Administrative Services
Approved by Joseph D. Schmidt, Commissioner
Department of Corrections

Phone 907-465-3339
Date/Time 02/24/12 1045AM
Date 2/24/2012

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB 200

Analysis

This legislation amends AS 12.50 by adding new section Article 4. Identification of Persons by Eyewitnesses. Should this legislation pass, it will place a requirement on law enforcement agencies conducting eye witness identification proceedings shall adopt specific procedures for conducting photo and live lineups; require the Department of Public Safety to create, administer, and conduct training programs in the methods, technical aspects, and scientific findings related to eyewitness proceedings under AS 12.50.300-12.50.399; and, provides a section on definitions for purposes of AS 12.50.300-12.50.399.

There is no fiscal impact on the Department of Corrections.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB 200**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB200-LAW-CRIM-02-24-12
Dept. Affected: Law
Title: An Act establishing procedures related to the identification of suspects by eyewitnesses to criminal...
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Senator FRENCH
Requester: (S) Judiciary
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 2/24/12 3:30 PM
Approved by: Michael C. Geraghty, Attorney General — Date 2/24/2012
Department of Law

(Revised 1/17/2012 OMB)

STATE OF ALASKA **BILL NO.** SB 200
2012 LEGISLATIVE SESSION

Analysis

SB 200 creates minimum requirements for lineups for eyewitness identification procedures by police agencies. It requires the Department of Public Safety to train law enforcement officers in conducting lineups.

The bill would probably increase litigation concerning the validity of identification procedures, particularly in cases arising from small police agencies. But we expect to be able to address this litigation with current resources.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **SB200**
Fiscal Note Number:
() Publish Date:

Identifier (file name): SB200-DOA-PDA-2-23-12
Title: Eyewitnesses and Lineups
Sponsor: Senator French
Requester: Senate Judiciary

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 907 334-4414
Division: Public Defender Agency — Date/Time: 2/23/12 2:30 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/23/2012
Department of Administration

(Revised 1/17/2012 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. SB200

Analysis

SB200 amends AS 12.50 by adding new sections governing eyewitness identification. This bill outlines procedures that police must follow when conducting lineups. These procedures include requiring police to obtain and record eyewitnesses' statements, in their own words, that detail specific information about their observations prior to being shown a lineup. This bill also requires, whenever practical, the lineup be conducted by an administrator who is not directly participating in the investigation and is unaware of suspect's identity in the lineup.

This legislation will have no fiscal impact on the Public Defender Agency.

Analysis
As of: Feb 27, 2012

FRANK MOSES TEGOSEAK, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-10074, No. 2248

COURT OF APPEALS OF ALASKA

221 P.3d 345*; *2009 Alas. App. LEXIS 185

December 11, 2009, Decided

PRIOR HISTORY: [**1]

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge. Trial Court No. 3AN-05-5489 Cr.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of an order from the Superior Court, Third Judicial District, Anchorage (Alaska), which denied his motion to suppress a citizen's identification of him as the driver of a vehicle and convicted him of felony driving under the influence and driving with a suspended license.

OVERVIEW: Defendant was convicted of felony driving under the influence and driving with a suspended license. Both the grand jury and the trial jury heard the testimony of a private citizen who observed a vehicle being driven in an obviously impaired manner, and who later identified defendant from a photographic lineup as having driven the vehicle. On appeal, the court found that it was extremely unlikely that the grand jurors' decision to indict defendant would have been altered if they had known that the citizen's wife identified another man's photograph in the photo lineup, or if they had known that the citizen's identification of defendant's photograph was uncertain. Even assuming that the lineup procedure was unnecessarily suggestive, any error was harmless beyond a reasonable doubt. An officer testified that a codefendant stated that he had taken over driving the vehicle after a stop because defendant had been driving so poorly that he thought defendant was going to kill them. The jury would have convicted defendant even if the citizen had been unable to identify him at trial, and even if the jurors had been told that the citizen was unable to identify the driver in the photo lineup.

OUTCOME: The court affirmed the judgment of the trial court.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Grand Juries > Evidence Before the Grand Jury > Exculpatory Evidence

[HN1] Under Alaska law, a prosecutor must inform a grand jury of exculpatory evidence known to the government.

Criminal Law & Procedure > Grand Juries > Evidence Before the Grand Jury > Exculpatory Evidence

[HN2] For purposes of defining a prosecutor's duty to present evidence to a grand jury, courts define the term "exculpatory evidence" narrowly: it means only the type of evidence that tends, in and of itself, to negate the defendant's guilt.

Criminal Law & Procedure > Eyewitness Identification > Fair Identification Requirement

[HN3] A witness's identification is admissible if the State demonstrates the reliability of the identification under the totality of the circumstances. The phrase "totality of the

circumstances" encompasses five factors: 1) the witness's opportunity to view the perpetrator during the crime; 2) the witness's degree of attention; 3) the accuracy of any prior description given by the witness; 4) the witness's level of certainty when making the identification; and 5) the length of time between the crime and the witness's identification.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Constitutional Errors
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Definitions
[HN4] Constitutional error requires reversal of a criminal conviction unless the error is shown to be harmless beyond a reasonable doubt. In assessing whether an error is harmless beyond a reasonable doubt, the question is whether there is a reasonable possibility that the error affected the result.

COUNSEL: Tracey Wollenberg, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant.

Eric A. Ringsmuth, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Richard A. Svobodny, Acting Attorney General, Juneau, for the Appellee.

JUDGES: Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges. BOLGER, Judge, concurring.

OPINION BY: MANNHEIMER

OPINION

[*346] MANNHEIMER, Judge.

Following a jury trial, Frank Moses Tegoseak was convicted of felony driving under the influence and driving with a suspended license. [1] Both the grand jury that indicted Tegoseak and the trial jury that convicted him heard the testimony of Robert Maestas, a private citizen who observed a Ford Bronco being driven in an obviously impaired manner, and who later identified Tegoseak from a photographic lineup as having driven the Bronco.

1 *AS 28.35.030(n)* and *AS 28.15.291(a)(1)*, respectively.

In pre-trial motions, Tegoseak argued that the photographic lineup was conducted in an unduly suggestive manner and that the superior court should therefore suppress Maestas's [**2] identification of Tegoseak as the driver. The superior court, employing the test set forth in *Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)*, concluded that Maestas's identification of Tegoseak was reliable despite the arguable flaws in the way the photo lineup was conducted. The court therefore denied Tegoseak's motions and allowed evidence of the identification to be admitted at Tegoseak's trial.

We agree with Tegoseak that there are troublesome aspects to the photographic lineup procedure in this case. In addition, we are aware that scientific research conducted during the past thirty years has cast doubt on the analysis set forth in *Manson v. Brathwaite* -- raising questions as to whether that analysis is a valid method for ascertaining whether a photographic lineup has yielded a reliable identification. Nevertheless, we conclude that any potential suggestiveness in the photo lineup in Tegoseak's case was harmless beyond a reasonable doubt, and we therefore affirm Tegoseak's convictions.

Underlying facts

On June 19, 2005, Robert and Michelle [*347] Maestas [2] were driving around the Anchorage area, looking for a house to purchase. They observed a Ford Bronco that was [**3] traveling slower than normal. While they watched, the Bronco swerved and repeatedly changed lanes without apparent cause.

2 Robert and Michelle Maestas were formerly known as Robert and Michelle Mayer; they changed their names prior to Tegoseak's trial. Thus, in the grand jury transcript, they are referred to as "Mayer". But at trial, and in the parties' briefs to this Court, they are referred to by their current names.

The Maestases could see three occupants in the vehicle: two males in the front seat, and another person in the back seat. Using her cell phone, Michelle Maestas called the Anchorage Police dispatcher to report this vehicle because she and her husband thought that the driver was drunk.

After making this call to the police, the Maestases temporarily lost sight of the Bronco, but they came upon it again a few moments later. It was still being driven in an erratic manner. The Maestases then decided to follow the car. Michelle Maestas called the Anchorage police once more, and this time she remained on the line to assist officers in locating the Bronco as it continued to travel through Anchorage.

The Maestases followed the Bronco to the parking lot of Bell's Nursery on DeArmoun [**4] Road, where the Bronco stopped. Robert Maestas parked the couple's

car near the nursery parking lot in order to keep an eye on the Bronco while they waited for the police to arrive.

While the Bronco was parked in the Bell's Nursery parking lot, Mr. and Mrs. Maestas saw the driver and the front-seat passenger emerge from the Bronco and swap places. While these two men were outside the vehicle, Robert Maestas was able to observe them.

Maestas described both males as having dark or black hair. He described the man who was originally driving the Bronco (and who switched to the passenger seat in the nursery parking lot) as having a "slender build" and "wearing a black shirt". Maestas described the other man (that is, the man who was originally in the passenger seat of the Bronco, and who began driving the vehicle after the switch in the nursery parking lot) as "a heavier set gentleman" who was wearing a "white ... T-shirt".

After the two men switched places in the Bronco, the Bronco left the nursery parking lot and headed east on DeArmoun Road. Just after the Bronco started up DeArmoun, Anchorage Police Officer Gerald Asselin arrived and conducted a traffic stop of the vehicle.

When Officer Asselin [**5] stopped the Bronco, he found that there were two men and one woman inside the vehicle. The man driving the vehicle was wearing a white T-shirt, and the male passenger was wearing a black shirt. The driver was later identified as Edgar Henry, while the passenger was identified as Tegoseak.

Because his dispatcher had informed him that the driver and passenger had just switched places, Officer Asselin questioned both men about who had been driving the Bronco before the vehicle stopped at Bell's Nursery. Based on the men's responses (both verbal and non-verbal), Asselin concluded that Tegoseak had been driving the vehicle prior to the stop at Bell's. In particular, as Asselin later testified, Edgar Henry told the police that he had taken over driving the Bronco after the stop at Bell's Nursery because Tegoseak had been driving so poorly that he thought Tegoseak was going to kill them.

Officer Asselin conducted field sobriety tests of both Henry and Tegoseak. Based on the results of these tests, the officer concluded that he had probable cause to arrest both men. A subsequent breath test showed that Tegoseak had a blood alcohol content of .227 percent (in other words, just under three times [**6] the legal limit). [3]

3 *See AS 28.35.030(a)(2).*

One week later, on June 26th, Officer Asselin contacted Robert and Michelle Maestas and asked them to view a photographic lineup to see if they could identify the two men in the Bronco. This photo lineup was comprised of two separate arrays of six photographs [*348] each. The two arrays were composed so that each of them contained a photograph of one of the men in the Bronco. (The first array contained a photograph of Edgar Henry in position number 5; the second array contained a photograph of Frank Tegoseak in position number 5.)

Asselin showed the photo arrays to Mr. and Mrs. Maestas separately. He told them that he would show them two photo arrays, and he asked them to let him know if they "recognize[d] any of those individuals as being involved." When Asselin showed the first array to Mr. and Mrs. Maestas, he reminded them that, if they did not recognize anyone from the first array of six photographs, he had a second set of photographs to show them.

After Michelle Maestas examined the two arrays of photographs, she picked one person from among the twelve photographs as having been in the Bronco -- but that person was neither Henry nor Tegoseak.

After [**7] Michelle Maestas failed to identify either Henry or Tegoseak, Officer Asselin showed the photographs to Robert Maestas.

When Robert Maestas was shown the first array of six photographs, he selected *three* people from this array as the possible occupants of the Bronco. Maestas told Asselin, "[I]t could have been [number] 1 or 3 that was driving [the Bronco originally], and [number] 5 that was in the passenger seat. ... I think [that], between 1 and 3, those two [photographs] kind of look like the driver that we originally pulled up next to."

The three photographs that Maestas selected were of Edgar Henry and two "fillers" -- that is, two people whose photographs were included, not because the police suspected that they were connected to this incident, but rather to fill out the six-photograph array.

At this point -- that is, after Maestas had apparently identified both the original driver and the original passenger from among the photographs in the first array -- Asselin said to Maestas, "Let me try to at least show you [the second array of photographs]; then you can see the entire compilation of photos. So far, you've said [that] 1 and 3 [in the first array] could be the driver." Asselin [**8] then showed Maestas the second array of six photographs.

When Maestas looked at the second array of photos, he told Asselin that photograph number 5 in this second array could also potentially be the initial driver of the Bronco (that is, the man who was driving before the driver and passenger switched places in the nursery parking lot). Maestas told Asselin that the man "originally driving the car" was "either [number] 5 in [the second array] or [number] 1 in [the first array]." (As we

explained above, Tegoseak's picture was number 5 in the second photo array.)

Asselin asked Maestas to memorialize his identifications on two different "Photographic Lineup" forms. These forms (one for each of the two arrays) apparently had boxes on them that corresponded to the photographs in the arrays. Asselin asked Maestas to place a check mark on the boxes that corresponded to the photographs he had selected.

On the first of these forms (*i.e.,* the form that corresponded to the first photo array), Maestas stated that he identified photograph number 5 in the first array as the man who began driving the Bronco *after* [**9] the car stopped at the nursery. (As explained above, this photograph was of Edgar Henry.)

Asselin then handed Maestas the second form (*i.e.,* the form corresponding to the second photo array). Although Maestas had told Asselin that he was uncertain whether the original driver of the Bronco was photograph number 1 from the first array or photograph number 5 from the second array, Asselin directed Maestas to put a check mark in only one box -- the box corresponding to photograph number 5 from the second array.

Asselin invited Maestas to add a handwritten notation explaining his uncertainty about the identification. Maestas wrote on the form, "When looking at the photos, both [photograph] # 5 on [the second array] and [photograph] # 1 on [the first array] look similar to the original driver that we ... first [saw]."

However, Officer Asselin added his own separate notation to this form. In the officer's notation, he indicated that Maestas had [*349] made an identification from the photographs, and that the person Maestas had identified was Frank Tegoseak (who, as we explained above, was photograph number 5 in the second array). Maestas signed this form.

This same ambiguity concerning the nature or precision [**10] of Maestas's identification is reflected in the testimony given by Asselin and Maestas at the evidentiary hearing.

At the hearing, Asselin testified that he did not remember the exact exchange between himself and Maestas, "but it was clear to [him], based upon the [conversation], that [Maestas] identified [photograph] number 5 [in the second array] as being ... the person who was originally driving the vehicle." Asselin conceded that, while he was showing the photographs to Maestas, "there was some conversation ... where [Maestas] would say, 'Well, [photograph] number 1 [in the first array] looks very similar', but [Maestas] came back to it being [photograph] number 5 [in the second array]."

When Maestas testified at the evidentiary hearing, he acknowledged that he was hesitant to positively identify either photograph 1 from the first array or photograph 5 from the second array -- "because the two photos look similar, ... and [because it was] a week [after the incident]." When Maestas was asked whether he had made a "positive identification", he responded, "I wouldn't say it was 100 percent positive; no."

After hearing this testimony, and after listening to Officer Asselin's tape recording [**11] of the photo lineup procedure, Superior Court Judge Michael L. Wolverton concluded that the photo lineup procedure was not unduly suggestive.

In particular, Judge Wolverton found that the "filler" photographs were well-selected (in the sense that the people depicted in these filler photographs were visually similar to the two suspects). The judge suggested that this fact (the good selection of fillers) was potentially the explanation for Robert and Michelle Maestas's difficulty in selecting Henry and Tegoseak from among the photographs.

Judge Wolverton also concluded that there was nothing wrong in Officer Asselin's act of drawing Robert Maestas's attention to the second array after Maestas had already declared that the first array contained photographs of both suspects. The judge found that Asselin was not trying to suggest that Maestas had chosen prematurely, or to suggest that the second array contained a photograph of at least one of the suspects. Rather, Judge Wolverton found that Asselin was simply "trying to explain" the procedure (*i.e.,* the need to examine both arrays) and to request that Maestas withhold his final judgement until he had seen all twelve of the photographs.

Judge [**12] Wolverton also concluded that, given the circumstances of the case, there was essentially no possibility of a misidentification. The judge remarked that "this might [have been] a different situation if [the occupants of the Bronco] had not been followed and [immediately arrested] -- almost like a hand-off to the police -- [but] we know who was in the vehicle [when] it was stopped, [and the photo lineup] was [merely] a determination as to ... who was driving when" -- a determination that was made "easier ... because one [man] was wearing a white shirt and [the other] was wearing a black shirt."

Tegoseak's claim that his indictment is flawed because the prosecutor did not inform the grand jury that Michelle Maestas failed to identify Tegoseak as one of the men in the Bronco, and that Robert Maestas's identification of Tegoseak was less than certain

[HN1] Under Alaska law, a prosecutor must inform the grand jury of exculpatory evidence known to the government. [4] Tegoseak contends that the prosecutor in his case violated this duty in two ways. First, Tegoseak argues that the prosecutor was required to tell the grand jury that Michelle Maestas had not identified Tegoseak as one of the men in the Bronco [**13] -- and that, in fact, the only man she identified as having been in the Bronco [*350] was a "filler". Second, Tegoseak argues that the prosecutor was required to tell the grand jury that Robert Maestas's identification of Tegoseak was less than certain.

> 4 *Cameron v. State, 171 P.3d 1154, 1157 (Alaska 2007); Frink v. State, 597 P.2d 154, 164-66 (Alaska 1979).*

[HN2] For purposes of defining a prosecutor's duty to present evidence to the grand jury, we have defined the term "exculpatory evidence" narrowly: it means only the type of evidence "that tends, in and of itself, to negate the defendant's guilt". [5] Thus, we have held that a witness's failure to identify the defendant as the perpetrator of the crime, or the fact that a witness's post-event description of the perpetrator did not match the defendant, was not "exculpatory evidence", given the other evidence linking the defendant to the crime. [6]

> 5 *See, e.g., Cathey v. State, 60 P.3d 192, 195 (Alaska App. 2002); State v. McDonald, 872 P.2d 627, 639 (Alaska App. 1994).*
>
> 6 *See, e.g., Wilkie v. State, 715 P.2d 1199, 1201-02 (Alaska App. 1986); Tookak v. State, 648 P.2d 1018, 1020-21 (Alaska App. 1982). See also Abruska v. State, 705 P.2d 1261, 1272-73 (Alaska App. 1985)* [**14] (holding that the victim's potentially contradictory statements about whether it was the defendant who shot him were not exculpatory evidence).

For example, in *Haag v. State, 117 P.3d 775 (Alaska App. 2005)*, the defendant (who was white) argued that the prosecutor violated the duty to present exculpatory evidence because the prosecutor failed to inform the grand jurors that a witness to the crime initially reported that the two perpetrators were black. *Id. at 777-78*. We held that, in the context of the other evidence linking Haag to the crime, the witness's description of the perpetrators as black was not exculpatory: "The fact that [the witness] initially stated that both robbers were black is certainly something that a defense attorney might use to attack [the witness's] later identification of Haag as one of the robbers. But this is not information that *negates Haag's guilt in and of itself" Haag, 117 P.3d at 778* (emphasis added).

In Tegoseak's case, the police responded quickly to the Maestas's report of the Bronco being driven in an erratic manner, and there is essentially no doubt that, when the police stopped the Bronco, the vehicle contained the same people that Michelle and [**15] Robert Maestas had observed minutes before. As Judge Wolverton noted when he issued his rulings on Tegoseak's pre-trial motions, there is essentially no possibility that Tegoseak was misidentified as one of the drivers of the Bronco.

Given these circumstances, it is extremely unlikely that the grand jurors' decision to indict Tegoseak would have been altered if they had known that Michelle Maestas identified another man's photograph in the photo lineup, or if they had known that Robert Maestas's identification of Tegoseak's photograph was uncertain. For this reason, either the evidence that Tegoseak complains of was not "exculpatory" as that term is defined in our cases, or the State's failure to apprise the grand jurors of this evidence was harmless.

Tegoseak's claim on appeal, and a preliminary discussion of the problems that can be encountered in post-crime eyewitness identification

On appeal, Tegoseak renews his argument that the photographic lineup procedure was unduly suggestive, and he further argues that when the facts of the case are analyzed under the factors set forth in *Brathwaite,* this analysis fails to demonstrate that Robert Maestas's identification of him was reliable.

The [**16] photographic lineup in this case does not appear to be overtly suggestive. As Judge Wolverton noted when he denied Tegoseak's suppression motion, the ten filler photographs are quite similar to the two suspects' photographs in facial characteristics and hair style. In other words, Henry's and Tegoseak's photographs did not stand out from the filler photographs in such an obvious way as to practically single out these two men as the suspects.

But even though a photographic lineup may not be overtly suggestive, the procedure by which the photographs are selected, the procedure by which a photo lineup is displayed to a witness, and the procedure by which the witness's identification is elicited, can engender suggestiveness -- even when [*351] this is not the intention of the officer conducting the lineup.

Medical researchers have long recognized the phenomenon that testers influence the persons they are testing. Even though one might think that a test subject's physical reaction to an experimental drug or therapy would remain the same regardless of the mental attitude or desires of the researchers, the truth is that the re-

searchers' expectations regarding the experiment *do* make a difference to [**17] the result.

One well-known problem is the "placebo effect": the recognized phenomenon that when a person *believes* that they are receiving an effective drug or therapy, their body will physically react in accordance with their belief -- even though the substance or treatment they are receiving would ordinarily do nothing to alleviate their condition.

But the placebo effect is compounded by another difficulty known as the "Clever Hans effect". This is the problem that researchers, because of their knowledge of the experiment and their expectations concerning the outcome, can unintentionally influence the responses of the test subjects -- by unconscious signaling, or by small differences in how they interact with test subjects who are receiving the real drug or therapy as opposed to a placebo. [7]

7 In 1891, William von Osten began displaying his horse, "Clever Hans", to the public. Hans would answer questions by tapping his hoof -- either by tapping out a number, or by tapping out the letters of the alphabet that corresponded to the answer (with one tap equaling "A", two taps equaling "B", and so on). Hans could apparently perform mathematical calculations, tell time, identify musical intervals, [**18] and name people.

Von Osten did not intend to trick people. He believed that animals possessed an intelligence equal to that of humans -- and, in his quest to prove this, he attempted to teach many animals how to do simple calculations. However, Clever Hans was the only animal who showed any ability.

The first scientific test of Hans's ability was conducted in 1904 by Professor Carl Stumpf. Stumpf looked for evidence of cheating or trickery to explain Hans's ability, but he found none, and he subsequently endorsed Hans's abilities as genuine. Following Professor Stumpf's endorsement, Clever Hans became a sensation, and people flocked to see him.

In 1907, a group of thirteen scientists (the "Hans Commission") re-tested Clever Hans. Their test is now recognized as a classic experiment in psychology.

Because there was no evidence of connivance or cheating, the scientists began with the assumption that Hans did have an ability of some kind, and they designed their experiment to find out what this ability was.

Hans was tested inside a large tent to avoid outside distractions, such as spectators. The experiment was designed in the following way:

> . A large number of questions were used, to eliminate [**19] the effects of chance;
>
> . Different people posed these questions, in case Hans was picking up signals from his owner, von Osten;
>
> . The questioners sometimes knew the answers to the questions they were asking, but other times they did not;
>
> . The questioners would stand at different distances from Hans during different trials; and
>
> . Some trials were run with Hans blinkered.

The first important finding was that Clever Hans needed to have visual contact with the questioner in order to answer correctly. The farther away the questioner stood, the less accurate Hans became. And when Hans's peripheral vision was obstructed by blinkers, his ability to answer was diminished even further.

The other major finding was that Hans could only answer a question correctly if the questioner also knew the answer to the question. When the questioner did not know the answer to the question, Hans could not give the answer.

These facts -- that Hans could only answer a question correctly if it was posed by a questioner who knew the answer, and only if Hans could see the questioner -- led the psychologists to perceive that Hans was not using intelligence to work out the answers; rather, he was responding to visual cues [**20] given unwittingly by the questioner. These unwitting visual cues took the form of increases or decreases in the tension of the questioner's body, changes in the questioner's facial expression, and other involuntary movements that the questioner would make when Hans reached the right answer.

The results of the experiment with Clever Hans led the scientists to the key insight that an

animal's -- or a person's -- behavior can be influenced by subtle and unintentional cues given by a questioner or researcher.

This effect -- now known as the "Clever Hans effect" -- is one of the primary reasons why scientific tests (and, in particular, clinical trials) must be done using a "double-blind" method: a procedure in which neither the questioner/researcher nor the subject being tested knows the nature of the information required or the treatment being administered.

Source: John Jackson, "Clever Hans" (2005), available at:

www.skeptics.org.uk/article.php?dir=articles&article=clever_hans.php

[*352] In the late 1980s (that is, approximately ten years after the Supreme Court issued its decision in *Brathwaite*), Professor Gary L. Wells of Iowa State University noted that photographic lineups could be affected by [**21] these same difficulties -- that the police officers who conducted photographic lineups could unwittingly be influencing the witnesses they were interviewing. Professor Wells accordingly proposed that photo lineups (like medical trials) should be conducted using a double-blind procedure. [8] In other words, (1) the lineup should be conducted by an officer who does not know which photograph in the lineup represents the suspect and which photographs are fillers, and (2) because witnesses will naturally assume that any photo lineup will contain a photograph of the person whom the police suspect, the witness must affirmatively be told that the lineup may not contain a photograph of the perpetrator.

8 Gary L. Wells, *Eyewitness Identification: a system handbook* (Carswell Legal Publications, 1988); Gary L. Wells & C. A. Elizabeth Luus, "Police Lineups as Experiments: Social methodology as a framework for properly conducted lineups", 16 Personality and Social Psychology Bulletin 106-117 (1990).

In his article, "The Double-Blind Lineup: General Comments and Observations" (2008), [9] Professor Wells notes that police officers can inadvertently (and often unconsciously) influence witnesses by such seemingly [**22] innocuous comments as, "I noticed you paused on photograph number 3". Or, when a witness hesitates between two or three photographs, the officer might say to the witness, "Tell me about photograph 2" -- directing the witness's attention to the photograph that the officer knows is the suspect, rather than to one of the fillers. Or, when the witness has picked a filler, the officer might ask, "Is there any other photograph that stands out to you?" -- a question that obviously would not be asked if the witness had selected the suspect.

9 Available at: www.psychology.iastate.edu/~glwells/homepage.htm, through the link "Meet the double-blind lineup".

According to Professor Wells, there are currently close to 200 cases in which (1) the police identified a person as the suspected perpetrator of a crime, (2) the suspect was included in a photographic or live lineup, (3) the witness who viewed the lineup identified the suspect as the perpetrator, (4) the suspect was convicted, but (5) post-trial DNA testing proved that the suspect was innocent.

One of these cases recently received national publicity through the publication of the book, *Picking Cotton,* [10] and the related story that aired in March [**23] 2009 on the CBS television news show "60 Minutes". [11]

10 Jennifer Thompson-Cannino & Ronald Cotton, with Erin Torneo, *Picking Cotton: Our Memoir of Injustice and Redemption* (St. Martin's Press, 2009).

11 Both the video and the text of the 60 Minutes story, "Picking Cotton" (originally aired in March 2009) are available at:

www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml

As described in the 60 Minutes story, in the summer of 1984, a man broke into Jennifer Thompson's apartment and raped her at knife-point. During the attack, Thompson forced herself to stay alert and study this man carefully -- his physical characteristics, his voice, his accent -- so that, if she survived, she could make sure that he was convicted and sentenced to prison. After about half an hour, Thompson tricked the rapist into letting her get up to fix him a drink; she then took the opportunity to escape from her apartment through the back door.

Police Detective Mike Gauldin interviewed Thompson at the hospital, and he worked with Thompson to assemble a composite sketch of the rapist. After the sketch was broadcast, the police started to receive tips

about the crime. One of these tips was about a young man [**24] named Ronald Cotton. Cotton worked at a restaurant near Thompson's apartment, and he had a previous conviction for breaking and entering, as well as a juvenile record for sexual assault.

Three days after the rape, Detective Gauldin assembled a six-photograph lineup that contained Cotton's picture, and then he called Thompson to come view the lineup. Thompson studied the photographs for about [*353] five minutes, and then she identified Cotton as the man who had raped her.

Thompson subsequently picked Cotton from a live lineup. After Thompson made the live lineup identification, the police informed her that she had picked the same man that she previously selected from the photo lineup. When she heard this, Thompson remembers thinking, "Bingo! I did it right; I did it right."

Later, Thompson identified Cotton again when she testified at his trial. Cotton was convicted and sentenced to life imprisonment plus 50 years.

While in prison, Cotton met a man named Bobby Poole. Poole looked very similar to Cotton; in fact, some of the prison stewards mistook them for each other. Then Cotton heard, from a fellow inmate, that Poole had admitted raping Thompson. Based on this information, Cotton received a [**25] new trial.

At the new trial, Cotton's lawyers summoned Bobby Poole to court so that Jennifer Thompson could see him. But when Thompson looked at Poole, she did not recognize him. Indeed, she felt nothing but anger toward Cotton and his attorneys. She remembers thinking, "How dare you question me? How dare you [suggest that I] could possibly have forgotten what my rapist looked like? ... The one person [I] would never forget?"

Cotton was again convicted. This time, he received two life sentences.

Seven years later (ten years after the rape), Cotton watched the O.J. Simpson trial on television and learned about DNA. He convinced his lawyer to investigate the possibility of DNA testing. By luck, the Birmingham, North Carolina police still had the rape kit, and the kit contained enough viable sperm to conduct a DNA test. The result: Bobby Poole was indeed the rapist -- and Ronald Cotton was innocent.

For people who care about our justice system, this is a bittersweet tale. A man spent a decade in prison for a crime he did not commit -- and yet he was finally exonerated, and he has even become reconciled with the woman whose testimony sent him to prison. Cotton and Thompson are now friends; they [**26] co-authored the book *Picking Cotton,* which describes the case, and they are prominent advocates of reform in police identification practices.

But for the judges and lawyers who administer and actively participate in the criminal justice system, this story has a more fundamental and disquieting aspect. What happened in Ronald Cotton's case lends anecdotal support to the scientific research that casts doubt on the validity of the *Brathwaite* method for assessing the reliability of eyewitness identifications.

The test established by the Supreme Court in Manson v. Brathwaite, and how this test relates to the facts of the Ronald Cotton case

In *Brathwaite,* the United States Supreme Court had to decide whether an eyewitness identification should be suppressed if the identification procedure was unnecessarily suggestive. As this Court explained in *Anderson v. State, 123 P.3d 1110, 1115 (Alaska App. 2005)*, the precise issue confronting the Supreme Court in *Brathwaite* was whether, following an unnecessarily suggestive identification procedure, the witness's identification should be automatically suppressed or whether, instead, the government should be given the opportunity to demonstrate the reliability [**27] of the witness's identification despite the undue suggestiveness of the procedure.

In *Brathwaite,* the Supreme Court rejected a rule of *per se* suppression and instead held that [HN3] the witness's identification would be admissible if the State could demonstrate the reliability of the identification under the "totality of the circumstances". [12] The Supreme Court defined this phrase, "totality of the circumstances", as encompassing the five factors that the Court had set forth in an earlier decision, *Neil v. Biggers:* [13]

> [*354] . the witness's opportunity to view the perpetrator during the crime,
>
> . the witness's degree of attention,
>
> . the accuracy of any prior description given by the witness,
>
> . the witness's level of certainty when making the identification, and
>
> . the length of time between the crime and the witness's identification.

Brathwaite, 432 U.S. at 114, 97 S.Ct. at 2253 (citing *Neil v. Biggers, 409 U.S. at 199-200, 93 S.Ct. at 382*).

12 *Brathwaite, 432 U.S. at 112-14, 97 S.Ct. at 2252-53*, citing *Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199*; *388 U.S.*

293, 87 S.Ct. 1967, 1972, 18 L. Ed. 2d 1199; *388 U.S. 293, 87 S. Ct. 1967, 18 L.Ed.2d 1199 (1967).*
13 *409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).*

With the *Brathwaite* reliability test in mind, we now return to the facts [**28] of the Ronald Cotton case.

One of the crucial events in that case occurred after Bobby Poole was finally identified as a suspect in the case and Ronald Cotton was granted a second trial. At that second trial, Poole was summoned to court so that Jennifer Thompson would have the opportunity to view Cotton and Poole together.

As we explained earlier in this opinion, Thompson spent half an hour in Poole's presence during the rape. During that half hour, Thompson consciously paid attention to, and made a point of remembering, Poole's physical features and the nuances of his voice and speech, so that she could be sure to identify him later. Nevertheless, when Thompson saw the two men together in court, she did not recognize Poole as her attacker. Indeed, even though the two men apparently had similar physical features, Thompson did not even experience any uncertainty. She reaffirmed that Cotton was the rapist -- and Cotton was convicted again.

Years later, when the DNA test results finally proved Cotton's innocence, Detective Gauldin (the detective who conducted the photo lineup) was the one who went to tell Thompson that Poole was the rapist and that Cotton was innocent. Thompson's reaction [**29] was, "No, that can't be true; it's not possible. ... I know Ronald Cotton raped me. There's no question in my mind."

Moreover, even after Thompson knew the truth, her memory of the event remained the same: whenever she thought about the rape, or dreamed about it, it was still Cotton's face that she saw.

This last aspect of the case is particularly troubling: the fact that Thompson's false memory of Cotton as her attacker persisted even after Thompson knew (intellectually) that Cotton was innocent and that Poole had committed the rape. This false memory was clearly the result of the identification procedures employed during the investigation -- because Thompson was not previously acquainted with Cotton, and because she was in Poole's presence (not Cotton's presence) during the half-hour of the rape. But if the five *Brathwaite* factors are applied to this case, it is obvious that a court would have allowed Thompson to testify and identify Cotton as her assailant -- even if the court had found that the photo lineup was unnecessarily suggestive.

Thompson had plenty of opportunity (a half an hour) to view the rapist. And during the attack, she consciously devoted her attention to the rapist, [**30] so that she would remember his physical characteristics and voice. Shortly after the rape, when Thompson was interviewed at the hospital, she worked with the police to develop a composite drawing of her attacker -- a drawing that resembled Ronald Cotton. And when Thompson was shown the photo lineup three days after the rape, she declared she was certain that Cotton was her attacker.

One might conclude that this is simply a rare and unfortunate instance where application of the *Brathwaite* factors would lead a court to admit evidence of a mistaken identification. But there is another, more troubling conclusion that could be drawn: that the *Brathwaite* factors are inadequate to the task of sorting reliable identifications from unreliable identifications.

A photographic lineup is generally conducted in private between a police investigator and a witness. As Professor Wells notes in the recent article he co-authored with Deah S. Quinlivan concerning the validity of the *Brathwaite* factors, when a police investigator conducts a photographic lineup, the investigator interacts directly with the witness: in effect, they have a conversation [*355] about the photos. [14] If the police investigator knows which [**31] photograph represents the person who is under suspicion, there is a danger that the witness's identification will be influenced by the officer's knowledge and expectations, even though, seemingly, there is nothing suggestive about the procedure:

> [When the police investigator knows which photograph is the suspect's photograph, this] creates a situation very similar to one that has been extensively studied by psychological scientists in other contexts in which a tester's knowledge or expectations influence the person being tested in a direction that is consistent with the tester's knowledge or expectations. ... There is no presumption that these tester effects are the result of intentional efforts by the tester or that the tester is aware of influencing the person being tested. ... [T]he concern here is with the kinds of influences that are unintentional, natural by-products of the [personal] interaction.

Wells & Quinlivan at 7-8.

14 Gary L. Wells & Deah S. Quinlivan, "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later" [*i.e.*, 30 years after *Brathwaite*], 33 Law and Human Be-

havior 1-24 (2009), DOI [Digital Object Identifier] 10.1007/s10979-008-9130-3.

Moreover, the *Brathwaite* decision appears to be premised on the assumption that, despite the suggestiveness of an identification procedure, a witness retains a "true" memory of the event which may be independently sufficient to reliably identify the perpetrator -- [**32] if the witness had an adequate opportunity to observe the perpetrator, if the witness was paying attention, etc. In effect, the five *Brathwaite* factors are the test that a court uses to determine if the witness is relying on this presumed independent memory rather than on the result suggested by the identification procedure.

Indeed, even the dissent in *Brathwaite* subscribes to this notion that a witness retains a "true" memory of the event that exists independent of the suggestive photo lineup or show-up, and that this memory can be retrieved despite the previous suggestive procedure. Justice Marshall, writing in dissent, suggested that "when a prosecuting attorney learns that there has been a suggestive confrontation", the prosecutor can "easily" cure this error by "arrang[ing] another lineup under scrupulously fair conditions." *Brathwaite, 432 U.S. at 126-27, 97 S.Ct. at 2259.*

But as Professors Wells and Quinlivan point out in their article on *Brathwaite,* "the dominant view among psychological scientists [is] that, once an eyewitness has mistakenly identified someone, that [mis-identified] person 'becomes' the witness' memory[,] and the error will simply repeat itself [in subsequent [**33] identifications]." [15]

15 *Id.* at 9.

This observation is vividly corroborated by the facts of the Ronald Cotton case. Even when Jennifer Thompson was confronted with Bobby Poole (the real rapist) in court, she had no recollection of him, and she re-affirmed her identification of Ronald Cotton as her attacker. Indeed, this false memory persisted even after Thompson *knew* that the memory was false: she continued to see Ronald Cotton's face when she thought back to the rape even after she learned that the DNA testing had demonstrated Cotton's innocence.

Moreover, even assuming that a "true" memory exists independently of a witness's exposure to a suggestive identification procedure, there is reason to doubt whether the five *Brathwaite* factors are a valid method for judging whether a witness's testimony reflects that independent memory.

For instance, according to the Wells and Quinlivan article, when a witness is asked to estimate how long they were able to observe the perpetrator of a crime, the witness will often grossly over-estimate the amount of time the perpetrator was in their view -- especially if the witness was under stress or anxiety at the time they observed the events. [16] Similarly, a witness [**34] will often inaccurately minimize the amount of time that [*356] their view of the perpetrator was blocked by another person or a physical obstruction. [17]

16 *Id.* at 10.
17 *Id.*

Perhaps more troubling are the results of experiments showing that the comments of a police investigator can alter a witness's perception or memory of how long they were able to view the perpetrator, and how good their view was. In a series of experiments, witnesses were given a poor view of a simulated crime, and then they were shown a photo lineup that did *not* include the culprit. [18] The experiment centered on those witnesses who (mistakenly) identified one of the people in the lineup as having committed the crime. The lineup administrator would tell some of these witnesses, "Good; you identified the suspect in this case", while the administrator would make no suggestive remark to the others. [19]

18 *Id.*
19 *Id.*

Later, when all of these witnesses were asked, "How good was the view that you had of the culprit?" and "How well could you make out the details of the culprit's face?", the overwhelming majority of witnesses who heard no confirmatory remark conceded that, even though they had made an identification from the lineup, their view was not very good and [**35] they could not easily make out the details of the culprit's face. [20] On the other hand, the witnesses who received a confirmatory remark from the lineup administrator had very different perceptions of their own experience. Even though these witnesses had the same poor view of the crime, about 25 percent of them reported that they had a "good" or "excellent" view of the crime, and 20 percent of them declared that they could easily make out the details of the culprit's face. [21]

20 *Id.*
21 *Id.*

The results of these experiments suggest that if the evidence in support of the first *Brathwaite* factor -- opportunity to view -- is based solely on the self-reporting of the witness, then a court would need to know (and try to take account of) what was said to the witness during the identification procedure. In other words, there is reason to believe that this first *Brathwaite* factor is *not* independent of the suggestive identification procedure.

Similarly, many experiments have shown that when a witness receives a confirmatory suggestive remark following their identification of a person in a lineup, this tends to inflate the witness's own perception of how much attention they were paying to the perpetrator of the [**36] crime -- the second *Brathwaite* factor. [22]

22 *Id.* at 11.

The third *Brathwaite* factor -- the witness's degree of certainty in their identification -- is obviously crucial to all stages of a criminal investigation. A witness's certainty (or lack of certainty) may influence whether a person is charged at all, or whether the prosecutor takes the case to trial, and if the case goes to trial, how much weight the jury will give to the witness's testimony.

Of course, life provides many instances of people who are certain about something but who are nevertheless mistaken. The question is: is there a valid correlation between a witness's certainty and the correctness of their identification?

Studies have shown that, among witnesses who make an identification (either correct or mistaken) from a lineup, the statistical correlation between the witness's certainty and the correctness of their identification can be as high as 0.41. [23] (Some studies suggest that the correlation is lower.) To put this figure in perspective, the statistical correlation between height and sex in human beings is considerably higher than 0.4. In other words, these studies suggest that you would have much better success in predicting a person's [**37] sex if you knew their height than you would have in predicting the accuracy of a witness's identification if you knew the witness's degree of certainty. [24]

23 *Id.* at 12.
24 *Id.*

[*357] Nevertheless, the fact that there is a positive correlation between a witness's certainty and the accuracy of their identification means that a witness's degree of certainty is *some* indication of the accuracy of their identification. [25]

25 *Id.*

However, as is the case with *Brathwaite* factors one and two, a lineup administrator's confirmatory remark can have a substantial influence on a witness's degree of certainty. In one study, for example, witnesses who mistakenly identified someone from a lineup were later asked whether they had been "positive" or "nearly positive" when they made their identification. Of the witnesses who did not receive a confirmatory remark from the lineup administrator, only 15 percent reported that they had been "positive" or "nearly positive" when they made their selection from the lineup. However, among the witnesses who received a confirmatory remark following their mistaken identification, 50 percent reported that they had been "positive" or "nearly positive" when they made their selection. [26]

26 *Id.*

As Professors Wells [**38] and Quinlivan observe, one crucial aspect of this experiment is that these witnesses were asked *after the fact* to report on their degree of certainty *at the time they made their identification.* [27] In other words, the lineup administrator's suggestive confirmatory remark was not altering the witness's degree of certainty at the time they made their selection from the lineup. Rather, the confirmatory remark was altering the witness's memory -- their *recollection* of their degree of certainty at that earlier time.

27 *Id.*

This finding has potential importance to a judge's evaluation of a witness's testimony -- in particular, the witness's self-report of their degree of certainty -- at any pre-trial hearing on the *Brathwaite* factors. It suggests that a witness's self-reported degree of certainty is not necessarily trustworthy.

The fourth *Brathwaite* factor -- the "accuracy" of the witness's pre-lineup description of the perpetrator -- suggests a logical error. One can not know whether a witness's description of the perpetrator is "accurate" unless one knows who the perpetrator is.

As illustrated by the Ronald Cotton case, the fact that a witness may have accurately described the defendant in advance [**39] of the lineup, and then selected the defendant's photograph from the lineup, does not prove guilt unless the witness's recollection of the perpetrator is accurate. To conclude that a witness's pre-lineup description was "accurate" (in the sense of describing the true perpetrator of the crime) simply because the witness's description fits the physical characteristics of the defendant is to assume the very fact that needs to be proved.

Instead of the "accuracy" of a witness's pre-lineup description, the fourth *Brathwaite* factor is more properly concerned with the *consistency* between the witness's pre-lineup description of the perpetrator and the physical characteristics of the person whom the witness later selects in the lineup, as well as the *degree* of this consistency (*i.e.,* the amount of detail in the witness's pre-lineup description, and how much of that detail is consistent with physical characteristics of the person whom the witness selected in the lineup).

This fourth *Brathwaite* factor suffers from an underlying analytical weakness. The probative value of this fourth factor -- *i.e.,* the consistency between a witness's pre-lineup description of the culprit and the physical characteristics [**40] of the person who is later selected in the lineup -- hinges in large measure on the assumption that the composition of the lineup has not been influenced by the witness's pre-lineup description of the culprit. This assumption is often false. It is common for the police to rely on the witness's pre-lineup description when they select which photographs to include in a lineup -- because the witness's description is often one of the primary clues that the police rely on when they begin to narrow the field of potential suspects.

Moreover, some studies have shown that when witnesses are confronted with a photo [*358] lineup, they tend to select the person who looks most like their memory of the culprit, even when none of the photos matches their memory exactly. [28] This is apparently what happened in the Ronald Cotton case.

28 *Id.* at 13.

Even though Detective Gauldin did not expressly tell Thompson that the photo lineup contained a photograph of the person whom the police suspected, Thompson made the assumption that her attacker's photograph was among the six photos displayed to her, and she believed that her job was to identify the correct photograph. She later told "60 Minutes" reporter Leslie Stahl, "I ... remember [**41] almost feeling like I was [taking] an SAT [multiple choice] test. You know, where you start narrowing down your choices. You can [immediately] discount A and B, [and then you work on the others]."

What does this mean in terms of *Brathwaite*'s fourth factor? Professors Wells and Quinlivan suggest the following hypothetical: The police assemble a photo lineup, and they include a photo of the defendant because the defendant seems to match the witness's description of the perpetrator. The witness views the lineup and identifies the defendant. A judge later rules that the lineup was unnecessarily suggestive because the filler photographs were too dissimilar to the photograph of the defendant. But then, based on the consistency between the witness's pre-lineup description of the culprit and the defendant's physical characteristics, the judge concludes that the witness's identification of the defendant is reliable. [29] One might well question whether courts should indulge in this form of circular reasoning.

29 *Id.*

The judicial, legislative, and [**42] *law enforcement response to this research*

Despite the tension between the *Brathwaite* analysis of reliability and the results of the past three decades' psychological research into the dynamics of eyewitness identification, few courts have conducted a critical re-examination of the *Brathwaite* approach.

The New York Court of Appeals was the first court to reject *Brathwaite* on state constitutional grounds: *People v. Adams, 53 N.Y.2d 241, 423 N.E.2d 379, 383-84, 440 N.Y.S.2d 902*; *53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902, 905-07 (N.Y. 1981).* The New York court concluded that the *Biggers/Brathwaite* approach to assessing the reliability of eyewitness identifications was flawed, and so the New York court instead adopted the *per se* rule of exclusion that the United States Supreme Court rejected in *Brathwaite.* In other words, the New York court ruled that evidence of an eyewitness identification arising from an unnecessarily suggestive police-arranged identification procedure must be suppressed, [**43] regardless of the *Brathwaite* factors. However, the New York decision -- rendered in 1981 -- was not based on the nascent scientific research into eyewitness identification; rather, it was based on the New York court's agreement with the *Brathwaite* dissenters that it was simply too risky to try to assess the reliability of an identification made during an unnecessarily suggestive lineup or showup.

Beginning in the early 1990s, courts began to demonstrate awareness of the growing scientific criticism of the *Brathwaite* approach. In *State v. Ramirez, 817 P.2d 774, 780-81 (Utah 1991)*, the Utah Supreme Court adopted a modified version of the *Brathwaite* factors. The court's primary aim was to craft factors that "more precisely define[d] the focus of the relevant inquiry", and that expressly recognized the problem of witness suggestibility -- a difficulty that has no comparable emphasis in the *Biggers/Brathwaite* factors. *See Ramirez, 817 P.2d at 781.*

See also State v. Hunt, 275 Kan. 811, 69 P.3d 571, 576 (Kan. 2003) (adopting the *Ramirez* formulation of the test for reliability of eyewitness identifications because the *Ramirez* factors "present an approach to the identification issue which heightens ... the reliability [**44] of such identification[s]" and which represents "a refinement in the [*Brathwaite*] analysis").

In *Commonwealth v. Johnson, 420 Mass. 458, 650 N.E.2d 1257, 1261-65 (Mass. 1995)*, the Massachusetts Supreme Court followed the lead of the New York Court of Appeals and rejected the *Brathwaite* reliability analysis in [*359] favor of a *per se* rule of exclusion (under the Massachusetts constitution). The Massachusetts court relied in part on the research conducted into eyewitness identification by Professors Gary Wells and Elizabeth Loftus. *See Johnson, 650 N.E.2d at 1262 n. 9.*

The year 2005 appears to have been a turning point of sorts in the judicial recognition of the growing body of research into the psychological dynamics of eyewitness identification. In that year, two state supreme courts issued opinions that contained lengthy citations and discussions of the research literature: *State v. Ledbetter, 275 Conn. 534, 881 A.2d 290, 311-13 (Conn. 2005)*, and *State v. Dubose, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, 591-92 (Wis. 2005)*. The Connecticut court in *Ledbetter* concluded that the research data was not convincing enough to abandon the *Brathwaite* analysis, but the Wisconsin court in *Dubose* held that an eyewitness identification arising from an unnecessarily [**45] suggestive showup must be suppressed, without regard to any *Brathwaite* reliability analysis.

See also *Smith v. Smith, unpublished, 2003 U.S. Dist. LEXIS 17642, 2003 WL 22290984, *10-14 (S.D. N.Y. 2003)*, a habeas corpus decision which contains a lengthy discussion of the various potential flaws in eyewitness identification testimony. The federal court acknowledged that the current research casts doubt on *Brathwaite,* but the court denied the defendant's petition for habeas corpus relief because the state courts that affirmed the defendant's conviction were not clearly wrong to follow the prevailing *Brathwaite* analysis.

In addition to these few courts that have responded to the psychological research on eyewitness identification, several legislatures and police agencies have enacted new laws or policies based on this research.

In September 2005, the Wisconsin Attorney General issued a "Model Policy and Procedure for Eyewitness Identification". [30] This policy recommended that all police agencies utilize a double-blind, sequential photo lineup procedure. [31] The salient details of this procedure are: (1) the officer conducting the photo lineup does not know who the suspect is, (2) the witness being interviewed is told [**46] that the culprit may not be included among the photographs, (3) the photographs are shown to the witness one at a time, rather than in a group, (4) the witness is not told in advance how many photographs they will see, and (5) the witness is asked to rate each photograph separately (*e.g.,* "yes", "no", or "unsure") -- thus minimizing the danger that the witness will view the procedure as a "multiple choice" test where their task is to pick the one photo that best matches their memory of the culprit. [32]

30 This model policy is available at: www.doj.state.wi.us/dles/tns/eyewitnesspublic.pdf

31 *Id.* at 3.

32 *Id.* at 3 & 8-9. On page 9 of the model policy, the Wisconsin Attorney General recommends that the following instructions be given to each witness before a photo lineup:

> In a moment, I am going to show you a series of photos. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all the photos in the series.
>
> Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different [**47] in photographs.
>
> You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.
>
> The photos will be shown to you one at a time and are not in any particular order. Take as much time as you need to look at each one. After each photo, I will ask you "Is this the person you saw [insert description of act here]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"
>
> Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.
>
> Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

In April 2006, the California Commission on the Fair Administration of Justice issued its "Report and Recommendations Regarding Eye Witness Identification Procedures". In this report, the California Commission

likewise recommended that all police agencies in the state adopt a double-blind, sequential [*360] photo lineup procedure. [33]

33 California Commission on the Fair Administration of Justice: [**48] Report and Recommendations Regarding Eye Witness Identification Procedures (April 2006), page 5. Available at: www.psychology.iastate.edu/~glwells/California_commission.pdf

In October 2008, a series of articles that appeared in the Dallas Morning News highlighted a number of misidentifications (and ensuing wrongful criminal convictions) that resulted from suggestive showups and photo lineups. [34] These articles contained a discussion of the current psychological research regarding eyewitness identification, and they prompted the Dallas Police Department to alter their procedures.

34 *See, e.g.,* Steve McGonigle & Jennifer Emily, "18 Dallas County cases overturned by DNA relied heavily on eyewitness testimony", Dallas Morning News, October 10, 2008. Available at:

www.dallasnews.com/sharedcontent/dws/dn/dnacases/stories/101208dnproDNAlineups.-263c4f5.html#slcgm_comments_anchor

For more information on this series of articles, see:

www.dallasnews.com/sharedcontent/dws/spe/2008/dna

In September 2009, USA Today reported that five other states (Connecticut, Georgia, Maryland, North Carolina, and West Virginia) and several major metropolitan police departments are changing their identification procedures [**49] in response to the psychological research and the wealth of information confirming that innocent people are indeed being convicted based on mistaken eyewitness identifications. [35]

35 Kevin Johnson, "States Change Police Lineups After Wrongful Convictions", USA Today, September 17, 2009. Available at:

www.usatoday.com/news/nation/2009-09-16-police-lineups_N.htm

In particular, North Carolina has enacted a statute that mandates double-blind, sequential photo lineup procedures. *See* North Carolina Statute 15A-284.52. According to the USA Today article, one of the leading proponents of this revision of North Carolina's lineup procedures was Michael Gauldin -- the chief investigator in the Ronald Cotton case. [36]

36 *Id.*

There can be little doubt that these recent changes in the legal system have been prompted by the confluence of two forces: the increasing amount of psychological research in this area, and the concurrent development of forensic DNA testing. As Professors Gary L. Wells, Amina Memon, and Steven D. Penrod noted in their article, "Eyewitness Evidence: Improving Its Probative Value", 7 Psychological Science in the Public Interest 45 (2006), the last two decades have seen no major change [**50] in how eyewitness identification scientists approach their work; rather, "the advent of forensic DNA testing has changed the way the legal system views eyewitness evidence." [37]

37 *Id.* at 48.

The changing attitude of the legal system is attributable to the fact that "the development of forensic DNA testing in the 1990s [uncovered] definitive cases of the conviction of innocent people in the United States", and that "[e]yewitness identification error was at the heart of the evidence used to convict the vast majority of these innocent people." [38] In other words, DNA testing provided the physical science confirmation of what the psychological scientists had been suggesting for years -- and this made the non-scientific world begin to pay close attention.

38 *Id.*

A re-examination of the photo lineup in Tegoseak's case

As we explained earlier in this opinion, Officer Asselin -- the lead investigator in this case -- knew that Edgar Henry was photograph number 5 in the first array of six photos and that Frank Tegoseak was photograph number 5 in the second array. Asselin first showed the two photographic arrays to Michelle Maestas, but she failed to identify either Edgar Henry or Frank Tegoseak. Thus, [**51] when Asselin next showed the photographs to Robert Maestas, Asselin knew that this was his

final opportunity to get an identification of either Henry or Tegoseak from an eyewitness.

[*361] As we also explained, when Robert Maestas was shown the first array, he "correctly" identified the photograph of Henry (photograph number 5) as being the original passenger in the Bronco, but Maestas also "incorrectly" identified photographs 1 and 3 of this first array as being the original driver.

Asselin knew that this was "wrong", so he said to Maestas, "Let me try to at least show you [the second array of photographs]; then you can see the entire compilation of photos. So far, you've said [that] 1 and 3 [in the first array] could be the driver." Asselin then showed Maestas the second array of six photographs.

When Judge Wolverton ruled on Tegoseak's motion to suppress Maestas's identification, the judge concluded that Asselin's remark to Maestas was not meant to suggest that Maestas should keep looking at more photos because he had not yet successfully identified the culprit. Rather, Judge Wolverton concluded that Asselin's remark was simply intended to clarify the photo lineup procedure -- to remind Maestas [**52] that there were two photo arrays, and that Maestas should examine both arrays before he made his final selections.

But as we have explained, for purposes of assessing the suggestiveness of the photo lineup, the crucial aspect of the communication between Asselin and Maestas was not Asselin's intention when he made these remarks; instead, the crucial aspect was the information or the suggestion that Maestas may have drawn from these remarks.

If -- as appears likely -- Maestas knew or suspected that the photo arrays contained photographs of the two men whom Asselin knew to be the culprits (the two men who had been found in the Bronco), then when Asselin told Maestas to keep looking at more photos even though Maestas had apparently identified both men, Asselin's remark could well have suggested to Maestas that his initial selection was "wrong", and that he had not yet identified the true culprit.

This is not to imply that Asselin was consciously attempting to manipulate Maestas's choice. The suggestiveness of the procedure could have been inadvertent on Asselin's part -- but real, nonetheless.

The potential suggestiveness of Asselin's remark could only have been amplified later, when Maestas [**53] viewed the second array and told Asselin that the original driver of the Bronco was either photograph 1 in the first array (a filler) or photograph 5 in the second array (Tegoseak). Rather than have Maestas place an "X" in the two boxes representing these two photos, Asselin directed Maestas to place an "X" in only one box, the box representing Tegoseak's photo -- although Asselin invited Maestas to add a written notation explaining that Maestas thought that the other photo might also be the driver.

Asselin's reaction to Maestas's ambiguous identification was not necessarily an attempt to manipulate Maestas. Rather, it might be attributed to the phenomenon of "observer bias". Both scientific researchers and police investigators can fall prey to the normal human tendency to pay attention to, or to overemphasize, the results that they expect or hope to see -- and the converse tendency to fail to observe, or to ignore the significance of, results they do not expect or hope to see.

But while Asselin may not have intended to manipulate Maestas, his directions to Maestas may have affected Maestas's perception of the identification procedure. Asselin's directions to Maestas potentially constituted [**54] an inadvertent suggestion that photograph number 5 in the second array (*i.e.,* Tegoseak) was Maestas's "real" selection, and that photograph number 1 in the first array was only a subsidiary alternative selection.

As we explained earlier in this opinion, one of the important findings of the psychological research in this area is that, if a witness makes an identification during a suggestive lineup procedure and then the witness receives some kind of confirmation from the officer administering the lineup, the witness's after-the-fact perception of their identification can be altered: the witness can become artificially more confident in their identification. There is reason to believe that this is what happened to Robert Maestas.

[*362] At the evidentiary hearing on Tegoseak's motion to suppress, Maestas readily admitted that he had selected two photos from the lineup as "look[ing] similar to" the man who was the original driver of the Bronco -- "both [number] 5 on [the second array] and number 1 on [the first array]". When Maestas was asked whether his identification was "positive", Maestas conceded that it was not.

But by the time of Tegoseak's trial ten weeks later, Maestas viewed the matter [**55] differently. When Maestas was questioned about the photo lineup at trial, he now declared that, even though he had initially wavered between photograph 1 in the first array (a filler) and photograph 5 in the second array (Tegoseak), he soon perceived that Tegoseak was the man he had seen in the Bronco.

Here is Maestas's testimony on direct examination:

> *Prosecutor:* And [with regard to] Photo Lineup B, were you able to make an identification [from that array]?

Maestas: I was. ... [Photograph] number 5 ... was the original driver.

Prosecutor: And when you were asked to make the identification, did you hesitate somewhat between [photograph] 5 [in the second array] and [photograph] 1 [in the first array]?

Maestas: I did; I did. But then I had recalled the way that the gentleman's ears kind of stuck out, after the fact.

Prosecutor: Okay. And when you say "the gentleman" -- that's [photograph] number 5?

Maestas: ... Five. Uh-huh. [affirmative]

And here is Maestas's testimony on redirect examination:

Prosecutor: You said [with regard to] the first photo lineup [that] you weren't 100 percent sure. Did you become more sure as you looked at those photos?

Maestas: I -- I became more sure when I recollected, like [**56] I said, what I really distinctly remember was the way the ears stuck out from the head, [from the] side of the head.

Prosecutor: Okay.

Maestas: That's why I was able to make my determination a little easier.

Prosecutor: And that's how you selected [photograph] number 5 [in the second array]?

Maestas: Yes.

Maestas said nothing about the distinctiveness of Tegoseak's ears during the photo lineup procedure itself, nor did he say anything about this physical feature when he testified at the suppression hearing. Rather, as Maestas himself admitted, "[he] became more sure when [he] recollected". By the time of Tegosaek's trial, Maestas "distinctly remember[ed] ... the way the ears stuck out from ... the side of [Tegoseak's] head", and he declared that he was able to identify Tegoseak's photo based on this physical feature. This is arguably an example of the kind of altered memory and altered certainty described in the research literature.

Why we conclude that the potential suggestiveness of the photo lineup is harmless beyond a reasonable doubt

We have covered a lot of ground in this opinion: a lengthy discussion of the Ronald Cotton case, a look at some of the scientific research on the subject of [**57] eyewitness identification, and a description of the recent efforts in various states and cities to improve eyewitness identification procedures. All of this naturally leads to the question: What, if anything, should this Court do in response to what society has learned in the thirty years since *Brathwaite?*

We first wish to clarify that the Ronald Cotton case is simply one case, albeit a prominent one. What happened in that case may provide reason to question the *Brathwaite* analysis, but it does not constitute scientific proof that the *Brathwaite* analysis is flawed.

Second, we acknowledge that our examination of the past three decades' research has not been an exhaustive one. There are many studies in this area that we have not mentioned. And, of course, there are questions in the scientific community about the methodology of particular studies, as well as questions regarding the significance that should [*363] be attributed to the results of various studies.

We do not intend to endorse a particular viewpoint or reach a definitive conclusion at this time. Rather, our goals are more modest: to acknowledge that psychological research into eyewitness identification has furnished new insights into [**58] the potential suggestiveness of identification procedures, and to point out that this research has illuminated the related problem that a suggestive identification procedure can work an after-the-fact alteration of a witness's memory of a criminal episode.

We need go no further at the present time -- because, even assuming that the photo lineup procedure in Tegoseak's case was unnecessarily suggestive, any error was harmless beyond a reasonable doubt. [39]

> 39 [HN4] Constitutional error requires reversal of a criminal conviction unless the error is shown to be harmless beyond a reasonable doubt. *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705*; *386 U.S. 18, 87 S.Ct. 824, 828, 17 L. Ed. 2d 705*; *386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)*; *Raphael v. State, 994 P.2d 1004, 1010 (Alaska 2000)*. In assessing whether an error is harmless beyond a reasonable doubt, "the question is whether there is a reasonable possibility that the error affected the result."

Dailey v. State, 65 P.3d 891, 896 (Alaska App. 2003), citing *Smithart v. State, 988 P.2d 583, 589 (Alaska 1999)*.

When Judge Wolverton ruled on Tegosaek's suppression motion, he noted that "this might [have been] a different situation if [Tegoseak and Henry] had not been followed and almost [handed]-off to the [**59] police." As Judge Wolverton correctly pointed out, the case against Tegoseak was not a "whodunit" -- not a case where the police knew that a crime had been committed but did not know the identity of the perpetrator. Rather, the State's evidence clearly established (1) that the Bronco was being driven in an erratic manner, (2) that two men -- one wearing a white shirt and one wearing a black shirt -- got out of the Bronco in the nursery parking lot and switched places before getting back in the vehicle and driving off, (3) that only two men were in the Bronco when the police stopped the vehicle minutes later -- one wearing a white shirt and one wearing a black shirt, and (4) that, following the stop, both men initially admitted to having just driven the car. In addition, Officer Asselin testified that Edgar Henry told the police that he had taken over driving the Bronco after the stop at Bell's Nursery because Tegoseak had been driving so poorly that he thought Tegoseak was going to kill them.

Given all of this, we have no doubt that the jury would have convicted Tegoseak even if Maestas had been unable to identify Tegoseak at trial, and even if the jurors had been told that Maestas [**60] was unable to identify the driver in the photo lineup, or that Maestas had identified one of the filler photos as being the driver. In other words, even if the superior court should have granted Tegoseak's motion to suppress Robert Maestas's identification of him as the initial driver of the Bronco, any error was harmless beyond a reasonable doubt.

Conclusion

The judgement of the superior court is AFFIRMED.

CONCUR BY: BOLGER

CONCUR

BOLGER, Judge, concurring.

The research cited in the lead opinion suggests that we should consider changes to the test we currently use to determine whether a photo lineup procedure satisfies due process of law. But I choose to withhold my opinion on this issue until both parties have the opportunity to submit their positions on the relevant research either through an evidentiary hearing or adversarial briefing. This occasion will more likely arise in a case where the research is essential to the outcome. In the present case, I agree with the conclusion of the lead opinion: Any error in the photo lineup procedure was harmless beyond a reasonable doubt.

The Why and How of Blind Sequential Lineup Reform

By: Jeanne Schleh, Assistant Ramsey County Attorney (retired)

The Problem: Faulty Eyewitness Identification & DNA

Eyewitness identification evidence is often crucial in criminal investigations. In a growing number of well-publicized cases nationwide, however, DNA evidence has exonerated individuals who were convicted primarily on the basis of mistaken eyewitness identification. This has brought public scrutiny on law enforcement procedures and challenged law enforcement practitioners both to reexamine long-standing practices and to implement change that will reduce the likelihood of such misidentifications in the future. No one in law enforcement has any interest in convicting the innocent.

More than a decade ago, in the wake of early DNA exonerations, the U.S. Department of Justice's National Institute of Justice (NIJ), under then-Attorney General Janet Reno, formed an inter-disciplinary study group (including law enforcement, prosecutors, defense attorneys and scientists) to examine eyewitness identification procedures. Its landmark 1999 report[1] began the national law enforcement discussion of lineup reform. Already at that time, the scientific evidence from years of laboratory studies showed that eyewitness identification was more reliable when blind sequential procedures were used, but questions remained on whether the reform was practical in the field. Nonetheless, some states and local law enforcement jurisdictions throughout the country, convinced by the scientific evidence, successfully implemented lineup reform following the NIJ report.[2]

Now, ten years after the report, the scientific evidence supporting the reform has only grown, and a growing number of law enforcement agencies have adopted it and found it to be practical in the field.[3] However, even in states like Minnesota and Wisconsin in which substantial headway has been made, there is a long way to go to achieve universal compliance with lineup reform.

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[1] See, U.S. Department of Justice research report, *Eyewitness Evidence, A Guide for Law Enforcement* (October 1999). New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (August 2001); North Carolina's *Recommendations for Eyewitness Identification* (October 2003).

[2] Early reform jurisdictions include the states of New Jersey and North Carolina and the Northampton (MA) Police Department (its then Capt. Ken Patenaude was an NIJ panel member). See, New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (April 2001), www.njdcj.org/agguide/photoid.pdf and *North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification* (October 2003), www.ncids.org/New%20ID.pdf and that state's subsequent enactment in 2006 of sections 15A-284.50 to 15A-284.53 of the *North Carolina General Statutes*, adopting its recommendations.

[3] These include, in Minnesota, the Minnesota Bureau of Criminal Apprehension, Ramsey County, Hennepin County and the Chaska Police Department; in Wisconsin, Milwaukee, Madison and more than 200 other Wisconsin agencies (following the Wisconsin Attorney General's 2005 recommendation that these changes be adopted statewide www.thejusticeproject.org/reports/model-policy-and-procedure); others include: Suffolk County (MA)(Boston and suburbs), Denver (CO), Westfield (MA), Virginia Beach (VA), Santa Clara County (CA) and Dallas (TX).

Rationale for Change to Blind Sequential Lineups

The most widely used law enforcement eyewitness identification procedure nationwide has long been the simultaneous photo array. The typical photo array contains six photos. It is common practice for an investigator with knowledge of the case, and the identity of the suspect, to show the photo lineup to witnesses.

However, 25 years of scientific research on memory and interview techniques convincingly demonstrates that the likelihood of mistaken identification drops sharply if lineups[4] are *blind*[5] (that is, conducted by someone who does not know who the suspect is) and *sequential*. When (as occurred in the DNA exoneration cases), the real perpetrator's photo *is not* present in the lineup, witnesses shown the photos simultaneously are up to three times more likely to identify someone than are witnesses shown the same photos sequentially. When the real perpetrator's photo *is* included in the lineup, laboratory studies show some reduction in the number of correct identifications made using the sequential method. However, that somewhat lower identification rate is offset by the much larger risk of misidentification using the simultaneous method if the perpetrator is not present.

The first meta-analysis[6] in 2001 of 30 laboratory tests comparing sequential and simultaneous photo displays[7] over 16 years of research reveals this differential in numerical terms. Specifically, in perpetrator-absent lineups (the scenario most like the DNA exoneration cases), there is an aggregate error rate of 27 percent (incorrect identification of a specific filler photo, the designated innocent suspect who looked most similar to the real perpetrator) for the simultaneous method compared to a 9 percent error rate when the sequential method was used. The simultaneous method, in short, encouraged guessing. There is a trade-off: In perpetrator-present lineups, the 2001 meta-analysis showed a 15 percent drop in correct identifications (from 50 percent in simultaneous to 35 percent in sequential displays). See Nancy Steblay, et. al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentation: A Meta-analytical Comparison," *Law and Human Behavior* 25, no. 5 (October 2001): 459-473.

In the six years following the 2001 meta-analysis, there was an explosion of additional studies. A follow-up meta-analysis, now aggregating the results of 70 tests over 22 years, confirms the significantly greater risk of mistaken identification for simultaneous lineups when the perpetrator is absent. The larger sample, moreover, shows the trade-off drop in incorrect identifications when the perpetrator is present to be lower than it appeared in 2001 (8 percent rather than 15).[8] Most scientists consider these results to be conclusive and the issue to be settled (as demonstrated by the lack of further studies since 2007).

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[4] The terms *lineup* and *photo display* are used interchangeably in this training bulletin.

[5] This procedure is sometimes also referred to as "double blind" to include the fact that the witness likewise does not know the location of the suspect in the sequence (or even if the suspect is included at all). Since this is implicit in any lineup, the term *blind* in this bulletin should be construed to cover both.

[6] Meta-analysis is a cumulative quantitative summary of outcomes across studies.

[7] All of the studies were blind or blinded since that is a presumption in the scientific method.

[8] Dr. Steblay presented this data at the John Jay College of Criminal Justice as "2001+6: An Updated Meta-analysis of Eyewitness Lineup Performance under Sequential versus Simultaneous Formats" (paper presented at conference entitled "Off the Witness Stand: Using Psychology in the Practice of Justice," March 1-3, 2007. This paper is pending publication.

This scientific data supporting the switch to blind sequential lineups as a means of increasing the accuracy of lineups and reducing the likelihood of misidentification is clear, as is the startling implication that the traditional law enforcement method of conducting photo lineups might have inadvertently increased the likelihood of mistaken eyewitness identifications.

On reflection, the reasons for this result also makes sense objectively: (1) Simultaneous photo display encourages *relative judgment* (i.e., a witness comparing photos side by side is more likely to pick a person who looks *most like* the perpetrator—regardless of whether the person is, in fact, the perpetrator). (2) The most professional and well-intentioned investigator who knows where the suspect is in the lineup cannot eliminate all possibility of unintentionally cueing the witness or responding to the witness's identification. Even the smallest response—like the investigator's eyes lighting up when the "right" person is picked—can artificially inflate the witness's level of confidence and convert a "looks like" into a positive identification. If the risk of administrator influence on lineup results (and, therefore, defense attack on those grounds) can be eliminated by having someone other than the investigator who knows the identity of the suspect conduct the lineup, why would we want to do it any other way?

The most common error in the DNA exoneration cases was the identification of a person the police suspected—a person who looked similar to the real perpetrator—but who turned out to be innocent. The typical simultaneous photo array shown in these cases did not contain the photo of the real perpetrator, and the mistaken eyewitness was, in effect, identifying a "filler" photo. Use of the blind sequential method removes, or at least greatly diminishes, the role of police error in the equation.

Essential Components: Sequential Display and Blind Administration (or Functional Equivalent)

Both sequential display and blind administration are necessary components of the reform. Switching from simultaneous to sequential photo displays alone could even increase misidentification, since there is a danger of inadvertently highlighting an individual suspect photo. On the other hand, in a law enforcement setting, an independent administrator may not always be available. The practical realities of conducting lineups under the time pressures and personnel constraints of a criminal investigation, especially in a small department, might mean only an investigator with knowledge of the case is available, or that other options would result in unacceptable delay. In these circumstances, an alternate method still maintaining the blind component may be used: Under this alternative, the investigator who knows the identity of the suspect may show the lineup—as long as it is done in a way that assures that he does not know and cannot see the order in which the photos are presented, and the witness knows this (and therefore will not be looking to the investigator for cues or validation). This is the functional equivalent of blind administration, sometimes referred to as the "blinded" method.

Practical Law Enforcement Experience with the New Method

In Minnesota, Hennepin County, Ramsey County, the Chaska Police Department and the Minnesota Bureau of Criminal Apprehension each have four or more years of experience with implementation of this reform. In each of these jurisdictions, the change has now become standard procedure and has proved no more difficult to administer than the old method.

Concerns that it would result in administrative complications or additional costs have turned out to be unwarranted.

In evaluating its program, Ramsey County discovered some surprising additional benefits: Although meta-analysis of laboratory studies showed some drop in correct identifications using the new methods (as the price paid for far fewer incorrect identifications), investigators using the new method in Ramsey County did not feel they were "losing" identifications and, moreover, felt more confident in identifications that were made. This perception is likely to be a consequence of less overall guessing by witnesses, as well as a reluctance to charge obviously marginal identification cases. Moreover, although Ramsey County investigators were trained on the alternative "blinded" method, in practice, most were able to find, and came to prefer using, an independent administrator. A concern widely expressed before implementation that lineups would be adversely affected if the administrator was not the investigator who had developed rapport with the witness turned out to be a nonissue. Finally, the bonus of adopting this reform has been that in court a major avenue of defense attack on the admissibility and reliability of eyewitness identification procedures used has been eliminated. Other jurisdictions that have adopted the change report a similar experience.

Elements of Eyewitness Lineup Protocol Change

Investigator training on the new method of doing lineups should include an explanation of the scientific data and rationale for change to blind sequential lineups (see above). Instruct that while blind administration by an independent administrator is the preferred route, alternative blinded procedures may be used. The key to implementing this reform is an understanding of what "blind" means and why it is important. Emphasize that this change in no way implies any doubt about the integrity and professionalism of the investigator but simply eliminates all possibility of even unintentionally cueing a witness or inflating a witness's level of confidence in any identification. This, in turn, eliminates these as potential issues in subsequent court proceedings.

Some jurisdictions prefer to use a lineup form (with or without a supplemental report); others instead write a general supplemental report for lineups. Regardless of approach, the following elements are necessary:

- Instructions to the administrator on how to do a blind sequential lineup
- Instructions to the witness (including different language depending on whether an independent or "blinded" administrator is conducting the lineup)
- Documentation of any witness reaction to any of the photos (verbal, physical or emotional)
- If an identification is made, documentation of the witness's level of certainty

A one page (two-sided) Sequential Photo Display Form, developed specifically for use by all Ramsey County law enforcement officers, is appended as an example of a form containing these elements. On the administrator side are all the instructions for the administrator, a section to be

filled out by the administrator during the photo display and a section to be filled out by the administrator after the photo display. On the witness side are the instructions to be read to the witness before the photo display (including alternative language, depending upon whether an independent administrator [IA] or "blinded" functional equivalent [FE] is used) and a section to be completed by the witness after the photo display. This form is designed to be self-explanatory so that an officer from the street with no knowledge of the case could be called in, if necessary, to be the independent administrator.

How to Do a Blind Sequential Lineup

There are several methods by which the photos may be displayed sequentially. All have in common that the witness sees only one photo at a time and must continue to view all photos even if a person is identified before all are shown.[9] After each photo is shown, it must be removed from view before the next photo is shown. Regardless of which method is used, a record must be kept of which photos were shown in which order to which witness.

The low-tech version can be as simple as numbering the photos and placing each in a separate folder bearing the same number (or for the blinded method, having someone else, including another investigator who knows who the suspect is or even a civilian employee, do this for the administrator). The witness is then instructed to look at the folders one at a time (for blinded method, have the witness open the folders in such a manner that the investigator cannot see the photos). Return the folder to the bottom of the pile before handing the witness the next folder, or keep remaining folders out of sight, so the witness does not know how many there are.

The "box with 6 doors" method, developed and used in the state of New Jersey since 2001, has also been widely used in Ramsey County. The standard 6-person simultaneous display is inserted in a box with six numbered doors, built specifically for this purpose. Only one door at a time is opened, and the doors are opened in numerical order. The box is equally adaptable to the blinded method since someone else can prepare the standard 6-pack lineup sheet and insert it in the box. The box is easily transportable to the field.

The high-tech version would be to download lineup photos to a laptop to be shown to the witness one at a time.[10] The witness must be instructed to continue forward only (i.e., may not go back to look at a prior photo). The display should start and end in black.

Do not repeat the display unless the witness requests it. If, after one rotation is completed, the witness requests to see the photos again, the entire array may be repeated. Even if the witness asks to see only one photo, the entire array must be shown. A record must be made of the

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[9] Continuing the photo display when the witness identifies a photo before all photos are shown avoids later legal criticism that the lineup was improperly truncated. In the circumstance that a witness makes an early "filler" pick without having seen the suspect's photo, it also allows an answer to the question of what would have happened had the witness seen the suspect's photo. Conversely, a witness may pick the suspect but then discredit this pick when a later photo is shown.

[10] An elegant software program has been developed by SunGard OSSI (North Carolina) for this purpose. It randomly sorts photos, assigns a discrete number to each lineup shown, maintains a record of which version each witness saw, guides witnesses through a series of questions on each photo (with a beep to prompt the administrator to ask follow-up questions if an identification is made), preserves an audio recording of all questions and answers (downloadable to CD) and generates a report of results including the photos shown, identifying who the suspect was and whom the witness picked. (See Jerry Farris, "Remote Lineup Application," *The Police Chief* 75, no. 8 (August 2008): 96-98.)

number of times the display was shown, and all photos must be shown each time in the same order as the original display. Since the scientific evidence establishes a sharp drop-off in the reliability of any identification made after two cycles, some departments will not allow more than two cycles. Certainly, no criminal charge should be based on an identification requiring more than two cycles. (All eyewitness identification cases should, in any event, have other corroborating evidence.)

Blind Administration

Emphasize the importance of using an independent administrator whenever possible. When the investigator has already interviewed and cultivated a relationship with the witness, he should simply explain that department policy requires another officer to conduct this procedure but that he will be available to talk to the witness as soon as the procedure is done. Whenever an independent administrator is used, the investigator who knows the identity of the suspect must remain out of sight of the witness when the photos are shown.

When no independent administrator is available, a functionally equivalent blinded method must be used to administer the lineup. "Blinded" means that the investigator administering the lineup who knows the identity of the suspect must (1) instruct the witness that he does not know the order of the photos or whether the person who committed the crime is in any of the photos and (2) have the witness view the photos in such a manner that the administrator cannot see which photo the witness is viewing.

Make clear that the blind component requirement is not because there is any question about their professionalism or integrity but because of human nature: It is natural for a witness to look to the investigator for validation, and it is natural for the investigator to be pleased the suspect is picked. The slightest reaction, such as seeing the investigator's eyes light up when the "right" person is picked, can instantly artificially inflate the witness's level of confidence in his or her selection. Blind administration eliminates this risk.

Instructions to the Witness

Before any photo display is shown, the witness should be instructed:

- The person who committed the crime may or may not be included
- I do not know whether any person being investigated is included **(blind)** ***or*** I do not know the order of the photos **(blinded)**
- Even if you identify someone during this procedure, I will continue to show you all photos in the series
- Keep in mind that a photo may be an old one; some things, like hair styles, can be changed, and skin tones may look slightly different in photos
- You should not feel you have to make an identification; it is just as important to clear innocent persons as it is to identify the guilty; whether or not you identify someone, the investigation will continue
- You will see only one photo at a time; they are not in any particular order; take as much time as you need to look at each one
- You should avoid discussing this procedure or the results with any other potential witness in the case

Role of Administrator During and After the Lineup

After the witness has looked at each photo, the administrator should ask, "Is this the person who [describe act committed]? If the answer is no, move on to the next photo. If the answer is yes, follow up with, "How certain are you of your selection?" The witness's exact answers must be documented for any yes answer. (If the witness asks whether you mean a percentage or on a scale of 1 to 10, tell him or her to use whatever method seems right to him or her.) Note also any physical or emotional reactions of the witness.

Be careful not to give the witness any feedback on his or her answer (such as "good work!" or "that's who we thought it was"). (Of course, an independent administrator who does not know who the suspect is will be unable to give such feedback.) Answers other than yes or no may also be helpful to the investigation and should likewise be documented. Even if an identification is made, continue showing the remaining photos in the array." After one cycle of the array has been completed, do not repeat the procedure unless requested by the witness. If requested, show all photos in the array, in the same order, and document any additional comments.

The administrator's report must indicate how many times the array was shown. Keeping track of the number of times photos are displayed before an identification is made provides an additional tool for evaluating the reliability of the identification. If the photo display is shown more than twice, the witness is likely to be "comparison shopping"—i.e., guessing. Documenting this alone is an improvement over the simultaneous display procedure, in which comparing photos to find the person most like the perpetrator (regardless of whether it is, in fact, the perpetrator) was always an inherent, but usually immeasurable, risk.

Many departments (including Ramsey County) complete their eyewitness identification procedure by asking the witness to fill out a form confirming the oral result in the witness's own handwriting. The portion of the Ramsey County form to be completed by the witness indicates how many photos were shown, a check-off that the witness either was or was not able to identify any person, a space to answer in the witness's own words the question, "How certain are you of your identification?" and a signature and date line. If the witness refuses to sign the form, the administrator writes "refused." The entire form, including the witness advisory and the portions completed by the administrator and the witness, is placed in the case file regardless of whether any identification is made. Ramsey County also has an alternate version of its form in simplified language as an option for use with young children, mentally impaired persons or persons with limited knowledge of English. (Both forms are available online at: www.co.ramsey.mn.us/attorney/SPDNA.asp.)

The administrator must also preserve the photo display used, including the order of photos. The 6-person template for simultaneous photo displays may be used for this purpose. If an identification is made, have the witness sign and date the photo.

Follow-up Interview by the Investigator

In cases in which an identification is made, after the witness has answered the level of certainty question, the case investigator who knows who the suspect is may follow up with a supplemental interview as needed. This is the time to develop as many additional facts as possible about

details of any identification made, including exploring what it was about the photo (or photos) selected that made the witness pick it, any follow-up on the witness's level of certainty or confidence in the selection or, in the case of multiple perpetrators, what each individual did.

It continues to be important that the investigator not provide any information that could artificially inflate the level of confidence the witness expressed in any selection. If a witness asks whether he or she has picked the "right" person, that question should not be answered (if at all) until the investigator has asked all follow-up questions and the investigation is complete. Especially if other potential eyewitnesses are yet to be questioned, witnesses may simply be told the investigation is ongoing and needs to be concluded before that question can be answered. If the person picked is ultimately charged with a crime, the witness will eventually find this out. However, being careful not to reinforce the witness's selection, and documenting this, will strengthen any case ultimately charged by eliminating any defense claim that the witness was manipulated into making a positive identification. If witnesses are concerned for their safety and want to know if the suspect is in custody, that question may be answered at the end of the interview.

Selecting Photos for the Lineup

As has typically been the practice in the past, the investigator with knowledge of the case and the identity of the suspect may continue under the new protocol to be involved in assembling the photo lineup. Training on the new protocol is a good opportunity to review lineup photo selection. Use M-RAP descriptors given by the witness to find fillers (*unless* the witness's description does not match the suspect's: in that event, use descriptors matching the suspect's description). Select at least 5 fillers (a larger number may be used). Before finalizing the photo group, look at them together to make sure the suspect does not stand out. Number the photos. Do not make the suspect Number 1. If the blinded method is used, the investigator simply has someone else number the photos and insert them in folders, the box or the laptop.

When there are multiple perpetrators, the same ratio of fillers to suspects should be used (at least 5:1). Typically separate photo displays are prepared for each suspect. If all suspects have similar characteristics (such as in gang cases with multiple perpetrators of the same age and ethnicity), one large lineup containing all suspects could be done containing the same filler-to-suspect ratio.

If more than one witness views the photo display, consider placing the suspect in different positions in each. However, be sure to preserve a photo record of the order of photos shown to each witness and to have each witness sign and date any photo selected. (A good way to preserve the record of the order of photos shown is to print a copy of the 6 photos used in the simultaneous display 6-pack format.)

Training Key® #600

Eyewitness Identification

Recent research findings have prompted development of new guidelines and protocols for using eyewitness identification—whether it be through photo arrays, showups, or lineups.

Background

Although the evidence provided by eyewitnesses can be tremendously helpful in the development of leads, identifying criminals, and exonerating the innocent—it is subject to error. Civilian eyewitnesses frequently prove to be unreliable observers, and erroneous identifications are sometimes the result. Misidentifications by eyewitnesses are normally the result of a combination of factors.

For example, human perception tends to be inaccurate, especially under stress. The average citizen, untrained in observation and placed under extreme stress as a victim of or witness to a crime, may not be able to describe a perpetrator accurately, sometimes even after coming face-to-face with the individual.

Also, a witness, particularly one who is not really sure what the perpetrator actually looked like, may be easily influenced by suggestions conveyed to him or her during the identification process. In *United States* v. *Wade*, the Supreme Court of the United States recognized these facts in saying:

> *The influence of improper suggestions upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor. Perhaps it is responsible for more such errors than all other factors combined.*[1]

Law enforcement officers may unwittingly facilitate misidentifications by using suggestive words or engaging in certain types of suggestive behavior. The average witness, anxious to make an identification and influenced by the police officer's image as an authority figure, can be very sensitive to any suggestion made by the police regarding the identity of the perpetrator. Officers may, totally unintentionally, convey to the witness by word or behavioral cue, that a particular person being viewed is the suspect.

Consequently, great care must be taken by officers conducting any type of eyewitness identification to avoid any action that might lead to an erroneous identification. Scrupulously adhering to the procedures and precautions outlined in this document will help avoid misidentifications that may lead to unjust accusations or even erroneous convictions of innocent persons and divert the investigation away from the real culprit. In addition, even if the actual perpetrator is caught and brought to trial, using improper identification procedures during the investigation will often cause the suppression of identification evidence at trial, resulting in dismissal of the charges or otherwise making it impossible to convict the guilty party.

It is estimated that some 77,000 people nationwide are put on trial because eyewitnesses pick them out of lineups or photo arrays. Recently, changes in eyewitness identification procedures have been spurred by the fact that nearly 200 people have been cleared of crimes through DNA evidence, most of which were convicted based on eyewitness identification.[2]

Research in this field has provided much information on the dynamics of eyewitness identification. For example, the manner in which suspects are presented to witnesses has bearing on whether identification will be made and which individual is more likely to be pinpointed by the witness. In the wake of these and many other research findings, the American Bar Association (ABA) issued a resolution containing *Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* in August 2004. The document has subsequently prompted states such as Wisconsin and California to conduct similar reviews of eyewitness identification practices and to issue recommendations for change in their respective

jurisdictions that generally mirror the ABA suggestions.[3] No doubt, these findings will continue to influence reforms around the nation. Officers may find that these best practices may also be cited during court proceedings as models for conducting eyewitness identification.

If a court determines that an identification procedure was excessively suggestive, the court may prohibit introduction of the evidence in question. It may rule that any in-court identification of the accused by the victim is inadmissible or suppress other evidence that was obtained as a result of an improper pretrial identification procedure or both. Of course, any of these actions may be fatal to a case.

Today, in evaluating proper identification procedure, the courts will generally be concerned with whether it was suggestive. If the court finds that the procedure was suggestive, the court will then proceed to determine whether, despite the suggestiveness, the identification was reliable when considering the totality of the circumstances.[4]

For purposes of this document, identification procedures may be categorized as showups, lineups, or photo arrays. In a lineup, eyewitnesses are presented with a number of individuals. By contrast, in a showup, witnesses are shown one suspect only. Photo array procedures generally involve showing several photographs to a witness for the purpose of obtaining identification.

Showups

The showup has been widely condemned by the courts and by experts in law, law enforcement, and law enforcement identification procedures.[5] While the courts have not held showups to be categorically improper, they have ruled that the determination of whether a specific showup was excessively suggestive will be made based upon the totality of the circumstances attending that particular showup. In practice, evidence deriving from showups is frequently suppressed because the showup is so inherently suggestive. Consequently, the use of showups should be avoided where possible, particularly when photo arrays or lineups could be used.

It is recognized however, that a showup may provide sufficient probable cause early in an investigation that will help avoid the escape of a prime suspect as well as facilitate the release an innocent person and thus redirect police investigations in potentially more productive areas. Therefore, where use of a showup seems reasonable and appropriate, certain guidelines should be followed to minimize the suggestiveness of the procedure and the risk of suppression of any resultant identification evidence.

Showups conducted in the station house or jail are the most unreliable and hence the most objectionable. Showups should, whenever reasonably possible, conform with the following guidelines:

- Showups should not be used when independent probable cause exists to arrest a suspect.
- Prior to the showup, the witness should provide officers with as complete a description of the suspect as possible.
- When possible, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.
- Showups should not be conducted when the suspect is in a cell, handcuffed, or dressed in jail clothing.
- Showups should not be conducted with more than one witness present at a time. If showups are conducted separately for multiple witnesses, the witnesses should not be permitted to communicate before or after the showup regarding the identification of the suspect.
- The same suspect should not be presented to the same witness more than once.
- Showup suspects should not be required to put on clothing worn by the perpetrator, speak words uttered by the perpetrator, or perform other actions mimicking those of the perpetrator.[6]
- Words or conduct by the police that may suggest to the witness that the individual is or may be the perpetrator should be scrupulously avoided. For example, one should never tell the witness that the individual was apprehended near the crime scene, that the evidence points to the individual as the perpetrator or that other witnesses have identified the individual as the perpetrator. Unfortunately, the mere fact that the individual has been presented to the witness for identification strongly suggests that the officers believe him to be the guilty party.
- Following the showup, ask the witness how confident he or she is in the identification.
- Before showing the suspect, the following statement should be read to the witness. (Note: The same statement, with minor adjustments for context, should be made prior to using photo arrays or lineups). The statement should include the following:

In a moment I am going to ask you to view (a person) (a series of photos) (a series of individuals).

It is just as important to clear innocent persons from suspicion as to identify guilty parties.

[In the case of lineups and photo arrays say that]: Individual(s) present in the (lineup) (photo array) may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change.

The person who committed the crime may or may not be present in the group of individuals.

You do not have to identify anyone.

Regardless of whether you make an identification, we will continue to investigate the incident.

Do you understand these instructions?

Lineups

The lineup, if properly conducted, is significantly less suggestive than the showup and hence is generally preferable. Nevertheless, police officers conducting a lineup must also use caution to avoid suggestive influences. Studies of witness psychology reveal that lineup witnesses tend to believe that the guilty party must be one of the individuals in the lineup. Consequently, witnesses tend to pick out the person in the lineup who most closely resembles their perception of the perpetrator, even though the perpetrator may not in fact be

present.

Instructions—similar to those given to a witness prior to a showup—can facilitate an identification and avoid misidentification based on the witness's memory. The witness should be told that he or she is about to view a group of individuals who may have committed the crime. Before making any identification, the witness should be told that the individuals present in the lineup may not appear as they did on the date of the incident due to changes in features, such as head and facial hair or scars. The witness should also be told that the suspect may or may not be in the lineup; and that a positive identification is therefore not mandatory. The witness should be informed that whether or not an identification is made, the investigation will continue. Where two or more witnesses are involved, they should view the lineup separately and should not be allowed to discuss the lineup until all have completed the process.

Many witnesses, in an effort to please the police officers conducting the lineup, feel obligated to pick out someone from the lineup rather than disappoint the officers.[7] Such witnesses are often sensitive to, and strongly influenced by, subtle clues conveyed by the officers that may indicate to the witness that the officer believes that a particular individual in the lineup is the perpetrator. This makes it doubly important that officers conduct the lineup—and conduct themselves—in a nonsuggestive manner. To prevent these suggestive techniques and avoid any tip offs about the suspect's identity, police lineups should be administered by an officer who does not know which person in the lineup is the actual suspect.

Additionally, it has been recommended in the studies cited by the ABA and others that a lineup should be administered sequentially rather than all at once (simultaneously). When witnesses view photos or lineups simultaneously, they tend to make comparative judgments; they try to determine which of those persons present appears to make the best fit to their memory of the suspect. When the suspect is present in the lineup or photo array, they will likely be identified in this manner and no harm is caused. But, if the actual suspect is not present, witnesses still tend to make an identification based on the best fit among those present. This can lead to misidentification. Therefore, studies suggest that sequential presentation of suspects in both photo arrays and lineups is the better approach because witnesses tend to make absolute rather than comparative judgments when viewing suspects individually. In this process, suspects and fillers are presented one at a time and then move out of site as the next person is brought into view.

Preparing for a lineup may be as important to the validity of the procedure as actually conducting it. Selecting individuals as fillers for the lineup is a particularly important issue. In determining which fillers should be presented to the witnesses in a lineup, the following principles should be observed:

1. The lineup should consist of individuals of similar physical characteristics. Witnesses tend to pick out anyone who stands out from the rest of the group in any significant way. Therefore, the individuals who appear in the lineup should be reasonably similar with respect to age; height; weight; hair color, length and style; facial hair, clothing; and other characteristics such as glasses or visible tattoos. Of course, the individuals must be of the same race and sex. Absolute uniformity of the lineup participants is obviously unattainable and is not procedurally necessary.[8] However, lineups should avoid using fillers who so closely resemble the suspect that the witness cannot correctly identify the actual suspect.

2. The lineup should consist of at least five or six persons. The smaller the lineup, the less objective it is. A lineup with only two or three persons is little better than a showup, and suggestive factors become excessively influential. In addition, some authorities caution against the use of plainclothes police officers in lineups because they do not naturally look or act like suspects, a factor that causes witnesses to reject them as possibilities. They also may have been seen by the witness in the community, upon visits to the police station, or in similar contexts.

Preparing a witness for viewing the lineup is another important consideration. Preparation should be limited to nonsuggestive statements, such as explaining the procedure that will be used and making it clear that the individuals in the lineup will be unable to see the witness. Officers should avoid taking any action or making any statement that will adversely affect the validity of the lineup. In particular, before a lineup, officers should avoid:

1. Showing the witness any photos of the suspect.[9]

2. Conducting a showup with the suspect, or allowing the witness—accidentally or otherwise—to see the suspect, such as in an office or holding cell prior to the lineup.

3. Making suggestive statements to the witness, such as telling the witness that the person that is the suspect will be in the lineup. It is even desirable to tell the witness that the perpetrator may not be among those in the lineup. Other common errors that should be avoided include telling the witness that another witness has identified someone in the same lineup, advising the witness to take special notice of some particular individual in the lineup, or making any other statement or action which may cause the witness to focus on a particular individual, or to feel that the witness must pick out somebody.

4. Finally, if more than one witness is to view a lineup, the witnesses should be kept separated prior to the lineup and should not be permitted to discuss the case with each other, compare descriptions, etc.

5. In conducting the lineup, officers who are not assigned to that case should handle the procedure if possible. This helps to minimize the possibility that the officers who are conducting the investigation will in their zeal to solve the case, convey (inadvertently or otherwise) clues to the witness as to which person to pick out, or put pressure on the witness to pick out somebody. The following should also be observed in conducting lineups:

- *Statements that put pressure on the witness to make an identification should be avoided.* Witnesses are anxious to please the officers conducting the lineup, so they should not be made to feel that they are expected to pick out someone. For example, urging a hesitant witness to make an identification or to try harder would be improper.
- *Statements that may cause the witness to focus on a particular individual should be avoided.* The same sort of statements discussed in regard to witness preparation should be avoided during actual conduct of the lineup. Officers are often tempted to prompt a witness when someone in the lineup is a prime suspect and the witness is hesitant to make an identification.
- *The lineup should be presented to one witness at a time.* The common practice of having a group of witnesses view a lineup simultaneously should not be permitted. Courts,

including the U.S. Supreme Court,[10] have disapproved multiple-witness lineups. If for some reason, more than one witness must be present simultaneously, witnesses should be required to make their identifications silently, in writing, and should not be permitted to discuss the identification aloud with each other or with the officers present.

• *If possible, conduct a blank lineup.* Conducting two or more lineups, where one lineup includes the suspect and the others do not, assists the prosecution in later refuting any claim by the defense that the lineup was too small or was suggestive.

• *If multiple lineups are to be conducted for the same witnesses, do not put the suspect in more than one.* Seeing the same face in a second lineup may cause the witness to erroneously recognize the person as the perpetrator, merely because the face is familiar from the first lineup. Because of this, the courts have disapproved this practice.[11]

6. Videotape and audiotape the lineup whenever possible. This procedure provides a historical record of the proceeding should the identification or the process used come into question, or the actual identification process is necessary to assist the prosecution at trial.

In another context the Court has held that requiring a suspect participating in a lineup to speak, even to the extent of uttering the same words used by the criminal does not violate the Fifth Amendment, since it is not "testimonial self-incrimination." Other actions, such as standing, walking, gesturing, and the like are similarly not self-incriminating within the meaning of the Fifth Amendment. Similarly, requiring the suspect to wear certain clothing has been held to be outside of the coverage of the Fifth Amendment.

Following the lineup, certain precautions should be taken. For example, where more than one witness has viewed a lineup, witnesses should be kept separate after the lineup procedure has been completed. While discussions between witnesses following a lineup will presumably not render any previously made identification invalid, it may affect the admissibility of a subsequent in-court identification of the defendant by these witnesses during the trial itself.

Additionally, witnesses should not be praised or congratulated for picking out the suspect. This may serve to reinforce a shaky identification, convincing the witness that he or she has picked out the actual perpetrator when the witness actually has doubt. In addition to increasing the chances of a miscarriage of justice, this may lead to suppression of a later in-court identification of the perpetrator by the same witness.

Photo Identifications

Photographic identifications may take a number of forms. If a single photo is shown to the witness, the photo identification has all of the vices of the showup and is generally regarded by the courts as improper. Consequently, multiple-photo arrays are preferable. In such procedures, the photos may be shown individually, one at a time, or may be displayed simultaneously on a card. This procedure is similar to a lineup, and virtually all of the cautions set forth for lineups in the preceding discussion apply to multiple-photo identification procedures as well.

Specifically, the following recommendations are made regarding photographic identifications presented simultaneously or sequentially:

• There should be at least six photographs.

• The photographs should be of people who are reasonably uniform in age; height; weight and general appearance; and of the same sex and race. If scars or tattoos were present on the suspect, all in the photo array should be similarly marked or the area of the body should be covered for all.

• The photographs themselves should be similar. For example, color photographs and black and white photographs should not be mixed; they should be of approximately the same size and composition.

• Mug shots should not be mixed with snapshots since they are generally recognizable as such and have an immediate tendency to brand an individual.

• If mug shots are used, or if the photographs otherwise include any identifying information regarding the subject of the photograph, this information should be covered so that it cannot be seen by the witness. If only some of the photos have such information, the corresponding portions of photos should be covered so that none of the photos will look different.

• The array should not include more than one photo of the same suspect.

• The photo array should be shown to only one witness at a time.

• As with showups and lineups, no suggestive statements should be made. For example, witnesses should not be told that the suspect's photo is in the group, or that someone else has already picked out one of the photos as being the criminal. Similarly, nothing should be said or done to direct the witness's attention to any particular photograph. For example, pointing to a particular photo and saying, "Is this the guy?" is improper and may lead to suppression.

• As in the case of lineups, it is recommended by some that photo arrays be presented to the witness one at a time, then removed from view before the next photo is presented.

• The photo array should be preserved for future reference. In fact, in some states, failure to preserve the array will lead to suppression of the identification process. Additionally, as in lineups, full details about the identification process should be recorded and preserved—such as the administrator's name; procedures used; date, time and location of the procedure; number of fillers, names of those present during the procedure; and whether the array was viewed more than once by the same witness. Assuming that the photo identification has been properly conducted and that the array itself was not in any way suggestive, preserving this information helps the prosecution refute any claims by the defense to the contrary.

The proper use of photographs to obtain identification of a perpetrator has been approved by the courts.[12] However, the courts appear to prefer that photographic identification procedures be used only to develop investigative leads. Some courts have criticized the practice of using photographic identifications once the suspect has been arrested, preferring that once the suspect is in custody and therefore readily available, a lineup be employed for eyewitness identifications.[13]

The Right to Counsel at Eyewitness Identifications

In 1967, the U.S. Supreme Court held that a suspect has a right to counsel at a post-indictment lineup.[14] Subsequently, the Court expanded this ruling to provide for a right to counsel at any lineup conducted after formal adversary proceedings

have been initiated against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.[15] There is, however, no right to have counsel present at a lineup conducted before such adversary proceedings have been initiated. These same rules apply to showups. However, there is no right to counsel at photo identification sessions.[16]

The purpose of having counsel present at the identification is to enable counsel to detect any suggestiveness or other irregularities in the procedure. It should be recognized, however, that the presence-of-counsel requirement may actually help the police in certain instances. First, the department's goal should be to avoid any possibility of an erroneous identification and a resultant miscarriage of justice. Therefore, the presence of counsel may be regarded as a positive step in preventing any such occurrence. In addition, if counsel is present and acquiesces in the procedure being employed, this may preclude any subsequent defense contention that suggestiveness or other impropriety occurred. This will strengthen the prosecution's case. Therefore, to the extent that defense counsel is responsible and objective, cooperation with counsel in constructing and conducting a nonsuggestive and otherwise proper identification procedure may benefit to all concerned.

Summary

Of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.

Endnotes

[1] 388 U.S. 218, 229 (1967).

[2] Kate Zernike, "Study Fuels Debate Over Police Lineups," The New York Times (April 19, 2006).

[3] See: American Bar Association Criminal Justice Section, "Report to the House of Delegates on Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures," August 2004. Also: California Commission on the Fair Administration of Justice, "Report and Recommendations Regarding Eyewitness Identification Procedures," released April 13, 2006. Also: State of Wisconsin, Office of the Attorney General, "Model Policy and Procedure for Eyewitness Identification," September 2005.

[4] This in turn is to be achieved by analyzing six factors. These are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; (5) the length of time between the crime and the confrontation and (6) whether the witness was a casual observer or the victim of the crime. If in view of these various factors, it appears that the identification was reliable despite the suggestiveness of the procedure, evidence of the identification will be admissible to bolster a subsequent in-court identification. *Neil* v. *Biggers*, 409 U.S. 188 (1972). See also *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). (*Biggers* test applied to photo identifications.)

[5] See *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[6] Although such requirements sometimes may properly be imposed during a lineup, the showup is so inherently suggestive that the same court that would approve their use in a lineup may find them excessively suggestive when employed during a showup.

[7] Although it may surprise many officers to hear it, the average citizen still sees the police officer as a benevolent father figure (or perhaps, in the case of a female officer, a mother figure), with the result that the lineup witness is often extremely anxious to please the officer by making an identification—even though the citizen is not at all certain that the person chosen is the guilty party.

[8] *United States* v. *Lewis*, 547 F.2d 1030, 1035 (8th Cir. 1976).

[9] Even a photo array should be avoided. This is especially true if the suspect is the only person in the photo array who is also in the lineup.

[10] See *Gilbert* v. *California*, 388 U.S. 263 (1967).

[11] See *Foster* v. *California*, 394 U.S. 440 (1969).

[12] *Simmons* v. *United States*, 390 U.S. 377 (1968).

[13] It has been said that once a witness has identified a photo, this influences subsequent identifications. The contention is that the witness thereafter is really only recognizing the previously seen photograph, not the actual criminal. For this reason, the practice of showing a witness a photograph of the defendant just prior to trial to "refresh the witness's memory" should be avoided.

[14] *United States* v. *Wade*, 388 U.S. 218 (1967), *Gilbert* v. *California*, 388 U.S. 263 (1967).

[15] *Kirby* v. *Illinois*, 406 U.S. 682, 688-89 (1972).

[16] *United States* v. *Ash*, 413 U.S. 300 (1973). At least one state supreme court has held that where simulated lineups are filmed or videotaped for later exhibition, there is no right to have counsel present when the film or videotape is subsequently shown to witnesses, *People* v. *Lawrence*, 481 P.2d 212 (1971). Showing witnesses a film or tape of a previously recorded simulated lineup has become known as a "Lawrence lineup."

questions

The following questions are based on information in this *Training Key*. Select the one best answer for each question.

1. Which of the following statements is *false*?

   (a) Improper identification procedures may result in suppression of eyewitness testimony at trial.
   (b) Some eyewitnesses are anxious to please or assist officers and may make identifications based on subtle suggestions or cues from officers during lineups or photo identification.
   (c) Showups should be used even when independent probable cause exists to arrest the suspect in question.
   (d) During showups, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.

2. Which of the following statements is *false*?

   (a) Showup suspects may be required to put on clothing or speak words uttered by the perpetrator.
   (b) Following a showup, the witness should be asked how confident he or she is in the identification.
   (c) Lineups are inherently less suggestive to witnesses than showups.
   (d) Lineups should be conducted by someone who does not know the identity of the suspect.

3. Which of the following statements is *true*?

   (a) A lineup should consist of at least five or six people.
   (b) Multiple witnesses to the same lineup should be kept separate from one another prior to and following the identification procedure.
   (c) Whenever possible, lineups should be presented to one witness at a time.
   (d) All of the above are true.

answers

1. (c) When independent probable cause exists, the suspect should be taken into custody without conducting a showup.
2. (a) During showups, suspects may not be required to put on clothing worn by or speak words uttered by the perpetrator as these could promote a misidentification.
3. (d) All of the statements are true.

have you read . . . ?

Training Key #596, Video and Audio Recoding of Interrogations and Confessions: An Update, International Association of Chiefs of Police, Alexandria, Virginia 22314.

This document provides protocols for video and audio recording of custodial interviews, interrogations, and confessions. Wherever possible, video and audio recordings should also be used for recording lineups.

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Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol

By Susan Gaertner, Ramsey County Attorney, Saint Paul, Minnesota; and John Harrington, Chief of Police, Saint Paul, Minnesota

An article in the October 2008 issue of this magazine raises one of the most critical issues in the law enforcement community today—the problem of faulty eyewitness identification—and urges police chiefs to lead the discussion of reform.[1] Highly publicized DNA exoneration cases, most of which involved mistaken eyewitness identifications, have focused public scrutiny on law enforcement procedures and challenged law enforcement practitioners both to reexamine long-standing practices and to implement change that will reduce the likelihood of such misidentifications in the future. No one in the law enforcement profession has any interest in convicting the innocent.

The Mecklenburg article makes eight general recommendations[2] but is short on practical specifics. It also sidesteps the two essentials in lineup reform that are supported by more than a quarter century of scientific study—that lineups be "blind" (that is, conducted by someone who does not know who the suspect is) and sequential.[3] The article argues that both points require more field study and that there are practical impediments to the implementation of these reforms in a law enforcement setting.

The present article, intended as a pragmatic contribution to the reform discussion, describes the successful implementation of a blind sequential lineup protocol in Ramsey County, Minnesota. Its purpose is not to debate the science but to address the practical application of this change in a law enforcement setting and to provide specifics for any other agency interested in doing the same.

Persuaded by its own review of the science (for reasons stated below), Ramsey County decided to move ahead in 2005 with a year-long pilot project to test whether implementation of blind sequential lineups was feasible and practical for law enforcement practitioners. The pilot was successful and, in April 2006, the new lineup protocol was adopted as countywide policy by all law enforcement agencies in the jurisdiction. The Illinois Field Study (described in the Mecklenburg article) notwithstanding, Ramsey County continues to be satisfied that the bulk of scientific evidence—and pragmatic considerations—support this change. After almost four years of experience with this protocol, the county has concluded that it is feasible, practical, and superior to past eyewitness identification procedures.

Lineup reform need not be delayed for years awaiting the outcome of additional field study when the basic reforms make sense objectively and when experience demonstrates that they can be successfully applied in the field.[4] Implementing this change in protocol has not only proved workable for investigators in Ramsey County but has also improved the uniformity and the quality of eyewitness identification investigations. It has also yielded bonus practical benefits in court.

The county's experience is adaptable to other law enforcement jurisdictions; hopefully, outlining it here will encourage other jurisdictions to replicate this effort—and perhaps provide some shortcuts for doing so.

Background: The Sutherlin Exoneration

Ramsey County is a jurisdiction of 493,215 residents.[5] It has 10 separate law enforcement agencies, including the Saint Paul Police Department (the largest agency, currently with 599 sworn officers), the Ramsey County

Sheriff's Department, seven smaller suburban departments, and a campus police department. The Ramsey County Attorney's Office prosecutes all felony crimes committed in the jurisdiction.

As a result of national discussion of the DNA exoneration cases, the county attorney in March 2001 decided to initiate a systematic postconviction review of cases of all persons convicted in Ramsey County prior to 1995 (when current DNA technology became widely available) to determine if DNA testing could shed new light on the validity of their convictions.[6] Of the 116 cases identified, three, all from the 1980s, were found in which DNA evidence could be outcome-determinative. In only one was the evidence still available. Testing of that evidence resulted in the exoneration of David Sutherlin for a 1985 rape. The primary evidence against Sutherlin was mistaken eyewitness identification.

In the Sutherlin case, the investigator suspected Sutherlin was the rapist based on the victim's physical description of her assailant, which matched Sutherlin's, and the fact that Sutherlin lived close to the location of the crime. His photo was included in a simultaneous photo display, which was shown to the victim by the investigator. The victim said he looked exactly like her assailant. At trial, she could only say, however, that he resembled her attacker. Other evidence presented included that enzymes found on the victim's clothing were consistent with those of Sutherlin as well as 22 percent of the population and that Sutherlin's car had a noisy muffler similar to one heard leaving the scene. The defendant was convicted and sentenced to serve time consecutive to an unrelated double murder.[7]

The 2002 DNA testing of the evidence in the 1985 rape case that exonerated Sutherlin also positively identified the real assailant: it turned out he lived in the same neighborhood as Sutherlin and matched the physical description provided by the victim.[8] Unlike Sutherlin, however, his photo was not on file with the Saint Paul Police Department at the time.[9]

The indisputable evidence of a miscarriage of justice in the Sutherlin case and the failure to retain evidence that would either have confirmed or refuted the validity of two other convictions prompted two reforms in Ramsey County: the development of a countywide evidence retention policy and a reexamination of eyewitness identification procedures.[10]

Review of Practice and Science

The traditional photo identification procedure in Ramsey County, as it has been across the United States, was the simultaneous photo array. The typical photo array contained six photos. It was the usual practice for an investigator with knowledge of the case to show the photo lineup to witnesses.

In the wake of the DNA exonerations, the U.S. Department of Justice's National Institute of Justice (NIJ), under then U.S. attorney general Janet Reno, formed a study group to examine eyewitness identification procedures.[11] The panel reviewed what was then 20 years of scientific research on memory and interview techniques, including scientific evidence supporting blind sequential lineup administration.[12] Its landmark 1999 report began the national law enforcement discussion of lineup reform and made numerous reform recommendations (many of which parallel those in the Mecklenburg article).[13] The panel acknowledged the scientific evidence at that time showing eyewitness identification to be more reliable when photos were shown sequentially and blind procedures were used.[14] However, operating on consensus, the report presented both sequential and simultaneous as acceptable alternative procedures and stopped short of including blind administration in its final recommendations, instead stating that it "may be impractical for some jurisdictions to implement."[15]

The first meta-analysis assessing all laboratory studies comparing the simultaneous and sequential lineup formats came in 2001.[16] It showed that identification errors are significantly more likely (up to three times higher) in a simultaneous format; conversely, the sequential procedure produces fewer misidentifications. The sequential format also produces fewer correct identifications overall. However, the reduction in correct identifications using this method is offset by the much larger reduction of incorrect identifications.[17]

The DNA exonerations, the NIJ report, scientific data, and subsequent open discussion of the science involved in eyewitness identification caused law enforcement jurisdictions throughout the United States to reassess eyewitness identification procedures and whether those procedures contributed to misidentification. New Jersey was the first state to implement statewide blind sequential lineup reform, followed more recently by North Carolina.[18] Ramsey County's review of the NIJ report and the underlying science convinced the jurisdiction that it should attempt to implement the reform, or at least test its feasibility in a law enforcement setting.

Rationale for Change

On reflection, the startling scientific evidence that the traditional law enforcement method of offering photo displays might have inadvertently increased the likelihood of misidentification makes sense objectively for two reasons:

- The risk of administrator influence on lineup results can be essentially eliminated by having someone other than the investigator, who knows the identity of the suspect, conduct the photo lineup, whether the lineup is simultaneous or sequential. (Ramsey County has the utmost confidence in the integrity and professionalism of its investigators but recognizes that even the most well-intentioned investigator who knows which person in the lineup is the suspect cannot eliminate all possibility of unintentionally cueing the witness or responding to the witness's identification or nonidentification of that person.)
- Simultaneous photo display tends to encourage relative judgment; that is, a witness comparing photos side by side can more easily pick the person who looks most like the perpetrator—regardless of whether that person is, in fact, the perpetrator.

The scientific evidence made clear that both components were necessary and that each accomplished a different objective. If a nonblind administrator is used, switching from simultaneous to sequential photo displays alone may even increase misidentification, since there is a danger of inadvertently highlighting an individual suspect photo. On the other hand, while recognizing the necessity of blind administration, the county understood the practical realities of conducting photo lineups under the time pressures and the personnel constraints in a criminal investigation and that, especially in a small department, the investigator with knowledge of the case (a nonblind administrator) might be the only one available. The county therefore set up a practical alternative that still maintained the blind component: If no independent administrator is available, the investigator must use a method that is the functional equivalent (FE)—that is, a method that assures that the investigator does not know and cannot see the order in which the photos are presented and that the witness knows this (and therefore will not be looking to the administrator for cues). This is sometimes called a "blinded" method.

Blind Sequential Lineup Pilot Project

In the spring of 2005, after reviewing the NIJ report and the scientific literature, the county attorney approached the Saint Paul chief of police and Ramsey County Sheriff Bob Fletcher about conducting a pilot project to test the feasibility of employing blind sequential lineups in the field.[19] They agreed. The county attorney developed a new lineup form to facilitate uniformity of application of this protocol change and conducted training of the pilot investigators in April 2005.[20] The training explained the rationale behind both the blind and the sequential components of the protocol.[21] Although using an independent administrator was the preferred method, the training also included the alternative FE (blinded) method. The pilot began May 1, 2005, and lasted one year.

At the outset, some law enforcement personnel were skeptical. Would having an independent administrator conducting the lineups cause unacceptable delays? Would this procedure result in overtime or other administrative complications or costs? Would lineup results be adversely affected because the administrator was not the investigator who had developed a rapport with the witness? Would there be a decline in positive identifications?

After one year, the results were clear: investigators who used this method found it not only workable but no more difficult to apply than the traditional method. There were no associated administrative difficulties or additional overtime costs. However, there was an unexpected benefit: most investigators involved in the pilot came to prefer the new method and felt more confident in the eyewitness identifications that resulted. Notwithstanding laboratory study results,[22] no one felt that appreciably fewer identifications had been made. The fear that independent administrators' lack of rapport with witnesses would adversely affect identifications turned out to be a nonissue. To Ramsey County's surprise, most investigators ended up preferring to use and managed to find an independent administrator; as a result, there was less need, in practice, to use the FE (blinded) option than was anticipated.

Taking the time to have a pilot project and being open to the suggestions of the investigators involved were crucial to winning support for the change. The blind sequential lineup procedure was adopted by all Ramsey County law enforcement agencies in April 2006. Countywide training of all investigators was conducted that month, and the protocol has been used since that time.

Ramsey County Blind Sequential Photo Identification Protocol

A one-page (two-sided) Sequential Photo Display Form was developed specifically for use by all Ramsey County law enforcement officers.[23] It contains all instructions needed in the field to ensure that the basic elements of the new protocol are uniformly applied. On one side are all the instructions for the administrator (whether independent or an FE), a section to be filled out by the administrator during the photo display, and a section to be filled out by the administrator after the photo display. On the other side are the instructions to be read to the witness before the photo display (including alternative language, depending on whether an independent or an FE administrator is used) and a section to be completed by the witness after the photo display. The form is designed to be selfexplanatory, enabling an officer from the street with no knowledge of the case to be called in, if necessary, to be the independent administrator.

In formulating the photo display (typically, six photos), administrators are instructed to use descriptors given by the witness to find fillers. They are instructed to select at least five fillers and, before finalizing the array, to look at them together to make sure the suspect does not stand out.

An independent administrator is to be used whenever possible. Agencies deal with the rapport issue directly. If an investigator has already interviewed and cultivated a relationship with a witness, the investigator explains that department procedures require another officer to show the photos but that the investigator will be available to talk to the witness as soon as the procedure is done. Whenever an independent administrator conducts the procedure, the investigator with knowledge of the suspect's identity must remain out of sight of the witness while the lineup is being conducted.

When no independent administrator is available, the FE method may be used, ensuring first that the investigator in the case with knowledge of the identity of the suspect does not know and cannot see where the suspect is in the order of photos displayed and, second, that the witness knows this. Using the alternate FE language on the Sequential Photo Display Form instructions to the witness, the investigator tells the witness, "I do not know the order of the photos," and instructs the witness not to let the investigator see which photo is being viewed.

Lineup Methods

There are several methods by which the photos may be displayed sequentially. All have in common the fact that the witness sees only one photo at a time and must continue to view all the photos even if a person is identified before all are shown.[24]

The high-tech version of this method would be to use a laptop computer to display and maintain a record of the photos shown. However, no adequate software program was available to Ramsey County in 2005 that adequately addressed technical issues.[25]

The low-tech version can be as simple as numbering the photos and placing each in a separate folder (or, for the FE alternative, having someone else do so for the investigator). The witness can then be instructed to look at the folders one at a time (for the FE alternative, this must be done in such a manner that the investigator cannot see the photos). The remaining folders should be kept out of sight so that the witness does not know how many there will be.

The "box with six doors" method, developed and used in the state of New Jersey since 2001, has been used widely by Ramsey County investigators and is the preferred method for many departments in this jurisdiction. The standard six-person simultaneous photo display sheet is simply inserted in a box built specifically for this purpose. Only one door at a time is opened by the witness. The box is equally adaptable to the FE method since someone else can prepare the six-person lineup sheet and insert it into the box.

Regardless of the method used, a record must be kept of the photos used and the order shown.

Whether an independent administrator or an FE is used, the sequential photo display procedure is the same and includes the following:

- Reading the administrator instructions on the form and completing the case and witness identification information at the top of the form
- Selecting the applicable independent administrator or FE language on the form; reading and checking off the six instructions[26] to the witness and having the witness initial in the spot indicated that she understands the instructions (an alternate simplified instruction form has been developed for use with children, mentally impaired adults, and persons with limited knowledge of English)[27]
- Displaying the photos to the witness one at a time, with only one photo visible at a time, being careful not

to give the witness any feedback during or after the photo display
- Recording any comments the witness makes while examining the photos and any other relevant observations (such as the witness's physical reactions)
- If the witness makes an identification, asking the witness how certain he is of the identification and recording the answer on the form
- Not showing the lineup more than once *unless* the witness requests it; if requested, the entire lineup must be shown, even if the witness requests only one or a few
- Recording the number of times the lineup was shown and what the witness said each time
- At the conclusion of the photo display, having the witness complete the witness section of the form and, if an identification is made, having the witness sign the selected photo
- *Not* giving the witness feedback on the accuracy of any selection, as this can artificially inflate witness confidence in the selection and skew further investigation

The witness section of the form is the record, in the witness's own handwriting, of whether any identification was made and, if so, how certain the witness is of the identification. This portion of the form is to be signed and dated by the witness.

It is critical for administrators to record the number of times a witness is shown the sequence because the scientific evidence strongly supports the conclusion that there is a sharp drop-off in the accuracy of any identification made after two showings.[28]

The completed Sequential Photo Display Form covers all these points and is sufficient to document the procedure; however, some departments require that a general supplementary report be written as well.

Follow-up Interview by Investigator

After an independent administrator has conducted a lineup, the investigator assigned to the case may follow up with a supplemental interview, as needed. This is the time to develop as many additional facts as possible about the details of any identification made, including exploring what it was about the photo (or photos) selected that made the witness pick it, any follow-up on the witness's level of certainty or confidence in the selection, and, in the case of multiple perpetrators, what each individual did.

It is critical that investigators *not* provide any information that could artificially inflate the level of confidence witnesses express in their selections (for example, witnesses must not be told that they did a good job or picked the same person other witnesses picked). If witnesses ask whether they picked the right person, that question should not be answered until investigators have already asked all follow-up questions, if at all. If an investigation is ongoing—and especially if other potential eyewitnesses are yet to be questioned—witnesses may simply be told that the investigation needs to be concluded before that question can be answered. If the person a witness picked is ultimately charged with a crime, the witness will eventually find this out. However, being careful not to reinforce the witness's selection, and documenting this, should eliminate any defense claim that the investigator artificially inflated the witness's level of confidence in his or her selection. If witnesses are concerned for their safety and want to know if the suspect is in custody, that question, of course, may be answered.

Other Implementations of Blind Sequential Lineup Protocols

Ramsey County is not alone in the adoption of this new eyewitness identification protocol. The neighboring jurisdiction, Hennepin County (which contains the city of Minneapolis and suburbs), after a similar pilot in 2004, successfully implemented blind sequential lineups countywide in 2005. Like Ramsey County, officers in Hennepin County may use an alternate "blinded" procedure if an independent administrator is unavailable.[29] In addition to the statewide adoption of this procedure in New Jersey and North Carolina, the Wisconsin Attorney General's Office has formally recommended that this change be adopted statewide,[30] and more than 200 Wisconsin law enforcement agencies, including those in Milwaukee and Madison, have done so to date. Others using this procedure include Denver, Colorado; Suffolk County, Massachusetts (including the Boston Police Department and suburbs); the Northampton, Massachusetts, Police Department; the Westfield, Massachusetts, Police Department; the Chaska, Minnesota, Police Department; the Virginia Beach, Virginia, Police Department; and Santa Clara County, California.[31] In January 2009, the Dallas, Texas, Police Department announced it was withdrawing from the NIJ-sponsored field study mentioned in the Mecklenburg article and was adopting the blind sequential protocol.[32] Seven other Texas jurisdictions had already adopted it. These examples indicate that the protocol can be adapted for large and small agencies in a variety of settings, urban, suburban, small-town, and rural.[33]

Assessment of the Ramsey County Experience

After almost four years of experience with the blind sequential eyewitness identification protocol, Ramsey County investigators and prosecutors report no problems with the change. Notwithstanding laboratory findings that this method may produce a slight drop in correct identifications (as the price for significantly fewer faulty identifications), investigators do not feel that they have lost identifications, and they have increased confidence in the identifications that are made. Use of the form has contributed to uniformity in application of the protocol. Overall, the additional attention paid to this issue has also heightened the county's awareness that no case should be based on eyewitness identification alone and that further investigation is always needed.

Keeping track of the number of times the photos are displayed before an identification is made provides an additional tool for evaluating the reliability of the identification, since it provides a mechanism for assessing whether the witness is "comparison shopping." This alone is an improvement over the simultaneous display procedure, in which comparing photos to find the person most like the perpetrator (regardless of whether it is, in fact, the perpetrator) was always an inherent, but usually unmeasurable, risk.

The change in protocol has not resulted in overtime, delay, or other administrative difficulties. The unexpected bonus of adopting this reform is that, in the courtroom, a major avenue of defense attack on both the admissibility and the reliability of eyewitness identification procedures has been eliminated. Most importantly, however, Ramsey County feels it has taken a significant step in reducing the likelihood of false eyewitness identification.

Conclusion

Ramsey County's change in protocol is not the only model for blind sequential identification reform, nor is it perfect. The county is prepared to make adjustments in the future as scientific knowledge in this area evolves. However, it is confident that this change represents an improvement over prior practice. The Ramsey County experience unequivocally demonstrates that this model can work in a law enforcement setting.

The authors wish to acknowledge the assistance of retired assistant Ramsey County attorney Jeanne Schleh in the writing of this article. Ms. Schleh also designed and implemented the blind sequential training method described herein. ■

Notes:

[1]See Sheri Mecklenburg et al., "Eyewitness Identification: What Chiefs Need to Know Now," *The Police Chief* 75, no. 10 (October 2008): 68–81 (hereafter referred to as the Mecklenburg article).

[2]Ibid., 74–76. These recommendations include standards and training on appropriate interviewing, selecting fillers, instructions to witnesses, memorializing witness verbal and nonverbal reactions in report writing, and raising officer awareness of the potential for influencing the outcome.

[3]This procedure is sometimes also referred to as "double blind" to include the fact that the witness likewise does not know the location of the suspect in the sequence (or even if the suspect is included at all). Since this should be a given in any lineup, this article will simply use the term *blind* to cover both.

[4]Action on this front should not be postponed pending the current NIJ-sponsored field study to which the Mecklenburg article alludes because that study appears to contain the same design flaw that existed in the Illinois study: it is designed to test whether witnesses correctly identify the person the police suspect. However, the crux of the matter in the DNA exoneration cases was that the police did not identify the correct suspect. Unlike laboratory studies, in which scientists can control ground truth (that is, who the real perpetrator is), a field study based on real crime cannot control for a known perpetrator.

[5]U.S. Bureau of the Census, Population Estimates Program, "Minnesota—County," 2006 Population Estimates, http://factfinder.census.gov/servlet/GCTTable?-ds_name=PEP_2006_EST&-mt_name=PEP_2006_EST_GCTT1R_ST2S&-geo_id=04000US27&-format=ST-2&-tree_id=806&-context=gct (accessed February 27, 2009).

[6]Only cases of persons convicted before 1995 who were still imprisoned were reviewed.

[7]While the rape investigation was under way, Sutherlin was arrested on a double murder and was convicted and sentenced for those offenses first, with a consecutive sentence imposed for his ultimate rape conviction. He is still serving time on the murders, but his 2002 exoneration of the rape means he will never serve any prison time for the sex offense. He will also be eligible for earlier release on the murders and, upon release, will not be subject to sex offender registration requirements that would otherwise apply.

[8]He could not be prosecuted due to expiration of the statute of limitations in effect at the time of the crime.

[9]Within a year of the 1985 rape, he did develop an arrest record. By 2002, when the DNA match was made, he had a lengthy record of convictions, although none was sex-related.

[10]This policy, first implemented countywide in 2004, is available on the county attorney's Web site at http://www.co.ramsey.mn.us/attorney/SPDNA.asp.

[11]The interdisciplinary panel of 34 persons included representatives of the criminal justice community (law enforcement agencies, prosecutors, and the defense bar) and social science researchers.

[12]A good summary of scientific recommendations from that time is found in Gary L. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads," *Law and Human Behavior* 22, no. 6 (December 1998): 603–647.

[13]See U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement*, NCJ 178240, October 1999, http://www.ncjrs.org/pdffiles1/nij/178240.pdf (accessed February 26, 2009).

[14]Ibid., 9.

[15]Ibid.

[16]A meta-analysis is a review of existing studies providing a cumulative quantitative summary of outcomes across the studies.

[17]Nancy Steblay et al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentation: A Meta-analytic Comparison," *Law and Human Behavior* 25, no. 5 (October 2001): 459–473. Specifically, it shows an aggregate error rate of 27 percent (incorrect identification of a specific filler photo, the designated innocent suspect) for the simultaneous method compared to a 9 percent error rate using the sequential method. An updated meta-analysis, currently under review, again shows significantly greater risk of mistaken identification for simultaneous lineups and somewhat small correct identification rates for sequential lineups. Steblay presented the preliminary data for this more recent meta-analysis at the John Jay College of Criminal Justice as "2001+6: An Updated Meta-analysis of Eyewitness Lineup Performance under Sequential versus Simultaneous Formats," (paper presented at conference titled "Off the Witness Stand: Using Psychology in the Practice of Justice," New York City, March 1–3, 2007).

[18]See New Jersey's *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, April 2001, http://www.njdcj.org/agguide/photoid.pdf (accessed February 26, 2009); the North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification, October 2003, http://www.ncids.org/New%20Legal%20Resources/Eyewitness%20ID.pdf (accessed February 26, 2009); and that state's subsequent enactment in 2006 of sections 15A-284.50 to 15A-284.53 of the *North Carolina General Statute*, adopting its recommendations.

[19]The terms *lineup* and *photo display* are used interchangeably here. Ramsey County rarely conducts in-person lineups.

[20]Participating in the training were the Saint Paul Police Department's homicide and sex crime investigators and the Ramsey County Sheriff's Department's general investigators, as well as investigators from three smaller suburban departments.

[21]Ramsey County's scientific consultant for the training and development of its Sequential Photo Display Form is Nancy Steblay, professor of psychology at Augsburg College in Minneapolis. She also provided oversight and review of scientific references in this article. Dr. Steblay may be contacted at steblay@augsburg.edu.

[22]See note 17.

[23]The form may be downloaded at http://www.co.ramsey.mn.us/attorney/SPDNA.asp.

[24]Continuing the photo display when the witness identifies a photo before all photos are shown avoids later legal criticism that the lineup was improperly truncated. In the circumstance that a witness makes an early "filler" pick without having seen the suspect's photo, it also allows an answer to the question of what would have happened had the witness seen the suspect's photo (in some cases, a witness might revoke the filler pick). Conversely, the witness may pick the suspect but then discredit this pick when a later photo is shown. Regardless of what happens when the full display is completed, documenting all of these reactions is important and useful information about the witness's memory, the quality of lineup fillers, and the strength of the witness's identification—and ultimately whether the police have the right suspect.

[25]An elegant software program has recently been developed by SunGard OSSI for this purpose. It randomly sorts photos, maintains a record of which version witnesses saw, guides witnesses through a series of questions on each photo by blind administration, preserves an audio recording of all answers (which can be downloaded to a discloseable CD), and generates a written report of results. (See Jerry Farris, "Remote Lineup Application," *The Police Chief* 75, no. 8 (August 2008): 96–98, for a description of its use for blind sequential lineups by the Winston-Salem, North Carolina, Police Department.) A variation of this program is currently used by the Tucson, Arizona, Police Department in a field study comparing simultaneous and sequential lineups. It uses blind administration in either format (which the computer randomly assigns). The study, for which Dr. Steblay is the scientific consultant, will run approximately through October 2009.

[26]These instructions advise witnesses (1) that the person who committed the crime may or may not be included in the photos shown; (2) that the administrator does not know whether the person being investigated is included (or, for an FE, that the administrator does not know the order of the photos); (3) that even if the witness identifies someone during the procedure, all photos will continue to be shown; (4) that a photo may be an old one and that some things, like hair styles, can be changed, and skin colors may look slightly different in photos; (5) that witnesses should not feel compelled to make an identification, since it is just as important to clear innocent persons as it is to identify the guilty and that the investigation will continue whether or not an identification is made; and (6) that witnesses will see only one photo at a time, that the photos are not in any particular order, and that they may take as much time as needed to look at each one. Witnesses are also cautioned to avoid discussing this procedure or the results with any other potential witnesses in the case.

[27]This form may also be downloaded at http://www.co.ramsey.mn.us/attorney/SPDNA.asp.

[28]This effect has been found in both field and laboratory studies. For field tests, see Amy Klobuchar et al., "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," *Cardozo Public Law, Policy, and Ethics Journal* 4, no. 2 (April 2006): 381–414; for laboratory tests, see Nancy Steblay, *Double-Blind Sequential Police Lineup Procedures: Toward an Integrated Laboratory and Field Practice Perspective*, final report to the National Institute of Justice, grant no. 2004-IJ-CX-0044, http://web.augsburg.edu/~steblay/March2007_Final_NIJ_report.pdf (accessed February 26, 2009).

[29]The inference in the Mecklenburg article that the blind component is optional in Hennepin County is incorrect, as is the statement that the Hennepin County sequential protocol called for witnesses to make a choice after seeing all the photos. The county's protocol requires an alternative blinded procedure if an independent administrator is not available. For the complete report on the field study, see Klobuchar et al., "Improving Eyewitness Identifications."

[30]These very comprehensive guidelines may be viewed at http://www.thejusticeproject.org/reports/model-policy-and-procedure/.

[31]Northampton Police Captain Ken Patenaude was one of the law enforcement members on the original NIJ panel and an early proponent of this change. He remains active in police training on this issue. His protocol materials may be viewed at http://www.innocenceproject.org/docs/Northampton_eyewitness.pdf (accessed February 26, 2009).

[32] Jennifer Emily, "Dallas Police Drop Study, Plan Photo-Lineup Changes," *Dallas Morning News*, January 16, 2009, http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/011609dnmetsequentialblind.4311ff6.html (accessed February 27, 2009).

[33] This list does not purport to be comprehensive.

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Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

PERRY *v.* NEW HAMPSHIRE

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Syllabus

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

Affirmed.

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

SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

[January 11, 2012]

JUSTICE GINSBURG delivered the opinion of the Court.

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

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

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

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

I

A

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

at 10a–11a.

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

II

A

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

sarily suggestive identification procedure. The Court adopted a judicial screen for reliability as a course preferable to a *per se* rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct. 432 U. S., at 112–113.[6]

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

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

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

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

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

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

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

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

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

C

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

[January 11, 2012]

JUSTICE THOMAS, concurring.

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

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

SUPREME COURT OF THE UNITED STATES

No. 10–8974

BARION PERRY, PETITIONER *v.* NEW HAMPSHIRE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

[January 11, 2012]

JUSTICE SOTOMAYOR, dissenting.

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

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

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

I

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

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

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

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

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

More generally, our precedents focus not on the act of suggestion, but on suggestion's "corrupting effect" on

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

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

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

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

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

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

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

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

II

A

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

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

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

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

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

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

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

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

B

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

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

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

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

stances do not stem from improper police arrangement.

C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that eyewitness recollections are highly susceptible to distortion by postevent information or social cues;[7] that jurors routinely overestimate the accuracy of eyewitness identifications;[8] that jurors place the greatest weight on eyewitness confidence in assessing identifications[9] even though confidence is a poor gauge of accuracy;[10] and that suggestiveness can stem from sources beyond police-orchestrated procedures.[11] The majority today nevertheless adopts an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened.

III

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

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felony convictions overturned on DNA evidence involved eyewitness misidentification).

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

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

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

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

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

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

* * *

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