CHAPTER 5
Ensuring Reliable Eyewitness Testimony

In 1986, Frank Lee Smith was sentenced to death for the rape and murder of an 8-year-old girl in Broward County, Florida. He was convicted on the testimony of three eyewitnesses – the victim's mother and two neighbors – who had caught only brief glimpses of the killer at night. They described the killer as a black man, about 30 years old, six feet tall with a dark complexion. Based on the eyewitnesses' recollections, police identified Smith as a potential suspect and arrested him. No physical evidence linked him to the crime.

More than a decade after his conviction, one of the neighbors recanted her testimony, after defense investigators showed her a picture of Eddie Lee Mosley, a serial rapist-murderer who lived in the same area at the time of the murder. The witness stated that Mosely was the man she saw and admitted that at the time of the original trial she had been uncertain about her identification of Smith, but felt pressure from friends and police to identify him. Based on the witness's identification of Mosley as the perpetrator, Smith's attorneys sought DNA testing to compare Smith's DNA to semen found on the victim. The DNA test cleared Smith and confirmed that Mosley was the true perpetrator.

Unfortunately, Smith died of pancreatic cancer before the DNA test was allowed. Eleven months after his death, in December 2000, Smith became the first death row prisoner in history to be posthumously exonerated by DNA.

Recommendation 14. State and federal jurisdictions should adopt legislation to require that eyewitness identifications be conducted in accordance with best practice techniques called for by prevailing scientific research. Further, jurisdictions should support research that will result in the continuing development of best practices in identification techniques.

Concerns about the reliability of eyewitness testimony in criminal trials have become more prevalent in the past twenty years. Numerous commentators have identified factors that influence the reliability of eyewitness testimony and catalogued wrongful convictions based on false identifications in state and federal criminal cases. The effects of unreliable eyewitness testimony are particularly devastating in capital cases because the stakes are so high.

Since 1973, 144 people in 26 states have been released from death row based on evidence of their innocence.[1] Some of the exonerees were wrongly convicted, at least in part, on the basis of flawed eyewitness testimony. Kirk Bloodsworth, for example, was convicted and sentenced to death based, in part, on false eyewitness testimony.[2] DNA evidence exonerated him in 1993, after he spent almost nine years in prison, two of them on death row.[3] According to the Innocence Project, eyewitness misidentification testimony is the leading cause of wrongful convictions, playing a factor in 72 percent of post-conviction DNA exoneration cases.[4] Many critics argue that the true number must be greater because in a large percentage of cases, biological evidence was never available for DNA testing, or has since deteriorated, been lost, or been destroyed.[5]

Inaccurate eyewitness identifications can steer police to focus their investigation on the wrong suspect, wasting precious time and resources. This can lead to the aging of evidence and allows the true perpetrator to evade police detection.[6] In a 2009 report, the Innocence Project

---

[1] Death Penalty Information Center, The Innocence List, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

[2] The National Registry of Exonerations, Kirk Bloodsworth, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3032.

[3] *Id.*

[4] *See* The Innocence Project, DNA Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.

[5] *See* Gary L. Wells & Dean S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 2 (2009). The Innocence Project reports that a review of its closed cases from 2004-2010 revealed that 22 percent of cases were closed because of lost or destroyed evidence. *See* DNA Exonerations Nationwide, *supra* note 4; *cf.* Innocence Project, Non-DNA Exonerations, http://www.innocenceproject.org/know/non-dna-exonerations.php (reporting that DNA testing is available in only five to ten percent of all criminal cases).

[6] Particularly alarming in this regard are the results of field experiments showing that where the true perpetrator was not in a lineup, eyewitnesses identified as the suspect an innocent lineup participant more

found that in at least 48 percent of the misidentification cases where the actual perpetrator was later identified through DNA evidence, the perpetrator went on to commit violent crimes while the innocent person was in prison.[7]

Certainly, human memory is flawed, and perception can be imperfect. Limitations of human memory to accurately recall details, either immediately after viewing a crime or later, may compromise a crime victim's or witness's identification of the perpetrator. Influences inherent to being a victim of or witness to a crime, such as the stress of the crime itself and of being subjected to questioning from law enforcement, can naturally affect the accuracy of the identification. Stress is heightened in situations involving a violent crime in which force or a weapon is used or where a victim dies; in other words, precisely the types of crimes that can lead to a capital charge.[8] In addition, external factors, such as the conditions under which police conduct a lineup or showup, can compromise the accuracy of an eyewitness' identification. For example, combined with a suggestively-formed lineup, suggestive instructions and an administrator who is predisposed to a particular suspect, imperfect memory can easily result in a false identification. Researchers have identified a variety of factors that may affect the accuracy of eyewitness identification in police lineups, including: the type of lineup conducted (i.e., whether it is a lineup of people or photographs, and whether it is simultaneous so all people or photos are shown at once or sequential so that they are shown consecutively); instructions given to the witness; the number and physical characteristics of fillers; whether the administrator is aware of who the suspect is in the lineup; and similarities or differences between the witness's and the suspect's age, race or ethnicity.[9]

Limitations of human memory to accurately recall details, either immediately after viewing a crime or later, may compromise a crime victim's or witness's identification of the perpetrator.

---

than one-third of the time. *See* Carol Krafka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 58 (1985).

7 *See* The Innocence Project, Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification 4 (2009), at http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf ("Reevaluating Lineups").

8 *See* Wells & Quinlivan, *supra* note 5, at 11.

9 *See* Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ J. No. 258 (Oct. 2007); G.L. Wells & C.E. Luus, *Police Lineups as Experiments: Social Methodology as a Framework for Properly Conducted Lineups*, Personality and Soc. Psychol. Bull. 16 (1990).

For a defendant who is not the true perpetrator, an eyewitness identification is especially problematic, because such first-hand testimony is typically very persuasive to a jury. As a result, faulty or suggestive procedures that are not calculated to ensure accurate eyewitness identifications necessarily implicate a defendant's due process rights. Furthermore, a later-administered fair procedure cannot remedy an earlier, unfairly suggestive procedure. Accordingly, in order to obtain the most accurate eyewitness testimony, law enforcement must conduct the initial identification process with integrity.

At the most basic level, jurisdictions must adopt lineup procedures that are reasonably calculated to lead to accurate identification of suspects. Currently, there is no uniform national standard for identification procedures. Federal, state, and local procedures vary widely. In fact, many police departments have no written procedures, leading to potential inconsistency within these departments.[10] A 2007 study by the Georgia Innocence Project found that 82 percent of law enforcement agencies in that state had no policies for eyewitness identification procedures.[11]

Psychological and socio-legal research regarding best practices for eyewitness identification by police lineup in criminal cases has produced a series of generally accepted best practices, including:

Double-blind administration. A neutral administrator who does not know the identity of the suspect should administer photographic or in-person lineups. These "double-blind" lineups, where neither the administrator nor the eyewitness knows the suspect, eliminate the risk of intentionally or unintentionally signaling to the witness. Research has shown that even nonverbal and inadvertent hints from the administrator can have an effect on selection.[12] A U.S. Department of Justice report noted that these cues can result from the rapport that develops between investigator and eyewitness, empathy for a victim, or the eyewitness seeking guidance or affirmation from the investigator.[13] Any of these can lead to false identification.

---

[10] In some jurisdiction, law enforcement officer may not even receive formal training in lineup practices. *See* Reevaluating Lineups, *supra* note 7, at 22. A 2007 study by the Georgia Innocence Project found that 82 percent of law enforcement agencies had no policies for eyewitness identification procedures. *See* Georgia Innocence Project, 2007 Georgia Innocence Project Law Enforcement Survey, at http://www.ga-innocenceproject.org/images/Eyewitness%20ID%20Report%202007.pdf.

[11] *See* Reevaluating Lineups, *supra* note 7, at 24 (citing 2007 Georgia Innocence Project Law Enforcement Survey, *supra* note 10).

[12] *See* Stanley Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions 39-82 (2003); Barry Scheck et al., Actual Innocence: When Justice Goes Wrong and How to Make it Right 53-100 (2001); *see also* Reevaluating Lineups, *supra* note 7, at 18 (explaining that blind administration is based on the basic tenet of scientific research that test subjects are influenced by the expectations of those who perform the tests, and providing practical suggestions for police departments where there are limitations to obtaining an independent officer to act as a blind administrator).

[13] Nat'l Inst. of Just., U.S. Dept. of Just., Eyewitness Evidence: A Guide for Law Enforcement 11-12 (1999) ("Eyewitness Evidence").

Assurances given after an eyewitness has made an identification – with comments like "good, that's who we thought it was" or "yes, that's the guy" – can affect later stages in the process, including later self-reports of identification confidence and in-court testimony.[14] Adopting a double-blind procedure for administering lineups removes the risk that the administrator will taint the witness's identification.

Fillers with similar characteristics to the suspect. The composition of the lineup is as important as the procedures used to conduct the lineup. Among the suggestive lineups that have resulted in actual wrongful convictions are "a photo array in which the suspect's photo was the only one in color, a photo array in which the suspect and only one other man were shirtless (and the perpetrator had been described as shirtless), and a physical lineup in which the suspect was the only one wearing an orange prison jumpsuit."[15] Although these are extreme examples, they demonstrate the impact a poorly designed lineup can have on a witness's ability to properly identify a perpetrator.

Researchers conclude that to counterbalance the effect of eyewitness guessing, police departments should implement lineup procedures that include at least five people, in addition to the suspect, in the lineup.[16] These five fillers, who are known to be innocent of the crime in question, should have characteristics similar to the eyewitness's description of the perpetrator. As would be expected, research shows that if only one person in the lineup has those characteristics, the witness is much more likely to identify that person, based on likeness alone. In those instances where a witness's description of the perpetrator varies from the police's identified suspect, the characteristics of fillers should fit the perpetrator's description, and fillers should not be selected because they look like the suspect.[17] In this way, witnesses will be more likely to select a person from the lineup based on their memory, rather than on a comparative analysis. Care should be taken to ensure that fillers are presented in a reasonably similar manner to the suspect in terms of stance, clothing, significant features in common with the perpetrator, and any other characteristics that would otherwise isolate the suspect and make the witness more likely to select him or her.

---

[14] *See* Gary L. Wells et al., *Eyewitness Identification Procedures*, 22 Law & Hum. Behav. 1, 22 (1998).

[15] Reevaluating Lineups, *supra* note 7, at 10.

[16] *See ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (Aug. 2004), at 12 ("*ABA Statement of Best Practices*"), at http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAEyewitnessIDrecommendations.pdf.

[17] *See id.*; Wells et al., *supra* note 14, at 23-27; *see also* Steven D. Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 Crim. Just. Magazine 37, 37-45 (2003). Researchers have found that using fillers who do not fit the eyewitness's description of the perpetrator dramatically increases the chances that an innocent suspect who fits the description will be selected in a lineup. Wells & Quinlivan, *supra* note 5, at 7 (citing studies).

Police should also not provide biographical information about the lineup participants to the eyewitness. Fillers should not be re-used for lineups for additional suspects to be viewed by the same eyewitness, and if there are multiple witnesses, the suspect should be placed in a different position in each lineup.[18]

Instructions that perpetrator may or may not be in lineup. It is critical to the reliable administration of a lineup that eyewitnesses be instructed that the perpetrator may not be in the lineup and that they are not required to identify anyone in the lineup – in other words, an eyewitness can pick "none of the above."[19] Research reveals that mistaken identifications from lineups where the perpetrator is not present are significantly higher when the witness is not given this pre-lineup instruction.[20] Conversely, the incidence of false identifications goes down when the instruction is given.[21] Called "instruction bias," the eyewitness's failure to understand the true purpose of a police lineup – to exculpate the innocent as well as to identify the actual perpetrator – can lead to a false identification through the witness's selection of the closest match to the perpetrator, rather than selection of an individual who the witness believes *is* the perpetrator.[22] This effect may result as well from multiple presentations of a suspect, which can similarly suggest to the eyewitness which person to identify, whether or not the eyewitness is confident that the suspect is the perpetrator.

...the eyewitness's failure to understand the true purpose of a police lineup – to exculpate the innocent as well as to identify the actual perpetrator – can lead to a false identification

Eyewitness assertion of confidence. After a lineup identification and prior to providing any feedback, the administrator should obtain from the eyewitness a statement of his or her

---

[18] Reevaluating Lineups, *supra* note 7, at 18.

[19] *See* Penrod, *supra* note 17, at 45; *see also* Eyewitness Evidence, *supra* note 13, at 31-32.

[20] *See* Brian L. Cutler, Eyewitness Testimony: Challenging Your Opponent's Witness 34 (May 2002). In one study where the eyewitness was not instructed that the perpetrator may not be present in the lineup, 78 percent of the eyewitnesses falsely identified a suspect. Eyewitnesses falsely identified a suspect only 33 percent of the time when the eyewitnesses were instructed in advance of the lineup that the perpetrator may not be present. Wells et al., *supra* note 14, at 11.

[21] Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, Law & Hum. Behav. 21, 283-97 (1997).

[22] *See* Wells et al., *supra* note 14, at 23 (finding from empirical data that an explicit warning that the culprit might not be in the lineup or photospread reduces the rate of incorrect identifications in culprit-absent lineups, but does not cause an appreciable reduction of accurate identifications in culprit-present lineups).

level of confidence.[23] Researchers have determined that the confidence that an eyewitness expresses in his or her identification testimony is the most powerful determiner of whether the jury will give credence to the eyewitness's identification.[24] Events following the identification that have nothing to do with the witness's memory, such as assuring statements or repeated post-lineup questioning, can have an effect on an eyewitness' confidence in his or her lineup identification.[25] Accordingly, immediately after a witness makes an identification, before any outside influences may affect the witness, law enforcement should take a statement regarding the witness's confidence in the identification.

No feedback regarding selection of perpetrator. Due to the impact that assurances from law enforcement officers can have on witnesses, police departments should implement procedures that shield eyewitnesses from feedback regarding whether they selected the suspect. Where double-blind administration of a lineup is not logistically possible or where other law enforcement officers who know the location of the suspect in the lineup are in contact with the eyewitness, it is important that law enforcement have clearly established guidelines to follow to prevent intentional and inadvertent feedback. Additionally, no writings, information or comments regarding any previous arrest, indictment or conviction of the suspect, or any information connecting the suspect with the offense, should be visible or made known to the witness.

Record lineup procedures and process. Although video recording is the most accurate and complete form of recording, audio recording can be employed as well to record the identification procedure. Chapter 4, discusses at greater length the benefits of video and audiotaping. Where neither recording mechanism is available, the lineup administrator should create a detailed written record of the identification process, including, but not limited to, any failure to follow established procedures, and the reason for such failures.[26] Creating a record of the lineup process as it was used to identify the suspect protects the constitutional rights of the defendant by making it more likely that the appropriate procedures will be followed, providing a deterrent against the use of improper techniques and providing documentation to support challenges when police fail to follow proper techniques. From the perspective of the prosecution, documentation of the process and its outcome improves

---

[23] *See* Reevaluating Lineups, *supra* note 7, at 20.

[24] *See* Wells et al., *supra* note 14, at 15.

[25] *See ABA Statement of Best Practices*, *supra* note 16, at 13; Penrod, *supra* note 17, at 46; Cutler, *supra* note 20, at 24-25.

[26] In *State v. Delgado*, 188 N.J. 48 (2006), the New Jersey Supreme Court exercised its rulemaking authority "to require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." *Id.* at 63. In February 2012, the court referred the matter to the Criminal Practice Committee for the drafting of a proposed rule.

the strength and credibility of the eyewitness identification and can be significant for the investigation and any subsequent court proceedings.[27] Eyewitness identifications following these procedures are more reliable and more likely to stand up in court and on appeal.

Sequential vs. simultaneous presentation. There is debate about the best way to conduct identification lineups – either with sequential or simultaneous presentation of the lineup participants. In sequential lineups, there are different methods, but all have in common that the witness sees one lineup participant at a time and must continue to view all participants even if a suspect is identified before all are shown. In a simultaneous lineup, all participants are shown at the same time. Sequential lineup procedures have been developed in response to research that demonstrates that in simultaneous lineups eyewitnesses are more likely to engage in relative judgment, and to identify the individual who looks *most like* the perpetrator, rather than the individual who the eyewitness believes *is* the perpetrator.[28] Psychology experts assert that eyewitnesses are more likely to identify the guilty suspect if the lineup is sequential, and that there is a greater likelihood of misidentification if the perpetrator is not present in a simultaneous lineup than in a sequential lineup.[29]

Researchers have concluded that the procedures outlined above, used together, can reduce the number of mistaken identifications by half.[30] Moreover, there is little to no cost associated with these reforms.[31] For law enforcement, adopting the recommended identification

[27] Eyewitness Evidence, *supra* note 13, at 20, 38.

[28] *See* Jeanne Schleh, The Why and How of Blind Sequential Lineup Reform 3 (2009), at http://www.co.ramsey.mn.us/NR/rdonlyres/CFFF14C4-0F44-4BD9-9995-0186E9C17085/18041/TheHowandWhyofBlindSequentialLineupReform.pdf; Reevaluating Lineups, *supra* note 7, at 21; *ABA Statement of Best Practices*, *supra* note 16, at 10; Michael J. Saks et al., *Model Prevention and Remedy of Erroneous Convictions Act*, 22 Ariz. St. L.J. 665 (2001); Wells et al., *supra* note 14, at 10-13, 31.

[29] *See* Schleh, *supra* note 28, at 2. There are certain requirements for administering a sequential lineup that are particular to that format. It is critical in a sequential lineup to have a double-blind administrator. Research has shown that where they are not administered blindly, sequential lineups can actually decrease the likelihood of a correct identification. Moreover, in a sequential lineup, it is important that, even if the witness picks someone from the lineup, the administrator shows the remainder of the lineup participants to the witness. *See* Eyewitness Evidence, *supra* note 13, at 36-37.

[30] Schleh, *supra* note 28, at 2. These findings about identification lineups are in sharp contrast to the conclusions regarding showups, where the eyewitness is shown only a single suspect and asked if that is the perpetrator who they recall. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme Court found that showups are inherently suggestive because they suggest which person to pick, but held that they may not be so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant will be denied due process. Still, experiments have shown that rates of positive identification are actually lower for showups than for lineups. *See* Nancy Steblay, et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison,* 75 Law & Hum. Behav. 523, 530 (2003). Thus, there is reason to conclude that showups are ineffective as well as unfairly suggestive.

[31] For smaller law enforcement offices or departments, it may be easier to have a single lineup administrator so as not to distract from other responsibilities and to ensure timeliness of lineups. Alternatively, departments without a blind lineup administrator can implement a folder shuffle system with photographs, designed to conceal from the administrator which lineup participant a witness is viewing at any given time.

procedures increases the reliability of identifications, helping them to apprehend the actual perpetrator and present witness testimony that is more likely to stand up in court and on appeal. It is easier for law enforcement agents to explain the procedure, to testify they followed the procedure and to convince the jury that the identification was reliable. Plus, the procedures further the goal of doing justice and getting accurate perpetrator identifications, not just convictions.

Discussion of identification procedures and the ways in which traditional procedures have failed has generated considerable reforms, but many of these reforms are achieved through changes to internal procedures and there is no penalty and no redress for defendants when the procedures are not followed. The Department of Justice, through the National Institute of Justice ("NIJ"), developed a lineup protocol in 1999.[32] As a premise for its recommendations, NIJ stated that 75,000 people are charged criminally each year based on mistaken identification.[33] The reforms have the backing of the American Bar Association, but the procedures set forth in the NIJ report are not mandatory, and they only apply to federal, not state, law enforcement agencies.

While federal, state and local jurisdictions have adopted a range of procedural reforms,[34] there is no effective means for enforcing these procedures or deterring conduct that may taint an

32 *See* Eyewitness Evidence, *supra* note 13; *see also* Int'l Ass'n of Chiefs of Police, Training Key on Eyewitness Identification (2006), at http://www.ripd.org/Documents/APPENDIX/2/Supporting%20Materials/IP%20113%20IACP%202006.pdf; *see also* Int'l Ass'n of Chiefs of Police, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 18 (Aug. 2013) (joint summit between the International Association of Chiefs of Police and the Department of Justice Office of Justice Programs recommending best practices for eyewitness identification protocols consistent with the Committee's recommendations).

33 *See* Eyewitness Evidence, *supra* note 13.

34 The New Jersey Attorney General's office was the first to adopt these recommendations in 2001. In addition, the New Jersey Supreme Court relied on the new commonly accepted best practices in determining whether there is evidence of unreliable identification arising out of the system. *See State v. Henderson*, 27 A.3d 872 (N.J. 2011). North Carolina has adopted the most comprehensive reforms: blind-sequential procedure, proper filler selection, comprehensive witness instructions, confidence statements, training of law enforcement officers, and legal remedies in cases where law enforcement agency failed to comply with the policies. N.C. Gen Stat. Ann. § 15A-284.50 *et seq*. (2007). Other full or partial reforms have been implemented by the Wisconsin Department of Justice; Dallas, Texas; Boston and Northampton, Massachusetts; Hennepin County, Ramsey County and Minneapolis-St. Paul, Minnesota; Santa Clara County, California; Virginia Beach, Virginia; Denver, Colorado and Connecticut. *See* Innocence Project, Eyewitness Identification, http://www.innocenceproject.org/fix/Eyewitness-Identification.php. Maryland has mandated that all of its law enforcement agencies adopt written policies for eyewitness identification practices that are in compliance with NIJ standards. Md. Code Ann., Pub. Safety § 3-506 (LexisNexis 2011). Studies have been done in Connecticut, Illinois, Rhode Island, Virginia, West Virginia and Vermont. *See* Police Executive Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies 26 (2013). California, Kentucky and New Mexico have considered proposed legislation reforming and unifying their eyewitness identification, although the legislation has not yet passed. *See* Reevaluating Lineups, *supra* note 7, at 25.

eyewitness's identification of a suspect. In theory, identification evidence may be excluded from trial as a violation of the defendant's due process rights if it is acquired through unnecessarily suggestive procedures and there is a substantial likelihood of irreparable mistake; however, as a practical matter, courts frequently admit eyewitness identifications even if they resulted from highly suggestive procedures. Recommendation 15 discusses this in greater detail. Thus, the judicial process does not adequately deter suggestive procedures, and there is no legal compulsion for jurisdictions to adopt best practices. The Committee recommends that jurisdictions adopt mandatory procedures that implement best practice techniques called for by prevailing scientific research for conducting identification lineups. Further, jurisdictions should support research that will result in the continuing development of best practices in identification techniques.[35]

as a practical matter, courts frequently admit eyewitness identifications even if they resulted from even highly suggestive procedures.

Recommendation 15. Courts should suppress unreliable eyewitness identifications. The admissibility determination should be made based on objective criteria, not subjective self-reporting by the witness of his or her likelihood of accuracy at the time of the identification.

Since the U.S. Supreme Court's rulings in *Neil v. Biggers*[36] and *Manson v. Brathwaite*[37] more than 30 years ago, the test for reliable and admissible eyewitness identification testimony has not changed. In *Manson*, the Court held that suspect identifications that (1) result from unnecessarily suggestive procedures and (2) result in a substantial likelihood of irreparable mistaken identification in violation of the defendant's due process rights are inadmissible at trial. *Manson* was a showup case, rather than a lineup case, but its test has been applied consistently to lineup identifications as well. Under the *Manson* test, if the court does not find unnecessarily suggestive procedures were utilized, then the court will not conduct the reliability analysis. Where the court finds that unnecessarily suggestive lineup procedures were used, the court will undertake the reliability analysis. In *Biggers*, the Supreme Court established the factors for determining the reliability of eyewitness testimony: (1) opportunity to view, (2) attention, (3) description, (4) time to identification and (5) certainty.[38]

[35] The Innocence Project has proposed model legislation for jurisdictions to create a task force to recommend procedures and practices to improve the accuracy of eyewitness identifications. Reevaluating Lineups, *supra* note 7, at Appendix B.

[36] 409 U.S. 188 (1972).

[37] 432 U.S. 98 (1977).

[38] *Biggers*, 409 U.S. at 199.

In *Perry v. New Hampshire* (2012),[39] the Court affirmed *Manson*'s test for reliable and admissible eyewitness identification testimony. However, as critics have argued, in a majority of cases, courts rule that even highly suggestive procedures are outweighed by the reliability prong of the test, and permit the evidence go to the jury. Significantly, three of the considered factors – view, attention and certainty – are based on subjective self-reports. A reliability determination based on subjective self-reporting is most likely to result in the identification being admitted into evidence.[40] In addition, there may be relevant circumstances that make the identification unreliable that are related to the events in question or the witness and that, under the *Manson* test, would not be considered without a court's determination that the identification procedures themselves were unfairly suggestive. Once the evidence goes to the jury, these issues still are not adequately addressed because cross-examination and expert testimony often is not permitted. The current predominant legal framework does not deter police from using suggestive identification procedures because the evidence usually is admitted nonetheless.[41]

Some states have refined or rejected the *Manson* test in favor of a stricter standard. In *State v. Henderson*,[42] the New Jersey Supreme Court noted that since *Manson*, "a vast body of scientific research about human memory has emerged" which "casts doubt on some commonly held views relating to memory" and "calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications."[43] The court found:

> … that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.[44]

In *Henderson*, the court adopted a burden-shifting approach. Under that test, the defendant must make an initial showing of some evidence of suggestiveness in what it called a "system variable" that could lead to a mistaken identification. A system variable is a factor that is within the control of the criminal justice system, namely, the identification procedures themselves. System variables are juxtaposed with so-called "estimator variables," which are factors like lighting conditions at the time of the crime or the presence of a weapon, over which the criminal justice system has no control. Once the defendant makes the required

[39] 132 S. Ct. 716 (2012).

[40] *See* Wells & Quinlivan, *supra* note 5.

[41] *See id.* at 21 (arguing that *Manson* is ineffective because its deterrent effect is largely absent).

[42] 27 A.3d 872 (N.J. 2011). See also *State v. Chen*, 25 A.3d 256 (2011), a companion case.

[43] *Henderson*, 27 A.3d at 877.

[44] *Id.* at 872.

initial showing, the state must offer proof to show the eyewitness identification is reliable – accounting for both system and estimator variables.[45] An identification will be suppressed if, based on the totality of the circumstances, the defendant has demonstrated a very substantial likelihood of irreparable misidentification. On the other hand, a New Jersey trial court can end the inquiry at any time if it determines that the defendant's initial claim is groundless.

Other states have similarly altered the *Manson* test. New York and Massachusetts require automatic suppression of unnecessarily suggestive procedures.[46] Wisconsin courts suppress showups unless they were necessary under the circumstances.[47] Connecticut mandates a jury instruction if police failed to give a pre-lineup instruction to the eyewitness that the perpetrator "might or might not be present" in the lineup.[48] Georgia precludes trial courts from instructing jurors to consider the eyewitness's confidence when evaluating the witness's testimony.[49] Kansas and Utah have refined and added factors to the *Manson* test.[50] Another, more exacting standard that commentators have suggested but no jurisdiction has adopted is one in which the prosecution has "to make the case that the identification was reliable regardless of whether a suggestive procedure was necessary or unnecessary."[51]

Under any approach, successful alternatives to *Manson* must do two things: (1) deter suggestive procedures by creating a meaningful risk of suppression, appropriate jury instruction or other cost to the government where suggestive procedures are used; and (2) establish criteria for determining the admissibility of a suggestive identification taking into

---

45 The New Jersey Supreme Court directed the Supreme Court Committee on Model Criminal Jury Charges to consider a revision to the identification model criminal jury instructions, in response to the court's ruling in *Henderson*. *See* Supreme Court Committee on Criminal Practice, Report of the Supreme Court Criminal Practice Committee on Revisions to the Court Rules Addressing Recording Requirements for Out-Of-Court Identification Procedures and Addressing the Identification Model Charges (Feb. 2, 2012), at http://www.judiciary.state.nj.us/criminal/CPCREPORTHENDERSONDELGADOREPORT.pdf; Supreme Court Committee on Model Criminal Jury Charges, Report of the Supreme Court Committee on Model Criminal Jury Charges on the Revisions to the Identification Model Charges (Jan. 9, 2012), at http://www.judiciary.state.nj.us/criminal/ModelCrimJuryChargeCommHENDERSONREPORT.pdf.

46 *See Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (NY 1981).

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

48 *See State v. Ledbetter*, 881 A.2d 290 (Ct. 2005).

49 *See Brodes v. State*, 614 S.E.2d 766 (Ga. 2005).

50 The case of *State v. Ramirez*, 817 P.2d 774 (Utah 1991), altered the *Manson* analysis by changing the third factor so that the court evaluates the witness' capacity to observe the event, including his or her physical and mental acuity. *Ramirez* also added two factors: 1) whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion, and consideration of the nature of the event being observed and 2) the likelihood that the witness would perceive, remember, and relate it correctly; *see also State v. Hunt*, 69 P.3d 571 (Ks. 2003).

51 Wells & Quinlivan, *supra* note 5, at 20.

account that self-reports of the witness's opportunity to view, attention to detail, etc., are not a good indicator of reliability. A court should make the admissibility determination based on objective criteria, not subjective self-reporting by the witness regarding the accuracy of his or her identification at the time of the lineup. Rather than relying on subjective self-reports, police should be encouraged to collect statements from witnesses regarding their viewing conditions and attention prior to a lineup. Prosecutors can then use these statements to support a reliability claim even if there is a later suggestive procedure.

A court should make the admissibility determination based on objective criteria, not subjective self-reporting by the witness regarding the accuracy of his or her identification at the time of the lineup.

Recommendation 16. When courts admit eyewitness identification testimony, jurors should be given specific instructions that identify the factors that may influence reliability.

If a court admits eyewitness identification testimony, it should instruct the jury on the various factors – both objective and subjective – that have been shown to enhance or detract eyewitness reliability. Enhanced jury instructions would help jurors evaluate eyewitness identification evidence introduced at trial. Jury instructions should identify particular factors that are relevant to the case and direct jurors to consider those factors in making decisions regarding the reliability of eyewitness identification testimony. Instructions also should direct jurors to consider whether the witness had an adequate opportunity to observe the suspect, including the length of time to observe, visibility, distance, number of times observed, length of time between observance and identification, and other relevant factors.[52] Threshold requirements for such jury instructions – for example, that there be no corroborating independent evidence or demonstrations that the characteristics would not be fully understood by the jury without the jury instructions – impose additional burdens on the defendant that serve no legitimate purpose.[53] Instead, where there is evidence in the

---

[52] *See* Kevin F. O'Malley et al., Federal Jury Practice and Instructions: Criminal §§ 14.10, 14.11 (5th ed. 2000) (setting forth *Telfaire* instruction); Edie Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. Applied Soc. Psychol. 252 (1988) (reporting findings from jury simulation studies designed to examine the effect that instructions have on jurors' decisions in cases in which identification testimony is central).

[53] *State v. Wright*, 206 P.3d 856 (Idaho Ct. App. 2009) (adopting detailed instruction for cases in which eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by independent evidence and the defendant offers expert testimony on psychological factors

case that implicates an estimator variable, the court should give a jury instruction identifying that variable and requiring jurors to consider it in making their reliability determination. Similarly, with respect to system variables, judges should instruct the jury in cases where there is a suggestive identification procedure that such procedures lessen the reliability of the identification testimony and can be considered in assessing the reliability of the testimony.

The ABA has advocated for greater use of jury instructions, as well as expert testimony (see Recommendation 17), in criminal cases where identity is a central issue in the case.[54] The ABA further recommends that the court give a specific instruction "tailored to the needs of the individual case" explaining the accuracy factors to be considered.[55] For example, research has demonstrated a cross-racial effect, or own-race identification bias, in criminal cases. This effect describes the tendency of eyewitnesses of one race to better recognize faces – and, therefore, suspects – of their own race or ethnic group than faces of another race or ethnic group.[56] In recognition of this effect, the ABA has recommended (1) permitting experts on witness identification and (2) providing jury instructions explaining identification accuracy factors and whether they have been shown to enhance or detract eyewitness identification reliability.[57]

Jury instructions, in that they come from judges, are an authoritative, reliable source in courtrooms. In general, juries consider the directions of judges more credible than the arguments of lawyers for the parties, battling experts or witnesses aligned with one of the parties. Jurors are more likely to discuss the effects of system and estimator variables when the judge includes those issues in his or her instructions to the jury, both drawing their attention to the variables and sensitizing them to their significance.

---

shown to have potentially affected the accuracy of the identification but not fully known or understood by the jury); *see also State v. Cromedy*, 727 A.2d 457 (N.J. 1999) (finding that jury instruction addressing cross-racial identification is appropriate when the evidence is not corroborated by other evidence giving it independent reliability).

[54] *American Bar Association Criminal Justice Section, Report to the House of Delegates* (Aug. 2004) ("*ABA Report*"), at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am04111c.authcheckdam.doc; *see generally ABA Statement of Best Practices*, *supra* note 16.

[55] *ABA Report*, *supra* note 54, at Rec. 2.

[56] *See* Gary L. Wells and Elizabeth A. Olson, *Eyewitness Testimony*, Ann. Rev. of Psychol. 54, 280 (2003); *see also* Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ J. 258 (2007); Christian A. Meissner and John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory of Faces*, Psychol., Pub. Pol'y & L. 7, 270-75 (2001). The Innocence Project reported that 53 percent of misidentification cases in which race is known involve cross-racial misidentification. Cross-racial misidentifications in DNA exoneration cases involved an African-American or Latino defendant 99 percent of the time, and a Caucasian defendant only one percent of the time. Reevaluating Lineups, *supra* note 7, at 8. The significance of race in capital cases is discussed more fully in Chapter 10, *infra*.

[57] *American Bar Association Criminal Justice Section, Report to House of Delegates*, (Aug. 2008), at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104d.authcheckdam.pdf; *see* David E. Aaronson and B. J. Tennery, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 Crim. Just. 4 (2008).

Recommendation 17. To give further context to the jury instructions, courts should admit expert trial testimony explaining prevailing research trends relating to the objective reliability of identification procedures and the factors that affect subjective identification reliability.

Estimator variables, or event-related factors, may not be properly addressed on cross-examination. Cross-examination is well-suited to help jurors determine the credibility of witnesses who are intentionally deceptive versus those who are truthful. However, cross-examination is ineffective – some would say virtually useless – for detecting witnesses who are trying to be truthful but are genuinely mistaken.[58] For this reason, experts are appropriately called upon to explain to the jury what scientific research shows about the impact of event-related factors on eyewitness identifications. Concerning system variables, under current law, it is the province of the court to determine whether they are likely to result in a false identification and violate the defendant's due process rights. However, even where system procedures are not so unfair that they violate the defendant's due process rights, they may have an impact on the reliability of the resulting identification. Expert testimony on both system and estimator variables is essential to fully educate jurors about these variables and their potential impact on identification reliability.

The human mind is inherently fallible, including its inability to accurately remember events or people. Additionally, witnesses will often adhere to their initial identification, sometimes when they no longer have an independent memory of the events they witnessed. On occasion witnesses may even identify a suspect based on characteristics other than their independent recollection (e.g. identifying an individual sitting in a particular chair in a courtroom, rather than based on their memory of the perpetrator). To combat these all too human tendencies and provide juries with insight into the risks they present, witness identification is an appropriate subject for expert testimony. For these reasons, the Committee recommends that expert testimony be permitted in capital cases to explain the prevailing research trends relating to the objective reliability of identification procedures and the factors that affect identification reliability.

Recommendation 18. Jurisdictions should adopt a standardized protocol or set of best practices to be followed for all forensic interviews of children, which should include the videotaping of all interviews of children.

Empirical research shows that children's testimony can be uniquely unreliable, both because of their mental and emotional immaturity and because they can be vulnerable to suggestive interview techniques. In order to minimize the susceptibility of children to suggestion during interviewing and to reduce the risk of false allegations in capital cases, jurisdictions should adopt standardized protocols or best practices for interviewing children who witness violent crimes.

---

[58] Wells et al., *supra* note 14, at 6.

Every witness is suggestible to some degree, but children – particularly preschool-age children – are more suggestible than older children and adults.[59] Many courts, including the Supreme Court, have recognized the risks of using suggestive interview techniques and the need to take greater care when interviewing children.[60] Children also tend to be much more susceptible to pressures to conform to the expectations of others, making them more likely to make false accusations or respond inaccurately to leading questions.

This suggestibility should not preclude children from being heard as witnesses. Indeed, the vast majority of research suggests that children have good memory ability and can provide information that is both meaningful and accurate to investigators or triers of fact. However, there are significant differences between children's memories and adults' memories. For instance, adults have more complex memory retrieval strategies than children, allowing adults to recall more information independently. In addition, children do not necessarily notice or appreciate all of the details of an event and therefore may not consider it sufficiently important for storage in their memories. Children's memories also depend more on context than do adults' memories.[61] Accordingly, because of the differences between the memories of children and adults, and the higher potential for fallibility in children's memories, children's testimony must be subjected to more exacting standards when it is obtained and to higher standards of scrutiny during evaluation in both the investigative and trial processes.

The human mind is inherently fallible, including its inability to accurately remember events or people.

Children are particularly susceptible to suggestive questioning. Interviewers can inadvertently elicit false allegations from children as a result. The potential for these errors tends to be exacerbated when children are interviewed as witnesses following their involvement in a traumatic event, *e.g.*, witnessing a crime. It is important to minimize the occurrences and the effects of any such errors, particularly because the improper solicitation of information can lead to both the contamination of facts and the destruction of a child's credibility in the courtroom.

---

59 *See* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 34 (2000); *see also* Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 Law & Contemp. Probs. 127, 127-30 (2002) (concluding that suggestibility problems continue to exist in older children due to the ability to shape memories through questioning).

60 *See Idaho v. Wright*, 497 U.S. 805, 812-13 (1990) (noting that "blatantly leading questions" and "interrogation… performed by someone with a preconceived idea of what the child should be disclosing" can affect children's memories).

61 *See* John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 Pac. L.J. 3 (1996).

Because of the potential for influence, each jurisdiction should adopt standard protocols for interviewing children as witnesses. All parties that may at one point interview a child as a witness should employ these standard protocols, including, but not limited to, law enforcement officers, child protective services personnel and other social workers, specialized forensic interviewers, medical and mental health professionals, and even attorneys. Moreover, jurisdictions should provide extensive hands-on training to these parties to ensure that they are well-versed in the proper strategies for interviewing children.

Interviewers of children, whether they are aware of it or not, have the power to elicit false allegations, to foster or inhibit the accuracy of facts children provide, to encourage or discourage the amount of information provided, or to prevent children from disclosing any information at all.[62] Children's vulnerability in these circumstances is compounded by the desire of most children to "please" the interviewer by providing "correct" answers. If interviews are conducted a number of times, by multiple different people, contradictions and inaccuracies are even more likely to arise, as children react to the different influences of each interviewer.

Interviewers of children, whether they are aware of it or not, have the power to elicit false allegations, to foster or inhibit the accuracy of facts children provide, to encourage or discourage the amount of information provided, or to prevent children from disclosing any information at all.

Although the research is not entirely conclusive, several generally accepted best practices for interviewing children have emerged. Perhaps the most important of these practices is to videotape all interviews of children. The advantages to videotaping are numerous. For instance, the videotape allows the jury to evaluate for itself the interview techniques used, rather than relying on the interviewer's notes, and to determine whether the interview itself was unduly suggestive. Videotaping also tends to increase the likelihood that interviewers will follow the standardized protocol. The videotaping creates an incentive for the interviewer to use proper techniques and also provides for better monitoring, supervision, and training.[63] The videotape ensures that there is an accurate and complete record of the exchange between the interviewer and the child and minimizes the number of times a child is interviewed, as police officers, prosecutors, and defense attorneys are less likely to request additional interviews of

---

62 *See* Lindsay E. Cronch et al., *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behav. 195, 196 (2006).

63 Ceci & Friedman, *supra* note 59, at 103-106.

the child. As discussed above, minimizing repeated questioning and interviews is important to maintaining the integrity of the child's testimony.[64]

Other generally-accepted best practices include:

Conducting the Interview as Promptly as Possible. Memories of both children and adults inevitably fade over time. Although children often can remember details of salient events well after they occur, it is generally agreed that the sooner the interview can be conducted, the less fragile the child's memory.

Using Developmentally-Appropriate Language. Differences in language comprehension and usage require that the interviewer use simply-phrased, straight-forward questions. In other words, the interviewer should use the active rather than the passive voice, should avoid negatives and double negatives, should use simple words and phrases and the child's own terms, and should include only one query per question.[65]

Establishing Rapport. It is imperative that the child feel as comfortable and relaxed as possible during the interview. According to researchers, this rapport-building does more than put the child at ease. If done correctly, rapport-building can serve as a supplement to the interview, allowing the interviewer to better understand the child's social, emotional, and cognitive development, as well as his or her communication skills and degree of understanding.[66]

Setting Ground Rules at the Beginning of the Interview. The interviewer should explain the interview's purpose (again, in language that the child can understand), what the child should do if he or she does not know an answer, does not understand the question, does not remember, does not want to answer, and what to do if the interviewer makes a mistake or misstates a response during the course of the interview. The ground rules also should include a discussion of the differences between the truth and a lie, including the consequences of

---

[64] Failure to videotape could result in any number of consequences, including, *inter alia*, the inadmissibility of the testimony altogether, consideration of the lack of videotape as a factor in determining admissibility, or an instruction to the jury that the interviewer failed to follow proper practice and that the failure can or should be taken into account in evaluating the possibility that the child's statement was the product of suggestion. For instance, Michigan has enacted legislation mandating use of an investigative procedure, using as a model the forensic protocol developed by the Governor's Task Force. *See* Mich. Comp. Laws §722.628 (2014); *see generally* Governor's Task Force on Children's Abuse and Neglect & Dep't of Human Services, State of Michigan, Forensic Interviewing Protocol (3d ed. 2011), at http://www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf. Counties may use a different protocol if they so choose. Mich. Comp. Laws §722.628(8)(6) (2014).

[65] *See* Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 Law & Contem. Probs. 149, 165 (2002) (citing Nancy E. Walker and Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don't, the How's and the Why's*, 29 Creighton L. Rev. 1587, 1592-93 (1996)).

[66] *See id.*

telling a lie. The interviewer should obtain the child's agreement that he or she will tell the truth. The interviewer also must explain that, because he or she was not there at the time of the incident, he or she does not know the correct details. Accordingly, the child has all of the information and it is up to the child to describe the events completely and to provide correct details. It should be clear to the child that he or she, not the interviewer, will be doing most of the talking.[67]

Using Free-Recall and Open-Ended Questions. Open-ended questions allow children to provide free narrative accounts, and research demonstrates that such free narrative accounts are not only more detailed, but are significantly more reliable (and more persuasive) than children's responses to direct, pointed questioning.[68] Interviewers should avoid using suggestive techniques, including leading or forced-choice questions, reinforcement (both positive and negative) for responses, and social influence (*i.e.*, telling the child what others, including his or her peers, have said).

Limiting Repetition of "Closed" Questions Within the Interview and Limiting the Number of Interviews and Interviewers. Multiple interviews tend to create additional stress. In addition, as discussed above, increasing the number of interviews or interviewers also increases the likelihood that suggestive questions will be asked.

Recommendation 19. State and federal courts should admit expert trial testimony to give context to jury instructions and to explain prevailing research trends relating to the suggestibility of children and the factors that affect the reliability of children's testimony.

Children's suggestibility should not preclude them from testifying as witnesses. A jury, however, must evaluate differently the credibility of children and the reliability of a child's memory. To this end, courts should admit expert trial testimony explaining prevailing research relating to the reliability of children's testimony and the factors that affect such reliability.

Historically, expert testimony often has been excluded on the issue of children's testimony because it (1) addressed matters within the common understanding of jurors,[69] (2) was confusing, or (3) invaded the province of the jury to make credibility determinations.[70] However, even if jurors accept that children are suggestible, most jurors are not aware of the effects that interview techniques or other suggestive influences can have on children. Expert

---

[67] *See id.* at 167.

[68] *See id.*; *see also* Cronch, *supra* note 62, at 198.

[69] *See State v. Swan*, 790 P.2d 610, 632 (Wash. 1990).

[70] *See Martinez-Macias v. Collins*, 810 F. Supp. 782, 814 (W.D. Tex. 1991) (stating that Texas law in 1984 prohibited the use of an expert to impeach the testimony of a witness).

testimony thus is helpful to aid the jury in identifying leading questions, understanding the effects of leading questions on a suggestible child, explaining the pressure on a child to please the interviewer, and comprehending the necessity for employing proper interview techniques.[71] To this end, some courts have recognized that expert testimony in this area can assist the trier of fact.[72]

71 *See State v. Gersin*, 668 N.E.2d 486, 488 (Ohio 1996) (finding that most jurors lack the knowledge of accepted practices in interviewing child victims and therefore that expert testimony on this issue is admissible); see also Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1285 (2005).

72 *See id.* at 1273-74.