TEMPLE LAW REVIEW

REPORT

2019 REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS

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DISCLAIMER

The Eyewitness Identification Task Force Report (Report) is the product of a diverse group of judges, lawyers, professors, and law enforcement agents, all of whom were brought together to study the issue of eyewitness identification. Although several members of the Third Circuit Task Force on Eyewitness Identifications (Task Force) are judges, the Report does not represent the views of the United States Court of Appeals for the Third Circuit or any federal court within the Third Circuit. The Report creates no rights of any kind and it is not binding on any court or law enforcement and imposes no particular practices. Rather, the Report is solely intended to generally inform and educate law enforcement, advocates, and courts about issues surrounding eyewitness identification. Moreover, the Task Force does not intend this Report to be viewed, for example, as facts that cannot be reasonably questioned for the purposes of judicial notice or be regarded as a learned treatise.

The Report is not intended to be a substitute for evidence or authority for a ruling.

I.   INTRODUCTION

A.   *Preface: The Creation, Composition, and Purview of the Task Force*

The Third Circuit Task Force on Eyewitness Identifications (Task Force) was created, in part, in response to the scientific developments in the field of eyewitness identification and the recognition that courts had begun to apply these developments in criminal cases.[1] The Task Force was co-chaired by the Honorable Theodore A. McKee, Judge for the United States Court of Appeals for the Third Circuit, and the Honorable Mitchell S. Goldberg, Judge for the United States District Court for the Eastern District of Pennsylvania. The Task Force was charged with making recommendations "to promote reliable practices for eyewitness investigation and to effectively deter unnecessarily suggestive identification procedures, which raise the risk of wrongful conviction."[2] At the time the Task Force was formed, no other federal court had undertaken such a project on eyewitness identification.[3]

Its diverse members included three judges of the U.S. Court of Appeals for the Third Circuit (including Judge McKee), district judges from almost every district within the Third Circuit, an internationally prominent Chief of Police who is a member of the board of directors of the International Association of Chiefs of Police, nationally prominent academicians and researchers with expertise in the area of eyewitness identification, an Assistant United States Attorney, a former Chief Federal Public Defender, a Supervising Deputy Attorney General who serves as Deputy Chief of the Prosecutors Supervision and Training Bureau for the state of New Jersey, and an Assistant Special Agent-in-Charge of the Federal Bureau of Investigation. The Task Force met as a whole and in subcommittees, drafted provisional reports, and ultimately adopted this Report. To the extent that Task Force members disagree with portions of this Report, their disagreement is noted.

In order to better "drill down" on topics of interest, the Task Force members were divided into four subcommittees—Scientific Consensus, Best Practices, Continuing Education, and Jury Instructions.

The subcommittee on Scientific Consensus was tasked with identifying and summarizing the currently accepted science on the subject of eyewitness identifications. This subcommittee was chaired by the Honorable Timothy R. Rice, United States

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1.   The Task Force was created by order of then-Chief Judge Theodore A. McKee on September 9, 2016. On June 8, 2016, Chief Judge D. Brooks Smith extended the term of the Task Force "until such a date as it prepares and releases a Final Report and the co-chairs agree that the work of the Task Force is completed."

2*. Order*, U.S. CT. APPEALS FOR THIRD CIR. (Sep. 9, 2016), http://www.ca3.uscourts.gov/sites/ca3/files/TFEyewitnessIdOrder_11042016.pdf [https://perma.cc/59AU-MBMN] (creating Third Circuit Task Force on Eyewitness Identifications). The Task Force was not concerned with and did not attempt to address identification procedures that are so unduly suggestive as to raise a Due Process objection pursuant to *Manson v. Brathwaite*, 432 U.S. 98 (1977), and its progeny.

3.   The Third Circuit has convened many such task forces on other matters over the last three decades. *See Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689 (2001); *Report of the Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1355 (1997); *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237 (1985); *see also* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989).

Magistrate Judge for the Eastern District of Pennsylvania. The subcommittee was composed of Police Chief William G. Brooks, III; Dr. Jennifer E. Dysart; Professor Jules Epstein; and Professor John F. Hollway.

The Best Practices subcommittee was tasked with identifying practices that law enforcement agencies can use to minimize the likelihood of mistaken identifications. The Best Practices subcommittee was chaired by Police Chief Brooks. The subcommittee was composed of the Honorable Jerome B. Simandle, who was then the Chief Judge of the United States District Court for the District of New Jersey; Judge Rice; Supervising Deputy Attorney General Robert Czepiel Jr.; Professor Hollway; Assistant United States Attorney Robert F. Kravetz; then-Federal Defender James V. Wade; and FBI Assistant Special Agent-in-Charge Christian Zajac.

The Continuing Education subcommittee was tasked with envisioning a repository of information to be used as a resource for attorneys and judges. This subcommittee was co-chaired by Professors Epstein and Hollway. It was composed of Judge McKee; the Honorable L. Felipe Restrepo, Judge for the United States Court of Appeals for the Third Circuit; the Honorable Wilma A. Lewis, Chief Judge of the United States District Court of the Virgin Islands; the Honorable Cathy Bissoon, United States District Court Judge for the Western District of Pennsylvania; the Honorable Yvette Kane, United States District Court Judge for the Middle District of Pennsylvania; Judge Simandle; Dr. Dysart, and Dr. Amanda Bergold.

The Jury Instructions subcommittee was tasked with assessing the efficacy of the Third Circuit's current jury instructions on eyewitness testimony and, if appropriate, suggesting changes to those instructions. This subcommittee was co-chaired by Judge Restrepo and Judge Goldberg. The subcommittee was composed of Judge McKee; the Honorable Patty Shwartz, Judge for the United States Court of Appeals for the Third Circuit; the Honorable Gregory M. Sleet, Judge for the United States District Court for the District of Delaware; Professor Epstein; Professor Hollway; and Mr. Kravetz.

The research that was reviewed by these subcommittees included peer reviewed studies, generally accepted best practices for law enforcement investigations and identification procedures, expert trial testimony, and model jury instructions from federal and state courts. All Task Force members were also encouraged to consult with experts in the field of eyewitness identification and to solicit critical review and input from recognized scholars in this area, as deemed appropriate. While the Task Force was empowered to hear testimony, it determined that hearings were unnecessary because sufficient information was readily available in the legion of scientific studies and reports that already existed on eyewitness identifications as well as through consultation with noted experts.

The work of the Task Force took place from October 2016 through the publication of this Report in 2019. In the interim, the subcommittees met separately, drafted provisional reports on their respective areas of study, and presented them for adoption by the full Task Force.

B.   Expert Review and Intra-Task Force Dialogue

The scientific findings of the Task Force's scientific research subcommittee—set out below—were reviewed by eleven noted experts in the field of eyewitness identification: Dr. Amanda Bergold, Assistant Professor of Criminal Justice at Marist

College; Dr. Brian L. Cutler, Professor of Social Sciences and Humanities at the University of Ontario Institute of Technology; Dr. Mitchell Eisen, Professor of Psychology and Director of the Forensic Psychology Graduate Program at California State University, Los Angeles; Dr. Margaret Kovera, Presidential Scholar and Professor of Psychology at the John Jay College of Criminal Justice; Dr. Michael R. Leippe, Professor of Psychology at the John Jay College of Criminal Justice; Dr. Elizabeth F. Loftus, Distinguished Professor of Social Ecology, Law, and Cognitive Science at the University of California, Irvine; Dr. Amina Memon, Chair of Psychology at the Royal Holloway, University of London; Dr. Steven D. Penrod, Distinguished Professor of Psychology at the John Jay College of Criminal Justice; Dr. Nancy K. Steblay, Professor of Psychology at Augsburg University; Dr. Deryn Strange, Professor of Psychology at the John Jay College of Criminal Justice; and Dr. Gary L. Wells, Distinguished Professor of Psychology and the Wendy and Mark Stavish Chair in Social Sciences at Iowa State University.

All but two members of the Task Force—Mr. Kravetz, and Special Agent Zajac—joined in these scientific findings in full.[4] Mr. Kravetz and Special Agent Zajac submitted different views on certain identification topics. Those views are reflected in the "Minority View" subsections below, as well as in the separate "Minority Statement."

Mr. Kravetz solicited and obtained separate reviews of the subcommittee report of the scientific research subcommittee from several individuals, including: Dr. Curt Carlson, Associate Professor of Psychology and Coordinator of the Educational Psychology Doctoral Program at Texas A&M University-Commerce; Dr. Joseph S. Cecil of the Federal Judicial Center, Division of Research (retired); Dr. Jonathan Gould, Professor of Justice, Law and Criminology at the American University School of Public Affairs; Dr. Laura Mickes, Professor of Psychology at the Royal Holloway, University of London; Dr. Richard Shiffrin, Distinguished Professor and Luther Dana Waterman Professor of Psychological and Brain Sciences at Indiana University, Bloomington;[5] Dr. John Wixted, Distinguished Professor of Psychology at the University of California, San Diego; and two anonymous reviewers, to whom the subcommittee report was forwarded by Mr. Kravetz via the National Institute of Justice of the U.S. Department of Justice.

Having considered the views set out by Mr. Kravetz and Special Agent Zajac, the other members of the Task Force stand by the Majority's scientific findings and have responded to the Minority's views where appropriate in this Report.

C. *Background and Context*

Ronald Cotton, wrongfully accused of a brutal rape in North Carolina, spent over ten years in prison based on a flawed eyewitness identification process. Law enforcement employed identification procedures considered standard, including a composite sketch, a photo array with a subsequent lineup, and finally an in-court identification wherein the victim declared she was "absolutely sure" Cotton had raped her. The victim's initial interactions with police, wherein she inquired about the accuracy of her selection of Cotton's photo from the photo array, resulted in police suggestively reinforcing the

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4. Judge Shwartz joins Mr. Kravetz and Special Agent Zajac in certain areas as noted.

5. Dr. Wixted solicited Dr. Shiffrin's support for his review.

accuracy of her identification of Cotton. Yet DNA tests later conclusively established that another person was the perpetrator.[6]

John White was incarcerated for twenty-seven years of a life sentence for a crime he did not commit.[7] Like Ronald Cotton, White's conviction was the result of a suggestive eyewitness process that unintentionally resulted in a wrongful conviction.[8] White was identified from a lineup after the crime victim selected his photo from a photo array. He was the only person in the lineup whose photo had previously been viewed by the victim.[9] As we explain below, although police no doubt did not intend the result, displaying White to the victim in a lineup after she had seen his photo in a photo array greatly increased the likelihood that he would be erroneously identified as the perpetrator. That is exactly what happened. Subsequent DNA analysis not only established White's innocence, it also disclosed that (by the cruelest of ironies) the police had unknowingly selected the real perpetrator to be in White's lineup. The person whom DNA analysis would subsequently identify as the actual assailant had apparently been in custody on unrelated charges when police were comprising a lineup for White, and they had unsuspectingly included him in that lineup as a "filler." Yet even though the actual assailant was in the lineup, the victim, having previously seen and selected a photograph of White, mistakenly identified White as her assailant. White's case is particularly illustrative of the importance of educating those involved in the criminal justice system about the research surrounding eyewitness identifications.

Eyewitness misidentifications have been a factor in well over half of the cases that resulted in wrongful convictions later overturned by DNA evidence.[10] Nearly seventy percent of the DNA driven exonerations in the United States involved eyewitness misidentifications.[11] Eyewitness misidentification is the "single greatest source" of wrongful convictions in the United States.[12] In fact, mistaken identifications "are

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6. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 10 (2014) [hereinafter NAT'L RESEARCH COUNCIL].

7. *John Jerome White*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/john-jerome-white/ [https://perma.cc/7V7M-ZUAL] (last visited Nov. 1, 2019).

8. *Id.*

9. *Id.*

10. *See, e.g.*, THE INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 17 (2009) [hereinafter INNOCENCE PROJECT, REEVALUATING LINEUPS].

11. *See, e.g., id.* at 17; *id.* 28–32 app. A (setting forth the names of the exonerees); Gary L. Wells, Margaret Bull Kovera, Amy Bradfield Douglass, Neil Brewer, Christian A. Meissner, & John T. Wixted, *Policy and Procedure Recommendations for the Collections and Preservation of Eyewitness Identification Evidence* 8 (Feb. 4, 2019) (draft of the American Psychology-Law Society Scientific Review Paper on Eyewitness Identification Procedures) [hereinafter Wells et al., *Policy and Procedure Recommendations*]; *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/5E6T-X7XE] (last visited Nov. 1, 2019).

12. Perry v. New Hampshire, 565 U.S. 228, 249, 263 (2012) (Sotomayor, J., dissenting) (quoting State v. Henderson, 27 A.3d 872, 885 (N.J. 2011)); *see also* Young v. State, 374 P.3d 395, 416 (Alaska 2016); State v. Guilbert, 49 A.3d 705, 730 & n.29 (Conn. 2012); State v. Cabagbag, 277 P.3d 1027, 1038 (Haw. 2012); State v. Almaraz, 301 P.3d 242, 251 (Idaho 2013); People v. Lerma, 47 N.E.3d 985, 993 (Ill. 2016); Commonwealth v. Gomes, 22 N.E.3d 897, 908 & n.21 (Mass. 2015); State v. Henderson, 27 A.3d 872, 885 (N.J. 2011); People v. Boone, 91 N.E.3d 1194, 1197 (N.Y. 2017); State v. Hibl, 714 N.W.2d 194, 202 (Wis. 2006); *Eyewitness*

responsible for more wrongful convictions than all other causes combined."[13] Innocent people are convicted, the perpetrator goes free,[14] and public confidence in the judicial system erodes.[15]

"Wrongful identification clearly can serve as the first step along a continuum of actions leading to wrongful arrest, prosecution, and conviction. A wrongful identification often leads to the pursuance of a perceived offender, less consideration given to other possible offenders, and opens the door for a myriad of missteps to be made."[16]

When this happens, not only are innocent people wrongfully incarcerated, but perpetrators go free (perhaps to victimize others), and public confidence in our criminal justice system is gravely shaken. It may also be the only evidence that is available at trial. Nevertheless, weaknesses in an erroneous identification may be very difficult to convey to a jury because the witness will often be making an honest mistake and will therefore be very difficult to cross-examine. Moreover, even after judges, lawyers, and jurors are made aware of the potential weaknesses of eyewitness testimony, the probative force of a courtroom identification remains quite compelling. As Justice Brennan explained more than three decades ago:

> "[E]yewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[17]

Fortunately, voluminous studies of this subject demonstrate that there are ways to make eyewitness testimony more reliable and trustworthy. Courts and law enforcement agencies can adopt practices based upon the weight of scientific research to help jurors evaluate eyewitness identifications. The Task Force was created to better inform all involved in the criminal justice system about those practices and the underlying research in this area.

D.   *The Focus of this Report*

Improving the quality of justice in these investigations and reducing the likelihood of error begins with paying attention to this body of scientific scholarship. Research has identified various factors that reduce the likelihood of an erroneous identification. System variables are factors within the control of law enforcement. Estimator variables

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Misidentification, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/eyewitness-misidentification/ [https://perma.cc/8CQL-SRUM] (last visited Nov. 1, 2019).

13.   United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (citation omitted).

14.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 9.

15.   *See, e.g.*, Dennis v. Secretary, 834 F.3d 263, 316 (3d Cir. 2016) (en banc) (McKee, C.J., concurring); NAT'L RESEARCH COUNCIL, *supra* note 6, at 22 (citing INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT ON WRONGFUL CONVICTIONS: BUILDING A SYSTEMIC APPROACH TO PREVENT WRONGFUL CONVICTIONS (2013) [hereinafter INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT]).

16.   INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT, supra note 15, at 5.

17.   Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (alteration in original) (emphasis in original) (quoting ELIZABETH J. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

include circumstances beyond the control of law enforcement such as lighting, opportunity to observe, and the presence of "stressors."

Researchers have been able to achieve substantial agreement regarding best practices for law enforcement that, if followed, can increase the accuracy and reliability of identification procedure outcomes. By adopting best practices, law enforcement can minimize the likelihood of a misidentification at the start of a criminal prosecution. This is critical, because by the time a case reaches trial, an eyewitness identification has taken on great importance, and the ultimate fact finder (including judges in the case of bench trials) may lack even a basic understanding of the underlying science. As we have just noted, jurists have long recognized the persuasive force of an in-court identification.

Nevertheless, courts and law enforcement agencies can adopt practices based upon the weight of scientific research to help jurors evaluate eyewitness identifications. These include, by way of illustration, expert testimony on the science and fallibility of eyewitness identification and related jury instructions. Implementing trial safeguards in turn creates incentives for law enforcement to adopt best practices.

Many law enforcement agencies, including the United States Department of Justice, have already adopted certain practices, consistent with the scientific research in this area, that will hopefully reduce the likelihood of a wrongful conviction based upon erroneous eyewitness identifications.[18] The following is an Executive Summary of the findings and recommendations of the Task Force. The full Report follows the summary.

II.   EXECUTIVE SUMMARY

A.   *Basic Science of Perception and Memory*

Over several decades, a burgeoning body of research has shed light on how human perception and memory function. We now understand that the brain does not work like a video camera. Rather, it is generally accepted that the memory process occurs in three stages—encoding, storing, and retrieving—with limitations and potential for error at each stage.[19] In short, perception is imperfect, and memories are malleable and may be impermanent. While memories can sometimes be very precise and accurate, they can also be distorted or contaminated, without an individual intending or even knowing that his/her memory is inaccurate. Researchers have applied these general principles of memory to the study of eyewitness identification and, in particular, have studied how system and estimator variables have the potential to impact eyewitness accuracy.

B.   *System Variables*

System variables are factors within the control of law enforcement. The scientific research on system variables has demonstrated that certain law enforcement practices

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18. *See* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION: PROCEDURES FOR CONDUCTING PHOTO ARRAYS (2017) [hereinafter U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION]; Memorandum from Sally Q. Yates, Deputy Attorney General, U.S. Dep't of Justice 1 (Jan. 6, 2017), http://www.justice.gov/file/923201/download [https://perma.cc/6745-RX96] ("It is . . . crucial that the procedures law enforcement officers follow in conducting [eyewitness] identifications ensure the accuracy and reliability of evidence elicited from eyewitnesses.").

19. *See* THE OXFORD HANDBOOK OF MEMORY 36 (Endel Tulving & Fergus I.M. Craik eds., 2000).

may increase the accuracy of eyewitness identifications. There is now substantial agreement regarding many of these best practices.

1.   "Double-Blind" Administration

Double-blind administration of an eyewitness identification procedure, such as a lineup or photo array, occurs when the officer administering the procedure does not know which person in the display is the suspect. Blinded administration occurs when the administrator knows who the suspect is but does not know who the witness is viewing at a particular time. Double-blind administration is important, among other reasons, because of the "expectancy effect." The term describes a situation where experimenters subconsciously and unintentionally shape the results of experiments to fit their expectations. The expectancy effect can be eliminated from identification procedures through double-blind administration.[20] The Task Force recommends that lineups and photo arrays be administered double-blind. Where it is not practical, they should, at a minimum, be blinded.[21] These procedures will minimize the likelihood that an investigator will unintentionally do or say something that may suggest the identity of the suspect to the witness. The Task Force recognizes that it may appear impractical for very small jurisdictions to rely upon double-blind identification procedures because most, if not all, law enforcement personnel in such a jurisdiction will know who the suspect is. Nevertheless, researchers and law enforcement officials have developed methods to allow for blinded and double-blind administration of an identification procedure even in these departments. These techniques are discussed below.

2.   Filler and Photograph Selection for Lineups and Photo Arrays

Fillers are nonsuspect individuals who are included in a lineup or photo array along with the suspect. Generally, the preferred method for selecting fillers is to use all the features included in the witness's description of the perpetrator, rather than selecting fillers based only on their resemblance to the suspect.[22] No person should stand out,

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20.   *See* Steve D. Charman & Vanessa Quiroz, *Blind Sequential Lineup Administration Reduces Both False Identifications and Confidence in Those False Identifications*, 40 L. & HUM. BEHAV. 477, 477–87 (2016); Jennifer E. Dysart et al., *Blind Lineup Administration as a Prophylactic Against the Post-Identification Feedback Effect*, 36 L. & HUM. BEHAV. 312, 312–19 (2012); Sarah M. Greathouse & Margaret B. Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 L. & HUM. BEHAV. 70, 70–82 (2009); Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 940–51 (1999); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 603–47 (1998) [hereinafter Wells et al., *Eyewitness Identification Procedures*]; *see also* Hart v. Mannina, 798 F.3d 578, 588 n.1 (7th Cir. 2015); United States v. Williams, 522 F.3d 809, 811 (7th Cir. 2008).

21.   *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(B); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY: EYEWITNESS IDENTIFICATION § IV(B)(1) (2016) [hereinafter INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY]; NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 26, 106–07; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 5.1, 8–9; Am. Bar Ass'n, *American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*, 37 SW. L. REV. 810, 811 (2008) (adopted as Resolution 111C in August 2004); Gary L. Wells et al., *supra* note 11, at 33.

22.   *See* Gary L. Wells et al., *The Selection of Distractors for Eyewitness Lineups*, 78 J. APPLIED PSYCHOL. 835, 835–44 (1993) [hereinafter Wells et al., *Selection of Distractors*]; *see also* Ryan J. Fitzgerald et al., *The*

especially the suspect.[23] Accordingly, the Task Force recommends that lineups and photo arrays use fillers that match the witness's description of the perpetrator (not the suspect) and look similar to the suspect. It is obviously crucial that the suspect not stand out.[24]

3. Show-Ups or Field Identifications

In a show-up or field identification a witness is presented with only one person for identification. Researchers generally agree that show-ups result in higher rates of false identifications of innocent suspects than lineups.[25] However, properly administered show-ups can be important tools for law enforcement because they occur relatively quickly after a crime has been committed, when the witness's memory of the perpetrator has had little time to fade or be contaminated by external influences. The Task Force recommends that instead of show-ups, lineups and photo arrays should be used whenever possible. When used, show-ups should be conducted as soon as possible and in a manner that minimizes suggestivity.[26]

4. Pre-Identification Instructions for Show-Ups, Lineups, and Photo Arrays

What happens prior to an identification procedure may be as important as the subsequent procedure itself in determining the witness's state of mind and the accuracy of an identification. Before a show-up, lineup, or photo array, there is substantial agreement that law enforcement should carefully instruct the witness so as to minimize any impression that the perpetrator will necessarily be among the individuals displayed. This minimizes the risk that someone will be identified merely because they most closely resemble the perpetrator.[27] Commonly recommended instructions include that the blind

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Effect of Suspect-Filler Similarity on Eyewitness Identification Decisions: A Meta-Analysis, 19 PSYCHOL., PUB. POL'Y, & L. 151, 152 (2013); C.A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distracters for Lineups*, 15 L. & HUM. BEHAV. 43, 55 (1991) [hereinafter Luus & Wells, *Eyewitness Identification*].

23. *See, e.g.*, Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY 155, 157 (R.C.L. Lindsay et al. eds., 2007); Fitzgerald et al., *supra* note 22, 151, 158, 160; Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47; *see also* Foster v. California, 394 U.S. 440, 443 (1969); United States v. Wade, 388 U.S. 218, 232–33 (1967).

24. *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(G), (H)(1); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(3), (B)(5), (C)(1); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 3.2–3.3; Gary L. Wells et al., *Policy and Procedure*, *supra* note 11, at 43.

25. *See* Jennifer E. Dysart & R.C.L. Lindsay, *Show-Up Identifications: Suggestive Technique or Reliable Method?*, *in* HANDBOOK OF EYEWITNESS PSYCHOLOGY, *supra* note 23, at 137–54; Andrew M. Smith et al., *Fair Lineups Are Better than Biased Lineups and Showups, But Not Because They Increase Underlying Discriminability*, 41 L. & HUM. BEHAV. 127, 128–29, 141–43 (2017); Nancy K. Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & HUM. BEHAV. 523, 525, 538 (2003) [hereinafter Steblay et al., *Eyewitness Accuracy Rates*]; *see also* Moore v. Illinois, 434 U.S. 220, 229 (1977); Stovall v. Denno, 388 U.S. 293, 302 (1967).

26. *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(S); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A); NAT'L RESEARCH COUNCIL, *supra* note 6, at 27–28; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11.

27. *See* Steven E. Clark, *A Re-Examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 L. & HUM. BEHAV. 575, 576 (2005); Gary L. Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47; *see also* United States v. Williams, 522 F.3d 809, 811 (7th Cir. 2008); *cf.*

administrator does not know whether the actual perpetrator is displayed and that witnesses should be told that the perpetrator "may or may not be present." They should also be instructed that "whether an identification is made, the police will continue to investigate," and that "it is just as important to free innocent people from suspicion as it is to identify the guilty."[28] The Task Force recommends that these standard preliminary instructions be given to witnesses prior to show-ups, lineups, and photo arrays, and all efforts be made to avoid suggesting that the perpetrator is among the individuals displayed.[29]

5.   Confidence Statements and Post-Identification Feedback

Recent research has shown that there are few mistaken identifications of an innocent suspect when a witness expresses the highest levels of confidence in their identification, there was no pre-procedure suggestivity, the procedures surrounding the identification are pristine, and the blind administrator obtains the confidence statement immediately following the identification.[30] Conversely, in absence of pristine procedures, it is more difficult to know if the witness's purported level of confidence is the result of subtle influence or suggestion as opposed to the witness making the identification based on his or her memory of the perpetrator. It is exceedingly difficult to know if the witness made an identification because something suggested the identity of the suspect or made the witness feel compelled to select someone from the lineup or photo array. These influences can include positive feedback, such as feedback communicated nonverbally or unintentionally.[31] The Task Force therefore recommends that after a show-up, lineup, or photo array, witnesses be given no feedback, and that a verbatim statement of confidence be recorded by the blind administrator.[32]

Moore, 434 U.S. at 229–30 (recognizing the suggestive nature of instructing a witness "that she was going to view a suspect"); Simmons v. United States, 390 U.S. 377, 383 (1968) ("The chance of misidentification is . . . heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.").

28. *See, e.g.*, Clark, *supra* note 27, at 576; Greathouse & Kovera, *supra* note 20, at 74 (citing U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 32 (1999)).

29. *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 19, app. B § 3(D); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(7), (B)(10); NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 107; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 6.1-6.3; Am. Bar Ass'n, *supra* note 21, at 811, 822–23; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 74.

30. *See* John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 PSYCHOL. SCI. PUB. INT. 10, 14–20 (2017).

31. *See, e.g.*, Amy Bradfield Douglass & Nancy K. Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 859–69 (2006); Nancy K. Steblay et al., *The Eyewitness Post-Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 PSYCHOL., PUB. POL'Y, & L. 1, 1–18 (2014) [hereinafter Steblay et al., *Eyewitness Post-Identification*]; Daniel B. Wright & Elin M. Skagerberg, *Postidentification Feedback Affects Real Eyewitnesses,* 18 PSYCHOL. SCI. 172, 172–78 (2007).

32. *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20, app. B § 3(P)–(S); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(13)–(14), (B)(10), (B)(13)–(14); NAT'L RESEARCH COUNCIL, *supra* note 6, at 5–6, 108; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 6.3.3, 8.1.3, 8.1.4, 8.2, 9.1, 9.9–10; Am. Bar Ass'n, *supra* note 21, at 813, 823; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 74.

6.   Multiple Identification Procedures with the Same Witness

Researchers substantially agree that a witness should be provided with only one opportunity to make an identification of the same suspect. Repeated identification attempts with the same suspect increase the chance of error and can inflate witness confidence.[33] The Task Force recommends that multiple identification procedures with the same witness and suspect be avoided.[34]

7.   Exposure to Other Witnesses and to Media Accounts

Because memory is malleable, an eyewitness's interactions with others may modify their memory of an event and a perpetrator.[35] Accordingly, based upon the research, the Task Force recommends that witnesses be kept separate during all interviews and identification procedures, including show-ups, composites, mug-shot searches, lineups, and photo arrays, and instructed not to discuss the matter with anyone and to avoid media and social media accounts of the event.[36]

8.   Interviewing and Leading Questions

Leading questions can alter memory.[37] A witness may learn information from the police, for example, but through "source memory failure" come to believe the source of the information was the witnessed event.[38] The Task Force recommends that witnesses be interviewed as soon as possible, prior to an identification procedure, using nonleading and nonsuggestive questions.[39]

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33.   *See, e.g.*, Ryan D. Godfrey & Steven E. Clark, *Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value*, 34 L. & HUM. BEHAV. 241, 242 (2010); Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures With the Same Suspect*, 5 J. APPLIED RES. MEMORY & COGNITION 284, 284–89 (2016); *see also* Foster v. California, 394 U.S. 400, 443 (1969) (holding repeated identification procedures unnecessarily suggestive); Dennis v. Secretary, 834 F.3d 263, 270 n.4 (3d Cir. 2016) (en banc); Young v. Conway, 698 F.3d 69, 82 (2d Cir. 2012).

34.   *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(11), (B)(12); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11.

35.   *See* D. Stephen Lindsay & Marcia K. Johnson, *The Eyewitness Suggestibility Effect and Memory for Source*, 17 MEMORY & COGNITION 349, 349 (1989); C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714, 714–15 (1994) [hereinafter Luus & Wells, *Malleability of Eyewitness Confidence*]; Maria S. Zaragoza & Sean M. Lane, *Source Misattributions and the Suggestibility of Eyewitness Memory*, 20 J. EXPERIMENTAL PSYCHOL. 934, 934–45 (1994); *see also* United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006); Sanchell v. Parratt, 530 F.2d 286, 295 (8th Cir. 1976)

36.   *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, 20, app. B § 3(D)(6), (I), (S)(2)(e)(i); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, §§ IV(A)(8)–(9), (A)(15), (B)(10)–(11); NAT'L RESEARCH COUNCIL, *supra* note 6, at 106; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 1.1, 6.3.7, 7.1–7.3, 8.1.4; Am. Bar Ass'n, *supra* note 21, at 823; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 24–25.

37.   *See* Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361, 365 (2005).

38.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 66–67.

39.   *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(A); NAT'L RESEARCH COUNCIL, *supra* note 6, at 106; Am. Bar Ass'n, *supra* note 21, at 818; Wells et al., *Policy and Procedure Recommendations*, *supra* note 21, at 24.

9.   Mug-Shot Searching

Mug-shot searching occurs when a witness looks through a large number of arrest photographs in hope of recognizing the perpetrator. This can negatively impact the reliability of any purported identification that results. Mug-shot searching may cause the witness to conflate the perpetrator with someone seen elsewhere, unduly commit to the mug-shot identification, and be less reliable at a subsequent identification procedure even if there is no mug-shot identification.[40] The Task Force recommends that witnesses not be shown large numbers of random arrest photographs.[41]

10.   Composites and Sketches

In a composite or sketch procedure, a witness selects or describes individual facial features to create a single image of a face. However, people typically process faces holistically, not feature-by-feature.[42] Therefore, the result is that a composite may bear little resemblance to the actual perpetrator. The concern with composites is exacerbated if an arrest is subsequently made based on the composite. It may well be that the person was arrested because of his or her resemblance to the composite, which may or may not bear any resemblance to the perpetrator. An eyewitness who has created a composite may also be less likely to correctly identify the perpetrator from a lineup.[43] Approximately twenty-five percent of DNA exoneration cases included composite or sketch evidence.[44] The Task Force recommends that law enforcement agencies should only use them rarely and with great caution.[45]

11.   Single Photo

Police will sometimes show a witness a single photograph of a suspect when the witness knows the perpetrator. The Task Force recommends that a single photo only be used when the perpetrator is a person already well known to the witness, and the photo is displayed only to be sure that the police and witness are referring to the same individual. A single photograph should never be used as a "confirmatory" photographic show-up when the witness and perpetrator are strangers but rather be placed into a photo array.

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40.   *See* Kenneth A. Deffenbacher et al. *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 L. & HUM. BEHAV. 287, 287–307 (2006) [hereinafter Deffenbacher et al., *Mugshot Exposure Effects*]; Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 405–16 (2001); *see also* Young v. Conway, 698 F.3d 69, 82 (2d Cir. 2012).

41.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 29; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 69–70.

42.   *See* Kate Kempen & Colin G. Tredoux, *'Seeing is Believing': The Effect of Viewing and Constructing a Composite on Identification Performance*, 42 S. AFR. J. PSYCHOL., 434, 435 (2012).

43.   *See id.* at 434–44; Gary L. Wells et al., *Building Face Composites Can Harm Lineup Identification Performance*, 11 J. EXPERIMENTAL PSYCHOL. APPLIED 147, 147–56 (2005) [hereinafter Well et al., *Building Face Composites*].

44.   *See DNA Exonerations in the United States*, *supra* note 11.

45.   *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 15.

12. Video Recording Identification Procedures

Researchers recommend that show-ups, lineups, and photo arrays be video recorded.[46] This documents the exact procedures used by law enforcement and the witness's words, tone, and mannerisms. Accordingly, the Task Force recommends that video recording of show-ups, lineups, and photo arrays be implemented by all law enforcement departments.[47] However, this recommendation is not a suggestion, nor does it express a view, that other aspects of an investigation should be recorded.

13. Written Policies

Many authorities recommend that police departments enact written policies on eyewitness identification. The Task Force agrees and also recommends that all law enforcement departments adopt written policies on eyewitness identification.[48]

14. Training

It may well be that the single most important aspect of maximizing the likelihood that perpetrators are correctly identified and successfully prosecuted is the training that investigators receive.[49] Researchers in the field of eyewitness identification recommend that law enforcement receive training in "evidence-based" techniques and the science underlying recommended best practices.[50] Accordingly, the Task Force recommends that all law enforcement departments implement training on eyewitness identification.[51]

C.   *Estimator Variables*

Estimator variables are characteristics of the witness or crime, and other factors outside of the control of law enforcement that influence eyewitness identifications. Although these factors are not necessarily susceptible to best practices, they influence eyewitness accuracy and are the subject of witness interviews. Accordingly, it is important for law enforcement officers, advocates, and judges to be aware of the importance of estimator variables and how they may impact the accuracy of an

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46. *See, e.g.*, Wixted & Wells, *supra* note 30, at 19, 51; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 10–11, 17–18, 61, 63, 77 (Feb. 4, 2019) (draft of the APLS Scientific Review Paper on Eyewitness Identification Procedures).

47. *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20–21, app. B § 3(T); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(16), (B)(16); NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 108–09; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 9.1.1–10; Am. Bar Ass'n, *supra* note 21, at 812, 823; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 63, 74.

48. *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21; NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 107; Am. Bar Ass'n, *supra* note 21, at 810–11.

49. *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5 ("*Recommendation # 1: Train All Law Enforcement Officers in Eyewitness Identification*[.] The committee recommends that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols." (emphasis omitted)).

50. Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 29, 81–82.

51. *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 5; NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 105–06; Am. Bar Ass'n, *supra* note 21, at 810.

identification. Many estimator variables, such as opportunity to observe, are common sense factors that are usually already included in jury instructions on eyewitness testimony. However, there are many other estimator variables that may not be as apparent to the uninformed participant in these investigations and prosecutions.

1.   Weapon Focus

The visible presence of a weapon during a witnessed event can influence eyewitness accuracy by directing attention towards the weapon and away from the perpetrator, an effect termed "weapon focus."[52]

2.   Stress and Fear

Like the presence of a weapon, increased levels of stress can affect memory.[53]

3.   Cross-Race Effect (or Own-Race Bias)

Witnesses may be less accurate when identifying members of another race or ethnicity compared to when they identify members of their own race or ethnicity, a finding known as the "cross-race effect" or "own-race bias."[54] To the extent that this is a factor in the accuracy of an identification, it may be less impactful depending on the extent to which a witness has had regular interactions and involvement with persons of the same ethnic group as the perpetrator.

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52.   *See* Kerstin Kocab & Siegfried Ludwig Sporer, *The Weapon Focus Effect for Person Identifications and Descriptions: A Meta-Analysis*, *in* 1 ADVANCES IN PSYCHOLOGY & LAW 71, 71–117 (Monica K. Miller & Brian H. Bornstein eds., 2016); Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the "Weapon Focus" Literature*, 19 PSYCHOL., CRIME & L. 35, 35–66 (2013); Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus,"* 11 L. & HUM. BEHAV. 55, 55–62 (1987); Anne Maass & Günther Köhnken, *Eyewitness Identification: Simulating the "Weapon Effect,"* 14 L. & HUM. BEHAV. 397, 397–408 (1989); Nancy K. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & HUM. BEHAV. 413, 415–17 (1992); *see also* Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (noting that whether the suspect carried a weapon bears upon the risk of misidentification); Young v. Conway, 698 F.3d 69, 80–81 (2d Cir. 2012); United States v. Stevens, 935 F.2d 1380, 1392 (3d Cir. 1991).

53.   *See* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & HUM. BEHAV. 687, 687–706 (2004) [hereinafter Deffenbacher et al., *Effects of High Stress*]; Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265, 265–79 (2004); *see also* Perry, 565 U.S. at 243 (noting that stress bears on the likelihood of misidentification); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 299 n.24 (3d Cir. 2016); *Young*, 698 F.3d at 81; *Stevens*, 935 F.2d at 1392; United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986).

54.   *See, e.g.*, Jacqueline Renee Evans et al., *Cross-Racial Lineup Identification: Assessing the Potential Benefits of Context Reinstatement*, 15 PSYCHOL., CRIME & L. 19, 19–28 (2009); Luke B. Jackiw et al., *Examining the Cross-Race Effect in Lineup Identification Using Caucasian and First Nations Samples*, 40 CAN. J. BEHAV. SCI. 52, 52–57 (2008); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL., PUB. POL'Y, & L. 3, 3–35 (2001); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972, 972–84 (1988); *see also Perry*, 565 U.S. at 243–44 (noting that the race of witness and suspect bears upon the risk of misidentification); Arizona v. Youngblood, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting); Manson v. Brathwaite, 432 U.S. 98, 115 (1977) (noting that eyewitness police officer and perpetrator were of the same race); *Young*, 698 F.3d at 81; United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000); *Stevens*, 935 F.2d at 1392.

4.   Age

Research has demonstrated that children of all ages are less likely to correctly reject a perpetrator-absent lineup than adults, but that once they were five years of age or older they did not significantly differ from adults in rates of correct identifications.[55] Research has also found that young adults make more accurate identification decisions than older adults (forty-five and older) or children (seventeen and under).[56] We note this to highlight the potential effect a witness's youthful age may have on the accuracy of an identification.

5.   Exposure Duration

Not surprisingly, the length of time that a witness has to view an event, known as the "exposure duration," can impact the accuracy of the memory.[57] Exposure of limited duration may also result in "poorer quality person descriptions."[58] In this regard, it is important to note that witness estimates of time are not always accurate because people tend to overestimate the length of brief viewing experiences.[59]

6.   Distance

Similarly, it is not surprising that people can view individuals better at shorter distances than longer ones.[60] The dominant explanation is "distance-as-filtering," wherein faces viewed from longer distances become coarser, with fewer details detectable.[61]

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55. *See* Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 L. & HUM. BEHAV. 549, 549–70 (1998).

56. *See* Ryan J. Fitzgerald & Heather L. Price, *Eyewitness Identification Across the Life Span: A Meta-Analysis of Age Differences*, 141 PSYCHOL. BULL. 1228, 1228–65 (2015).

57. *See* Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength*, 18 PSYCHOL., CRIME, & L. 473, 473–90 (2012); *see also Perry*, 565 U.S. at 243–44 (noting that the amount of time the witness has to observe the suspect bears upon the risk of misidentification).

58. Wells et al., *Policy and Procedure Recommendations*, *supra* note 11; *see also* NAT'L RESEARCH COUNCIL, *supra* note 6, at 97–98.

59. *See, e.g.*, Loftus et al., *supra* note 52, at 55–62 (1987); Tara L. Orchard & A. Daniel Yarmey, *The Effects of Whispers, Voice-Sample Duration, and Voice Distinctiveness on Criminal Speaker Identification*, 9 APPLIED COGNITIVE PSYCHOL. 249, 249–60 (1995).

60. *See* Marloes De Jong et al., *Familiar Face Recognition as a Function of Distance and Illumination: A Practical Tool for Use in the Courtroom*, 11 PSYCHOL., CRIME & L. 87, 87–97 (2005); James M. Lampinen et al., *Effects of Distance on Face Recognition: Implications for Eyewitness Identification*, 21 PSYCHONOMIC BULL. & REV. 1489, 1489–94 (2014); R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 L. & HUM. BEHAV. 526, 526–35 (2008); William A. Wagenaar & Juliette H. Van Der Schrier, *Face Recognition as a Function of Distance and Illumination: A Practical Tool for Use in the Courtroom*, 2 PSYCHOL., CRIME & L. 321, 321–32 (1996); *see also Perry*, 565 U.S. at 243–44 (noting that distance bears upon the risk of misidentification).

61. Geoffrey R. Loftus & Erin M. Harley, *Why Is It Easier to Identify Someone Close Than Far Away?*, 12 PSYCHONOMIC BULL. & REV. 43, 43–65 (2012).

7.   Lighting Conditions

Lighting is another viewing factor that influences the quality of memory.[62] Specifically, low illumination may result in "poorer quality person descriptions"[63] and reduced identification accuracy.[64]

8.   Disguises and Other Clothing

If a perpetrator is wearing a disguise or certain articles of clothing, such as sunglasses, it may be more difficult for a witness to identify the individual at an identification procedure.[65]

9.   Retention Interval

Identifications are more accurate when they occur soon after the event. The lapse of time from event to identification is referred to as the "retention interval."[66]

10.   Changes in Appearance

A perpetrator's change in appearance between the witnessed event and the identification procedure can reduce the accuracy of an identification.[67]

D.   Continuing Education Recommendations

Given the vital importance of furthering eyewitness reliability and deterring suggestive practices, the Task Force recommends that the Third Circuit create and maintain a website containing information about eyewitness identifications, including seminal cases from federal and state courts, pertinent scientific research, academic articles, this Report, and other resources. The Task Force recommends that the website be administered by the Third Circuit Librarian and curated and updated by a standing committee. Posting on the website is not intended to suggest anything about the conclusions in the research that is placed there, nor should placement there connote any kind of endorsement or imprimatur of the Third Circuit Court of Appeals, this Task

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62.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 99; *see also* Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Dickerson v. Fogg, 692 F.2d 238, 245 (2d Cir. 1982); Sanchell v. Parratt, 530 F.2d 286, 295 (8th Cir. 1976).

63.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 28.

64.   *See, e.g.,* Daniel Yarmey, *Verbal, Visual, and Voice Identification of a Rape Suspect Under Different Levels of Illumination*, 71 J. APPL. PSYCHOL. 363–70 (1986).

65.   *See* Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629, 629–37 (1987); Jamal K. Mansour et al., *Impact of Disguise on Identification Decisions and Confidence with Simultaneous and Sequential Lineups*, 36 L. & HUM. BEHAV. 513, 513–26 (2012); *see also* Young v. Conway, 698 F.3d 69, 80 (2d Cir. 2012).

66.   *See* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL. APPLIED 139, 139–50 (2008) [hereinafter Deffenbacher et al. *Forgetting the Once-Seen Face*]; *see also* Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (noting that that the passage of time bears upon the risk of misidentification); *Young*, 698 F.3d at 79; United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000).

67.   *See* Joanna D. Pozzulo & Siobhan Marciniak, *Comparing Identification Procedures when the Perpetrator Has Changed Appearance*, 12 PSYCHOL., CRIME & L. 429, 429–38 (2006); Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139, 139–56 (1986).

Force, or any of the judges on it. Rather, the website would only be intended to help educate persons about the topic of eyewitness identification.

E.   Jury Instruction Recommendations

In *Perry v. New Hampshire*,[68] the Supreme Court endorsed the use of jury instructions as a "safeguard" to prevent convictions based upon unreliable eyewitness identifications.[69] In keeping with *Perry*, the United States Court of Appeals for the Third Circuit has adopted a model jury instruction on eyewitness identification, Section 4.15. Adding to or revising this, or any model instruction, is the responsibility of the Third Circuit's Committee on Model Criminal Jury Instructions. The contents of this Report are in no way binding on that Committee. And, ultimately, it is in the sole discretion of a trial court whether to adopt any instructions and to compose whatever instructions that court may deem appropriate in a given case. With these parameters in mind, the Task Force studied and debated whether the existing model instruction should be modified to minimize the risk of wrongful convictions. The Task Force ultimately chose to make no recommendation on this question, although the positions of individual members are noted in this Report.

F.   Summary of Best Practices Recommendations

- Lineups and photo arrays should be administered double-blind. Where that is not practical, they should at least be blinded.
- Lineups and photo arrays should use fillers that match the witness's description of the perpetrator, look similar to the suspect, and the suspect must not stand out from the group of fillers in any way. At least five fillers—and only one suspect—should be included in a lineup or photo array.
- Lineups and photo arrays should be used whenever possible rather than show-ups. When show-ups are used, they should be conducted as soon after the crime as practical and conducted in a manner that minimizes any suggestion that the person in custody is the perpetrator.
- Standard preliminary instructions should be adopted and reduced to writing. They should be given to a witness before any identification procedure. These instructions should inform witnesses that the investigation will continue whether or not an identification is made and tell the witness that the actual perpetrator may or may not be present. The witness should not feel compelled to identify someone from the photo array or lineup.
- A verbatim statement of the witness's confidence in the accuracy of the identification decision should be obtained and recorded by the blind or blinded administrator immediately after any identification procedure, regardless of whether the procedure resulted in an identification.
- Multiple identification procedures with the same witness and suspect should be avoided.

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68.   565 U.S. 228 (2012).

69*.   Perry*, 565 U.S. at 245; *see also id.* at 233, 246.

- Witnesses should be kept separate from other witnesses during the entire identification process and instructed not to discuss the matter with one another and to avoid media and social media accounts of the event.
- Witnesses should be interviewed as soon as possible after the event and before any attempt to identify anyone. Nonleading questions should be used during the interview.
- Witnesses should not be shown large numbers of random arrest photographs (mug shots).
- Law enforcement agencies should only use composites and sketches of the perpetrator rarely and with great caution.
- A single photograph identification procedure should only be used when the perpetrator is believed to be a person already well known to the witness and then only used to confirm that the police and witness are referring to the same individual. Concomitantly, a single photo should never be used as a photographic show-up. Rather, any photo that is shown to a witness should be part of a carefully composed photo array.
- All law enforcement departments should be trained in appropriate procedures for enhancing the probability of an accurate eyewitness identification decision.
- Video and audio recordings should be made of all show-ups, lineups, and photo arrays.[70]
- Law enforcement agencies should develop written policies on conducting eyewitness identifications of a suspect.
- The United States Court of Appeals for the Third Circuit should create and maintain a website containing information about eyewitness identifications, including seminal cases from federal and state courts, pertinent scientific research, academic articles, this Report, and other resources that could assist in educating lawyers and judges.

G. *Conclusion of Executive Summary*

Adopting best practices for law enforcement can minimize the risk of a misidentification at the "front end" of a criminal prosecution.[71] This is critical before a case reaches a jury trial, because "'jurors seldom enter a courtroom with the knowledge that eyewitness identifications may be unreliable.'"[72] And this can be exacerbated if judges and jurors do not have a basic understanding of system and estimator variables and the extent to which they can impact the accuracy of a given identification or the best practices that can minimize the likelihood of error.[73]

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70. This is not a suggestion, nor does it express a view, that other aspects of an investigation should be recorded.

71. INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT, *supra* note 16, at 9.

72. United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (citations omitted).

73. *See, e.g.*, Young v. Conway, 698 F.3d 69, 79 (2d Cir. 2012) (noting that many estimator variables "are counterintuitive and, therefore, not coterminous with 'common sense'"); United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("Social science data suggests . . . that jurors are unaware of several scientific principles affecting eyewitness identifications. In fact, because many of the factors affecting eyewitness

As we have summarized, researchers have achieved substantial agreement on steps that can be taken to help jurors evaluate eyewitness identifications at trial,[74] as well as the factors (estimator variables) that can affect the accuracy of an identification. These factors include expert testimony on the science and fallibility of eyewitness identification and related jury instructions.[75] Implementing such trial safeguards in turn creates incentives for law enforcement to adopt best practices at the front end,[76] although many law enforcement agencies have already adopted such practices.

Courts, legislators, prosecutors, law enforcement officers, legal scholars, and others have studied the scientific research and implemented reforms. For example, the National Research Council of the National Academies of Science (National Research Council) has assessed the scientific research on eyewitness identification and recommended best practices for law enforcement.[77] So too have the International Association of Chiefs of Police,[78] the Innocence Project,[79] the American Psychology-Law Society,[80] and numerous task forces and commissions that have been established by various state supreme courts.[81] Throughout all such studies, there is a remarkable amount of agreement regarding the importance and impact of the variables we have identified and practices that can reduce the likelihood of an erroneous eyewitness identification. The Third Circuit Court of Appeals Eyewitness Identification Task Force now contributes this Report.

III.   BASIC SCIENCE OF PERCEPTION AND MEMORY

Over the past several decades, substantial research has shed light on how human perception and memory function. The basic teaching of this research is that, contrary to popular belief, the brain does not work like a video camera, or create "flashbulb" memories impervious to change. Rather, perception is imperfect.[82] Memories are malleable and not necessarily permanent.[83] While memories can sometimes be very

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impressions are counter-intuitive, many jurors' assumptions about how memories are created are actively wrong." (internal quotation marks omitted) (citations omitted)).

74.   *See Perry*, 565 U.S. at 247.

75.   *See id.* at 246–47; *see also Brownlee*, 454 F.3d at 144 (holding that district court abused its discretion by excluding expert testimony regarding eyewitness identification).

76.   *See Perry*, 565 U.S. at 241 (citing Manson v. Brathwaite, 432 U.S. 98, 112 (1977)) ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place."); *see also* NAT'L RESEARCH COUNCIL, *supra* note 6, at 36–37.

77.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 12.

78.   *See* INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21.

79.   *See* INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10.

80.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11.

81.   *See e.g.*, Report of the Special Master at 31, State v. Henderson, No. A-8-08 (N.J. June 18, 2011) [hereinafter Report of the Special Master]; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, REPORT AND RECOMMENDATIONS TO THE JUSTICES (2013), http://www.mass.gov/files/documents/2016/08/ql/eyewitness-evidence-report-2013.pdf [https://perma.cc/22MF-7SUR].

82.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 15.

83.   *See* Elizabeth F. Loftus, *Our Changeable Memories: Legal and Practical Implications*, 4 NATURE REVS.: NEUROSCIENCE 231, 231–34 (2003); Lawrence Patihis et al., *Memory Myths*, 23 CATALYST: SECONDARY

precise and accurate, they can also be distorted or contaminated by a variety of influences that an eyewitness may never even be aware of.[84] For example, an eyewitness who hears or reads a media report describing a suspect may absorb that information and integrate it with his or her memories, distorting what the eyewitness believes that he or she has seen.[85] Likewise, law enforcement officers interviewing an eyewitness or showing a witness a lineup or photo array may provide subtle cues that impact an eyewitness's memory of the perpetrator without the officer even being aware of how his or her interaction with the witness is affecting the witness's memory.[86]

Researchers generally agree that memory works in three stages, with limitations at each stage. These stages are encoding, storing, and retrieving.[87]

At the encoding stage, "perceived objects and events are initially placed into storage."[88] Encoding begins with the "[s]ensation" of the event—the process by which our sense organs (e.g., eyes, ears) receive information from our environment.[89] This may lead to "[a]ttention," the selection of features or aspects of what was observed for further processing.[90] From there, we experience "[p]erception," the process through which the brain selects, integrates, organizes, and interprets those sensations.[91] Many factors create noise or interference that may limit or distort perception (e.g., environmental cues, limitations of vision, distractions).[92]

The second stage of memory—storage—refers to the "long term retention of information after encoding."[93] During this stage, memories may be "continuously challenged and subject to modification."[94] Details stored in memory may be altered by new information or even a leading question.[95] Storage of memories is also limited in terms of capacity. As to short-term memory, scientists generally agree that we can retain about five to seven items of information at any one time.[96] However, individual capacity

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SCI. REV. 6, 6–8 (2013); Elin M. Skagerberg & Daniel B. Wright, *Manipulating Power Can Affect Memory Conformity*, 22 APPLIED COGNITIVE PSYCHOL. 207, 207–16 (2008).

84. *See* F.C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1932); Roger C. Schank, *Language and Memory*, 4 COGNITIVE SCI. 243, 243–84 (1980).

85. *See, e.g.*, Loftus, *supra* note 37, at 361–66.

86. *See, e.g.*, Daniel J. Gurney et al., *The Gestural Misinformation Effect: Skewing Eyewitness Testimony Through Gesture*, 126 AM. J. PSYCHOL. 301, 302 (2013) (summarizing research showing that an eyewitness's memory can be affected by a question's wording, and concluding that even gestures can influence memory).

87. *See* THE OXFORD HANDBOOK OF MEMORY, *supra* note 19, at 36.

88.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 60.

89. *Id.* at 46.

90. *Id.* at 47.

91. *Id.*

92. *See id.* at 47–49.

93. *Id.* at 62.

94. *Id.*

95. *See id.*

96. *See* Nelson Cowan, *Processing Limits of Selective Attention and Working Memory: Potential Implications for Interpreting*, 5 INTERPRETING 117, 117–46 (2000); George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81, 81–97 (1956).

varies,[97] and researchers debate the fidelity of those memories.[98] Long-term memory has a larger capacity.[99] Successful storage and retrieval of long-term memories are facilitated by associating the event with existing memories and knowledge[100] but, over time, long-term memories become harder to retrieve.[101]

At the retrieval stage "stored information is accessed and brought into consciousness."[102] This process may itself affect the fidelity of the memories retrieved.[103] Retrieval is often triggered by an external stimulus or "cue." [104] For example, stubble on a lineup participant's face may be enough to elicit retrieval of a suspect's entire face.[105] However, retrieval can also produce a false memory, when there are similarities in meaning or appearance between cues.[106] In an example given by the National Research Council, a rugged, mustachioed man in the lineup may cause an individual to retrieve a familiar categorical archetype, rather than the perpetrator, leading to errors in recognition.[107]

Applying these general principles regarding perception and human memory, researchers have studied the impact that certain variables have on the reliability of eyewitness identifications. Researchers divide such variables into two categories: (1) system variables, which consist of factors under the control of law enforcement that relate to eyewitness identification accuracy and testimony,[108] and (2) estimator variables, which consist of "conditions associated with the actual crime, such as viewing conditions, . . . factors specific to the eyewitness, such as the race of the victim relative to that of the perpetrator," or factors operating "during the retention interval (the time

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97.   *See* Steven J. Luck & Edward K. Vogel, *Visual Working Memory Capacity: From Psychophysics and Neurobiology to Individual Differences*, 17 TRENDS COGNITIVE SCI. 391, 391–400 (2013).

98.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 61 ("Memories are particularly labile during the encoding process. The contents of short-term memory are limited and highly subject to interference by subsequent sensory, cognitive, emotional, or behavioral events; the contents can also be biased by prior knowledge, expectations, or beliefs, resulting in a distorted representation of experience.").

99.   *See* Timothy F. Brady et al., *Visual Long-Term Memory Has a Massive Storage Capacity for Object Details*, 105 PROCEEDINGS NAT'L ACAD. SCIS. U.S. 14,325, 14,325–29 (2008); Talia Konkle et al., *Conceptual Distinctiveness Supports Detailed Visual Long-Term Memory*, 139 J. EXPERIMENTAL PSYCHOL. GEN. 558, 558–78 (2010); Joel L. Voss, *Long-Term Associative Memory Capacity in Man*, 16 PSYCHONOMIC BULL. & REV. 1076, 1076–81 (2009).

100.   *See* Timothy F. Brady & George A. Alvarez, *Hierarchical Encoding in Visual Working Memory: Ensemble Statistics Bias Memory for Individual Items*, 22 PSYCHOL. SCI. 384, 390 (2011).

101.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 62–63.

102.   *Id.* at 65.

103.   *See, e.g.*, Loftus, *supra* note 37, at 365.

104.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 65–66; *see also* Steven M. Smith & Edward Vela, *Environmental Context-Dependent Memory: A Review and Meta-Analysis*, 8 PSYCHONOMIC BULL. & REV. 203, 203–06 (2001).

105.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 65.

106.   *See id.* at 66; *see also* Henry L. Roediger et al., *Spreading Activation and the Arousal of False Memories*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 95, 111–12 (Henry L. Roediger et al. eds., 2001) .

107.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 65–66.

108.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 5–6.

between witnessing an event and the identification process)," all of which "cannot be controlled by law enforcement."[109]

Before turning to these two groups of variables, it is worth stressing that researchers have primarily reached these conclusions using the scientific method and peer reviewed research. As with other types of scientific research, human memory and eyewitness identification research is largely built on carefully designed experiments intended to test the effect of one or more variables while keeping constant, to the extent possible, the variables not being tested.[110]

Research on the impact of feedback on an eyewitness's confidence level is illustrative. To test that impact, one study involved an experiment in which test subjects watched a mock crime and then participated in a lineup.[111] Following the lineup, some of these test subjects were provided no feedback about their selection, some were provided positive feedback, and some were provided negative feedback.[112] Thereafter, the test subjects were asked questions about how confident they were that they had identified the perpetrator.[113] Subjects who had received positive feedback reported a higher degree of confidence, leading the researchers to conclude that such feedback can inflate an eyewitness's confidence level.[114] Similar experiments have been designed to test other system and estimator variables, as discussed below. Researchers have validated this substantial body of experimental research with multiple peer-reviewed studies.[115]

IV.   SYSTEM VARIABLES AND BEST PRACTICES RECOMMENDATIONS

System variables are factors within the control of law enforcement that relate to eyewitness accuracy. The term refers to procedures law enforcement officers use to conduct investigations and obtain identifications. There is a substantial agreement among researchers that a number of system variables can affect the reliability of eyewitness identifications. Those areas of agreement, and corresponding best practices, are set forth below.

A.   "Blind" Administration

1.   Scientific Conclusions

Blinding of eyewitness identification procedures is important because of a concept common to a broad spectrum of experiments, known to researchers as the "expectancy

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109.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 1, 72; *see also* Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1546–57 (1978) [hereinafter Wells, *Applied Eyewitness Testimony Research*].

110.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 5–6.

111.   *See* Steve D. Charman & Gary L. Wells, *The Moderating Effect of Ecphoric Experience on Post-Identification Feedback: A Critical Test of the Cues-Based Inference Conceptualization*, 26 APPLIED COGNITIVE PSYCHOL. 243, 243–50 (2011).

112.   *See id.*

113.   *See id.*

114.   *See id.*

115.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 6–7.

effect."[116] The expectancy effect is "the tendency for experimenters to obtain the results they expect because they have helped to shape" those results through their expectations, beliefs, and desires—all of which can subconsciously shape how an experimenter observes and interprets the results of an experiment.[117]

Blinding techniques seek to eliminate the expectancy effect by concealing from the experimenter the expected result.[118] The expectancy effect, and the efficacy of blinding techniques in remedying the effect, have been documented in a wide array of experiments. The concept is perhaps most familiar to the public in double-blind clinical trials for new pharmaceutical drugs, wherein some patients receive the medication and others receive a placebo, but neither the persons administering the drug or placebo nor the participants receiving them know which is being administered to any given participant.[119]

In the eyewitness identification context, there are two types of "blind" procedures: "double-blind" and "blinded." A lineup or photo array is "double-blind" when the officer administering the procedure and the eyewitness do not know which person is the suspect.[120] In double-blind photo arrays, for example, the officer who shows the photo array to the eyewitness does not know which person in the array is the suspect and which are fillers and neither does the witness, hence the term "double" blind.

In very small departments where it may not be practical to conduct a double-blind procedure because, for example, all of the officers know the suspect, an alternative is to use "blinded" identification procedures.[121] In one type of blinded procedure, a detective who knows the identity of the suspect may administer the lineup or photo array, but that officer takes steps to avoid knowing when the eyewitness is viewing the suspect, so as

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116.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 26; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 33.

117.   State v. Henderson, 27 A.3d 872, 896 (N.J. 2011); *see also* NAT'L RESEARCH COUNCIL, *supra* note 6, at 26–27. As to *Henderson*, it is remarkable that the Minority members disparaged this landmark decision of the New Jersey Supreme Court. *See* Minority Statement *infra*. As is well known, *Henderson* formed the basis for that Court's laudable efforts to inform and educate those involved in the criminal justice system in New Jersey about the intricacies of eyewitness identifications. This was a sincere effort that was earnestly undertaken by that Court and Chief Justice Stuart Rabner. At the request of the New Jersey Supreme Court, the *Henderson* Commission received thorough and voluminous testimony, which included much of the testimony submitted to the National Research Council. Specifically, the parties and amici produced over 360 exhibits, including over 200 published studies, and presented the testimony of 7 expert witnesses, including leaders in the field of eyewitness identification. *See Henderson*, 27 A.3d at 884. This depth of study has been a model for this Task Force.

118.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 26–27; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 33–35.

119.   *See, e.g.*, Report of the Special Master, *supra* note 81, at 19–20; NAT'L RESEARCH COUNCIL, *supra* note 6, at 26, 106; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 93; WIS. OFFICE OF THE ATTORNEY GEN., WIS. DEP'T OF JUSTICE, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION 4 (2010).

120.   *See, e.g.*, GARY L. WELLS, EYEWITNESS IDENTIFICATION: A SYSTEM HANDBOOK 60 (1988) [hereinafter WELLS, SYSTEM HANDBOOK]; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 34.

121.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 27; *see also* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 41–42.

not to send any cues to the eyewitness making the identification.[122] For example, a technique such as the "folder shuffle" method, described more fully below, could be used. Additionally, as discussed in greater detail below, a photo array may be shown to the suspect in such a way that the administering officer cannot see which photo the suspect is viewing at any given time. Other "blinded" procedures are self-administered by the eyewitness, such as by computer.[123]

There is substantial agreement that double-blind administration is the preferred method of conducting a lineup or photo array.[124] This process better ensures that the administrator will not be able to direct the witness to the suspect or away from fillers—consciously, or even subconsciously through subtle body language such as eye movements or other changes in facial expression.[125] Double-blind lineup or photo array administration also prevents administrators from inadvertently influencing the witness's confidence in his or her identification decision.[126] Research is also beginning to demonstrate that blinding encourages officers administering lineups and photo arrays to document the identification procedure more fully, which is particularly important when a video or audio-recording of the procedure cannot be made[127]

Scientists who study the reliability of eyewitness identifications have remarked that "blind administration" is one of the most—if not *the* most important—system variable.[128] And courts have regularly recognized the importance of blinding in eyewitness identification.[129]

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122. NAT'L RESEARCH COUNCIL, *supra* note 6, at 56–57; *see also* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 5.2, 9.

123. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 41, 81.

124. *See id.* at 16, 33–35, 41; *see also* NAT'L RESEARCH COUNCIL, *supra* note 6; Charman & Quiroz, *supra* note 20, at 477–87; Dysart et al., *supra* note 20, at 312–19; Greathouse & Kovera, *supra* note 20, at 70–82; Margaret Bull Kovera & Andrew J. Evelo, *The Case for Double-Blind Lineup Administration*, 23 PSYCHOL. PUB. POL'Y & L. 421, 433–34 (2017); Phillips et al., *supra* note 20, at 940–51; Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47.

125. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 36.

126. *See id.* at 37–38.

127. *See id.* at 38–40.

128. *See* Gary L. Wells, *Eyewitness Identification*, *in* REFORMING CRIMINAL JUSTICE 266 (Erik Luna ed., 2018) [hereinafter Wells, *Eyewitness Identification*] ("Double-blind lineup administration is probably the most important single reform that a jurisdiction can make to its eyewitness-identification procedures."); *see also* Charman & Quiroz, *supra* note 20, at 477–87; Kovera & Evelo, *supra* note 124, at 424.

129. *See, e.g.*, Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 321 (3d Cir. 2016) (McKee, C.J., concurring); Hart v. Mannina, 798 F.3d 578, 588 n.1 (7th Cir. 2015) ("Without the double-blind procedure, there is an avoidable risk that the administering officer will inadvertently provide cues to the witness before, during, or after the viewing."); United States v. Williams, 522 F.3d 809, 811 (7th Cir. 2008) (citing scientific studies establishing that "police acted prudently in telling witnesses that the . . . officer conducting [the lineup] may be ignorant of the suspect's identity"); United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("Memory and perception may be affected by factors such as . . . expectancy . . . ."); United States v. Smith, 621 F. Supp. 2d 1207, 1217 (M.D. Ala. 2009) (finding reliable and admissible testimony that "photo identification works best when neither the person conducting the photo array, nor the eyewitness, knows who the targeted suspect is," among other factors); Young v. State, 374 P.3d 395, 417, 418 (Alaska 2016) ("When the administrator of an identification procedure knows who the suspect is, the administrator may subconsciously affect the reliability of the witness's identification."); State v. Guilbert, 49 A.3d 705, 721–22 (Conn. 2012) ("Courts across the country now accept that . . . identifications are likely to be less reliable in the absence of a double-blind . . . identification procedure."); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (holding that "conducting the identification

While all members of the Task Force agree that double-blind procedures are preferred, Task Force Members Robert Kravetz and Special Agent Christian Zajac maintain that this is so for prudential reasons and dispute whether this preference is well supported by scientific research. One of the studies cited by Mr. Kravetz and Special Agent Zajac concludes that "there is at best weak evidence that blind lineup administration increases the diagnostic accuracy of identifications decisions."[130] The other members of the Task Force respectfully disagree with this conclusion. As one recent survey of the research concluded: "the evidence to date suggests that [double-blind lineup procedures] are necessary" because "[a]dministrators who know which lineup [or photo array] member is the suspect emit behaviors that increase the likelihood that witnesses will choose the suspect, primarily by affecting the decisions of witnesses" who would not have otherwise chosen the suspect.[131] And "[a]lthough it is true that we do not currently understand all the conditions that increase or decrease the effects of administrator knowledge or the mechanisms underlying its influence, these unknowns do not diminish the importance of implementing double-blind procedures."[132] Reviewing the scientific literature, the National Research Council reached the same conclusion in recommending double-blind procedures, explaining that "[d]ecades of scientific evidence demonstrate that expectations can bias perception and judgment and that expectations can be inadvertently communicated."[133] Moreover, the other members of the Task Force believe there is a reason that double-blind protocols are required in pharmaceutical trials and that we should not overlook the importance of adapting this proven technique to eyewitness identifications.

2. Best Practices Recommendations[134]

Identifications—whether by lineup or photo array—should use some form of blinding, either double-blind or blind administration, to prevent an officer from providing, even subconsciously, any cues to the eyewitness. This recommendation has been widely adopted.[135] Among many authorities, the National Research Council

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procedure double-blind helps ensure that lineup administrators who know the suspect's identity do not inadvertently suggest the information to the witness"); Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 311 (Mass. 2009) (holding that double-blind administration is "the better practice because it eliminates the risk of conscious or unconscious suggestion"); State v. Henderson, 27 A.3d 872, 896 (N.J. 2011) (quoting expert testimony that "double-blind lineup administration is 'the single most important characteristic that should apply to eyewitness identification' procedures"); State v. Lawson, 291 P.3d 673, 685, 706 (Or. 2012) (holding that "all identification procedures should be conducted by a 'blind' administrator").

130. *See* Steven E. Clark et al., *Legitimacy, Procedural Justice, Accuracy, and Eyewitness Identification*, 8 U.C. IRVINE L. REV. 41, 75 & n.173 (2018); *infra* note 523 and accompanying text.

131.   Kovera & Evelo, *supra* note 124, at 434.

132. *Id.*

133.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 106.

134.   The Department of Justice required that Mr. Kravetz and Special Agent Zajac abstain from making specific best practices recommendations, as they are bound by the Department of Justice guidelines. To be clear, they appreciate the effort made by Chief Bill Brooks and the other subcommittee members in drafting the best practices suggestions, a number of which track procedural requirements adopted by law enforcement agencies (including the Department of Justice). Unless otherwise set forth herein, their abstention should not be considered as a personal disagreement with a particular recommendation.

135. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(2) (West 2019) (effective Jan. 1, 2020); COLO. REV. STAT. §§ 16-1-109(3)(a)(II) (2018); CONN. GEN. STAT. § 54-1p(c)(2) (2018); FLA. STAT. § 92.70(3)(a) (2018); Ga.

recommends blinding as one of their five primary recommendations to establish best practices for law enforcement.[136]

   In any identification procedure, the witness should also be instructed that the officer administering the identification procedure does not know whether the person being investigated is included in the lineup or photo array.[137] This need not disrupt the rapport

Code Ann. § 17-20-2(b) (2018); 725 Ill. Comp. Stat. § 5/107A-2(a) (2018); KAN. STAT. ANN. § 22-4619(d)(1) (2018); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit. V-A, art. 253(B)(2)(e)-(f) (2018)); MD. CODE ANN., PUB. SAFETY, § 3-506.1(b) (West 2018); N.Y. CRIM. PROC. LAW §§ 60.25(1)(a)(ii), 60.30 (McKinney 2018); N.C. GEN. STAT. § 15A-284.52(b)(3)(b) (2018); OHIO REV. CODE ANN. § 2933.83(B)(1) (2018); VT. STAT. ANN. tit. 13 § 5581(b)(2) (2018); VA. CODE ANN. § 19.2-390.02(b)(2) (2018); W. VA. CODE § 62-1E-2(d) (2018); Report of the Special Master, *supra* note 81, at 19–20; ARK. ASS'N OF CHIEFS OF POLICE, MODEL POLICY: EYEWITNESS IDENTIFICATION PROCESS §§ IV(C)(16), (E)(4) (2016); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., MODEL POLICY ON EYEWITNESS IDENTIFICATION § III(B)(4) (2017); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE FINAL REPORT 27 (2008); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, POLICE OFFICER STANDARDS & TRAINING COUNCIL, MANDATORY UNIFORM POLICY: EYEWITNESS IDENTIFICATION PROCEDURES 2–3 (2012); CONN. EYEWITNESS IDENTIFICATION TASK FORCE, REPORT TO THE JUDICIARY COMMITTEE OF THE CONNECTICUT GENERAL ASSEMBLY 2, 6 (2012); DEL. POLICE CHIEFS' COUNCIL, EYEWITNESS IDENTIFICATION—MODEL POLICY § IV(B)(2) (2018); JOSEPH A. FOSTER, ATTORNEY GEN., STATE OF N.H., MODEL POLICY ON EYEWITNESS IDENTIFICATION PROCEDURES 1, 5 (2015); GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., REPORT 32 (2002); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(B); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, supra note 21, § IV(B)(1); INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT, *supra* note 15, at 18; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: LIVE LINE-UP IDENTIFICATION PROCESS § 3; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: PHOTO IDENTIFICATION PROCESS § 3; MONT. LAW ENF'T ACAD., EYEWITNESS IDENTIFICATION MODEL POLICY § 25.3.2 (2012); NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 26, 106–07; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, NEB. CRIME COMM'N, EYEWITNESS IDENTIFICATION MODEL POLICY 1, §§ B.2, C.2 (2016); N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS FOR IMPROVING EYEWITNESS IDENTIFICATIONS 4 (2011); N.C. ACTUAL INNOCENCE COMM'N, RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION §§ II(b), III(1)(b) (2003); OFFICE OF THE ATTORNEY GEN., STATE OF N.J., ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES § I.A (2001); OKLA. JUSTICE COMM'N, REPORT TO THE OKLAHOMA BAR ASSOCIATION 15 (2013); R.I. TASK FORCE TO IDENTIFY & RECOMMEND POLICIES & PROCEDURES TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATION, FINAL REPORT 7 (2010); STATE BAR OF MICH., EYEWITNESS IDENTIFICATION TASK FORCE, LAW ENFORCEMENT AND EYEWITNESS IDENTIFICATIONS: A POLICY WRITING GUIDE 5, 7, 8 (2015); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 88, 90, 93; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 5.1, 8–9; WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, MODEL POLICY: EYEWITNESS IDENTIFICATION—MINIMUM STANDARDS § C (2015); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 4; Am. Bar Ass'n, *supra* note 21, at 811; *see also* CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra*, at 7–8 (listing over forty jurisdictions where blind or double-blind administration is required, recommended, or offered as of 2012).

   136.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5 ("*Recommendation # 2: Implement Double-Blind Lineup and Photo Array Procedures*[.] The committee recommends blind (double-blind or blinded) administration of both photo arrays and live lineups and the adoption of clear, written policies and training on photo array and live lineup administration."). For other primary recommendations of the National Research Council, see *infra* notes 239, 309, 391, 393, 401 and accompanying text.

   137.   *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(10) ("I don't know whether the person being investigated is included in this series."); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.3.5 ("Do not assume that I know who committed this crime."); *id.* § 8.1.2 (administrator "should not . . . [i]ndicate that the administrator knows who the suspect is"); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 4 ("Telling witnesses that the administrator does not know who the suspect is will also help prevent witnesses from mistakenly looking to the administrator for cues about which person is the perpetrator.").

that can build between the investigating detective and a witness.[138] One study group has explained how the investigating detective can "remain engaged" with the witness while explaining the double-blind procedure to be used and introducing the second officer who will conduct it:

The [investigating] detective and officer [who will administer the procedure] meet with the witness together and the detective explains that the officer knows nothing about the photos in the array. The detective reads the instructions to the witness . . . and asks if there are any questions. He then explains that he is going to step out of the room while the second officer shows the array. The officer's only duties are to show the photos . . . , document any comments or identification from the witness, and if there is one, ask the witness how certain he is.[139]

Identification procedures should be administered double-blind where practical,[140] and no one who knows the identity of the suspect should be present.[141] In those situations where double-blind procedures are not practical—for example, in smaller investigating offices where all of the officers know the suspect[142] or where a second officer is not available[143]—blinding techniques should be used.[144]

One widely adopted blinding technique for photo arrays is known as the folder shuffle (or envelope shuffle). In this method, "the officer places each photo in a separate folder or envelope and then shuffles the folders/envelopes so that only the witness sees the images therein" as the witness opens them one at a time.[145] This way, the officer does

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138. *Cf.* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 5.2 (suggesting that in some circumstances the witness may demand that a photo array be administered by the investigating officer).

139. SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 94; *see also* NAT'L RESEARCH COUNCIL, *supra* note 6, at 26–27 (describing similarly the administration of a double-blind photo array). As explained below, a verbatim statement of certainty should be taken for either an identification or nonidentification. *See infra* Part IV.E..

140. *See supra* Part II.B.1.

141. *See, e.g.*, 725 ILL. COMP. STAT. 5/107A-2(f)(12) (2018); N.C. GEN. STAT. § 15A-284.52(b)(13) (2018); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(F), IV(B)(2) (noting that an exception may need to be made for defense counsel); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(a); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(7) ("During a blind presentation, no one who is aware of the suspect's identity should be present during the administration of the photo array. However, during a lineup, the suspect's attorney should be present."); OKLA. JUSTICE COMM'N, *supra* note 135, at 15.

142. *See, e.g.*, CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 3; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 5.2, 9. *But see* Wells, *Eyewitness Identification*, *supra* note 128, at 272 (proposing that small offices partner with one another to conduct double-blind lineups).

143. *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 94.

144. *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(1) ("Whenever possible, a blind presentation shall be utilized. In cases where a blind presentation is not feasible, a blinded presentation should be used."); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 5.2. *See also infra* notes 145–147.

145. NAT'L RESEARCH COUNCIL, *supra* note 6, at 25; *see also* CAL. PENAL CODE § 859.7(c)(2)(B) (West 2019) (effective Jan. 1, 2020); CONN. GEN. STAT. § 54-1p(c)(2) (2018); FLA. STAT. § 92.70(3)(a)(2) (2018); GA. CODE ANN. § 17-20-2(b)(2)(B) (2018); 725 ILL. COMP. STAT. 5/107A-2(a)(3); MD. CODE ANN., PUB. SAFETY § 3-506.1(b)(2)(ii) (2018); N.C. GEN. STAT. § 15A-284.52(c)(2) (2018); OHIO REV. CODE ANN. § 2933.83(A)(6) (2018); VT. STAT. ANN. tit. 13, § 5581(b)(2) (2018); VA. CODE ANN. § 19.2-390.02(b)(2) (2018); W. VA. CODE §§ 62-1E-1(7), 62-1E-2(d) (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(23); BILL

not know when the witness is viewing the suspect[146] and cannot inadvertently influence the witness. Other options are to use a computer program to display the photographs in a random order and in such a way that the administrator cannot see which photograph the witness is viewing[147] or to have the witness self-administer the procedure without an investigator present.[148]

Obviously, the witness should not be exposed to any photographs of the suspect prior to the identification procedure.[149] This can negate the protections afforded by any subsequent double-blind or blinded procedure and taint subsequent identifications.

3.   Minority View

Mr. Kravetz and Special Agent Zajac do not disagree with the Report's recommendation to conduct photo arrays in a double-blinded or blinded fashion, which is consistent with the guidelines of the Department of Justice and numerous other law enforcement agencies. But they assert that the Report conflates that reasonable, prudential recommendation with established scientific fact. At present, several studies have found that there is insufficient evidence to equate the lack of double-blinding in the eyewitness context with inaccuracy.

For example, a 2009 study concluded that "there are still many questions about the effects of administrator knowledge of a suspect's identity and double-blind lineup administration on witness behavior that remain unanswered before solid policy recommendations can be made."[150] Another review of the research concluded that "[t]here remains relatively little evidence evaluating the merits of double-blind lineup

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BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § III(B)(4); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 3, 5; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(b); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18–19; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, at § IV(C)(2)(b) ("The administrator should then shuffle the . . . folders (containing one suspect and the remainder of fillers) such that he or she cannot see how the lineup members are ordered."); MONT. LAW ENF'T ACAD., *supra* note 135, §§ 25.3.4-5, 24.4.3; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.2.b; FOSTER, *supra* note 135, at 1; OKLA. JUSTICE COMM'N, *supra* note 135, at 15; R.I. TASK FORCE, *supra* note 135, at 8 n.14; STATE BAR OF MICH., *supra* note 135, at 5, 7; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 5.3.2.

146.   *See, e.g.*, ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(23)(c); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 5; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(b)(3); FOSTER, *supra* note 135, at 1; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 19; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(2)(b); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.6.3(b); OKLA. JUSTICE COMM'N, *supra* note 135, at 15; R.I. TASK FORCE, *supra* note 135, at 7; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 5.3.2.

147.   *See, e.g.*, CAL. PENAL CODE § 859.7(c)(2)(A); CONN. GEN. STAT. § 54-1p(c)(2); FLA. STAT. § 92.70(3)(a)(1); 725 ILL. COMP. STAT. 5/107A-2(a)(2); MD. CODE ANN., PUB. SAFETY § 3-506.1(b)(2)(i); N.C. GEN. STAT. § 15A-284.52(c)(2); NAT'L RESEARCH COUNCIL, *supra* note 6, at 107, 117; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § C.3.l; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 5.3.1.

148.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 41–42.

149.   *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(9) ("Witnesses should not be permitted to see or be shown any photos of the suspect prior to the lineup or photo array."); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 1.2 ("Neither the suspect nor any photographs of the suspect (including wanted posters) should be visible in any area where the witness will be present.").

150.   Greathouse & Kovera, *supra* note 20, at 81.

administration."[151] And some researchers have found that "[t]here is at best weak evidence that blind lineup administration increases the diagnostic accuracy of identifications decisions."[152] Thus, those studies suggest that it is likely that the status of blinded administration of lineups "as a reform has more to do with the historical importance of blind testing in other fields than the existence of a definitive empirical base involving lineup testing."[153]

Thus, although Mr. Kravetz and Special Agent Zajac agree that double-blind and blinded procedures are a preferable practice, they caution that there is insufficient evidence at present that the failure to administer arrays and lineups in a blind fashion will yield inaccurate identifications.[154]

B.   *Filler and Photograph Selection for Lineups and Photo Arrays*

1.   Scientific Conclusions

"Fillers" (sometimes referred to as "foils") are individuals not suspected of having committed the crime being investigated who are included in a lineup or photo array along with the suspect.[155] Researchers recommend that (to the extent possible) fillers be definitively known to be innocent,[156] and there have been instances in which fillers are identified and wrongfully convicted of a crime.[157]

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151.   Scott E. Gronlund et al., *Conducting an Eyewitness Lineup: How the Research Got It Wrong*, *in* 63 THE PSYCHOLOGY OF LEARNING AND MOTIVATION 1, 30 (Brian Ross ed. 2015).

152.   Clark et al., *supra* note 130, at 75 & n.173 (citing Steven E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification and Eyewitness Confidence*, 2 J. APPLIED RES. MEMORY & COGNITION 158, 158 (2013)). Table 2 of the Clark *U.C. Irvine Law Review* article, *supra*, contains a helpful chart relating to certain system variables addressed in the Report.

153.   Gronlund et al., *supra* note 151, at 30.

154.   Judge Shwartz agrees with Mr. Kravetz and Special Agent Zajac on this point.

155.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 14, 75.

156*.   See* Wixted & Wells, *supra* note 30, at 15 (recommending the use of "known-innocent fillers"); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 51.

157.   Dennis Brown volunteered to be a filler in a lineup. He was mistakenly identified and arrested for a home-invasion rape. Mr. Brown served 19 years in prison before being exonerated by DNA evidence. *See Dennis Brown*, CONVICTING THE INNOCENT: DNA EXONERATIONS DATABASE, http://www.convictingtheinnocent.com/exoneree/dennis-brown/ [https://perma.cc/K7AG-FBEK] (last visited Nov. 1, 2019); *see also* Wells, *Eyewitness Identification*, *supra* note 128, at 267 ("[T]here is an inherent risk to an innocent suspect from being placed in an eyewitness identification procedure."). Moreover, we have already mentioned the tragically ironic case of John White who was mistakenly identified in a lineup, which coincidentally included the actual perpetrator.

Researchers have also focused on the criteria by which the fillers are selected.[158] Indeed, the study of biased lineups is one of the original questions in the field of eyewitness identification research.[159]

It is generally agreed that the preferred method for selecting fillers is to use all the features included in the witness's description of the perpetrator (e.g., gender, age, height, weight, hair color, eye color) and a resemblance to the suspect, rather than selecting fillers based only on their resemblance to the suspect.[160] Some researchers have concluded that choosing fillers based on a witness's description of the perpetrator, rather than on the suspect's appearance, "give[s] the witness the opportunity to provide new, recognition based information" that was not part of the witness's description.[161] On the other hand, fillers should not be so similar as to be effectively indistinguishable from the suspect.[162]

But it is also important that no person should "stand out" (i.e., differ in a significant way from the others in the lineup either by appearance or by factors related to the presentation), especially the suspect.[163] A lineup or photo array in which the suspect stands out from the other fillers may make it apparent to the witness which person is the suspect, thereby influencing the witness and possibly causing him or her to make an identification based upon the fact that one person stood out rather than relying on the

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158. *See* Fitzgerald et al., *supra* note 22, at 151 (noting that "[a]ppropriate selection of fillers is crucial for creating a fair lineup that balances the competing demands for minimizing false identification with maximizing culprit identification"); Steblay et al., *supra* note 25, at 527 (explaining that the reliability of an identification may depend on how the fillers are selected); *see also* NAT'L RESEARCH COUNCIL, *supra* note 6, at 16 (noting that "[r]esearch indicates that accuracy and reliability of eyewitness identifications may be influenced by the type of presentation (e.g., lineup) used, the likeness of non-suspect lineup participants (fillers) to the suspect, the number of fillers, and the suspect's physical location in the presentation").

159. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 43.

160. *See* Wells et al., *Selection of Distractors*, *supra* note 22, at 835–44; *see also* Luus & Wells, *Eyewitness Identification*, *supra* note 22, at 55 (describing the selection of fillers based on their similarity to the witness's description as "clearly preferred" to matching fillers to the appearance of the suspect); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 44–46 (setting forth advantages of the "match-to-description strategy"). *But see* Fitzgerald et al., *supra* note 22, at 151 (noting that matching fillers to the witness's description rather than to the suspect's appearance has "evinced little or no advantage," in light of experiments in which "description-matched line-ups produced only non-significant increases in culprit identification" over "appearance-matched lineups," and in which "the innocent suspect misidentification rate was significantly higher in description-matched lineups than in appearance-matched lineups").

161. Fitzgerald et al., *supra* note 22, at 152. *But see* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 51–52 (calling for further research on how proper fillers contribute to lineup reliability).

162. *See* Wells et al., *Selection of Distractors*, *supra* note 22, at 835-44; *see also* Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d. 263, 325 (3d Cir. 2016) (McKee, C.J., concurring) ("Using fillers that are relative look-alikes forces a witness to examine her memory . . . ."). *But see* Fitzgerald et al., *supra* note 22, at 160 (acknowledging the empirical support for the principle that fillers that are too similar to the suspect should be avoided, but finding "no reliable difference in correct identifications between lineups within the categories of high and moderate suspect-filler similarity"); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 45.

163. *See, e.g.*, Fitzgerald et al., *supra* note 22, at 151, 158, 160; Gary L. Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 46.

individual actually appearing to be the perpetrator.[164] We will discuss the importance of police obtaining a statement of the witness's confidence below. However, it is important to stress here that relying on a witness's high level of confidence when the suspect stands out from amongst the fillers in an identification procedure "is a recipe for wrongfully convicting the innocent."[165]

In circumstances where a suspect does not match the description of the perpetrator provided by the witness, all members of the lineup or photo array should be similar to the suspect as to the relevant characteristic,[166] so as not to make the suspect stand out from the fillers.[167] For example, if a witness described a blonde perpetrator but the suspect has brown hair, all the fillers should have brown hair.[168]

Nor should any fillers stand out. If a filler stands out in an identification procedure, then it may cause the "dud effect," which is when the presence of the dud has been shown to inflate a witness's confidence in identifying an innocent filler.[169]

Courts have recognized the impact that filler selection, and the photographs themselves, may have on the reliability of eyewitness identifications.[170]

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164. *See, e.g.*, Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47 (explaining that "[t]he presence of features that make the suspect stand out from the [fillers] confounds our ability to conclude that the selection of the suspect was due to true recognition versus some form of suggestion, demand, or inference"); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 43 (explaining that research finding that "using low-similarity fillers increases the chances of mistaken identification of an innocent suspect[] has been repeatedly replicated").

165. Wixted & Wells, *supra* note 30, at 51.

166. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 46; *see also* Report of the Special Master, *supra* note 81, at 27; Luus & Wells, *Eyewitness Identification*, *supra* note 22, at 53 (explaining that selecting fillers who match the eyewitness's description of the culprit where the suspect does not match that description is likely to make the suspect stand out).

167. *See* Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47 (1998); *see also* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 47 (cautioning that the suspect may stand out where he or she became the suspect based on a surveillance image, which may not match the witness's description, and making recommendations).

168. To take another example, a suspect is sometimes identified based on a close resemblance to a surveillance video of the perpetrator. If so, the fillers must also have a close resemblance to the video image, lest the suspect stand out. *See* Wixted & Wells, *supra* note 30, at 16.

169. *See* Steve D. Charman et al., *The Dud Effect: Adding Highly Dissimilar Fillers Increases Confidence in Lineup Identifications*, 35 L. & HUM. BEHAV. 479, 494 (2011).

170. *See, e.g.*, Foster v. California, 394 U.S. 440, 442–43 (1969) (holding that lineup was "unfair" where, *inter alia*, the defendant stood out from the fillers because of his height and leather jacket); Simmons v. United States, 390 U.S. 377, 384 (1968) (noting that the risk of misidentification increases where the suspect is included more than once in the array or "is in some way emphasized"); United States v. Wade, 388 U.S. 218, 232 (1967) (describing "striking examples" of cases where the defendant stood out from the fillers); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 324 (3d Cir. 2016) (McKee, C.J., concurring) (citing scientific research for the proposition that "not surprisingly, mistaken identifications are more likely where the suspect stands out in comparison to the fillers"); United States v. Garcia-Alvarez, 541 F.3d 8, 14 (1st Cir. 2008) (noting that the lineup was unduly suggestive in that defendant's accent stood out when participants were required to repeat a statement made by assailant); United States v. Saunders, 501 F.3d 384, 390 (4th Cir. 2007) (holding that the photo array was unduly suggestive where suspect's photograph "stood out" in its background color and lighting); United States v. Wiseman, 172 F.3d 1196, 1209 (10th Cir. 1999) (holding that the photo array was unduly suggestive where suspect's photo "st[oo]d out" due to unnatural skin tone and because the fillers each had a thin chain around their neck); United States v. Eltayib, 88 F.3d 157, 166 (2d Cir. 1996) (discussing how the suspect stood out because his photograph was cropped differently, emphasizing his bushy hair, and because of his light

Mr. Kravetz and Special Agent Zajac maintain that there is a lack of empirical evidence supporting the selection of fillers based on the witness's description of the suspect, rather than the suspect's actual appearance.[171] However, as explained above, substantial research suggests that both the description *and* the actual appearance of the suspect should be considered when selecting fillers—the former to allow the witness to provide "new, recognition-based information" [172] and the latter to prevent the suspect from standing out.[173] Researchers—even those relied upon by Mr. Kravetz and Special Agent Zajac—agree that selecting fillers based *solely* on their resemblance to the suspect can be problematic, as that can increase the likelihood that the suspect will be chosen regardless of the suspect's actual guilt or innocence.[174]

2.   Best Practices Recommendations

The Task Force recommends that, consistent with the weight of authority, the preferred method for selecting fillers for a lineup or photo array is to use all the features included in the witness's description of the perpetrator (e.g., gender, race, age, height, weight, hair color, eye color)[175] and the fillers should resemble the suspect.[176] This recommendation presupposes that an officer will take a description from the witness

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complexion); Grubbs v. Hannigan, 982 F.2d 1483, 1490 (10th Cir. 1993) (holding that the photo array was unduly suggestive, in part, because suspect's facial features stood out); Bernal v. People, 44 P.3d 184, 193–94 (Colo. 2002) (holding that the photo array was suggestive where defendant stood out because of his ethnicity and because of the background of the photo); State v. Henderson, 27 A.3d 872, 897–98 (N.J. 2011); People v. Perkins, 68 N.E.3d 679, 683 (N.Y. 2016) (suppressing lineups where defendant's hairstyle stood out).

171.   *See* Minority Statement *infra*.

172.   Fitzgerald et al., *supra* note 22, at 152.

173.   *See, e.g.*, *id*. at 151, 158, 160; Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 46.

174.   *See* Clark et al., *supra* note 130, at 70 (noting that, where fillers are chosen based only on their resemblance to an innocent suspect, "the innocent suspect will be the person in the lineup who is most likely to be identified").

175.   *See, e.g.*, CAL. PENAL CODE § 859.7(a)(5) (West 2019) (effective Jan. 1, 2020); COLO. REV. STAT. §§ 16-1-109(3)(a)(IV) (2018); CONN. GEN. STAT. § 54-1p(c)(5) (2018); GA. CODE ANN. § 17-20-2(b)(4) (2018); MD. CODE ANN., PUB. SAFETY § 3-506.1(c)(1) (2018); N.C. GEN. STAT. § 15A-284.52(b)(5)(a) (2018); TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(c)(2)(A)(i); VT. STAT. ANN. tit. 13, § 5581(b)(4)(A) (2018); VA. CODE ANN. § 19.2-390.02(b)(4)(A) (2018); W. VA. CODE § 62-1E-2(f) (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(3); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(C), IV(B)(1)(c), IV(C)(1)(b); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 4; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(1)(b); FOSTER, *supra* note 135, at 1, 5; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B §§ 3(G), (H)(1); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(3) ("Fillers should be reasonably similar in age, height, weight, and general appearance and be of the same sex and race, in accordance with the witness's description of the offender."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.2(l); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, at 1, § B.1.b; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(1)(g); OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, §§ I.E.2, I.F.2; OKLA. JUSTICE COMM'N, *supra* note 135, at 17; R.I. TASK FORCE, *supra* note 135, 8–9; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 87–88; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 3.2–3.3; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 8, 18. *But see* NAT'L RESEARCH COUNCIL, *supra* note 6, at 25 ("Fillers [in a live lineup] are selected for their physical similarities to the *suspect* (gender, race, hair length and color, facial hair, height, skin tone, and other distinguishing features)." (emphasis added)).

176.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 46.

before the identification procedure; indeed, that is the preferable practice.[177] The suspect should not "stand out" from the fillers,[178] but rather all fillers should, at a minimum, be plausible alternatives to the suspect based on the witness's description.[179] The administrator should take into account unique or unusual features, such as scars or tattoos, which can be added or overtly concealed on the fillers so that all participants or photographs are consistent.[180]

Similarly, in a photo array, no photo should stand out based upon any characteristics of the photographs, such as color, background, size, brightness, source, composition, or clothing.[181] All photographs should be devoid of any markings that reveal the lineup

177. *See infra* Part IV.H.

178. U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 3.2; *see also* CAL. PENAL CODE § 859.7(a)(5); CONN. GEN. STAT. § 54-1p(c)(5); 725 ILL. COMP. STAT. 5/107A-2(f)(3) (2018); KAN. STAT. ANN. § 22-4619(d)(3) (2018); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit V-A, art. 253(B)(2)(a)(ii)); N.C. GEN. STAT. § 15A-284.52(b)(5); TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(c)(2)(A)(ii); Report of the Special Master, *supra* note 81, at 24, 26; ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(11), (E)(5); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(C), IV(B)(1)(e), IV(C)(1)(d); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 4; CONN. EYEWITNESS IDENTIFICATION TASK FORCE, supra note 135, at 3, 16; FOSTER, *supra* note 135, at 1; GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., supra note 135, at 37; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(G); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.1; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, at 1; OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, §§ I.D, I.E.8; OKLA. JUSTICE COMM'N, *supra* note 135, 16; R.I. TASK FORCE, *supra* note 135, 8–9; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 87–88; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 3, 18; Am. Bar Ass'n, *supra* note 21, at 822.

179. *See* Malpass et al, *supra* note 23, at 157.

180. *See, e.g.*, VT. STAT. ANN. tit. 13, § 5581(b)(4)(A) (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(7); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 4; FOSTER, *supra* note 135, at 1; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(H)(1); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(5); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.2(f); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § C.3.e; OKLA. JUSTICE COMM'N, *supra* note 135, at 17; R.I. TASK FORCE, *supra* note 135, at 9; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 74 (providing that "a suspect's distinctive features—scars, tattoos, etc.—should either be concealed or artificially added to all of the lineup fillers") (citing U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 28, at 29); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 3.3.

181. *See, e.g.*, W. VA. CODE § 62-1E-2(g) (2018) ("In a photo lineup, there should be no characteristics of the photos themselves or the background context in which they are placed which shall make any of the photos unduly stand out."); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(10); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ IV(B)(1)(c), IV(C)(1)(b); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(1)(b); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(F); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(b)-(d) ("Do not mix color and black and white photos. . . . Use photos of the same size and basic composition. . . . Never mix mug shots with other photos."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.2(e); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.1.b; OKLA. JUSTICE COMM'N, *supra* note 135, 16–17.

members' identities or the fact of a previous arrest.[182] When covering portions of a photo of the suspect, all photos should be similarly covered.[183]

When assembling a photo array, it is also important to use a contemporary photograph of the suspect, as older photographs may not accurately represent how the suspect looked at the time of the crime.[184] If the case being investigated is an older one, a photograph of the suspect as he or she appeared at the time of the crime is more appropriate.[185]

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182. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(6); CONN. GEN. STAT. § 54-1p(c)(8) (2018); 725 ILL. COMP. STAT. 5/107A-2(f)(6); N.C. GEN. STAT. § 15A-284.52(b)(7) (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(14); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ IV(B)(1)(e), IV(C)(1)(d); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(J); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(f) ("Cover any portions of mug shots or other photos that provide identifying information on the subject—and similarly cover other photos used in the array."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.2(k); N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(1)(j); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.1.c; N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 4; OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, § I.E.7; R.I. TASK FORCE, *supra* note 135, 10; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 3.4-3.5.

183. *See, e.g.*, BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ IV(B)(1)(e), IV(C)(1)(d); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(1)(c); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(f) ("Cover any portions of mug shots or other photos that provide identifying information on the subject—and similarly cover other photos used in the array."); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.1.c; OKLA. JUSTICE COMM'N, *supra* note 135, at 17.

184. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(5); CONN. GEN. STAT. § 54-1p(c)(5) (2018); 725 ILL. COMP. STAT. 5/107A-2(f)(7); N.C. GEN. STAT. § 15A-284.52(b)(4) (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(4); FOSTER, *supra* note 135, at 1; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(E); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(1)(a) ("Use contemporary photos."); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.1.b; OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, § I.E.3; OKLA. JUSTICE COMM'N, *supra* note 135, at 16; STATE BAR OF MICH., *supra* note 135, at 7; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 87, 91–92; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 2.2–2.3.

185. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(5); *cf.* WELLS, SYSTEM HANDBOOK, *supra* note 120, at 59 ("There may be times when a photograph of the suspect is more like the suspect's appearance at the time of the witnessed event than is his or her current appearance . . . . This might constitute sufficient grounds for preferring a photo-spread to a live lineup.").

At least five fillers—and only one suspect—should be included in a lineup or photo array.[186] Some police departments use seven or more fillers.[187] Officers must not reuse fillers shown to a witness in previous identification procedures including mug-shot searchers, photo arrays, or lineups.[188] There should be only one photo of the suspect for photo arrays.[189]

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186. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(7); 725 ILL. COMP. STAT. 5/107A-2(f)(3)(C); MD. CODE ANN., PUB. SAFETY § 3-506.1(c)(2) (2018); N.C. GEN. STAT. § 15A-284.52(b)(5)(b)-(c); SUPREME JUDICIAL COURT ADVISORY COMM. ON MASS. EVIDENCE LAW, MASS. GUIDE TO EVIDENCE § 1112(b)(1)(A)(iv) (2018) [hereinafter MASS. GUIDE TO EVIDENCE]; Report of the Special Master, *supra* note 81, at 24–25; ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(2), (5); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ IV(B)(1)(b), (d), IV(C)(1)(c); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 135, at 28; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(1)(a); FOSTER, *supra* note 135, at 1; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(1) ("The lineup or photo array should consist of a minimum of six individuals or photographs. Use a minimum of five fillers and only one suspect."); *id.* § IV(B)(6) ("If there is more than one suspect, include only one in each lineup or photo array."); *id.* § IV(C)(1)(e) ("Do not include more than one photo of the same suspect."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.2(a), (d); NAT'L RESEARCH COUNCIL, *supra* note 6, at 23, 25; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, §§ B.1, C.1; N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 4; OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, §§ I.E.1, I.E.4, I.F.1; R.I. TASK FORCE, *supra* note 135, at 8; STATE BAR OF MICH., *supra* note 135, at 7; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 88–89, 92; U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 28, at 29; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 2.1, 3.1; WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § B(1), (4); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 8; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 17; *see also* Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d. 263, 325 (3d Cir. 2016) (McKee, C.J., concurring) (positing that "all lineups should include a minimum of five fillers" and only one suspect).

187. *See, e.g.*, BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(1)(d) ("Because increasing the number of fillers tends to increase the reliability of the procedure, one may have more than the minimum number of fillers."); FOSTER, *supra* note 135, at 1, 5 (recommending "seven fillers, but in no event less than five" for a photo array); NAT'L RESEARCH COUNCIL, *supra* note 6, at 23 ("A photo array consists of six to nine photographs."); N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, §§ II(d), III(1)(e) (recommending a minimum of seven fillers in a photo array and five fillers in a lineup); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 92 (reporting that some police departments in Massachusetts use seven fillers); Am. Bar Ass'n, *supra* note 21, at 822 (noting that Britain "uses arrays of 9").

188. *See, e.g.*, CONN. GEN. STAT. § 54-1p(c)(6); 725 ILL. COMP. STAT. 5/107A-2(f)(3)(E); MD. CODE ANN., PUB. SAFETY, § 3-506.1(d); N.C. GEN. STAT. § 15A-284.52(b)(5)(d); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(9); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(F), IV(B)(2)(n); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(g); FOSTER, *supra* note 135, at 6; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(H)(4); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.2(i); N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 4; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(1)(i); OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, §§ I.E.6, I.F.5; R.I. TASK FORCE, *supra* note 135, at 9; STATE BAR OF MICH., *supra* note 135, at 7; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 88–89, 92; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 3.7; WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § B(2); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 12, 17, 22.

189. *See, e.g.*, BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ IV(B)(1)(b), IV(C)(1)(a); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, at § IV(C)(d) ("Do not include more than one photo of the same suspect."); STATE BAR OF MICH., *supra* note 135, at 7; R.I. TASK FORCE, *supra* note 135, at 10.

3.   Minority View

Mr. Kravetz and Special Agent Zajac maintain that the Report should not conclusively recommend the method that law enforcement should use to select fillers. That is because there is not yet sufficient scientific consensus as to whether fillers should be selected based on the witness's description of the suspect (as the Report suggests) or on the basis of the suspect's appearance.[190] A contrary study cited by the Report itself questions the Report's claim that there is a "general agreement" to select fillers based on the witness's description.[191] Other studies cast doubt on whether there is a scientific consensus regarding the selection of fillers: "[E]xperimental comparisons beyond suspect-matched and description-matched lineups (beyond the original study by Wells et al.) show a surprising pattern. Description-matched lineups appear to be more biased than suspect-matched lineups."[192]

Thus, Mr. Kravetz and Special Agent Zajac believe that the Report should not have made a definitive best practice recommendation regarding filler selection at this time.

C.   *Show-Ups or Field Identifications*

1.   Scientific Conclusions

A show-up or field identification is a procedure wherein only one person—the suspect—is presented to a witness for the purpose of identification.[193] Show-ups typically occur live and relatively soon after the crime has been reported in the same vicinity.[194] They are an important tool for law enforcement because they provide an opportunity for identification while the witness's memory is fresh and before the perpetrator can alter his appearance, and also they can help to ensure the quick release of innocent persons.[195] However, when it is possible for law enforcement to conduct a lineup or photo array, show-ups should be avoided.[196]

There is general agreement in the scientific community that show-ups are, by their very nature, suggestive and result in a higher rate of false identifications of innocent suspects than lineups.[197] This is partly because the witness is presented with only one

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190.   *See supra* Section III.

191.   *See supra* Section III; *see also* Fitzgerald et al., *supra* note 22, at 151 (stating that "matching fillers to the witness's description rather than to the suspect's appearance has 'evinced little to no advantage'").

192.   *See* Clark et al., *supra* note 130, at 70 (citing Steven E. Clark et al., *Eyewitness Identification and the Accuracy of the Criminal Justice System*, 2 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 175 (2015)).

193.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 27; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 74.

194.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 27; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 75.

195.   *See* United States v. Funches, 84 F.3d 249, 254 (7th Cir. 1996); United States v. Wilson, 435 F.2d 403, 404–05 (D.C. Cir. 1970).

196.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 75. B*ut see* Wells, *Eyewitness Identification*, *supra* note 128, at 260 (proposing "rapid tablet-based photo lineups in the field").

197.   *See* Malpass et al, *supra* note 23, at 137–54; Steblay et al., *Eyewitness Accuracy Rates*, *supra* note 25, at 525 (noting that "[t]he showup reveals police suspicions about the single suspect," and thus "may be considered . . . 'inherently suggestive'"); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 13 ("There is no debate among eyewitness scientists about the fact that lineups produce better outcomes than

person and, thus, if mistaken, the witness will choose the innocent suspect. In a lineup or photo array, by contrast, a witness's mistaken identification may fall on the innocent suspect but may also fall on one of the known-innocent fillers, who will not be charged with a crime.[198] Results from a recent study have revealed that over thirty-five percent of all "'positive identifications'" made by witnesses in actual criminal cases are identifications of an innocent lineup filler.[199] Filler identifications tell us important information about the reliability of witnesses. In addition, because show-ups occur "in the field," there is a risk that an eyewitness may identify the suspect based upon clothing.[200] Overall, lineups and photo arrays reduce the rate of wrongful identifications of a suspect. Approximately fifteen percent of the persons subsequently exonerated by DNA had been involved in show-ups.[201]

Courts have recognized that show-ups are inherently suggestive.[202] Nevertheless, if conducted thoughtfully and presented in a manner that minimizes suggestive information

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do showups, whether the outcomes are measured in terms of diagnosticity ratios or measured using signal-detection based methods."); *see also id.* at 74, 76.

198. *See* Smith et al., *supra* note 25, at 128–29, 141–43 (explaining that lineups are superior to show-ups, not because the fillers improve the eyewitness's ability to differentiate someone who is the perpetrator from someone who is not, but rather because the fillers "spread[] affirmative mistaken identifications away from the innocent suspect and toward fillers," who are known to be innocent); Steblay et al., *Eyewitness Accuracy Rates*, *supra* note 25, at 525, 538 (noting that while "[a]n unreliable eyewitness or absence of the true perpetrator in the lineup can be signaled by a witness's selection of a foil," a show-up "does not offer such protection"); Wells et al*., Policy and Procedure Recommendations*, *supra* note 11, at 76.

199.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 76.

200.   *Id.* at 78.

201.   *See id.* at 76.

202.   *See, e.g.*, Moore v. Illinois, 434 U.S. 220, 229 (1977) ("Indeed, a one-on-one confrontation generally is thought to present greater risks of mistaken identification than a lineup."); Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (noting that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned"); Cooper v. Bergeron, 778 F.3d 294, 299 (1st Cir. 2015) ("The admissibility of an identification may be called into question when the police have used a highly suggestive procedure in asking an eyewitness to identify an individual, such as presenting photographs only of the suspect or having the suspect 'show up' alone."); United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006) ("As the Supreme Court has acknowledged, a show-up procedure is inherently suggestive because, by its very nature, it suggests that the police think they have caught the perpetrator of the crime." (citing *Stovall*, 388 U.S. at 302)); *see also id.* (noting that lineup and photo arrays are "less suggestive" than show-ups); Gregory v. City of Louisville, 444 F.3d 725, 755–57 (6th Cir. 2006) (reversing grant of summary judgment on *Monell* claim challenging the "indiscriminate[]" use of show-ups); Sanchell v. Parratt, 530 F.2d 286, 294 (8th Cir. 1976) (noting that the show-up used was more suggestive than lineup); Young v. State, 374 P.3d 395, 421 (Alaska 2016) ("The problems with showups are apparent: in contrast to lineups and photo arrays, which allow a witness with a faulty memory to pick someone other than the suspect, every positive identification in a showup implicates the suspect. Showups seemingly provide little protection against witnesses who are inclined to guess, as witnesses participating in showups tend to base their identifications on clothing."); Merriweather v. Commonwealth, 99 S.W.3d 448, 451 (Ky. 2003) ("[C]ourts generally look upon show-up identifications with disfavor due to the inherent suggestiveness of the procedure."); State v. Henderson, 27 A.3d 872, 903 (N.J. 2011) ("By their nature, showups are suggestive and cannot be performed blind or double-blind."); State v. Lawson, 291 P.3d 673, 686 (Or. 2012) ("Police showups are generally regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications—because the witness is always aware of whom police officers have targeted as a suspect."); State v. Dubose, 699 N.W.2d 582, 591-92 (Wis. 2005) (holding that "evidence obtained from . . . a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary").

to the witness (such as the suggestive practice of displaying the suspect handcuffed in the back of a police car), they can be an important law enforcement tool.

2.   Best Practices Recommendations

While show-ups are suggestive because the witness knows that the person being shown is a suspect (and thus it cannot be double-blind), many officers find them important either to confirm that a suspect is the perpetrator or to clear an innocent suspect and move on.[203] Caution should be exercised in conducting them,[204] and their use "should be avoided whenever possible in preference to the use of a lineup or photo array procedure."[205]

When show-ups are used, precautions should be taken to minimize the effect their inherently suggestive nature may have on a witness. Show-ups should generally be conducted no later than two hours after the eyewitness observed the perpetrator.[206] Before conducting a show-up, officers should first obtain a description of the offender from the witness.[207] This allows the eyewitness's description to be later compared with the appearance of the suspect.[208]

Before showing the suspect to the witness, law enforcement officers should instruct the witness, as with a lineup or photo array,[209] that "the person he or she is about to see may or may not be the perpetrator—and [that] it is equally important to clear an innocent

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203.   *See, e.g.*, Report of the Special Master, *supra* note 81, at 29; NAT'L RESEARCH COUNCIL, *supra* note 6, at 28; POLICE EXEC. RESEARCH FOUND., A NATIONAL SURVEY OF EYEWITNESS IDENTIFICATION PROCEDURES IN LAW ENFORCEMENT AGENCIES (2013); R.I. TASK FORCE, *supra* note 135, at 16; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 99–100; U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 28, at 27; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 23; Am. Bar Ass'n, *supra* note 21, at 825.

204.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 28.

205.   INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A); *see also* W. VA. CODE § 62-1E-2(j) (2018) ("Showups should only be performed using a live suspect and only in exigent circumstances that require the immediate display of a suspect to an eyewitness."); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § III(B)(2); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A) (2018); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(S); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.1; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A; OKLA. JUSTICE COMM'N, *supra* note 135, 17; STATE BAR OF MICH., *supra* note 135, at 9.

206.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 27–28 (explaining that "[i]n response to . . . case law, police typically restrict show-ups to a two-hour time period after the commission of a crime"); *see also* Report of the Special Master, *supra* note 81, at 29; MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.1(a); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 87, 89, 98; *cf.* INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(2) (providing guidance that a show-up should be used "only when the suspect is detained within a reasonably contemporaneous time frame after the commission of the offense and within a close physical proximity to the location of the crime").

207.   *See, e.g.*, W. VA. CODE § 62-1E-2(a) (2018); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(1); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20, app. B § 3(S)(2)(a); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(1 ("Document the witness's description of the perpetrator prior to conducting the showup"); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.2(b); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.1; STATE BAR OF MICH., *supra* note 135, at 9; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 24.

208.   *See, e.g.*, N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(3); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 86, 98.

209.   *See infra* Part IV.D.

person. The witness should also be advised that the investigation will continue regardless of the outcome of the showup."[210] Another instruction provides that if the witness does "not think the person is the culprit, they might have additional opportunities to view other people."[211] In variation of this instruction, some jurisdictions caution the witness that (1) he or she may be asked to view "some people," even if only one suspect will be shown, and (2) that the perpetrator may not be among the "people" shown.[212] These instructions are intended to minimize suggestiveness and limit any compulsion of the witness to identify the person presented. Some law enforcement agencies issue show-up instructions to officers on cards, in field notebooks, or in calendar books, so that the instructions are available when needed and can be read verbatim.[213]

As to the location of a show-up, officers should typically transport the witness to where the suspect has been detained.[214] Transporting the witness to the suspect, rather than vice versa, helps to "minimize the influence on the witness of seeing the suspect transported under custody."[215] Moreover, "[t]ransporting the suspect back to the scene of the crime can potentially taint evidence at the scene, expose the suspect to several witnesses simultaneously, or in cases of [serious] crimes, incite a crowd gathered at the scene."[216] It can also result in an eyewitness observing an identification made by another witness.[217]

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210.   INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(7); *see* W. VA. CODE § 62-1E-2(b) (2018); State v. Washington, 189 A.3d 43, 56 n.11 (R.I. 2018) (quoting PROVIDENCE POLICE DEP'T, EYEWITNESS IDENTIFICATION: PHOTOGRAPHIC LINE-UPS, PHYSICAL LINE-UPS & SHOW-UPS, GENERAL ORDER 360.08 (2013)); *see also* BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § III(D)-(E) (may or may not be present; investigation will continue); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(6) (may or may not be the perpetrator); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(S)(2)(c) (may or may not be perpetrator; investigation will continue); KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: SHOW-UP IDENTIFICATION PROCESS §§ 2, 3, 5; MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.4; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.7 (may or may not be the perpetrator); N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(3)(g); R.I. TASK FORCE, *supra* note 135, at 17 (may or may not be the perpetrator); Wells, *Policy and Procedure Recommendations*, *supra* note 11, at 17–18.

211.   *See* Andrew M. Smith et al., *Eyewitness Identification Performance on Showups Improves with an Additional-Opportunities Instruction: Evidence for Present–Absent Criteria Discrepancy*, 42 L. & HUM. BEHAV. 215, 215–26 (2018); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 77.

212.   *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 106 (providing, as the first instruction to be given to a witness, "You are going to be asked to view some people . . . ." and as the second instruction, "The person you saw may or may not be among the people you are about to view.").

213.   *See id.* at 99.

214.   *See, e.g.*, ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(B)(1); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 6; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(4); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20, app. B § 3(S)(2)(b); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, at § IV(A)(4); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.2(c); NAT'L RESEARCH COUNCIL, *supra* note 6, at 28; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.4; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(3)(e); OKLA. JUSTICE COMM'N, *supra* note 135, at 17; R.I. TASK FORCE, *supra* note 135, at 16–17; STATE BAR OF MICH., *supra* note 135, at 9; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 24.

215.   WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 24.

216.   SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 99.

217.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 78.

When displaying a suspect to a witness during a show-up, officers should take care to avoid any suggestive cues.[218] For example, the number of uniformed officers guarding a suspect should be minimized, and, where possible, a suspect should not be handcuffed or in a police car.[219] If unavoidable, a handcuffed suspect should be shown to the witness in such a way that the handcuffs are not visible.[220] The volume on any police radios should be lowered so that the witness does not overhear discussions about events surrounding the stopping of the suspect.[221] The suspect should not be required to put on clothing of the perpetrator, recite words used by the perpetrator, or perform any actions of the perpetrator.[222] If a suspect has been detained based on the witness's description of the perpetrator's clothing, consideration should be given to covering the suspect's clothing (e.g., with a blanket) for the show-up identification test.[223] If the eyewitness makes an identification, the officers should ask the witness for a statement of certainty and should record the statement (like all identification or nonidentification statements) verbatim.[224]

In circumstances where there is more than one witness, law enforcement should use alternative identification procedures (i.e., photo arrays or lineups) for the remaining witnesses after a positive identification of the suspect from a show-up, in lieu of multiple

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218. *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(13) ("Officers should scrupulously avoid words or conduct of any type that may suggest to the witness that the individual is or may be the perpetrator."); *see also id.* § IV(A)(12) ("Do not require showup suspects to put on clothing worn by, speak words uttered by, or perform other actions of the perpetrator."); NAT'L RESEARCH COUNCIL, *supra* note 6, at 28 (noting that the suspect should not be "display[ed] . . . in a suggestive manner (e.g., not in a police car, not handcuffed, without drawn weapons)"); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.12.

219. *See, e.g.*, ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(B)(2); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(5); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(S)(2)(d); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(5) ("If possible, avoid conducting a showup when the suspect is in a patrol car, handcuffed, or physically restrained by officers, unless safety concerns make this impractical."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.3(a), (b); NAT'L RESEARCH COUNCIL, *supra* note 6, at 28 (recommending that the suspect be "not handcuffed"); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.5; OKLA. JUSTICE COMM'N, *supra* note 135, at 17; R.I. TASK FORCE, *supra* note 135, at 16; STATE BAR OF MICH., *supra* note 135, at 9.

220. *See, e.g.*, ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(B)(2)(b); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 6; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 87, 89; R.I. TASK FORCE, *supra* note 135, at 16.

221. *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 99.

222. *See, e.g.*, DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(8); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(12) ("Do not require showup suspects to put on clothing worn by, speak words uttered by, or perform other actions of the perpetrator."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.3(c)-(e); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.11; OKLA. JUSTICE COMM'N, *supra* note 135, at 18.

223. *See, e.g.*, Jennifer E. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias*, 20 APPLIED COGNITIVE PSYCHOL. 1009, 1009–23 (2006); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 78.

224. *See, e.g.*, CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 7; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(10); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(S)(2)(c)(iv); KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: SHOW-UP IDENTIFICATION PROCESS §§ 4, 6; *cf.* INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(14) ("Ask the witness to provide a confidence statement."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.9.1; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.13; R.I. TASK FORCE, *supra* note 135, at 17–18.

show-ups.[225] Also, if there are grounds for arrest without a show-up identification (e.g., illegal possession of a gun, existing arrest warrant), law enforcement should consider making the arrest and arranging for a more reliable identification procedure.[226]

D.   *Pre-Identification Instructions for Show-Ups, Lineups, and Photo Arrays*

1.   Scientific Conclusions

Before a witness participates in an identification procedure (i.e., a show-up, lineup, or photo array), researchers substantially agree that the witness should be warned that the actual perpetrator "may or may not be present."[227] This minimizes the suggestion to the eyewitness that the perpetrator must be among the individuals displayed; this suggestion can increase the likelihood of the witness choosing the person who most resembles the perpetrator regardless of whether that person is, in fact, the perpetrator.[228] Indeed, one meta-analysis found that an eyewitness's ability to correctly reject a lineup in which the perpetrator is absent "consistent[ly] decrease[s]" when the eyewitness is not instructed that the perpetrator may not be present.[229]

Researchers have characterized this and similar instructions as "unbiased," meaning that the instructions "take a neutral position regarding the presence of the perpetrator in the lineup."[230] Other such unbiased instructions include those informing the witness that "whether an identification is made, the police will continue to investigate"[231] and that "it

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225.   *See, e.g.*, DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(7); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(S)(2)(e)(ii); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(10) ("If one witness identifies the suspect, use a line-up or photo array for remaining witnesses."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.9; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.9; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(3)(h); OKLA. JUSTICE COMM'N, *supra* note 135, at 17; R.I. TASK FORCE, *supra* note 135, at 18; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 106.

226.   *See, e.g.*, Report of the Special Master, *supra* note 81, at 29–30; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(3); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(3) ("Do not use a showup procedure if probable cause to arrest the suspect has already been established."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.8.1(d); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.3; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III.3.a; WIS. OFFICE OF THE ATTORNEY GEN., supra note 119, at 24, 26.

227.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 107; Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 17–18, 52–53.

228.   *See* Wells et al., *Eyewitness Identification Procedures*, *supra* note 20, at 603–47 (explaining that an instruction that the perpetrator may not be in the lineup "has the effect of reducing identifications when the perpetrator is absent from the lineup," by reducing eyewitnesses' tendency to "simply select the person in the lineup whom they perceive is *relatively* more similar to culprit than are the other lineup members").

229.   Clark, *supra* note 27, at 576.

230.   *Id*.; *see also* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 53.

231.   *See* U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 28, at 32 (providing for a pre-identification instruction that "[a]ssure[s] the witness that regardless of whether an identification is made, the police will continue to investigate the incident"); Greathouse & Kovera, *supra* note 20, at 74 (employing, as a set of "unbiased instructions" a set "adapted from the U.S. Department of Justice guidelines," as set out in the 1999 report of the Department's Technical Working Group for Eyewitness Evidence); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 17, 52.

is just as important to free innocent people from suspicion as it is to identify the guilty."[232]

Conversely, biased instructions—i.e., those that suggest that a perpetrator is among the individuals displayed—may cause eyewitnesses to "guess even when they are unsure that the [person] they are choosing is indeed the perpetrator."[233] Biased instructions may also take the form of officer-witness communications that occur far before the identification procedure, but likewise suggest to the witness that the perpetrator will be included, such as where an officer calls to invite a witness to an identification procedure, saying, "We got the guy. We just need for you to come pick him out of a lineup."[234] Researchers have found that biased pre-procedure suggestions, such as "Surely you are going to be able to pick the person out from the lineup," may negate the positive effect of unbiased instructions.[235]

Courts have recognized the importance of providing unbiased pre-identification instructions to witnesses and avoiding biased instructions.[236]

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232. Clark, *supra* note 27, at 576.

233. Greathouse & Kovera, *supra* note 20, at 73.

234. Wixted & Wells, *supra* note 30, at 17; *see also* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 17, 52–53, 81–82.

235. Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 55, 82; *see also* Deah S. Quinlivan et al., *Do Pre-Admonition Suggestions Moderate the Effect of Unbiased Lineup Instructions*, 17 LEGAL & CRIMINOLOGICAL PSYCHOL. 165, 174 (2010) (finding that "pre-admonition suggestion indicating that the perpetrator was in the lineup had three negative effects: it increased the risk of false identifications, it increased eyewitness confidence in their incorrect identifications, and most importantly, it increased witnesses' retrospective judgments on testimony-relevant variables," such as the quality of their view of the perpetrator).

236. *See, e.g.*, Moore v. Illinois, 434 U.S. 220, 230–31 (1977) (describing in-court identification where, among other things, the witness "was told that she was going to view a suspect" as suggestive); Simmons v. United States, 390 U.S. 377, 384 (1968) ("The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the person pictured [in an array] committed the crime."); United States v. Williams, 522 F.3d 809, 811 (7th Cir. 2008) (citing scientific studies for the point "that the police acted prudently in telling the witnesses that the lineup may have contained no suspect at all"); United States v. Saunders, 501 F.3d 384, 390 (4th Cir. 2007) (holding that photo array was suggestive, in part, because the police officer suggested to the eyewitness that a photograph of the person arrested would be in the array, thereby making the witness "feel pressure to make an identification, even if he is not fully confident, for fear of jeopardizing the case against the arrested suspect"); United States v. Wiseman, 172 F.3d 1196, 1209 (10th Cir. 1999) (holding that the photo array was unduly suggestive, in part, because "some witnesses were told that a suspect had been arrested"), *abrogated on other grounds by Rosemond v. United States*, 134 S. Ct. 1240 (2014)); Grubbs v. Hannigan, 982 F.2d 1483, 1490 (10th Cir. 1993) (holding that the photo array was unduly suggestive, in part, because officers told the witness that they had a suspect, "caus[ing] her to assume that one of the individuals in the lineup was the suspect"); United States v. Smith, 621 F. Supp. 2d 1207, 1217 (M.D. Ala. 2009) (finding reliable and admissible testimony that "eyewitnesses exhibit greater accuracy when they are explicitly informed that 'suspect may or may not be' in a photo array"); Young v. State, 374 P.3d 395, 417–18 (Alaska 2016) (noting that a "witness's expectation that a lineup will include the suspect may affect the identification's reliability"); State v. Ledbetter, 881 A.2d 290, 316, 318 (Conn. 2005) (directing trial courts to consider scientific research supporting a "may or may not be present" instruction and providing for a corresponding jury instruction); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (holding that "administering proper pre-lineup instructions that inform the witness that a suspect may or may not be in the lineup and it is permissible not to identify anyone" decreases the risk of misidentification); Commonwealth v. Silva-Santiago, 906 N.E.2d 299, 312 (Mass. 2009) (advising administrator to inform the witness that, *inter alia*, the perpetrator may or may not be present; that it is just as important to clear the innocent; and that regardless of the outcome, the investigation will continue); State v. Henderson, 27 A.3d 872, 896, 897 (N.J. 2011) (holding that "[i]dentification procedures should begin with instructions to the witness that the suspect may or may not be in

Despite Mr. Kravetz and Special Agent Zajac's assertions to the contrary, the Task Force does not contend that all three of the exemplar instructions *must* be given in order to obtain an accurate identification or that failure to provide these instructions will result in an inaccurate identification.[237] Rather, these instructions aim to minimize instances of mistaken identifications, and studies demonstrate that they are effective in doing so. For those reasons, Mr. Kravetz and Special Agent Zajac agree that these instructions should be used.

2.   Best Practices Recommendations

Prior to displaying a suspect to a witness, whether by show-up, lineup, or photo array, an officer should formally instruct the witness.[238] This is a primary recommendation of the National Research Council.[239]

The pre-identification instructions should explain to the witness in detail the procedure that will be used.[240] The witness should be instructed that the blind administrator does not know whether the person being investigated is included in the display.[241] The officer should also give "unbiased" instructions such as those

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the lineup or array and that the witness should not feel compelled to make an identification"); State v. Haugen, 392 P.3d 306, 318 (Or. 2017) (noting "concerns" about system variables where officer's statements suggested that that the assailant would be among the photographs shown); State v. Lawson, 291 P.3d 673, 685, 706 (Or. 2012) (holding that "the likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone"); Commonwealth v. Walker, 92 A.3d 766, 789 (Pa. 2014) (embracing research finding that "the risk of mistaken identification [is increased] when police investigators do not warn a witness, prior to viewing a photo array or line up, that the perpetrator may or may not be in the display"); State v. Dubose, 699 N.W.2d 582, 594 (Wis. 2005) (holding that where a show-up is necessary, witness must be instructed that "the real suspect may or may not be present, and that the investigation will continue regardless of the result of the impending identification procedure").

237.   *See* Minority Statement *infra*.

238.   *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(7) (show-up instruction); *id.* § IV (B)(10) (lineup or photo array instruction); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.1.

239.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5 ("*Recommendation # 3: Develop and Use Standardized Witness Instructions*[.] The committee recommends the development of a standard set of easily understood instructions to use when engaging a witness in an identification procedure.").

240.   *See, e.g.*, BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(b); CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 2; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(10); NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 107; N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 3; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(2); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 92; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 6.1-6.3; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 10, 14, 19.

241.   *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(10) ("I don't know whether the person being investigated is included in this series."); FOSTER, *supra* note 135, at 2, 3, 5; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.2.d; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.3.5 ("Do not assume that I know who committed this crime."); *id.* § 8.1.2 (explaining the administrator "should not . . . [i]ndicate that the administrator knows who the suspect is"); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 4 ("Telling witnesses that the administrator does not know who the suspect is will also help prevent witnesses from mistakenly looking to the administrator for cues about which person is the perpetrator.").

recommended by the International Association of Chiefs of Police[242] and widely in use.[243] Specifically, an officer should instruct the witness that the offender may or may not be present in the show-up, photo array, or lineup.[244] The officer should instruct the witness that whether or not the witness identifies someone the investigation will continue.[245] And the officer should instruct the witness that it is just as important to clear the innocent as it is to identify the guilty.[246] These instructions reduce the pressure on

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242.   *See* INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, §§ IV(A)(7), (B)(10).

243.   *See infra* notes 244–246.

244.   *See, e.g.*, CAL. PENAL CODE § 859.7(a)(4)(A) (West 2019) (effective Jan. 1, 2020); COLO. REV. STAT. §§ 16-1-109(3)(a)(III) (2018); CONN. GEN. STAT. § 54-1p(c)(3)(D) (2018); FLA. STAT. § 92.70(3)(b)(1) (2018); GA. CODE ANN. § 17-20-2(b)(3) (2018); 725 ILL. COMP. STAT. 5/107A-2(e)(1)(B); KAN. STAT. ANN. § 22-4619(d)(2) (2018); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit. V-A, art. 253(B)(2)(b) (2018)); MD. CODE ANN., PUB. SAFETY § 3-506.1(b)(3) (2018); N.C. GEN. STAT. § 15A-284.52(b)(3)(a) (2018); OHIO REV. CODE ANN. § 2933.83(A)(6)(e), (B)(5) (2018); TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(c)(2)(B); VT. STAT. ANN. tit. 13, § 5581(b)(3) (2018); VA. CODE ANN. § 19.2-390.02(b)(3) (2018); W. VA. CODE § 62-1E-2(b)(1) (2018); MASS. GUIDE TO EVIDENCE, *supra* note 186, § 1112(b)(1)(A)(i) (2018); Report of the Special Master, *supra* note 81, at 21; ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(17); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(D), IV(B)(2)(b), IV(C)(2)(b); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 135, at 27; CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 3; CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 2; FOSTER, *supra* note 135, 3–4, 7–8; GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., *supra* note 135, at 34; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 19, app. B § 3(D)(1); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, §§ IV(A)(7), (B)(10) ("may or may not be" present in show-up, lineup, or photo array); KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: LIVE LINE-UP IDENTIFICATION PROCESS § 2; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: PHOTO IDENTIFICATION PROCESS § 2; MONT. LAW ENF'T ACAD., *supra* note 135, § 25.5.1(d); NAT'L RESEARCH COUNCIL, *supra* note 6, at 107; N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 3; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, §§ II(c), III(2); OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, § I.B; OKLA. JUSTICE COMM'N, *supra* note 135, at 15; R.I. TASK FORCE, *supra* note 135, at 11; STATE BAR OF MICH., *supra* note 135, at 7; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 34, 89; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.3.1 (directing administrators to give such an instruction); WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § D(2)(i); Am. Bar Ass'n, *supra* note 21, at 811, 822–23.

245.   *See, e.g.*, CAL. PENAL CODE § 859.7(a)(4)(C); COLO. REV. STAT. §§ 16-1-109(3)(a)(III); CONN. GEN. STAT. § 54-1p(c)(3)(G); FLA. STAT. § 92.70(3)(b)(5); 725 ILL. COMP. STAT. 5/107A-2(e)(1)(F); N.C. GEN. STAT. § 15A-284.52(b)(3)(e); W. VA. CODE § 62-1E-2(b)(4); MASS. GUIDE TO EVIDENCE, *supra* note 186, § 1112(b)(1)(A)(i); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, §§ IV(C)(17); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(E), IV(B)(2)(b), IV(C)(2)(b); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 135, at 27; CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 3; CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 3; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, at attachment A, B; FOSTER, *supra* note 135, at 3–4, 7–8; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 19, app. B § 3(D)(4); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, §§ IV(A)(7),(B)(10) (investigation will continue regardless of the outcome of show-up, lineup, or photo array); KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: LIVE LINE-UP IDENTIFICATION PROCESS § 7; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: PHOTO IDENTIFICATION PROCESS § 7; MONT. LAW ENF'T ACAD., *supra* note 135, § 25.5.1(e); NAT'L RESEARCH COUNCIL, *supra* note 6, at 107; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, at 1, § B.2.d; OKLA. JUSTICE COMM'N, *supra* note 135, 15–16; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 90; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.3.4; WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § D(2)(iii).

246.   *See, e.g.*, CONN. GEN. STAT. § 54-1p(c)(3)(B); FLA. STAT. § 92.70(3)(b)(4); 725 ILL. COMP. STAT. 5/107A-2(e)(1)(E); N.C. GEN. STAT. § 15A-284.52(b)(3)(d); W. VA. CODE § 62-1E-2(b)(3); MASS. GUIDE

the witness to make a selection and thus minimize suggestiveness and guessing.[247] There should also be explicit options to answer "Not present," "Don't know," or "Not sure."[248]

Conversely, "[s]tatements that encourage the witness to make an identification should be avoided. . . . For example, urging a hesitant witness to make an identification or to try harder would be improper."[249] Likewise, the witness should not be given or exposed to "information about the case, the progress of the investigation, or the suspect," such as the fact that a suspect will be included in the identification procedure.[250]

An officer should read the instructions to the witness from a document,[251] such as an instruction sheet or card, like some officers do with *Miranda* warnings.[252] Reading the instructions ensures that a witness will receive complete and accurate instructions, and that the precise words spoken by the officer are known.[253] A model set of witness instructions from the International Association of Chiefs of Police model policy is attached to this Report as Appendix C.

3.   Minority View

Researchers have identified four types of pre-lineup instructions, categorized as neutral, liberal, unbiased, and conservative:

TO EVIDENCE, *supra* note 186, § 1112(b)(1)(A)(i); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(b), (C)(2)(b); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 3; CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 2; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, at attachment A, B; FOSTER, *supra* note 135, at 3–4, 7–8; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(7), (B)(10) (stating that it is just as important to clear the innocent instruction to be given before show-up, lineup, or photo array); KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: LIVE LINE-UP IDENTIFICATION PROCESS § 4; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: PHOTO IDENTIFICATION PROCESS § 4; MONT. LAW ENF'T ACAD., *supra* note 135, § 25.5.1(b); N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(2); OKLA. JUSTICE COMM'N, *supra* note 135, at 16; R.I. TASK FORCE, *supra* note 135, at 11; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 86, 89; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.3.3; WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § D(2)(ii); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 10, 14, 19.

247. *See, e.g.*, BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § III(D)–(E); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 19; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 92 .

248. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 17, 56.

249. INT'L ASS'N OF CHIEFS OF POLICE, EYEWITNESS IDENTIFICATION: CONCEPTS AND ISSUES PAPER 5 (2016) [hereinafter INT'L ASS'N OF CHIEFS OF POLICE, CONCEPTS].

250. U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, at § 1.1.

251. *See, e.g.*, ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(E)(8); CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 2; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, Attachment A, B; FOSTER, *supra* note 135, at 2, 5; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(10) ("The witness shall be given a copy of the following instructions prior to viewing the lineup or photo array and the administrator shall read the instructions aloud before the identification procedure."); NAT'L RESEARCH COUNCIL, *supra* note 6, at 25, 107; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 93; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 6.1, 9.4.1; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 10.

252. *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 107; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 34–35, 86.

253. However, reading model instructions is not a substitute for video-recording the identification procedure, as administrators may inadvertently alter scripts. *See infra* Part IV.M.

- "Neutral" response bias instructions do not indicate whether or not the culprit is in the lineup, but they also do not explicitly caution the witness that the culprit may not be present. For example: "If you see the person from the video in the lineup, please pick him; otherwise, choose the 'Not present' option";
- "Liberal" response bias instructions imply that the culprit is in the lineup and encourage the witness to make an identification even if the witness is not 100 percent certain of the identification;
- "Unbiased" instructions explicitly caution the witness that the culprit may not be in the lineup. For example: "The person from the video may or may not be in the lineup. If you see the person from the video, please pick him; otherwise, choose the 'Not present' option" and
- "Conservative" response bias instructions imply that the culprit is not in the lineup and caution the witness that an identification should be made only if the witness's certainty in the identification is high.[254]

All Task Force members agree that "liberal" response bias instructions should not be given. And the Report does not advocate for "conservative" response bias instructions. Thus, the disagreement regarding pre-lineup instructions relates to whether the Majority should recommend "unbiased" pre-lineup instructions over "neutral" instructions.

Mr. Kravetz and Special Agent Zajac disagree that, "as a matter of scientific consensus," a witness should be warned that (1) the actual perpetrator "may or may not" be present before conducting an identification procedure; (2) "whether an identification is made, the police will continue to investigate;" and (3) "it is just as important to free innocent people from suspicion as it is to identify the guilty."[255] Although many law enforcement agencies (including the Department of Justice) provide some version of these "unbiased" instructions as a matter of policy,[256] some research studies suggest that providing these unbiased instructions may be less effective than providing neutral instructions.

For example, the Report cites favorably a 2005 study by Professor Stephen Clark for the proposition that "an eyewitness's ability to correctly reject a lineup in which the perpetrator is absent 'consistent[ly] decrease[s]' when the eyewitness is not instructed that the perpetrator may not be present."[257] That quote, however, does not fully set forth the results of the study, which compared the impact of "biased" instructions—"those which do not take a neutral position regarding the presence of the perpetrator, and do not recognize or acknowledge the potential correctness of a no-identification response"—with "unbiased" instructions—those taking a "neutral position regarding the presence of

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254.   Laura Mickes et al., *ROCs in Eyewitness Identification: Instructions Versus Confidence Ratings: Confidence-Based vs. Instruction-Based ROCs*, 31 APPLIED COGNITIVE PSYCHOL. 467 (2017).

255.   *See* Minority Statement *infra*; *see also supra* notes 227–232 and accompanying text.

256.   *See* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 6.3.1, .6.3.4. Neither the DOJ Identification Procedures nor the 2014 NAS Report recommend that law enforcement inform a witness pre-identification that "it is just as important to clear the innocent as it is to identify the guilty." Moreover, the Report does not cite any empirical evidence in support of that specific instruction, which itself fails to accurately capture the role of the eyewitness—to tell the truth, not "clear" or "implicate" a suspect.

257.   *See supra* note 228–230 and accompanying text.

the perpetrator in the lineup."[258] Professor Clark concluded that the choice between biased and unbiased instructions affects response bias (the decision to make a suspect identification), but not discriminability.[259] Given these results, Professor Clark questioned in a 2018 law review article the "scientific basis" for the National Research Council including unbiased pre-lineup instructions in their recommendations given that "[t]he results of experimental simulations show that the cautionary instructions produce a reduction of both correct *and* false identification rates, with no change in diagnostic accuracy."[260] A more recent study further demonstrates that there is no diagnostic difference between a pre-lineup instruction that includes the "may or may not" language and a neutral instruction that does not provide such a warning (but otherwise does not imply that the culprit is in the lineup).[261]

Given these research studies, Mr. Kravetz and Special Agent Zajac thus disagree that there is a scientific consensus that law enforcement must provide the specific instructions adopted in the Report, as opposed to other neutral instructions, to avoid inaccurate identifications.[262] Rather, the decision to provide the recommended instructions represents a policy judgment "that witnesses may set an inappropriately low decision criterion based on their belief that the perpetrator is present, and that law enforcement carries a burden to correct that false assumption."[263]

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258. Clark, *supra* note 27, at 576 ("Specifically, the meta-analysis reported that *biased* instructions produced a large, consistent decrease in the correct rejection rate for target-absent lineups, but inconsistent effects on correct identification rates in target-present lineups, which when averaged across studies showed an average effect size near zero." (emphasis added)).

259. *Id.* at 600–01 (stating that biased instructions "will increase the likelihood of a suspect identification, whether or not that suspect is guilty or innocent"). Professor Clark's meta-analysis further revealed that "*biased instructions do produce more correct identifications* in [target present] lineups, and . . . the accuracy of those biased witnesses is considerably better than chance." *Id*. at 598 (emphasis added). But he stated that the results do not mean that law enforcement should utilize biased instructions as a matter of policy. That is because, as he aptly observed, "nudging a witness with biased instructions serves no good purpose" because it might "produce the worst outcome — a false identification of an innocent person." *Id*. at 6; *see also* Scott E. Gronlund & Aaron S. Benjamin, *The New Science of Eyewitness Memory*, 69 PSYCHOL. LEARNING & MOTIVATION 241 (2018) (citation omitted).

260. Clark et al., *supra* note 130, at 71 (emphasis added) (citing Steven E. Clark et al., *Probative Value of Absolute and Relative Judgments in Eyewitness Identifications*, 35 L. & HUM. BEHAV. 364, 365–66 (2011)).

261. Mickes et al., *supra* note 254, at 467. The study involved over 5,000 participants who viewed a mock crime video and were provided with a six-person photo array with four different types of pre-lineup instructions, categorized as neutral, liberal, unbiased, and conservative. The results of the study showed that there was no statistical difference between the "neutral" instruction and the "unbiased" instruction in terms of the correct and false identification rates.

262. *See* Gronlund & Benjamin, *supra* note 259, at 262 ("Given these results, it might seem puzzling that the US National Academy of Sciences, in a recent report reviewing the current state of the field of eyewitness memory (National Research Council, 2014), recommended the use of unbiased instructions.").

263. Clark et al., *supra* note 152, at 71.

E.   Pre-Identification Suggestivity, Post-Identification Feedback, and Confidence Statements

1.   Scientific Conclusions

The question of eyewitness confidence arises in three contexts: the need to protect against artificially inflating a witness's confidence both pre- and post-identification; the value of a witness's expressed confidence immediately upon making an initial identification; and the admissibility and value of a witness's expression of confidence at time of trial.

a.   *Pre-Identification Suggestivity and Post-Identification Feedback*

For an eyewitness's expression of confidence to have value, one prerequisite is that there be no suggestivity prior to the identification procedure. For example, pre-lineup communications such as "We got the guy. We just need for you to come pick him out of a lineup" have been shown to artificially inflate witness confidence.[264]

Also critical to any discussion of eyewitness confidence is the concept of post-identification feedback. Post-identification feedback occurs, for example, when an officer tells a witness that he or she identified the suspect. Feedback need not be explicit, as an eyewitness may also interpret as feedback "vague positive comments."[265] Feedback can even be as subtle as making eye contact or using certain intonation, and the officer and witness may not even be aware that it occurred.[266] Researchers agree that it is essential that law enforcement officers *not* provide an eyewitness with feedback until after the witness has been asked to declare a confidence level in the identification, if ever.[267] Researchers have consistently found, in both laboratory and field studies, that positive post-identification feedback can inflate a witness's level of confidence and impact the witness's memory of the conditions surrounding his or her viewing of the perpetrator, including how much attention he or she paid to the perpetrator, and how good a view he or she had of the perpetrator.[268] Post-identification feedback also artificially increases witness credibility, impairing the ability of fact-finders to determine if the witness's identification is accurate.[269]

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264.   *See* Wixted & Wells, *supra* note 30, at 17; *see also* Quinlivan et al., *supra* note 235, at 174 (finding that "pre-admonition suggestion indicating that the perpetrator was in the lineup . . . increased eyewitness confidence in their incorrect identifications").

265.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 62.

266.   *See* Wixted & Wells, *supra* note 30, at 18; *see also* Lynn Garrioch & C.A. Elizabeth Brimacombe, *Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence*, 25 L. & HUM. BEHAV. 299, 307–08 (2001).

267.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 108; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 60.

268.   *See, e.g.*, Douglass & Steblay, *supra* note 31, at 859–69 (2006); Steblay et al., *Eyewitness Post-Identification*, *supra* note 31, at 1–18; Wright & Skagerberg, *supra* note 31, at 172–78; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 60.

269.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 61.

For example, in the previously discussed case of exoneree Ronald Cotton,[270] the victim was shown a six-person photo array and, after viewing the array for five minutes, narrowed it down to two photos, including Mr. Cotton. She then later pointed to Mr. Cotton, and stated,

> VICTIM: "Yeah. This is the one. I think this is the guy."
> OFFICER: "You 'think' that's the guy?"
> VICTIM: "It's him."
> OFFICER: "You're sure?"
> VICTIM: "Positive."[271]
> VICTIM: "Did I do OK?"
> OFFICER: "You did great."[272]

The victim has subsequently described how this positive feedback made her more confident in her incorrect identification.[273] As noted previously, Mr. Cotton was convicted and served over a decade in prison before he was exonerated by DNA evidence.[274]

b. *Initial Confidence and a Correlation with Accuracy*[275]

The only time that an eyewitness's expression of confidence (in his or her identification) is potentially uncontaminated (assuming that no pre-identification suggestivity has occurred) is immediately upon making an initial identification.[276] As to such initial identifications, recent research has shown that there are very few mistaken identifications of an innocent suspect at the highest levels of witness confidence when the identification procedures used are "pristine."[277] As discussed above, pristine conditions include, among other things, double-blind or blinded administration, appropriate pre-lineup instructions, no suggestion that the perpetrator is included, including only one suspect per procedure, ensuring the suspect does not "stand out,"[278]

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270. *See generally* Nat'l Research Council, *supra* note 6, at 10; *Eyewitness: How Accurate is Visual Memory?*, CBS News (Mar. 6, 2009), http://www.cbsnews.com/news/eyewitness-how-accurate-is-visual-memory/ [https://perma.cc/B2SR-79JB].

271. Jennifer Thompson et al., Picking Cotton: Our Memoir of Injustice and Redemption 33 (St. Martin's Press 2010).

272. Nat'l Research Council, *supra* note 6, at 10.

273. *See id.*

274. *See id.*

275. Mr. Kravetz and Special Agent Zajac do not join this subsection. Their views are expressed separately below. *See* Minority Statement *infra*.

276. Wixted & Wells, *supra* note 30, at 13; *see also* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 59 (explaining that the statement of confidence must be taken immediately, and that a delay of even five minutes may "undermine the predictive value of confidence").

277. Wixted & Wells, *supra* note 30, at 14–20. Of note, a strong resemblance between an innocent suspect and actual perpetrator could lead to high levels of confidence in the erroneous identification of the innocent suspect. *See id.* at 15–16.

278. In the psychological literature, a lineup in which the suspect does not stand out is described as statistically "fair." This means that "the suspect would not be identified more often than chance by a group of

ensuring that fillers are not "duds" who look unlike the perpetrator,[279] and using a blind administrator to obtain a witness's statement of confidence immediately after the identification decision prior to the witness receiving any verbal or nonverbal feedback about their identification.[280] Without the existence of pristine conditions, a witness's confidence is less indicative of reliability because confidence can be artificially inflated by suggestive procedures.[281]

The critical point is that this relationship between an initial expression of highest confidence and accuracy is obtainable only under pristine conditions.[282] Although Mr. Kravetz and Special Agent Zajac disagree,[283] the research of Dr. Wells and Dr. Wixted speaks for itself: "It is important to keep in mind that our claims about the reliability of confidence as an indicator of accuracy in eyewitness identification apply *only* to cases in which the eyewitness-identification test procedures were pristine."[284] And although some of the conditions described as pristine are frequently employed (such as the use of pre-lineup instructions), others as of yet are not.[285]

Of the pristine conditions described, one—blinding—requires particular note. Dr. Wells and Dr. Wixted emphasize in their research that an initial expression of highest confidence is not related to accuracy without blinding. Specifically, they explain that without blinding, "post-identification feedback appears to be a pernicious problem."[286] One example is the case of exoneree Anthony Powell, who was convicted of cross-racial abduction and rape in Massachusetts. The victim later testified to the feedback she received during the non-blind identification procedure: The detective at the photo array "told me that I had picked the one he arrested" and "that I picked out the right one."

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mock witnesses provided with the perpetrator's description." *Id.* at 30; *see also* John T. Wixted et al., *Estimating the Reliability of Eyewitness Identifications from Police Lineups*, 113 PROC. NAT'L ACAD. SCI. 304, 305 (2016) [hereinafter Wixted et al., *Estimating the Reliability*] ("In a fair, six-person lineup, the suspect should be identified by a mock witness only 1/6 (0.17) of the time."). The Minority misunderstands this point when it suggests that Dr. Wells and Dr. Wixted use "fair" and "unfair" in a normative sense; they do not.

279.   Wixted & Wells, *supra* note 30, at 15.

280.   *See id.* at 17.

281.   *See id.* at 50 ("Scientific research has clearly established that certain non-pristine testing conditions severely compromise the information value of eyewitness confidence.").

282.   However, even under pristine conditions, very high-confidence initial identifications are *not* related to accuracy where the "base rate"—the likelihood that the lineup actually contains the perpetrator—is low. *See id.* at 49. To this point, the American Psychology-Law Society White Paper on eyewitness identification recommends that law enforcement include an individual in a lineup only upon reasonable suspicion. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 18; *see also* Wells, *Eyewitness Identification*, *supra* note 128, at 267–68, 277 (same). This Report takes no position on this important, developing question.

283.   *See* Minority Statement *infra*. Judge Shwartz joins Mr. Kravetz and Special Agent Zajac on this point.

284.   Wixted & Wells, *supra* note 30, at 19 (emphasis added).

285.   *See* Elizabeth F. Loftus & Rachel L. Greenspan, *If I'm Certain, Is It True? Accuracy and Confidence in Eyewitness Memory*, 18 PSYCHOL. SCI. PUB. INT. 2 (2017) (citing POLICE EXEC. RESEARCH FOUND., *supra* note 203).

286.   Wixted & Wells, *supra* note 30, at 19.

Twelve years later, Mr. Powell was exonerated by DNA evidence; the real perpetrator was later identified (also through DNA evidence) and pleaded guilty.[287]

The American Psychology-Law Society's White Paper on eyewitness identification explains the processes at work when feedback artificially inflates confidence: (1) "[n]on-blind administrators react to witness identifications in ways that send information to witnesses about whether their choice was 'correct,'" and (2) "[t]wo decades of research supports the conclusion that providing feedback to witnesses that they identified the suspect increases their confidence."[288] Therefore, feedback "renders witnesses' reports of their confidence useless for judging their accuracy."[289]

In arguing against this view, Mr. Kravetz and Special Agent Zajac cite three papers—all authored by the same lead researcher, Dr. Wixted—that purportedly contend that an initial high-confidence identification may be useful for predicting accuracy, regardless of the presence or absence of pristine conditions.[290] However, even these papers demonstrate the need for proper conditions so that the expression of confidence is uncontaminated. For example, Dr. Wixted's 2015 paper acknowledges that "because initial confidence reliably predicts accuracy *only if* the ID and the confidence statement made by the eyewitness are not influenced by the investigating officer," blinding is recommended.[291] Dr. Wixted's 2016 Houston field study contains exactly the same caveat—that the study's finding that high confidence is correlated with accuracy "appl[ies] *only* to fair lineups initially administered to adults in double-blind fashion."[292] Dr. Wixted's 2018 paper summarizes his 2015 and 2016 papers, which stand for the point that "on an initial test of uncontaminated memory *using proper procedures*, low confidence implies low accuracy, and high confidence implies high accuracy."[293]

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287. *Anthony Powell*, CONVICTING THE INNOCENT: DNA EXONERATIONS DATABASE, http://www.convictingtheinnocent.com/exoneree/anthony-powell/ [https://perma.cc/A8VS-STQC] (last visited Nov. 1, 2019).

288.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 37.

289.   *Id.* at 38; *see also* Matthew A. Palmer et al., *The Confidence-Accuracy Relationship for Eyewitness Identification Decisions: Effects of Exposure Duration, Retention Interval, and Divided Attention*, 19 J. EXPERIMENTAL PSYCHOL. 55, 69 (2013) (same).

290.   *See* Wixted et al., *Estimating the Reliability*, *supra* note 278, at 304; John T. Wixted et al., *Rethinking the Reliability of Eyewitness Memory*, 13 PERSP. ON PSYCHOL. SCI. 324 (2018) [hereinafter Wixted et al., *Rethinking the Reliability*]; John T. Wixted et al., *Initial Eyewitness Confidence Reliably Predicts Eyewitness Identification Accuracy*, 70 AM. PSYCHOLOGIST 515 (2015) [hereinafter Wixted et al. *Initial Eyewitness*].

291.   Wixted et al., *Initial Eyewitness*, *supra* note 290, at 524 (emphasis added).

292.   Wixted et al., *Estimating the Reliability*, *supra* note 278, at 309 (emphasis added). In addition, the Houston field study assumed that high confidence witnesses identified the right person when, in fact, the study involved real police department investigations where no one knows for sure if the prime suspect was indeed the doer. In short, the drawback of this type of study (a field study) is that the ground truth of guilt (i.e., whether the suspect who was picked was actually the perpetrator) is unknown. All that is known is that the police believed the suspect to be the perpetrator and may or may not have had corroborating evidence. *See* Wixted & Wells, *supra* note 30, at 40. In addition, the manner in which confidence was measured in the Houston field study was very unusual—a three-level rating scale—making it difficult to know how the results of this study compare to measurements that have been studied before. *See* Wixted et al., *Estimating the Reliability*, *supra* note 278, at 305.

293.   Wixted et al., *Rethinking the Reliability*, *supra* note 290, at 324 (emphasis added).

Relatively few eyewitnesses make initial identification decisions with high levels of confidence; thus, confidence will be less informative of accuracy in most identification cases.[294]

As for low-confidence identifications, they are serious cause for concern.[295] "[T]he information value of a low-confidence ID is never open to question. No matter how good or how bad the eyewitness-identification procedure is, a low-confidence ID implies that the ID is error prone."[296] Moreover, "low-confidence" is defined broadly.[297] For example, a leading compilation of DNA exonerations characterizes an initial identification as unreliable where the witness was not "certain."[298]

c. *Time-of-Trial Confidence*

There is no scientific basis for correlating time-of-trial confidence with accuracy.[299]

> [A]s research suggests, the passage of time since the initial identification may mean that a courtroom identification is a less accurate reflection of an eyewitness's memory. In-court confidence statements may also be less reliable than confidence judgments made at the time of an initial out-of-court

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294. *See* Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates*, 12 J. EXPERIMENTAL PSYCHOL. APPLIED 11, 11–30 (2006); Palmer et al., *supra* note 289, at 55–71; James D. Sauer et al., *Is There a Magical Time Boundary for Diagnosing Eyewitness Identification Accuracy in Sequential Line-Ups?*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 123, 123–35 (2008); James Sauer et al., *The Effect of Retention Interval on the Confidence-Accuracy Relationship for Eyewitness Identification*, 34 L. & HUM. BEHAV. 337, 337–47 (2010); Carolyn Semmler et al., *The Role of Estimator Variables in Eyewitness Identification*, 24 J. EXPERIMENTAL PSYCHOL. APPLIED 400, 400–15 (2018); Melissa F. Colloff & John T. Wixted, *Why Are Lineups Better than Showups? A Test of the Filler Siphoning and Enhanced Discriminability Accounts*, J. EXPERIMENTAL PSYCHOL. APPLIED (forthcoming 2019).

295. *See* Wixted & Wells, *supra* note 30, at 13 ("An expression of low confidence on that first test is a glaring red flag because it is almost always an indication that the risk of error is high. Instead of being ignored, an initial expression of low confidence should take center stage—overshadowing all other considerations—when a jury's goal is to evaluate the reliability of a suspect ID."); *id.* at 49 ("[L]ow confidence should never be ignored and should instead always raise red flags about the reliability of the ID."); *id.* at 55 ("[A]n initial ID made with low confidence—whether testing conditions are pristine or not—is highly error prone. A better appreciation of that simple fact might have prevented most of the DNA exonerees from being convicted in the first place.").

296. *Id.* at 20.

297. *See* Palmer et al., *supra* note 289, at 69 ("[I]n cases where a suspect identification is made with anything less than very high confidence, investigators should remain particularly open-minded about alternative suspects.").

298. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 63–68 (2011). In the case of exoneree Dwayne D. Scruggs, who served seven years in prison for rape and robbery before being exonerated by DNA, the initial identification was classified as low-confidence and, therefore, unreliable. The "[v]ictim stated in [a] taped statement taken following photo array, that 'A. About 98%. Q. About 98% sure that this would probably be the guy? A. Yes.' By the time of trial, however, she was 'positive.'" *Dwayne D Scruggs*, CONVICTING THE INNOCENT: DNA EXONERATIONS DATABASE, http://www.convictingtheinnocent.com/exoneree/dwayne-d-scruggs/ [https://perma.cc/AT4Q-MWLJ] (last visited Nov. 1, 2019).

299. *See, e.g.*, Wixted & Wells, *supra* note 30, at 19 ("The confidence of the witness at the time of a preliminary hearing or at trial is not a pristine assessment of confidence."); *see also id.* at 50 (asserting that confidence at trial "should be ignored"); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 62, 73 (noting that the fact that a trial is occurring is a form of suggestive feedback, and that repeatedly asking questions inflates confidence in the answer).

identification because memory fails and/or confidence may grow
disproportionately. The confidence of an eyewitness may increase by the time
of the trial as a result of learning more information about the case,
participating in trial preparation, and experiencing the pressures of being
placed on the stand.[300]

Even the fact that the case has proceeded to trial is a form of post-identification feedback
that can artificially inflate witness confidence.[301] Moreover, the extreme suggestivity of
a defendant sitting at counsel table with defense counsel should, by itself, raise caution
flags regarding the independent reliability of an in-court identification. Yet, jurors may
not understand this point. For example, fact-finders have difficulty setting aside the effect
of feedback on eyewitness testimony, which is one reason scientists recommend that
initial identification procedures be video recorded.[302]

Courts have recognized that post-identification feedback and other
post-identification information provided to a witness can inflate witness confidence.[303]

2. Best Practices Recommendations

Immediately after any identification procedure—whether a show-up,[304] lineup, or
photo array—the officer should ask the witness how confident he or she is in the
identification or other response.[305] The officer should record that level of confidence

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300. NAT'L RESEARCH COUNCIL, supra note 6, at 110 (citation omitted).

301. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 61.

302*. See id.*

303. *See, e.g.*, Bey v. Superintendent Green SCI, 856 F.3d 230, 239 & n.45 (3d Cir. 2017) (noting that
the degree of confidence an eyewitness possesses is malleable); Dennis v. Sec'y, Dep't of Corrs., 834 F.3d 263,
270 n.4 (3d Cir. 2016) (quoting favorably the concurring opinion for the point that "initially tentative guesses
became certain identifications by the time the witness took the stand" (quoting *id.* at 329 (McKee, J.,
concurring))); Dickerson v. Fogg, 692 F.2d 238, 245 (2d Cir. 1982) (noting that the officer "reinforce[d] any
possible misidentification" by arresting the suspect in the presence of the eyewitness, "thereby confirming [the
witness]'s selection" of the suspect); State v. Guilbert, 49 A.3d 705, 721–23 (Conn. 2012) ("Courts across the
country now accept that . . . witnesses are prone to develop unwarranted confidence in their identifications if
they are privy to postevent or postidentification information about the event or the identification . . . ."); State v.
Almaraz, 301 P.3d 242, 253 (Idaho 2013) (noting that "courts should be cautious in the amount of weight they
give to a witness's degree of certainty in their identification when police have used overly suggestive procedures,
particularly when confirmation feedback has been given"); State v. Henderson, 27 A.3d 872, 889–900 (N.J.
2011) (describing the risk of post-identification feedback, which "can distort memory"); State v. Haugen, 392
P.3d 306, 318–19 (Or. 2017) (noting that confirming feedback can inflate witness confidence in an identification
and alter memory of the viewing conditions).

304*. See supra* Part II.B.3.

305*. See, e.g.*, Report of the Special Master, *supra* note 81, at 38; CAL. COMM'N ON THE FAIR ADMIN. OF
JUSTICE, *supra* note 135, at 27; CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at
3-4; FOSTER, *supra* note 135, at 2; GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., *supra* note
135, at 37–38; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(14) (show-up); *id.*
§ IV(B)(14) (lineup or photo array); INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT, *supra* note 15, at
18; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: LIVE LINE-UP IDENTIFICATION PROCESS § 9; KY. LEAGUE
OF CITIES, WITNESS INSTRUCTIONS: PHOTO IDENTIFICATION PROCESS § 9; NAT'L RESEARCH COUNCIL, *supra*
note 6, at 108; N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 3; N.C. ACTUAL INNOCENCE COMM'N, *supra*
note 135, § II(g); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 88, 90,
97; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, at §§ 6.3.3, 8.2, 9.1, 9–10; WIS. OFFICE
OF THE ATTORNEY GEN., *supra* note 119, at 4, 10, 15, 20; Am. Bar Ass'n, *supra* note 21, at 813, 823.

verbatim[306] without providing any feedback.[307] Indeed, all identification *and* nonidentification statements should be documented.[308] Taking a statement of confidence

306. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(10)(A) (West 2019) (effective Jan. 1, 2020) (confidence recorded verbatim); COLO. REV. STAT. §§ 16-1-109(3)(a)(V) (2018) (document confidence verbatim); CONN. GEN. STAT. § 54-1p(c)(15)(A) (2018) (document certainty); GA. CODE ANN. § 17-20-2(b)(6) (2018) (document confidence verbatim); KAN. STAT. ANN. § 22-4619(d)(4) (2018) (document confidence "in the witness's own words"); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit. V-A, art. 253(B)(3) (2018)) (take statement of confidence immediately and document it verbatim); N.C. GEN. STAT. § 15A-284.52(b)(12) (2018) (document certainty verbatim); N.J. CT. R. 3:11(c)(7) (statement of confidence recorded verbatim); OHIO REV. CODE ANN. § 2933.83(A)(6)(h) (2018) (certainty statement taken immediately and documented verbatim); TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(d) (certainty statement taken immediately and documented verbatim); VT. STAT. ANN. tit. 13, § 5581(b)(5) (2018) (statement of confidence taken immediately and verbatim); W. VA. CODE § 62-1E-2(k)(3) (2018) (document witness statement, including statement of certainty at the time of the identification); MASS. GUIDE TO EVIDENCE, *supra* note 186, § 1112(b)(1)(A)(ii) (explaining that the court shall consider whether certainty statement was taken); Report of the Special Master, *supra* note 81, at 38 (document verbatim witness "confidence, ability to view, and degree of attention"); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(20), I(17) (document confidence in witness's own words); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(f), (C)(2)(f) (document certainty in the witness's own words); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, 3–5 (statement of certainty taken verbatim); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(l) (document certainty); GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., *supra* note 135, at 38 (document certainty, including statements of uncertainty); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20, app. B § 3(P) (document level of confidence immediately); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(b)(10) ("You should not feel that you have to make an identification. If you do identify someone, I will ask you to describe in your own words how certain you are."); MONT. LAW ENF'T ACAD., *supra* note 135, §§ 25.5.1(f), 25.7.2 (certainty statement and all statements of witness recorded verbatim); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, at 1, §§ A.16, B.2.i, C.2.f (confidence statement verbatim); N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(1)(x) (document witness certainty verbatim); OKLA. JUSTICE COMM'N, *supra* note 135, at 15, 18 (statement of certainty verbatim); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 83 (record certainty statement immediately and before feedback); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 9.1.2 (stating to document identification and statement of confidence "as close to verbatim as possible," along with "any relevant gestures or non-verbal reactions"); WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § F(2) (document confidence statement verbatim); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 15, 20 (document certainty); Am. Bar Ass'n, *supra* note 21, at 813, 823 (document confidence statement).

307. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(10)(B), (c) (West 2019) (effective Jan. 1, 2020) (suggesting no feedback before documenting statement of confidence and "officer shall not validate or invalidate the eyewitness'[s] identification"); CONN. GEN. STAT. § 54-1p(c)(14) (2018) (advising no feedback prior to statement of confidence); N.C. GEN. STAT. § 15A-284.52(b)(13) (2018) (advising no feedback before documenting certainty); OHIO REV. CODE ANN. § 2933.83(A)(6)(i) (2018) (advising no feedback until after identification and certainty documented); Report of the Special Master, *supra* note 81, at 38 (recognizing the problem of feedback, including feedback given "unwitting[ly]"); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(h), (C)(2) (h) (recommending to avoid feedback, including "unintentional voice inflection or prolonged eye contact, in addition to off-hand words or phrases . . . such as 'very good'"); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 3, 5 (no feedback); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(j) ("Do not comment on selections in any way."); GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., *supra* note 135, at 38 (suggesting that "police officers should not speak to eyewitnesses after lineups regarding their identification or their inability to identify anyone, as it could raise concerns that a potentially questionable identification was somehow reinforced"); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20, app. B § 3(Q) (no feedback until statement of confidence is taken if ever); INT'L ASS'N OF CHIEFS OF POLICE, CONCEPTS, supra note 249, at 5 ("Witnesses should not be praised, congratulated, or otherwise given any affirmation for identifying the suspect."); MONT. LAW ENF'T ACAD., *supra* note 135, §§ 25.6.2(f), 25.6.3(f) (advising no feedback prior to taking statement of

is a primary recommendation of the National Research Council to establish best practices for law enforcement.[309] The witness should be instructed not to use percentages to express his or her level of confidence in order to avoid subsequent confusion at trial about whether the percentage stated is sufficient to establish identity "beyond a reasonable doubt."[310]

F.   *Multiple Identification Procedures with the Same Witness*

1.   Scientific Conclusions

Researchers agree that a witness should have only one opportunity to make an identification of a suspect and that repeated identification attempts with the same suspect can increase the chance of error.[311]

One reason that repeated identification attempts may lead to increases in identification errors is that a witness may experience "unconscious transference" or "memory-source error." This occurs when the witness recognizes that the person identified is familiar but mistakenly attributes the person's familiarity to the crime, rather than to the prior identification procedure.[312] The witness may also experience the "commitment effect," the "powerful tendency to stick with an earlier decision that was

certainty); NAT'L RESEARCH COUNCIL, *supra* note 6, at 108 (no feedback); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.2.h; OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, §§ II.A.4, II.B.6, II.C.5, II.D.8 (advising no feedback prior to obtaining a statement of certainty); N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(1)(y) ("Do not give witnesses any feedback regarding the individual he/she has selected or comment on the outcome of the identification procedure in any way."); R.I. TASK FORCE, *supra* note 135, at 13–14 (no confirmatory feedback "in any manner"); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 83 (advising to record certainty statement immediately and before feedback); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 8.1.3 (no feedback); WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § E(3) (no feedback); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 11, 15–16, 20 (advising no feedback, including nonverbal cues or "casual comments"); Am. Bar Ass'n, *supra* note 21, at 823 (document confidence statement before feedback, which should never be provided "so that [the witness's] confidence is not artificially inflated by the time of trial").

308.   *See, e.g.*, 725 ILL. COMP. STAT. 5/107A-2(f)(10) (2018); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit. V-A, art. 253(B)(2)(c) (2018)); MD. CODE ANN., PUB. SAFETY § 3-506.1(b)(4) (2018); N.J. CT. R. 3:11(c)(3); W. VA. CODE § 62-1E-2(k)(3) (2018); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20, app. B § 3(R); *see also infra* notes 395–406 and accompanying text.

309.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5 ("*Recommendation # 4: Document Witness Confidence Judgments*[.] The committee recommends that law enforcement document the witness' level of confidence verbatim at the time when she or he first identifies a suspect.").

310.   *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 98. *But see* Wixted & Wells, *supra* note 30, at 54 (explaining that research is need on the question whether a statement of confidence should be taken in the witness's words or numerically); Wixted et al., *Initial Eyewitness*, *supra* note 290, at 524 (describing several possible ways of recording confidence and noting that recording confidence in the witness's own words is "insufficiently precise"); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 58, 60 (explaining that a statement of confidence can be taken in words or numerically).

311.   *See, e.g.*, Steblay & Dysart, *supra* note 33, at 284–89; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 17, 69–73 ("The importance of focusing on the first identification test cannot be emphasized strongly enough.").

312.   *See, e.g.*, Godfrey & Clark, *supra* note 33, at 242; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 71.

freely made," and his or her memory of the event itself may thereby be altered.[313] In addition, repeated identification attempts can inflate witness confidence.[314]

Researchers have further noted that an eyewitness's own Internet-derived identification is a first, suggestive identification procedure, which is one reason why witnesses should be cautioned not to conduct such independent investigations and why such investigations, if they occur, should be documented.[315]

Courts have recognized the deleterious effect of repeated identification attempts on eyewitness reliability.[316]

2.   Best Practices Recommendations

Unconscious transference may cause an eyewitness to mistakenly identify a person as the perpetrator merely because that person is familiar to the eyewitness from a prior

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313.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 72.

314.   *See* Steblay & Dysart, *supra* note 33, at 284; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 73.

315.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 28, 32–33, 69, 73–74.

316.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 252 (2012) (Sotomayor, J., dissenting) ("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.'" (alteration and emphasis in original) (quoting Simmons v. United States, 390 U.S. 377, 383–84 (1968))); Moore v. Illinois, 434 U.S. 220, 230 n.5 (1977) (noting that eyewitness identification "hardened" after initial identification); Foster v. California, 394 U.S. 440, 443 (1969) (condemning as "suggestive" the use of second lineup where, *inter alia*, the defendant "was the only person in this lineup who had also participated in the first lineup"); United States v. Wade, 388 U.S. 218, 229 (1967) ("Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'" (alteration in original) (citation omitted)); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 270 n.4 (3d Cir. 2016) (citing research that multiple viewing attempts increase misidentifications and inflate witness confidence); Young v. Conway, 698 F.3d 69, 82–84 (2d Cir. 2012) (describing scientific research demonstrating that multiple identification procedures may reduce reliability and nothing that this suspect "was the *only* lineup participant whose picture was also included in the photo array," which may have been the basis for the identification); Gregory v. City of Louisville, 444 F.3d 725, 756 (6th Cir. 2006) (noting that "a witness'[s] repeated exposure to a suspect prior to identification so taints the identification that a substantial likelihood of misidentification exists"); United States v. Mathis, 264 F.3d 321, 341 (3d Cir. 2001) (holding that the district court abused its discretion in failing to admit expert testimony on "double identification"); United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("Memory and perception may be affected by factors such as . . . repeated viewings [of the defendant.]" (citation omitted)); United States v. Milhollan, 599 F.2d 518, 523 (3d Cir. 1979) (holding that use of a photo array after exposing the witness to a single photo of the suspect was unconstitutionally suggestive); Young v. State, 374 P.3d 395, 421 (Alaska 2016) ("The reliability of an identification may suffer if the witness has viewed the suspect more than once during the investigation."); State v. Guilbert, 49 A.3d 705, 720–23 (Conn. 2012) ("Courts across the country now accept that . . . the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another."); State v. Lawson, 291 P.3d 673, 686–87 (Or. 2012) ("Viewing a suspect multiple times throughout the course of an investigation can adversely affect the reliability of any identification that follows those viewings. The negative effect of multiple viewings may result from the witness's inability to discern the source of his or her recognition of the suspect, an occurrence referred to as source confusion or a source monitoring error. A similar problem occurs when the police ask a witness to participate in multiple identification procedures.").

identification procedure.[317] For example, if the police conduct a show-up with a suspect, and later show the same witness a photo array containing that suspect, the witness may recognize the suspect from the show-up and believe he or she recognizes the suspect from the witnessed event.[318] Accordingly, successive identification attempts should be avoided.[319] Additionally, care should be taken by trial courts regarding an in-court identification—such as an identification at a hearing or a trial—that was preceded by an out-of-court identification, as the reliability of the in-court identification may be affected by the previous out-of-court identification.[320]

G.   *Exposure to Other Witnesses and to Media Accounts*

1.   Scientific Conclusions

The science of human memory reveals that stored memories are malleable and change in response to the "accounts of others"[321]—a "serious concern for the validity of eyewitness identification."[322] An eyewitness's interactions with other people "have the potential to significantly modify the witness's memory of faces encountered and other event details at the scene of the crime"[323] and to inflate confidence.[324] Research demonstrates that an eyewitness may be influenced by being exposed to co-witness's description of a facial feature, learning that a co-witness made an identification, or learning that a co-witness made an identification confidently.[325] Other sources of suggestivity include exposure to Internet or other media accounts of the event.[326]

Courts have regularly acknowledged the suggestive influence that witnesses can have on one another when allowed to interact at the scene of a crime, during an identification procedure, or elsewhere.[327]

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317. *See, e.g.*, Report of the Special Master, *supra* note 81, at 27–28; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 100.

318. *See, e.g.*, WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 4, 12, 17, 22.

319. *See, e.g.*, BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(F), IV(B)(2)(k); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(i); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(12) ("Multiple identification procedures should not be conducted in which the same witness views the same suspect more than once."); *id.* § IV(A)(11) ("Do not present the same suspect to the same witness more than once [for a show-up.]"); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 100; *see also id.* at 87; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.2.g; OKLA. JUSTICE COMM'N, *supra* note 135, at 15.

320. *See* Godfrey & Clark, *supra* note 33, at 241.

321. NAT'L RESEARCH COUNCIL, *supra* note 6, at 62; *see also* Zaragoza & Lane, *supra* note 35, at 934–45.

322. NAT'L RESEARCH COUNCIL, *supra* note 6, at 65.

323. *Id.* at 65; *see also* Lindsay & Johnson, *supra* note 35, at 349 (describing experiments showing that subjects who are verbally provided incorrect details about a witnessed event often recall that they witnessed the incorrect details).

324. *See* Luus & Wells, *The Malleability of Eyewitness Confidence*, *supra* note 35, at 714–15 (explaining that when witnesses share information about a perpetrator, the information can inflate the witness's confidence, making it "difficult for [others] to accept that the witness could be wrong").

325. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 32.

326. *See id.* at 27, 32.

327. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006) (describing as "suggestive influences of others" the fact that witnesses "were left at the scene to talk with bystanders as well as police" and

2.   Best Practices Recommendations

Police officers are taught that they should interview eyewitnesses separately. While crime scenes can be difficult to manage, especially where a crime of violence has taken place and emotions are high, officers should endeavor to separate witnesses[328] so that they do not overhear one another. Officers arriving at a scene where there are multiple witnesses should tell them that they need to conduct individual interviews and encourage witnesses to physically separate from each other.[329]

Witnesses should also be kept separate when giving a description of the perpetrator and during identification procedures.[330] If more than one witness is to be shown a show-up—despite the recommendation that subsequent witnesses be given an alternative identification procedure[331]—they should be transported to the show-ups separately.[332] Witnesses should not view show-ups,[333] mug shots, lineups, composites,

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"were not only questioned together but were taken to identify Brownlee together"); Sanchell v. Parratt, 530 F.2d 286, 295 (8th Cir. 1976) (holding that identification was unduly suggestive, in part, because witnesses were roommates and discussed the case); United States v. Smith, 621 F. Supp. 2d 1207, 1217 (M.D. Ala. 2009) (citing studies finding that "when witnesses discuss events with one another, shared false recollections sometimes result" and that "[e]yewitness testimony about an event reflects not only what they actually saw but information they obtained later on"); Young v. State, 374 P.3d 395, 425 (Alaska 2016) ("Studies show that feedback from other witnesses can influence a witness's memory of an event and that such feedback can cause witnesses to form false memories of details."); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (holding that "feedback from co-witnesses confirming the identification of a perpetrator" diminishes the reliability of a witness's identification); Commonwealth v. Gomes, 22 N.E. 3d 897, 915 (Mass. 2015) ("Although police officers are common potential sources of feedback, feedback from cowitnesses and other private actors can also influence a witness's memory."); State v. Henderson, 27 A.3d 872, 908 (N.J. 2011) ("Co-witness feedback may cause a person to form a false memory of details that he or she never actually observed."); State v. Lawson, 291 P.3d 673, 710 (Or. 2012) ("One common source of third-party memory contamination is cowitness interaction. When a witness is permitted to discuss the event with other witnesses or views another witness's identification decision, the witness may alter his or her own memory or identification decision to conform to that of the cowitness.").

328.   *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(9) ("Separate witnesses and do not allow communication between them before or after conducting a showup."); NAT'L RESEARCH COUNCIL, *supra* note 6, at 106 (recommending police training on how to "efficiently manage scenes with multiple witnesses (e.g., minimize interaction among witnesses)"); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § A.8; WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § E(1).

329.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 106; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 86, 90.

330.   *See, e.g.*, DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(12).

331.   *See supra* notes 225, 328–329.

332.   *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 86; *see also* N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(3)(f) ("Show-ups should not be conducted with more than one witness present at a time.").

333.   *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(S)(2)(e)(i); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(8) ("Do not conduct the showup with more than one witness present at a time."); STATE BAR OF MICH., *supra* note 135, at 9.

or photo arrays together[334] and should be kept separate during the entire process,[335] including during the instructions.[336] If a lineup or photo array is being shown to multiple witnesses, officers should shuffle the order of the lineup members or photos to ensure that the suspect is presented in different positions for the witnesses.[337] This will prevent a witness from influencing other witnesses by communicating which lineup number they believe is the suspect.

Upon terminating an interview or identification procedure, officers should tell witnesses to avoid media and social media accounts of the crime.[338] Witnesses should be cautioned to avoid undertaking their own investigations, such as through Internet searches or on social media, or receiving information from friends about possible suspects.[339] Witnesses should be instructed not to discuss the identification procedure or results with each other.[340] So too, officers should not inform a witness whether or not

334. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(8) (West 2019) (effective Jan. 1, 2020); 725 ILL. COMP. STAT. 5/107A-2(f)(2) (2018); MD. CODE ANN., PUB. SAFETY § 3-506.1(e)(1) (2018); W. VA. CODE § 62-1E-2(i)(1) (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(18); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 135, at 28; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(f); FOSTER, *supra* note 135, at 1, 5; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(I)(1); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(11) ("The lineup or photo array should be shown to only one witness at a time; officers should separate witnesses so they will not be aware of the responses of other witnesses."); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, §§ B.2.f, C.2.d; R.I. TASK FORCE, *supra* note 135, at 8–9; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 1.1, 7.1–7.2; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 12; Am. Bar Ass'n, *supra* note 21, at 823.

335. *See, e.g.*, N.C. GEN. STAT. § 15A-284.52(b)(12) (2018); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(I)(3); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 7.2–7.3.

336. *See, e.g.*, 725 ILL. COMP. STAT. 5/107A-2(f)(2); MD. CODE ANN., PUB. SAFETY § 3-506.1(b)(3); N.C. GEN. STAT. § 15A-284.52(b)(12); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(b).

337. *See, e.g.*, 725 ILL. COMP. STAT. § 5/107A-2(f)(4); MD. CODE ANN., PUB. SAFETY § 3-506.1(e)(2); N.C. GEN. STAT. § 15A-284.52(b)(6) (2018); W. VA. CODE § 62-1E-2(i)(2); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(8); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(h); FOSTER, *supra* note 135, at 2; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, app. B § 3(I)(2); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(8) ("Place suspects in different positions in each lineup or photo array, both across cases and with multiple witnesses in the same case."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.4.2(h); N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 4; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(1)(m); OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra* note 135, §§ I.E.5, I.F.3; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 88, 92; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 7.4.

338. *See, e.g.*, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 28, at 16.

339. *See, e.g.*, *id.*

340. *See, e.g.*, ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(18); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, at attachment A, B; FOSTER, *supra* note 135, at 3–4, 7–8; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 18, 20, app. B § 3(D)(6); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(15) ("Remind the witness not to talk about the show-up to other witnesses until police or prosecutors deem it permissible."); *id.* § IV(B)(10) ("Since this is an ongoing investigation, you should not discuss the identification procedures or results."); KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: LIVE LINE-UP IDENTIFICATION PROCESS § 10; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: PHOTO IDENTIFICATION PROCESS § 10; KY. LEAGUE OF CITIES, WITNESS INSTRUCTIONS: SHOW-UP IDENTIFICATION PROCESS § 7; MONT. LAW ENF'T ACAD., *supra* note 135, §§ 25.6.2(h), 25.6.3(i); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, §§ A.14, B.2.d; OFFICE OF THE ATTORNEY GEN., STATE OF N.J., *supra*

another witness made an identification.[341] If an eyewitness was exposed to another witness or to a media account, this should be recorded.[342]

H. *Interviewing and Leading Questions*

1.   Scientific Conclusions

Researchers substantially agree that as soon as possible and before an identification procedure, law enforcement should interview an eyewitness to document his or her description of the perpetrator, the viewing conditions, attention, and whether he or she is familiar with the perpetrator.[343] Researchers have recognized that "leading questions or suggestive techniques" during the identification process can contaminate memory.[344] A witness may learn information from the police, but through "source memory failure," come to believe the source of the information was the witnessed event.[345] "With each implicit retrieval or explicit telling of a story, we may unconsciously smooth over inconsistencies or modify content based on . . . the accounts of others, or through the lens of new information."[346] At an extreme, "[r]esearch on *false memories* shows that it is possible to plant fabricated content in memory, which leads us to recall things we never experienced."[347]

An alternative to leading questions when interviewing an eyewitness is to employ "cognitive interview" techniques, as supported by empirical research.[348] Cognitive interview techniques

> consist of a relatively specific set of rules representing the best ways to interrogate persons about their memories, e.g., tell the witness the type and level of detail of information necessary for the investigation, ask no leading or suggestive questions, volunteer no information, ask open-ended questions, instruct the witness not to guess and to report any doubt or uncertainty, avoid interrupting the witness, reinstate the context of the witnessed event, develop rapport with the witness, have the witness recall in both forward and backward directions, and the like.[349]

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note 135, §§ II.A.7, II.B.9, II.C.9, II.D.12; N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 3; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, §§ III(2); OKLA. JUSTICE COMM'N, *supra* note 135, at 16; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.3.7 ("Please do not discuss this procedure or any photograph that you may pick with any other witness in this case."); WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, at 3; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 10, 15, 19, 25.

341.   *See, e.g.*, U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 8.1.4.

342.   *See, e.g.*, N.J. CT. R. 3:11(c)(8).

343.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 16, 24–25, 29.

344.   Loftus, *supra* note 37, at 365; *see also* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 27–29.

345.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 66–67.

346.   *Id.* at 62.

347.   *Id.* at 63.

348.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 29; *see also* Report of the Special Master, *supra* note 81, at 32.

349.   Report of the Special Master, *supra* note 81, at 32.

Studies have found that such techniques "elicit significantly more correct detail" of an event than other interviewing techniques.[350] Researchers also recommend using "facial feature checklists" or a "person description interview"[351] to generate more complete descriptions without leading the eyewitness. While Task Force members Mr. Kravetz and Special Agent Zajac are unable to join the Majority in acknowledging these principles,[352] the cognitive interview technique relating to eyewitness identification has been researched for decades and is well-recognized in peer-reviewed studies,[353] the American Psychology-Law Society's White Paper, and, indeed, in a paper upon which the Minority itself relies.[354]

Courts too have recognized these scientific principles.[355]

2. Best Practices Recommendations

Before an identification procedure, and as soon as possible after the event occurs, investigators should interview the witness to document the witness's description of the perpetrator and perception of the estimator variables in the witness's own words.[356] Investigators should avoid asking leading questions or "leak[ing]" information learned

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350. *Id.* at 32–33; *see also* R. Edward Geiselman et al., *Enhancement of Eyewitness Memory with the Cognitive Interview*, 99 AM. J. PSYCHOL. 385, 385–401 (1986).

351. *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 27, 30.

352. As with other best practices recommendations, Mr. Kravetz and Special Agent Zajak are unable to join this Part. But they underscore their view that any interview of an eyewitness should not be conducted in a biased manner. They also appreciate that the Report has limited its recommendation of particular interview techniques to the eyewitness context.

353. *See, e.g.*, RONALD P. FISHER & R. EDWARD GEISELMAN, MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW (Charles C. Thomas ed. 1992); Amina Memon et al., *The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years*, 16 PSYCHOL., PUB. POL'Y, & L. 340, 340–72 (2010); James H. Smith-Spark et al., *Mental Time Travel Ability and the Mental Reinstatement of Context for Crime Witnesses*, 48 CONSCIOUSNESS & COGNITION 1, 1–10 (2017); Annelies Vredveldt et al., *The Effectiveness of Eye-Closure in Repeated Interviews*, 19 LEGAL & CRIMINOLOGICAL PSYCHOL. 282, 282–95 (2014); Annelies Vredeveldt et al., *The Effects of Eye-Closure and "Earclosure" on Recall of Visual and Auditory Aspects of a Criminal Event*, 8 EUR.'S J. PSYCHOL. 284, 284–99 (2012).

354. *See* Wixted et al., *Rethinking the Reliability*, *supra* note 290, at 324 (endorsing the Cognitive Interview, and cautioning against asking "suggestive questions," "closed questions (vs. open-ended questions)," and "encouraging/enticing witnesses to guess").

355. *See, e.g.*, Commonwealth v. Gomes, 22 N.E.3d 897, 915 (Mass. 2015) ("[S]uggestive wording and leading questions prior to participating in an identification procedure can influence the process of forming a memory."); State v. Lawson, 291 P.3d 673, 709 (Or. 2012) ("The use of suggestive wording and leading questions tend[s] to result in answers that more closely fit the expectation embedded in the question."); State v. Henderson, 27 A.3d 872, 895 (N.J. 2011) (citing a study by Dr. Loftus demonstrating that leading questions "cause[d] a substantial change in the reconstruction of memory"); *cf.* United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("Memory and perception may be affected by factors such as . . . the assimilation factor, which concerns a witness's incorporation of information gained subsequent to an event into his or her memory of that event . . . ." (citation omitted)).

356. *See, e.g.*, CAL. PENAL CODE § 859.7(a)(1) (West 2019) (effective Jan. 1, 2020); W. VA. CODE § 62-1E-2(a) (2018); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(A); Am. Bar Ass'n, *supra* note 21, at 818–19.

from other sources to a witness.[357] In order to avoid the expectancy effect that "leading or suggestive question[ing]" can have on an eyewitness's memory,[358] police officers now regularly use cognitive interview techniques.[359] In practical terms, the Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence has described these techniques as follows:

> This process includes establishing rapport prior to the interview and asking the witness to place himself back at the scene of the incident, close his eyes if necessary, and picture the event unfolding. Other aspects of this model include asking the witness to recount every detail they recall, even if it seems insignificant, encouraging the witness to look at the event from different perspectives, and urging the witness to describe what he remembers in various orders. Perhaps the most important component is for the officer to elicit information in an open-ended, non-leading manner. For example, in a case where a witness tells an officer that he saw a red sports car roar away at the time of the robbery, the officer must resist the temptation to ask other witnesses if they saw the red sports car. He should instead ask a neutral question, i.e., "Do you know how the robber left the area?"[360]

I. *Mug-Shot Searching*

1.   Scientific Conclusions

Mug-shot searching is an identification procedure wherein a witness is asked to look through a (typically large) number of arrest photographs (known as "mug shots"), in the hope that the witness will recognize the perpetrator.[361] This procedure rests upon the assumption that the perpetrator may have previously been arrested, otherwise his or her photograph would not be included in the set.[362] Mug-shot searches are either conducted on a computer, where photographs can be sorted by physical characteristics or by crime, or in hard copy format where prearranged "books" or files are presented to a witness for review.[363] For example, law enforcement officers sometimes employ mug-shot searching in gang-related crimes, where a witness may be asked to view arrest photographs of suspected or known gang members.[364]

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357.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 106 (recommending training on this topic); *see also* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 86; Am. Bar Ass'n, *supra* note 21, at 810, 818–19.

358.   Report of the Special Master, *supra* note 81, at 31; *see also* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 90; Am. Bar Ass'n, *supra* note 21, at 818.

359*.   See, e.g.*, Report of the Special Master, *supra* note 81, at 32; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 91.

360.   SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 91.

361*.   See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 28.

362*.   But cf.* COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS: THIRD CIRCUIT, THIRD CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 2.30 (2017) (advising the jury that "[t]he government collects pictures of many people from many different sources and for many different purposes").

363.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 28.

364*.   See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 101.

Researchers have studied the impact of mug-shot searching on eyewitness identification accuracy[365] and most have concluded that mug-shot searching can have, *inter alia*, three negative effects on an eyewitness. First, mug-shot searching can cause "unconscious transference"—that is, cause an eyewitness to conflate the perpetrator with a person whom the eyewitness has actually seen in a different context.[366] Second, mug-shot searching can cause a "commitment effect" in which an eyewitness making a positive identification of a suspect while viewing mug shots commits to that identification in future identifications.[367] Third, where the witness does *not* make an identification when viewing the collection of mug shots "the reliability of a positive identification made at a second procedure is undermined."[368] For example, a witness who sees an innocent person's mug shot but does not select it is more likely to choose that person in a subsequent lineup.[369]

Courts have recognized the impact of these negative effects on eyewitness identification accuracy.[370]

2.   Best Practices Recommendations

While there may be some instances where showing a large number of targeted photographs may be useful,[371] showing many random photographs should be avoided.[372] If unavoidable, the photographs shown should be documented.[373]

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365.   *See, e.g.*, Deffenbacher et al. *Mugshot Exposure Effects*, *supra* note 40, at 287–307.

366.   Kassin et al., *supra* note 40, at 405–16.

367.   Deffenbacher et al. *Mugshot Exposure Effects*, *supra* note 40, at 287–307; *see also* Report of the Special Master, *supra* note 81, at 28–29 ("Mug shot commitment occurs when the witness has made an identification from a photograph and that person or photograph is included in a lineup procedure: the likelihood is enhanced that the witness will remain committed to that identification."); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 72.

368.   Report of the Special Master, *supra* note 81, at 28–29.

369.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 71–72.

370.   *See, e.g.*, Young v. Conway, 698 F.3d 69, 82 (2d Cir. 2012) (recognizing that "memory can be tainted by the 'mugshot commitment effect': having identified that person as the perpetrator, she becomes attached to her prior identification"); Commonwealth v. Gomes, 22 N.E.3d 897, 916 (Mass. 2015) ("[P]rior mugshot exposure decreases accuracy at a subsequent lineup, both in terms of reductions in rates for hits and correct rejections as well as in terms of increases in the rate for false alarms."); State v. Henderson, 27 A.3d 872, 900 (N.J. 2011) ("Multiple identification procedures that involve more than one viewing of the same suspect . . . can create a risk of 'mugshot exposure' and 'mugshot commitment.' . . . [B]oth mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification."); State v. Haugen, 392 P.3d 306, 318 (Or. 2017) (recognizing that showing twenty-three mug shots of known motorcycle gang members was a system variable that "raise[s] concerns," among other reasons, by inflating witness confidence during a subsequent identification procedure).

371.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 28 (noting, for example, that "[w]itnesses who identify a perpetrator as being a student at a specific school might be asked to review a yearbook for that school" with the names obscured).

372.   *See, e.g.*, *id.* at 29 (noting that "mug books, [and] yearbooks . . . have the potential to introduce biases of the sort that blind lineup procedures are designed to avoid"); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 87, 101.

373.   *Cf.* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 63 (recommending as a general principle that administrators "preserve a faithful record of the conditions under which witnesses make their identifications").

J.   Composites and Sketches

1.   Scientific Conclusions

One of the investigative tools law enforcement officers may turn to when other identification methods fail to yield a viable suspect is having a witness participate in the creation of a composite or sketch of the perpetrator.[374] Composites are created using computer software programs or physical kits that allow a witness to select facial features—such as hairstyle, eyes, mouth, nose, and chin—to create a single image of a face.[375] Similarly, sketches are created with the assistance of a sketch artist, who creates the sketch from the witness's description of the perpetrator's features.[376]

Researchers have expressed concerns over the use of composites and sketches for two reasons. First, research has demonstrated that witnesses have difficulty creating a composite that adequately depicts the perpetrator.[377] Feature-by-feature construction of a suspect's face is inconsistent with the "holistic way in which we typically process faces."[378] Second, an eyewitness may be less likely to correctly identify the perpetrator from a lineup if he or she has gone through the process of creating a composite.[379]

Courts have likewise recognized that the process of creating a composite or sketch may negatively impact an eyewitness's memory of the perpetrator.[380]

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374.   *See* U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE, *supra* note 28, at 18.

375.   *See* Wells et al., *Building Face Composites*, *supra* note 43, at 147.

376.   *See* Kempen & Tredoux, *supra* note 42, at 434.

377.   *See* Graham Davis & Tim Valentine, *Facial Composites: Forensic Utility and Psychological Research*, *in* HANDBOOK OF EYEWITNESS PSYCHOLOGY, *supra* note 23, at 59–83; Margaret B. Kovera et al., *Identification of Computer-Generated Facial Composites*, 82 J. APPLIED PSYCHOL., 235, 235–46 (1997).

378.   *See* Kempen & Tredoux, *supra* note 42, at 435; *cf.* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 11 (2009) ("Generally, the amount of time spent looking at a stimulus has not been considered to be a particularly strong predictor of the ability of the witness to process the stimulus. Instead, psychological scientists have emphasized the type of processing that is occurring while attending to a stimulus to be much more important. In the case of faces, for example, devoting attention to special facial features . . . can take a considerable amount of time when compared to making a global or holistic judgment of the face. Yet, it is the holistic judgments, which can occur fairly rapidly, that lead to better ability later to recognize that face among filler faces . . . . On the other hand, for purposes of being able to reconstruct the face . . . attention to specific facial features is superior to the global judgments.").

379.   *See* Kempen & Tredoux, *supra* note 42, at 434–44; Wells et al., *Building Face Composites*, *supra* note 43, at 147–56.

380.   *See, e.g.*, State v. Lawson, 291 P.3d 673, 703 (Or. 2012) (noting that "some studies show a negative effect on identification accuracy after witnesses have attempted to produce a composite of a suspect or provide detailed verbal descriptions of facial features, a development that might result from the different cognitive mechanisms employed to verbally describe faces as opposed to recognizing them"); State v. Henderson, 27 A.3d 872, 902 (N.J. 2011) (holding that "composites produce poor results" because of a "mismatch between how composites are made and how memory works," but declining to preclude them (citations omitted)); People v. Maldonado, 769 N.E.2d 1281, 1285–86 (N.Y. 2002) (excluding a composite sketch as hearsay and noting if a sketch "forms the basis for an arrest, one thing is certain[:] . . . it will resemble the person accused," regardless of whether he or she is actually the perpetrator).

2.   Best Practices Recommendations

Historically, composites and sketches have been used to generate leads where other means have failed to turn up a suspect.[381] However, approximately twenty-five percent of all DNA exoneration cases included composite/sketch evidence.[382] Because research has shown that composites and sketches may taint an eyewitness's memory, law enforcement agencies should only use them rarely and with great caution.[383] In addition to the mismatch between the way we recognize and remember faces and the way composites are drawn, common sense suggests a danger that someone will be arrested because of a resemblance to a composite rather than a resemblance to the perpetrator. Moreover, in the case of multiple witnesses, law enforcement (1) should not allow witnesses to work together to create a composite; (2) should not expose a witness to another witness' composite; and (3) because of the reasons cited above, should consider having only one witness create a composite rather than multiple or all witnesses in a case.

K.   *Confirmatory Photo (Single Photo)*

1.   Scientific Conclusions

Show-ups are distinguished from situations in which a witness is shown a "confirmatory single photograph" of a person.[384] The presentation of a single photo is usually only done when "the perpetrator is previously known to or well acquainted with the witness."[385]

Courts have recognized the suggestive nature of a single photo procedure.[386]

2.   Best Practices Recommendations

"[I]t should be apparent that there should never be such a thing as a photographic showup. After all, the justification for a showup is that the individual has been detained

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381.   *See* WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 27.

382.   *See DNA Exonerations in the United States*, *supra* note 11.

383.   *See, e.g.*, INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 15 (explaining that "[p]eople remember faces holistically—not broken up into individual features" and that "[h]aving the composite face freshly in her mind, the witness is more likely to select a person that resembles the composite, rather than her original memory"); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 87 (noting that their use is "disfavored"); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 27 (noting that they should be used only in "rare situation[s]").

384.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 22; *see also* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, at 1 n.1 (making this distinction).

385.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 28.

386.   *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 116–17 (1977) (holding that "identifications arising from single-photograph displays may be viewed in general with suspicion" and remarking that the use of a photo array "would have been better"); Cooper v. Bergeron, 778 F.3d 294, 299 (1st Cir. 2015) ("The admissibility of an identification may be called into question when the police have used a highly suggestive procedure in asking an eyewitness to identify an individual, such as presenting photographs only of the suspect . . . ."); United States v. Johnson, 114 F.3d 435, 442 (4th Cir. 1997) (holding that use of single photo was unduly suggestive under the facts of the defendant's case); United States v. Milhollan, 599 F.2d 518, 523 (3d Cir. 1979) (observing that the use of a "single photograph, undoubtedly was suggestive"); State v. Nigro, 24 A.3d 1283, 1289 (Me. 2011) (collecting cases and stating that "[n]umerous courts, including our own, have condemned the display of a single photograph as an inherently suggestive identification practice").

on the street and there is a very limited time frame for conducting an identification procedure." [387] Nevertheless, there are instances where the police may show a single photo to a witness—when the witness knows the perpetrator—for the purpose of verifying that the witness and officers are both talking about the same person: "Is this the Jack Smith you're talking about?" If the police and witness are talking about the same person, the witness says so; if not, he or she says that instead. Here the single photograph is not suggestive because the witness, and not the police, have implicated the suspect's involvement and the photo is simply for confirmation of the person's identity. Otherwise, where investigators simply happen to have a photograph of a suspect, it should be placed in a photo array. Showing a single confirmatory photograph to an eyewitness who does not already know the suspect should be avoided as a basis for identification.[388]

L.   Training and Written Policies

1.   Scientific Conclusions

Researchers in the field of eyewitness identification recommend that law enforcement officers and investigators receive training in "evidence-based" techniques, such as "cognitive interviewing" of eyewitnesses.[389] Researchers further recommend that officers should be trained "to understand why certain procedures are recommended" as a matter of science to prevent the situation where a best practice is "technically followed and yet the principle . . . is violated at some other point or level."[390]

2.   Best Practices Recommendations

Every law enforcement officer should receive training on eyewitness identification, including training on the basic science of perception and memory, the system and estimator variables that affect reliability, and best practices and procedures to reduce factors that contaminate memory and decrease reliability. This is a primary recommendation of the National Research Council to establish best practices for law enforcement.[391] Many jurisdictions have made similar recommendations or requirements.[392]

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387.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 14; *see also* ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(D) (providing that a single photo "shall only be used where the witness is thoroughly familiar with the suspect and the officer is merely attempting to ensure that the witness and the officer are both referring to the same person").

388.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 28–29.

389.   Wells, *Policy and Procedure Recommendations*, *supra* note 11, at 29.

390.   *See id.* at 81–82.

391.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5 ("*Recommendation # 1: Train All Law Enforcement Officers in Eyewitness Identification*[.] The committee recommends that all law enforcement agencies provide their officers and agents with training on vision and memory and the variables that affect them, on practices for minimizing contamination, and on effective eyewitness identification protocols."); *see also id.* at 105–06.

392.   *See, e.g.*, COLO. REV. STAT. §§ 16-1-109(3)(d) (2018); CONN. GEN. STAT. § 7-294q (2018); FLA. STAT. § 92.70(5) (2018); TEX. CODE CRIM. PROC. ANN. art. 2.1386 (2017); VT. STAT. ANN. tit. 13, § 5581(c) (2018); W. VA. CODE § 62-1E-3 (2018); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 135, at 28 (recommending training on identification procedures); CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 2 (recommending training on eyewitness identification policies and guidelines); INNOCENCE

Every police department should also have written policies on eyewitness identification, as the National Research Council, the International Association of Chiefs of Police, and many other authorities recommend.[393] A written policy establishes clear guidance for investigators and allows officers to check back to review procedures during investigations should questions arise. Many models, including those from the International Association of Chiefs of Police and the Innocence Project, are available for law enforcement agencies to consult.[394]

M.   *Video Recording Identification Procedures*

1.   Scientific Conclusions

Video recording of eyewitness identification procedures is a system variable under the control of law enforcement.[395] Researchers recommend that show-ups, lineups, and photo arrays be video recorded, for example, to preserve the instructions given and the verbal and nonverbal reactions of the witness.[396] Basic research suggests that the memories of law enforcement officers are not infallible and, for example, officers may recall following "scripts" when improvisation occurred.[397] Researchers recommend that the recording depict both the investigator and the eyewitness.[398] Some questions about video recording, however, remain to be studied, such as "whether video-recording serves

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PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 5; N.Y. State Justice Task Force, *supra* note 135, at 5 (recommending training on the risks of eyewitness identification and that mistaken identifications have resulted in wrongful convictions); OKLA. JUSTICE COMM'N, *supra* note 135, at 18; R.I. TASK FORCE, *supra* note 135, at 18–19; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 104–05; Am. Bar Ass'n, *supra* note 21, at 810 (same).

393.   *See, e.g.*, CAL. PENAL CODE § 859.7(a) (West 2019) (operative Jan. 1, 2020); COLO. REV. STAT. § 16-1-109(1)(c), (3)(a) (2018) (written policy required); CONN. GEN. STAT. § 54-1p(b)-(c); GA. CODE ANN. § 17-20-2(a) (2018) (written policies required); KAN. STAT. ANN. § 22-4619(a) (2018) (written policy required); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit. V-A, art. 253(A)); NEB. REV. STAT. § 81-1455(1) (2018) (written policies required); NEV. REV. STAT. § 171.1237 (2017) (written policies required); N.H. REV. STAT. ANN. § 595-C:2 (2018) (written policy required); TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(a) (written policy required); VA. CODE ANN. § 19.2-390.02(a) (2018) (written policy required); VT. STAT. ANN. tit. 13, § 5581 (written policy required); W. VA. CODE § 62-1E-3 (written policy required); WIS. STAT. § 175.50(2) (2018) (written policy required); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135; CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 3; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21 (model policy); INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL SUMMIT, *supra* note 15, at 20, 23; NAT'L RESEARCH COUNCIL, *supra* note 6, at 5 ("*Recommendation #2*: . . . The committee recommends . . . the adoption of clear, written policies and training on photo array and live lineup administration"); *id.* at 107; OKLA. JUSTICE COMM'N, *supra* note 135, at 19; R.I. TASK FORCE, *supra* note 135, at 6; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 9–10, 86; Am. Bar Ass'n, *supra* note 21, at 810–11.

394.   *See* INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B (model legislation); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21 (model policy available to members).

395.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 10.

396.   *See, e.g.*, Wixted & Wells, *supra* note 30, at 19, 51; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 10–11, 17–18, 31, 61, 63, 77.

397.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 64–65.

398.   *See id.* at 31.

a prophylactic function," the uses of video recordings, and the recommended camera angle.[399]

2.   Best Practices Recommendations

As recommended by the Department of Justice, the International Association of Chiefs of Police, and many others, law enforcement should videotape (or audiotape if necessary) show-ups, lineups, and photo arrays.[400] Video recording is one of the National Research Council's five primary recommendations to establish best practices for law enforcement.[401]

Many law enforcement agencies have interview rooms equipped for video recording suspect interviews, thereby making this practice easy to implement. Some police cars are likewise equipped with video cameras, which can be used to record show-ups,[402] as can police body cameras.[403] Recording identification procedures not only captures the procedures used by officers, but also preserves all of the details that may reveal the witness's degree of confidence—including the witness's exact words, tone of voice, mannerisms, and other body language.[404] In this way, video recording augments the written and photographic record of the identification procedure, which should also

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399.   *See id.* at 11; *see also id.* at 68–69 (noting that research on video recording of interrogations suggests that recording deters suggestive practices, and that camera angle is significant to how viewers interpret video recordings).

400.   *See, e.g.*, CAL. PENAL CODE § 859.7(a)(11) (West 2019) (effective Jan. 1, 2020) (requiring video recording of lineups and photo arrays, or audio recording if necessary); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit. V-A, art. 253(F) (2018)); N.J. CT. R. 3:11(b); N.C. GEN. STAT. § 15A-284.52(b)(14) (2018); UTAH CODE ANN. § 77-8-4 (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(E)(11), (16); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(G), IV(B)(4); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 135, at 27; DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(11) (recommending video recording of show-ups via "in-car camera"); *id.* § IV(B)(2)(c) (recording photo arrays); FOSTER, *supra* note 135, at 1, 6; GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., *supra* note 135, at 39; INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 20–21, app. B § 3(T); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(16) ("Videotape the identification process [show-up] using an in-car camera or other recording device where available."); *id.* § IV(B)(16) ("Lineup and photo array procedures shall be video and audio recorded, unless doing so is not possible. If a procedure is not recorded, a written record shall be created and the reason for not recording shall be documented. In the case of lineups that are not recorded, officers shall take and preserve a still photograph of each individual in the lineup."); MONT. LAW ENF'T ACAD., *supra* note 135, §§ 25.7.5, 25.8.2(a); NAT'L RESEARCH COUNCIL, *supra* note 6, at 5, 108–09; NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, §§ B.2.c, C.2.e; OKLA. JUSTICE COMM'N, *supra* note 135, 18; STATE BAR OF MICH., *supra* note 135, at 6, 9; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 88, 101–02; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 9.1.1,10; WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, *supra* note 135, § F(1)WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 9–10, 14–15, 19; Am. Bar Ass'n, *supra* note 21, at 812, 823.

401.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5 ("*Recommendation # 5: Videotape the Witness Identification Process*[.] The committee recommends that the video recording of eyewitness identification procedures become standard practice.").

402.   *See, e.g.*, DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(A)(11) (recommending video recording of show-ups via "in-car camera"); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(16) (same); OKLA. JUSTICE COMM'N, *supra* note 135, at 18.

403.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 77.

404.   *See* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 9.1.1 n.3, 10; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 101.

be created and preserved,[405] including a record of any identification procedure conducted on a computer.[406]

N.   Whether Lineups and Photo Arrays Should Be Conducted Sequentially or Simultaneously

    1.   Scientific Conclusions

A sequential photo array is a group of photos with a minimum of five fillers and the suspect viewed by the witness one at a time. In sequential arrays, a witness makes an identification decision about the photograph being viewed before the next photograph is presented and witnesses are not permitted to "set aside" a photograph for a later decision. By contrast, a simultaneous array presents the photos (of the fillers and suspect) so that the witness can see them all at once.[407] Lineups can also be conducted sequentially or simultaneously.

The National Research Council has found that there is no general agreement as to whether showing an eyewitness a series of photos sequentially is preferable to showing the photos simultaneously.[408] On one hand, "the sequential procedure produces a higher diagnosticity ratio. That is, when considering only those cases in which a witness actually selects someone from a lineup, the ratio of correct to false identifications is commonly higher with the sequential" method.[409] In other words, the sequential method "comes closer to satisfying the popular criterion that those identified as guilty are actually

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405. *See, e.g.*, CONN. GEN. STAT. § 54-1p(c)(15) (2018) (written record required); Act of May 23, 2018, 2018 La. Sess. Law Serv. Act 466 (amending LA. CODE CRIM. PROC. ANN. tit. V-A, art. 253(B) (2018)) (document results of identification procedure, including witness statements); N.C. GEN. STAT. § 15A-284.52(b)(15) (documentation required); N.J. CT. R. 3:11(c); OHIO REV. CODE ANN. § 2933.83(A)(6)(h) (2018) (documentation required); TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(c)(2)(C) (results documented, including witness statements); W. VA. CODE § 62-1E-2(k) (2018) (documentation required); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(21)-(22); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 4 (requiring standard written record); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at app. B § 3(T), (V) (recommending that a written record include identification results, confidence statements, the names of people present, date and time of the procedure, and the fillers); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(1) ("Document the witness's description of the perpetrator prior to conducting the showup"); *id.* § IV(A)(17) ("Document the time and location of the showup, the officers present, the result of the procedure, and any other relevant information."); *id.* § IV(B)(15) ("The administrator shall ask the witness to complete and sign a lineup or photo array form."); *id.* § IV(C)(2)(a) ("[T]he photo array should be preserved, together with full information about the identification process as part of the case file."); N.Y. STATE JUSTICE TASK FORCE, *supra* note 135, at 3–4 (documentation); N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, §§ III(1)(x), (z), (aa) (documentation); OKLA. JUSTICE COMM'N, *supra* note 135, at 18 (documentation); R.I. TASK FORCE, *supra* note 135, at 15–16 (documentation); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 86 (detailed report required); U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, §§ 9.1–9.4 (detailed documentation of photo array procedure and results); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 11–12, 16, 21, 26 (documentation); Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 48 (written record should include how fillers were selected).

406. *See* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, at § 9.1.1 n.3.

407. *See, e.g., id.* § 4.1.

408. *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 3, 24; *see also* U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, at 8; Am. Bar Ass'n, *supra* note 21, at 816.

409. Nat'l Research Council, *supra* note 6, at 79.

guilty."[410] But it should be noted that "there is, as yet, not enough evidence" that the sequential method improves "discriminability,"[411] the "measure of how well the witness can discriminate between different possible matches to his or her memory of the face of the culprit."[412] The American Psychology-Law Society takes no position on the issue.[413] Accordingly, the Task Force makes no recommendations regarding this system variable.

2.   Best Practices Recommendations (if Sequential Method Is Used)

Should an agency decide to use sequential photo arrays, there are best practices that should be observed.[414] First, an officer should prevent the witness from knowing when he or she is viewing the last photo in the array.[415] This prevents the witness from feeling any urge to identify the person in the last photo as the perpetrator.[416] One common technique is sometimes called "back-loading," in which the officer places empty folders in the bottom of the stack of folders containing the photographs.[417]

The witness should make an identification decision after each photograph is shown and should not be permitted to "set aside" a photograph. The officer should show the witness the entire array, even if the witness identifies someone before the last photo is shown, and continue to ask whether the witness recognizes the person in each photo.[418] The witness should be informed before the procedure begins that they will be asked to view the entire series even if a photograph is selected. One way to accomplish this is to (1) allow the witness to make the identification, (2) ask the witness for a statement of certainty, (3) have the witness initial the chosen photo, and then (4) show the remainder of the photos.[419] One study group has provided a sample exchange illustrating how an

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410.   *Id.* at 80.

411.   *Id.* at 118.

412.   *Id.* at 117.

413.   *See generally* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11.

414.   These principles should also be applied to sequential lineups. *See, e.g.*, STATE BAR OF MICH., *supra* note 135, at 8.

415.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 27; BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(1)(f)(3); DEL. POLICE CHIEFS' COUNCIL, *supra* note 135, § IV(B)(2)(e); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 19; MONT. LAW ENF'T ACAD., *supra* note 135, § 24.4.3(f); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, § B.2.e.

416.   *See* WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 9, 14.

417.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 27; *see also* OHIO REV. CODE ANN. § 2933.83(A)(6)(d) (2018); ARK. ASS'N OF CHIEFS OF POLICE, *supra* note 135, § IV(C)(23)(a); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(1)(f)(3); INNOCENCE PROJECT, REEVALUATING LINEUPS, *supra* note 10, at 19; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(2)(b)(1) (directing administrators to "[i]nclude two additional folders each containing a blank sheet of paper" and then to set these aside to "be added to the end of the sequence"); MONT. LAW ENF'T ACAD., *supra* note 135, §§ 25.3.5, 24.4.3(a), (f); NEB. COMM'N ON LAW ENF'T & CRIMINAL JUSTICE, *supra* note 135, §§ B.1.a, B.2; OKLA. JUSTICE COMM'N, *supra* note 135, at 15.

418.   *See, e.g.*, 725 ILL. COMP. STAT. 5/107A-2(a) (2018); W. VA. CODE § 62-1E-1(7(B) (2018); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, §§ III(E), IV(B)(2)(g); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(2)(b)(2); *id.* § IV(B)(10) ("If you make an identification, I will continue to show you the remaining individuals or photos in the series."); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.6.3(c); OKLA. JUSTICE COMM'N, *supra* note 135, at 17; R.I. TASK FORCE, *supra* note 135, at 10; STATE BAR OF MICH., *supra* note 135, at 7.

419.   *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 97–98.

officer can obtain a confidence statement from a witness as soon as the witness identifies the perpetrator, without providing any feedback, and still show all of the photographs:

> WITNESS: Wait, that's the guy right there.
> OFFICER: Without using a numerical scale, how certain are you?
> WITNESS: Oh, that's him. I'm sure of it. I'll never forget that face.
> OFFICER: Now remember what I told you, I have to show you the entire series.
> WITNESS: Oh, right. OK.[420]

In this example, the officer at no point provides feedback as to whether or not the person identified is the suspect.

The officer should not suggest a second viewing of the photos.[421] Where an eyewitness requests to see one or more photos again, the witness should be shown the entire array one more time.[422] Showing the entire array again, rather than a particular photo, limits suggestiveness.[423] However, the officer should not offer two "laps"—i.e., two cycles through the photos—at the beginning of the procedure.[424] If officers were to do so, many witnesses would wait for the full array to be shown even if they recognized someone.

The officer should not show the array more than twice.[425] "A witness who needs to see the photos three times is probably unlikely to make an accurate selection, and showing three or more laps may permit relative judgment to occur," thereby undermining the purpose of the sequential presentation.[426]

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420. *Id.* at 98. *But see* Wixted & Wells, *supra* note 30, at 54 (explaining that research is need on the question whether a statement of confidence should be taken in the witness's words or numerically); Wixted et al., *Initial Eyewitness*, *supra* note 290, at 524 (describing several possible ways of recording confidence and noting that recording confidence in the witness's own words is "insufficiently precise"); Wells, *Policy and Procedure Recommendations*, *supra* note 11, at 58, 60 (explaining that a statement of confidence can be taken in words or numerically).

421. *See, e.g.*, 725 Ill. Comp. Stat. 5/107A-2(a); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(i); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 5.

422. *See, e.g.*, W. Va. Code § 62-1E-1(7)(C); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(i); CONN. DEP'T OF EMERGENCY SERVS. & TRAINING COUNCIL, *supra* note 135, at 3, 5; FOSTER, *supra* note 135, at 2; INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(2)(3); MONT. LAW ENF'T ACAD., *supra* note 135, § 25.6.3(g); STATE BAR OF MICH., *supra* note 135, at 7; SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 97; U.S. DEP'T OF JUSTICE, EYEWITNESS IDENTIFICATION, *supra* note 18, § 6.3.9; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 11, 16, 20–21.

423. *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 97; WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 11, 16, 20–21.

424. *See, e.g.*, CONN. EYEWITNESS IDENTIFICATION TASK FORCE, *supra* note 135, at 3; N.C. ACTUAL INNOCENCE COMM'N, *supra* note 135, § III(1)(t); WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 11.

425. *See, e.g.*, OHIO REV. CODE ANN. § 2933.83(A)(6)(g) (2018); W. VA. CODE § 62-1E-1(7)(D); BILL BLACKWOOD LAW ENF'T MGMT. INST. OF TEX., *supra* note 135, § IV(B)(2)(i); INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(C)(2)(b)(3); SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 97.

426. SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS EVIDENCE, *supra* note 81, at 95; *see also* WIS. OFFICE OF THE ATTORNEY GEN., *supra* note 119, at 11.

V.   ESTIMATOR VARIABLES

Estimator variables are those conditions outside of the control of law enforcement, such as those "associated with the actual crime."[427] Such variables include the presence of a weapon, whether an eyewitness was under stress at the time he or she saw the perpetrator and the level of that stress, the race of the eyewitness relative to that of the perpetrator, the duration of time that the eyewitness saw the perpetrator, and the interval of time between the crime and the identification.[428] Each of these variables may affect the accuracy of an eyewitness identification, but none can be considered in isolation.[429] For example, an eyewitness may have viewed the perpetrator for a substantial length of time, but if he or she was under significant stress during the crime, and the crime occurred long ago, the reliability of the eyewitness's identification may be affected.[430]

While estimator variables, by definition, cannot be controlled by law enforcement, understanding how these variables affect the accuracy of eyewitness identifications is necessary to assess the reliability of an identification. In addition, researchers recommend that law enforcement officers interview eyewitnesses regarding estimator variables before conducting an identification procedure.[431] Accordingly, the areas of general scientific agreement regarding the impact of estimator variables are set out below.

A.   Weapon Focus

1.   Majority View

The presence of a weapon while witnessing an event can reduce the accuracy of witness recall and subsequent identifications, an effect termed "weapon focus."[432] Weapon focus can potentially impair the witness's memory by directing attention towards the weapon, and therefore away from the perpetrator's appearance.[433] The National Research Council has noted the need for additional research on how the presence of a weapon interacts with other estimator variables to affect memory.[434]

Courts have regularly recognized the significance of weapon focus.[435]

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427.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 1, 72; *see also* Wells, *Applied Eyewitness Testimony Research*, *supra* note 109, at 1546.

428.   *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 6, at 92; WELLS, SYSTEM HANDBOOK, *supra* note 120, at 13-19.

429.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 93.

430.   *See generally* Deffenbacher et al., *Effects of High Stress*, *supra* note 53, at 687.

431.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 28–29.

432.   *See, e.g.*, Fawcett et al., *supra* note 52, at 35–66; Kocab & Sporer, *supra* note 52, at 71–117; Steblay, *supra* note 52, at 415–17.

433.   *See, e.g.*, Loftus et al., *supra* note 52, at 55–62; Maass & Köhnken, *supra* note 52, at 397–408; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 28.

434.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 94.

435.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (noting that whether the suspect carried a weapon bears upon the risk of misidentification); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 331 (3d Cir. 2016) ("As Chief Judge McKee's concurrence highlights . . . the presence of a weapon at a crime scene 'has a consistently negative impact on both feature recall accuracy and identification accuracy.'" (quoting *id.* at 331 (McKee, C.J., concurring)); Young v. Conway, 698 F.3d 69, 80–81 (2d Cir. 2012) ("[T]he scientific

Mr. Kravetz and Special Agent Zajac's minority view is not necessarily in tension with this conclusion. Instead, it points to studies that have found the presence of a weapon has no deleterious effect on subsequent identifications.[436] But the Task Force's conclusion is that the presence of a weapon "can *potentially* impair" a witness's ability to make an accurate identification decision. This conclusion allows for situations in which the presence of a weapon has no effect on the witness's ability to make an identification or could even improve their ability to identify. The Task Force does not conclude that the presence of a weapon will always make a subsequent identification inaccurate. Rather, the Task Force's conclusions are meant to educate practitioners and

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literature indicates that the presence of a weapon during a crime 'will draw central attention, thus decreasing the ability of the eyewitness to adequately encode and later recall peripheral details.'"); United States v. Brownlee, 454 F.3d 131, 140 (3d Cir. 2006) (noting that witness's focus on a weapon weakened the reliability of the identification); United States v. Mathis, 264 F.3d 321, 338, 342 (3d Cir. 2001) (holding that that it was an abuse of discretion not to admit expert testimony on weapon focus); United States v. Stevens, 935 F.2d 1380, 1392 (3d Cir. 1991) ("Courts have recognized that victims, out of fear, often focus their attention on the perpetrator's weapon, rather than his face."); United States v. Lester, 254 F. Supp. 2d 602, 614 (E.D. Va. 2003) (permitting an expert "to testify as to the effects that weapon focus ha[s] on the ability of eyewitnesses to perceive events"); Young v. State, 374 P.3d 395, 422 (Alaska 2016) ("When an extraordinary detail captures a witness's attention, the witness's ability to perceive other details may be compromised, undermining the reliability of an identification. The 'weapons focus effect' is one 'in which witnesses who observe a criminal with a visible weapon tend to remember less about the criminal's physical features and clothing than do witnesses who see the criminal either empty-handed or with a neutral object.' While the effect may be small, one study found it noteworthy."); Bernal v. People, 44 P.3d 184, 190 (Colo. 2002) ("A different study revealed that 'recognition accuracy was found to be poorer when the perpetrator was holding a weapon.'"); State v. Guilbert, 49 A.3d 705, 721–22 (Conn. 2012) ("Courts across the country now accept that . . . the reliability of an identification can be diminished by a witness' focus on a weapon."); State v. Cabagbag, 277 P.3d 1027, 1035 (Haw. 2012) (noting that "[r]esearchers have found that several variables tend to affect the reliability of an eyewitness's identification [including] . . . 'weapon focus'"); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (holding that "the use of a visible weapon during a crime" is a factor "that courts should consider in determining whether identifications procedures were overly suggestive"); People v. Lerma, 47 N.E.3d 985, 993 (Ill. 2016) (finding reversible error where the trial court excluded testimony about, *inter alia*, the effect the presence of a weapon has on identification); Commonwealth v. Christie, 98 S.W.3d 485, 490 (Ky. 2002) (holding that trial court abused its discretion when it refused to consider testimony that "eyewitness identifications are less accurate when a weapon is present"); Commonwealth v. Gomes, 22 N.E.3d 897, 920 n.7 (Mass. 2015) (proposing a model jury instruction on weapon focus); State v. Henderson, 27 A.3d 872, 904–05 (N.J. 2011) ("When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. 'Weapon focus' can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration."); State v. Lawson, 291 P.3d 673, 701 (Or. 2012) ("Studies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy because witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter."); Commonwealth v. Walker, 92 A.3d 766, 789 (Pa. 2014) (embracing research on "weapons focus"); State v. Clopten, 223 P.3d 1103, 1103, 1113 n.22 (Utah 2009) (permitting expert testimony in situations where, *inter alia*, weapons focus is at issue).

436. *See* Minority Statement *infra*. In their Minority View on weapon focus, Mr. Kravetz and Special Agent Zajac indicate that archival and field studies do not find the weapon focus effect. However, researchers have written about various concerns regarding the interpretation of archival and field studies in eyewitness research. Ruth Horry and colleagues discuss "the inherent, unavoidable limitations with archival studies and consider what such studies can really tell researchers. We conclude that differences in sampling prohibit sensible comparisons between the results of laboratory and archival studies, and that the informational value of archival studies is actually rather limited." Ruth Horry et al., *Archival Analyses of Eyewitness Identification Test Outcomes: What Can They Tell Us About Eyewitness Memory?*, 38 L. & HUM. BEHAV. 94, 94-108 (2014).

judges about the possibility that the presence of a weapon could affect a witness's ability to make a subsequent identification.

2.   Minority View

Mr. Kravetz and Special Agent Zajac note their disagreement with the Majority's conclusions about weapon focus. They state that the Report cites several studies in support of its conclusion that a weapon "can reduce" accuracy or "can potentially" impair memory, but it disregards other findings from within those same studies (and others) concluding that "neither field nor archival studies have reported an effect of weapon presence on suspect identification or description accuracy."[437] One meta-analysis questioned the failure of many weapons focus effect (WFE) studies to include target absent (TA) lineups—in which a misidentification, or false positive, may result in a wrongful conviction—finding that "[n]o conclusions can be drawn regarding the WFE on TA lineups and future research is clearly needed to remedy this defect."[438] The authors stated that their finding "implies that there seems not to be sufficient evidence for experts testifying for the defense on the weapon focus effect with respect to identification decisions, as this type of expert testimony typically focuses on factors contributing to the likelihood of false identifications."[439]

Moreover, a 2016 study suggested that for highly confident witnesses there is not a "weapons focus" effect: "Relatively high confidence after choosing from a lineup tended to indicate high accuracy in that decision regardless of a weapon being shown, concealed."[440] Given these studies, Mr. Kravetz and Special Agent Zajac submit that this Part should have indicated that it is unclear whether the presence of a weapon has any impact on the accuracy of a particular eyewitness identification.

B.   *Stress and Fear*

1.   Majority View

Related to weapon focus is the estimator variable of stress. There is a general agreement on the damaging effect of stress on memory.[441] Highly stressful situations have been demonstrated to interfere with eyewitness memory.[442] While the majority of research has concerned stress at modest levels (because it has been conducted in the experimental conditions where ethical regulations limit the amount of stress that can be

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437.   Fawcett et al., *supra* note 52, at 43; *see also* John C. Yuille et al., *Expert Testimony on Laboratory Witnesses*, 10 J. FORENSIC PSYCHOL. PRAC. 238, 243 (2010) (stating that the "few [field] studies that have examined the impact of the presence of a weapon on actual eyewitnesses have provided little to no empirical support for the weapons focus effect").

438.   Kocab & Sporer, *supra* note 52, at 105.

439.   *Id.*

440.   Curt A. Carlson et al., *An Investigation of the Weapon Focus Effect and the Confidence-Accuracy Relationship for Eyewitness Identification*, 6 J. APPLIED RES. MEMORY & COGNITION 1, 9 (2016) ("[N]ot only did the visible weapon not harm the C[onfidence] A[ccuracy] relationship, it actually improved it.").

441.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 94–95 ("Under conditions of high stress, a witness' ability to identify key characteristics of an individual's face . . . may be significantly impaired.").

442.   *See, e.g.*, Morgan et al., *supra* note 53, at 265–79.

induced in participants), these studies establish that even moderate stress may impair memory.[443]

Courts frequently recognize this estimator variable.[444]

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443.   *See* Deffenbacher et al., *Effects of High Stress*, *supra* note 53, at 687–706.

444.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 243 (2012) (noting that stress bears on the likelihood of misidentification); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 299 n.24 (3d Cir. 2016) (recognizing that "stress may have played a particularly damaging role in the strength of [the witness's] identification" and citing favorably the concurring opinion for the point that "stress may impair a witness's identifications"); *id.* at 329 (McKee, C.J., concurring) (recognizing that "high levels of stress at the time of memory formation can negatively impact a witness' ability to accurately identify the perpetrator"); Young v. Conway, 698 F.3d 69, 81 (2d Cir. 2012) ("[H]igh levels of stress have been shown to induce a defensive mental state that can result in a diminished ability accurately to process and recall events, leading to inaccurate identifications."); United States v. Brownlee, 454 F.3d 131, 140 (3d Cir. 2006) (noting that stress impairs accuracy); United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("Memory and perception may be affected by factors such as . . . stress [and] . . . the violence of the situation . . . ."); United States v. Stevens, 935 F.2d 1380, 1392 (3d Cir. 1991) (recognizing that stress was a "countervailing consideration[] . . . that detract[ed] from the reliability of the victims' identifications" because "stress has been recognized to distort witnesses' perceptions"); United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) ("[I]t is commonly believed that witnesses remember better when they are under stress. The data indicate that the opposite is true."); Dickerson v. Fogg, 692 F.2d 238, 245 (2d Cir. 1982) (taking into account deleterious impact of fear on memory); United States v. Smith, 621 F. Supp. 2d 1207, 1216 (M.D. Ala. 2009) (citing studies finding that "stress impairs an individual's perception and ability to accurately recall an event" and "that fear and stress impair perceptions"); United States v. Lester, 254 F. Supp. 2d 602, 614 (E.D. Va. 2003) (permitting an expert "to testify as to the effects that . . . stress ha[s] on the ability of eyewitnesses to perceive events"); Young v. State, 374 P.3d 395, 422 (Alaska 2016) ("The level of stress a witness experiences at the time of the crime may affect the accuracy of a later identification. While the science shows that moderate levels of stress can help improve accuracy of perception, it also shows that high levels of stress can negatively affect the accuracy of both the witness's identification of the suspect and the witness's memory of other details of the crime. Acknowledging the negative effect of stress on the reliability of eyewitness identifications may help jurors counteract the 'common misconception that faces seen in highly stressful situations can be 'burned into' a witness's memory.'"); People v. McDonald, 690 P.2d 709, 717 (Cal. 1984) (holding that trial court erred by excluding expert testimony about the risk of misidentification "when the observation was made at a time of stress or excitement"); State v. Guilbert, 49 A.3d 705, 721–22 (Conn. 2012) ("Courts across the country now accept that . . . high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events."); Minor v. United States, 57 A.3d 406, 415 (D.C. 2012) ("With regard to the effect of stress on eyewitness identifications, the studies found that the 'average juror is likely to believe that witnesses remember the details of violent events better than nonviolent ones,' but the research shows that the opposite is true."); State v. Cabagbag, 277 P.3d 1027, 1035 (Haw. 2012) (noting that "[r]esearchers have found that several variables tend to affect the reliability of an eyewitness's identification [including] . . . witness stress"); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (holding that "stress" is a factor "that courts should consider in determining whether identifications procedures were overly suggestive"); People v. Lerma, 47 N.E.3d 985, 993 (Ill. 2016) (finding reversible error where the trial court excluded testimony about, *inter alia*, the effect of stress on identifications); Commonwealth v. Christie, 98 S.W.3d 485, 490 (Ky. 2002) (holding that the trial court abused its discretion when it refused to consider testimony that "significant or extreme levels of stress impair memory rather than enhance it"); Commonwealth v. Gomes, 22 N.E.3d 897, 921 n.9 (Mass. 2015) ("The scientific literature reports that, while moderate levels of stress improve cognitive processing and might improve accuracy . . . , an eyewitness under high stress is less likely to make a reliable identification of the perpetrator."); State v. Henderson, 27 A.3d 872, 904 (N.J. 2011) ("Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification."); State v. Thompson, 504 N.W.2d 838, 843 (N.D. 1993) (reversing judgment of sentence where an identification was "based upon perceptions borne under circumstances that were fleeting, excited and stressful" and appropriate instruction was not given); State v. Haugen, 392 P.3d 306, 318 (Or. 2017) (considering stress as an estimator variable); State v. Lawson, 291 P.3d 673, 769 (Or. 2012) ("High levels of stress or fear can have a negative effect on a witness's ability to

Mr. Kravetz and Special Agent Zajac suggest that the Task Force concludes that stress will necessarily increase the likelihood of a false identification. Yet the Task Force only concludes that stress *can* have a damaging effect on memory. The Minority's cited sources do not undermine that conclusion and in fact, support it. The 2004 Morgan study—cited by both the Task Force and the Clark article (cited by Mr. Kravetz and Special Agent Zajac)—unequivocally concluded that

> [c]ontrary to popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 min[utes], a large number of subjects in this study were unable to correctly identify their perpetrator. These data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error.[445]

That conclusion does not undermine the Task Force's position, as Mr. Kravetz and Special Agent Zajac claim. It supports it.

2.   Minority View

Mr. Kravetz and Special Agent Zajac disagree with the Report's assertions that there exists a "general agreement on the damaging effect of stress on memory" and that "[h]ighly stressful situations have been demonstrated to interfere with eyewitness memory."[446]

Several studies suggest that there may be some circumstances under which stress may enhance memory.[447] Similarly, in a field study involving victims and witnesses to actual robberies, researchers found that "confidence in an eyewitness identification from a fair lineup is a highly reliable indicator of accuracy."[448] Since they deemed it fair to assume that many of the robbery victims suffered high stress, Professors Wixted and Mickes suggest that the results support the conclusion that variables like stress are "largely irrelevant."

Even the studies cited in the Report suggest that stress may not yield a false identification.[449] Rather, those studies indicate that stress may not increase the risk that

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make accurate identifications."); Commonwealth v. Walker, 92 A.3d 766, 789 (Pa. 2014) (embracing research on the "decreased accuracy in eyewitness identifications in high-stress/traumatic situations"); State v. Dyle, 899 S.W.2d 607, 609–10 (Tenn. 1995) (noting that "[m]any experts have found that eyewitness testimony can be influenced by . . . the observer's state of stress").

    445.   Morgan et al., *supra* note 53, at 265–79.

    446*.   See* Minority Report *infra*; *see also supra* notes 441–442.

    447*.   See* S.A. Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 Psychol. Bull. 284 (1992); Mara Mather & Matthew R. Sutherland, *Arousal-Biased Competition in Perception and Memory*, 6 Persp. on Psych. Sci. 114 (2011).

    448.   Wixted et al., *Estimating the Reliability*, *supra* note 278, at 309.

    449.   For example, the Morgan study cited *supra* in notes 53, 442, and 445 "showed that stress reduced the correct identification rate in [guilty suspect] lineups, but had no effect on the mistaken identification rate in [innocent suspect] lineups." Deffenbacher et al., *Effects of High Stress*, *supra* note 53, at 687. And in the Deffenbacher study (*supra* note 53), twenty-one of the twenty-two studies in the meta-analysis found little to no effect of stress on incorrect identifications. In fact, that study found that "[t]he overall negative impact of heightened stress on accuracy of face identification was due entirely to a substantial effect on hit rate for [target present] lineups. The correct rejection rate for [target absent] lineups was unaffected by stress level." *Id.* at 695.

an *innocent person might be misidentified*, but instead increased the likelihood that *a witness will not choose* the perpetrator.[450] The Majority conflates these two concepts in its consideration of the stress variable.

C.   *Cross-Race Effect (or Own-Race Bias)*

1.   Majority View

There is substantial agreement among eyewitness researchers that witnesses may be less accurate when identifying members of another race or ethnicity compared to when they identify members of their own race or ethnicity. This "cross-race effect" or "own-race bias" has been found across a number of different races and ethnicities around the globe[451] and the effect appears to be larger when exposure time is short and the retention interval is long.[452] The National Research Council has noted that "[a]lthough the existence of own-race bias is generally accepted, the causes for this effect are not fully understood."[453] There remains a need "to identify procedures that may help estimate the degree of own-race biases in individual eyewitnesses following an identification procedure."[454]

Many courts have noted the scientific agreement regarding the cross-race effect.[455]

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450.   Steven E. Clark & Gary L. Wells, *On the Diagnosticity of Multiple-Witness Identifications*, 32 L. & HUM. BEHAV. 406, 415 (2008). Even *Henderson* acknowledged deficiencies in adopting a uniform definition of "high level of stress," finding that "[t]here is no precise measure for what constitutes high stress, which must be based on the facts presented in individual cases" and cannot be replicated in the laboratory. State v. Henderson, 27 A.3d 872, 904 (N.J. 2011); *see also* Hugues F. Herve et al., *Biopsychosocial Perspectives on Memory Variability in Eyewitnesses*, *in* APPLIED ISSUES IN INVESTIGATIVE INTERVIEWING, EYEWITNESS MEMORY AND CREDIBILITY ASSESSMENT 99, 106 (Barry S. Cooper et al. eds. 2013) ("Laboratory-based methodologies are, for ethical reasons, unable to evoke remarkable memories as the stimuli used cannot produce extreme stress or trauma.").

451.   *See, e.g.*, Evans et al., *supra* note 54, at 19–28; Jackiw et al., *supra* note 54, at 52–57; Meissner & Brigham, *supra* note 54, at 3–35; Platz & Hosch, *supra* note 54, at 972–84.

452.   *See* Meissner & Brigham, *supra* note 54, at 19.

453.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 96.

454.   *Id.* at 97.

455.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (noting that the race of witness and suspect bears upon the risk of misidentification); Arizona v. Youngblood, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting) ("Cross-racial identifications are much less likely to be accurate than same race identifications."); Manson v. Brathwaite, 432 U.S. 98, 115 (1977) (noting that the eyewitness police officer and perpetrator were of the same race); Young v. Conway, 698 F.3d 69, 81 (2d Cir. 2012) ("[S]ocial science research indicates that people are significantly more prone to identification errors when trying to identify someone of a different race, a phenomenon known as 'own-race bias.'"); United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("Memory and perception may be affected by factors such as . . . the cross-racial aspects of identifications, that is where the eyewitness and the actor in the situation are of different racial groups." (citation omitted)); United States v. Stevens, 935 F.2d 1380, 1392 (3d Cir. 1991) ("Scholarly literature attacking the trustworthiness of cross-racial identification is now legion."); United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985) (noting that "differences in race . . . as between the eyewitness and the defendant[] . . . have been found by researchers to impair the accuracy of eyewitness identifications"); United States v. Smith, 621 F. Supp. 2d 1207, 1215 (M.D. Ala. 2009) ("Research shows that cross-racial identifications are less accurate than same-race identifications . . . Recent evidence also shows that cross-racial identifications are even more error-prone when, as was true here, one of the eyewitnesses is white and the suspect is black."); Sturgeon v. Quarterman, 615 F. Supp. 2d 546, 572 (S.D. Tex. 2009) ("The problems of cross-racial identification are well known and these issues have been the subject of significant scholarly research."); Young v. State, 374 P.3d 395, 424 (Alaska 2016)

Mr. Kravetz and Special Agent Zajac maintain that the other Task Force members "broad[ly] represent[] that witnesses are always less accurate" when making a cross-race identification.[456] That is not so. As the Task Force explains, researchers agree that there is generally a disparity in accuracy between identifications of a person of a different race, and those of a person of the same race.[457] But that is not to say that, in *all* circumstances, a cross-race identification is less likely to be accurate. As noted above, researchers are unsure of the cause of the cross-race effect—and, thus, are unable to conclude with certainty in which cases the effect is prominent.[458] Indeed, researchers have concluded that the prevalence of the effect can vary depending on other estimator variables—such as the amount of time that the witness could observe the perpetrator (exposure duration) and the length of time between the witnessed event and the identification procedure (retention interval).[459] But while the research does show that certain variables can impact the prevalence of the cross-race effect, that is no reason to discount entirely the importance of the effect.

("Research also convincingly demonstrates that witnesses are much more likely to accurately identify members of their own race or ethnicity than members of others, and that eyewitness identification is therefore likely to be less reliable if witness and perpetrator are of different races."); State v. Guilbert, 49 A.3d 705, 721–22 (Conn. 2012) ("Courts across the country now accept that . . . cross-racial identifications are considerably less accurate than same race identifications."); *In re* As.H., 851 A.2d 456, 460 (D.C. 2004) ("[I]t is well established that there exists a comparative difficulty in recognizing individual members of a race different from one's own."); State v. Cabagbag, 277 P.3d 1027, 1035–36 (Haw. 2012) (noting that "[r]esearchers have found that several variables tend to affect the reliability of an eyewitness's identification [including] . . . cross-race bias"); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (holding that "race-bias" is a factor "that courts should consider in determining whether identifications procedures were overly suggestive"); People v. Lerma, 47 N.E.3d 985, 993 (Ill. 2016) (finding reversible error where the trial court excluded testimony about, *inter alia*, cross-racial identifications); Commonwealth v. Christie, 98 S.W.3d 485, 490 (Ky. 2002) (holding that trial court abused its discretion when it refused to consider testimony that "cross-racial identifications [are] more unreliable than is testimony on same-race identifications"); State v. Mahmoud, 147 A.3d 833, 837 n.5 (Me. 2016) ("The current state of the science strongly suggests that cross-racial identifications tend to be less accurate than same-race identifications."); Commonwealth v. Gomes, 22 N.E.3d 897, 922 n.10 (Mass. 2015) ("A witness may have more difficulty identifying a person of a different race or ethnicity."); State v. Henderson, 27 A.3d 872, 907 (N.J. 2011) ("Cross-racial recognition continues to be a factor that can affect the reliability of an identification."); People v. Boone, 91 N.E.3d 1194, 1196 (N.Y. 2017) (noting "the near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race," and holding that a party is entitled to a jury instruction on cross-racial identification when such an identification is at issue); State v. Lawson, 291 P.3d 673, 688 (Or. 2012) ("Witnesses are significantly better at identifying members of their own race than those of other races."); Commonwealth v. Walker, 92 A.3d 766, 789 (Pa. 2014) (embracing research that discusses "the reduced reliability of identification in cross-racial identification cases"); State v. Davis, 131 A.3d 679, 696 n.13 (R.I. 2016) (recognizing "the growing body of scientific and psychological studies regarding the questionable accuracy of the accounts of eyewitnesses, and the efforts made to prevent a miscarriage of justice," and citing cases discussing cross-racial identifications); State v. Dyle, 899 S.W.2d 607, 609–10 (Tenn. 1995) (noting that "[m]any experts have found that eyewitness testimony can be influenced by . . . race"); State v. Clopten, 223 P.3d 1103, 1113 n.22 (Utah 2009) (permitting expert testimony in situations where, *inter alia*, a cross-racial identification is at issue).

456.   *See* Minority Statement *infra*.

457.   *See, e.g.*, Evans et al., *supra* note 54, at 19–28; Jackiw et al., *supra* note 54, at 52–57; Meissner & Brigham, *supra* note 54, at 3–35; Platz & Hosch, *supra* note 54, at 972–84.

458.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 96.

459.   Meissner & Brigham, *supra* note 54, at 26 (2001) (concluding that "factors such as study time and retention interval pay an important role in determining when the [own-race bias] is most likely to occur").

The Minority View further suggests that a high-confidence initial identification renders irrelevant the cross-racial variable.[460] However, even highly confident witnesses can make inaccurate cross-racial identifications, as in the case of exoneree Perry Mitchell, who served over fourteen years in prison for a rape that he did not commit. Mr. Mitchell, a black man, was convicted in South Carolina of raping a seventeen-year-old white girl at knifepoint. According to the testimony, at a photo array the victim "went straight to it, picked it up and said this is the man that raped me. I said are you positive? She said absolutely." Mr. Mitchell was later exonerated by DNA evidence.[461] Indeed, one study cited by the Minority itself hypothesizes that witnesses are unlikely to adjust their confidence downward in a cross-racial identification because they may be unaware of the cross-race effect "and that lack of awareness may result in overconfidence and a weakening of the confidence-accuracy relationship."[462] Furthermore, as explained, unless pristine testing conditions are used, a statement of high confidence may simply be a product of suggestivity.[463]

2.   Minority View

Mr. Kravetz and Special Agent Zajac do not disagree that a cross-race effect (CRE) may exist under certain circumstances, or that the impact of the CRE may be a relevant consideration in assessing the accuracy of an identification. But the Report should have cited to other relevant studies to give a more complete review of the state of the CRE literature.

For example, there are some archival or field studies where "no effect of different versus same race or suspects and witnesses was found."[464] In addition, other studies have described the factors under which any CRE may be eliminated. In the 2016 Houston field study, where two-thirds of the highly-confident witnesses identified suspects of another race, approximately ninety-four percent identified the suspect (not a filler) accurately.[465] A separate field study of armed robberies (using different data) similarly found that

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460.   The minority view raises serious questions as to its precision by citing as authority the Houston field study of Dr. Wixted et al. The minority claims that this "field study of armed robberies . . . similarly found that highly-confident witnesses were accurate in their identifications regardless of the suspect's race." However, the authors of that report made no such finding; race is never mentioned in the paper. *See* Wixted et al., *Estimating the Reliability*, *supra* note 278, at 304.

461.   *See Perry Mitchell*, CONVICTING THE INNOCENT: DNA EXONERATIONS DATABASE, http://www.convictingtheinnocent.com/exoneree/perry-mitchell/ [https://perma.cc/A5VT-6K9J] (last visited Nov. 1, 2019).

462.   Laura Mickes, *Receiver Operating Characteristic Analysis and Confidence-accuracy Characteristic Analysis in Investigations of System Variables and Estimator Variables That Affect Eyewitness Memory*, 4 J. APPLIED RES. MEMORY & COGNITION 93, 96 (2015); *see also* Wixted et al., *The Effect of Retention Interval on Eyewitness Identification Confidence-Accuracy Relationship*, 5 J. APPLIED RES. MEMORY & COGNITION 192, 203 (2016) [hereinafter Wixted et al, *Effect of Retention Interval*] (positing that confidence statements are an expression of one's "subjective sense of memory strength" obtained through life-experience).

463.   *See* Wixted & Wells, *supra* note 30, at 10.

464.   Tim Valentine et al., *Characteristics of Eyewitness Identification That Predict the Outcome of Real Lineups*, 17 APPLIED COGNITIVE PSYCHOL. 969 (2003); *see* Lindsay et al., *supra* note 60, at 534 (finding "no evidence of significant effects of [cross-race] on identification performance" and noting that "[i]f the cross-race effect is robust, one would have expected it to occur under the conditions of our study").

465.   William Wells et al., *The Characteristics and Results of Eyewitness Identification Procedures Conducted During Robbery Investigations in Houston, Texas*, 39 POLICING: AN INT'L J. 601, 609 (2016).

highly-confident witnesses were accurate in their identifications regardless of the suspect's race.[466] Under such conditions, "the magnitude of the" cross-race effect "is attenuated when confidence is taken into account."[467]

Other studies have found that the presence of certain factors may diminish the impact of any CRE in a particular identification, including:

- cross-race faces displaying expressions of anger or power;[468]
- prolonged cross-racial contact;[469]
- exposure to rigidly moving faces;[470] and
- increased exposure time to view the suspect.[471]

Finally, the Report claims a substantial agreement that cross-race witnesses are "less accurate" but then acknowledges that there are gaps in "estimat[ing] the *degree* of own-race biases in *individual eyewitnesses*."[472] At present, scientists have been unable to gauge the practical significance of CRE and "do not know what basis might exist for predicting that a specific person might be subject to it or exempt from it."[473] That researchers have yet to determine whether (if at all) there is a cross-race impact on particular witnesses that undercuts the assertion that cross-race witnesses are categorically "less accurate." Researchers have recognized this shortcoming, stating "there is no measure at present that would be forensically useful in predicting which individuals are likely to manifest a strong CRE in face identification" and that it "remains to be seen whether other potentially useful individual-difference variables can be identified."[474]

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466.   Wixted et al., *Estimating the Reliability*, *supra* note 278, at 305.

467.   Thao B. Nguyen, Kathy Pezdek, & John T. Wixted, *Evidence for a Confidence-Accuracy Relationship in Memory for Same- and Cross-Race Faces*, 70 Q. J. EXPERIMENTAL PSYCHOL. 1, 15 (2017).

468.   Steven G. Young & Kurt Hugenberg, *Individuation Motivation and Face Experience Can Operate Jointly to Produce the Own-Race Bias*, 3 SOC. PSYCHOL. & PERSONALITY SCI. 80, (2012) (finding that "when [cross-race] faces were angry and thus highly important to individuate, [cross-race] recognition improved for both high- and low-experience participants").

469.   John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 257, 260 (2007) (referencing a study where Korean adults who had been adopted as children by Caucasian families could better recognize Caucasian faces over Korean faces); Christian A. Meissner et al., *Memory for Own- and Other-Race Faces: A Dual Process Approach*, 19 APPLIED COGNITIVE PSYCHOL. 545, 563 (2005) ("Individuals residing in integrated populations show less of a CRE when compared with same-race individuals residing in more homogenous populations.").

470.   Mintao Zhao & Isabelle Buelthoff, *Face Format at Encoding Affects the Other-Race Effect in Face Memory*, 14 J. VISION 1 (2014) (finding in a facial recognition study involving Caucasian and Asian participants viewing Caucasian and Asian subjects that the significant cross-race effect present in the showing a cross-race subject in a single static pose disappeared when the participants viewed cross-race subjects in a series of four static poses and a rapidly moving face).

471.   Jessica L. Macron et al., *Perceptual Identification and the Cross-Race Effect*, 18 VISUAL COGNITION 767, 771 (2010) (concluding that the "significant CREs were observed at the 100ms and 500ms encoding conditions, but were not observed when encoding time was 1000 ms and 1500 ms").

472.   *See supra* note 454 and accompanying text.

473.   Otto H. Maclin & Roy S. Malpass, *Racial Categorization of Faces: The Ambiguous Race Effect*, 7 PSYCH, PUB. POL'Y, & L., 98, 114 (2001).

474.   Meissner et al., *supra* note 469, at 563.

D.   *Age*

The age of a witness can impact his or her ability to make an accurate eyewitness identification. One meta-analysis found that children of all ages were less likely to correctly reject a lineup in which the perpetrator was absent than were adults, but that once they were five years of age or older they did not significantly differ from adults in rates of correct identifications.[475] A meta-analysis examining eyewitness accuracy throughout the lifespan found that young adults made more accurate identification decisions than either older adults (ages forty-five and older) or children (ages seventeen or under).[476] Courts have recognized the impact of this variable.[477]

E.   *Exposure Duration*

1.   Majority View

There is substantial agreement among eyewitness researchers that exposure duration—the length of time that the witness has to view the event and perpetrator—can impact the accuracy of memory for that event as "limited time of exposure can lead to poorer quality person descriptions."[478] A meta-analysis of exposure duration found that exposure duration had a significant effect on identification accuracy.[479] Research has not established, however, a specific amount of time for optimal identification accuracy.[480]

The Minority View attempts to place a numerical value on what constitutes a short versus long exposure duration.[481] But judging the accuracy of eyewitness identifications based on exposure duration is complicated by the fact that witness estimates of time—such as the length of the crime—are not always accurate: people tend to overestimate the length of brief viewing experiences.[482]

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475.   *See* Pozzulo & Lindsay, *supra* note 55, at 549–70.

476.   *See* Fitzgerald & Price, *supra* note 56, at 1228–65.

477.   *See, e.g.*, State v. Henderson, 27 A.3d 872, 906 (N.J. 2011) (discussing research regarding the impact of a witness's age on the reliability of an identification); State v. Lawson, 291 P.3d 673, 687 (Or. 2012) ("Studies show that children and elderly witnesses are generally less likely to make accurate identifications than adults, especially in target-absent conditions."); State v. Clopten, 223 P.3d 1103, 1103, 1113 n.22 (Utah 2009) (noting that the fact that an eyewitness is a child or elderly is a factor affecting reliability).

478.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11; *see also* NAT'L RESEARCH COUNCIL, *supra* note 6, at 97–98.

479.   *See* Bornstein et al., *supra* note 57, at 473–90.

480.   *See* Amina Memon et al., *Effects on Eyewitness Accuracy and Confidence*, 94 BRITISH J. PSYCHOL. 339, 350 (2003).

481.   The dissenting view is also misleading in its suggestion that exposure durations of a few seconds or even fractions of a second are long enough for accuracy. In support of this claim, the dissent cites one study for the proposition that a five-second duration is "moderate." *See infra* note 492. But another study cited by the dissent characterizes five seconds as "short." *See* Palmer et al., *supra* note 289, at 58. Indeed, the dissenting view itself elsewhere refers to a ten second exposure duration as "short." *See* Minority Statement *infra*. Furthermore, the other study cited by the dissenting view (Dr. Macron's) in no way suggests that exposures of mere fractions of a second are long enough. Dr. Macron's experiment did not even study eyewitness recognition, but rather the working-memory task of "perceptual identification," such as where border patrol agents are charged with scanning crowds for individuals on a terrorist watch list. Macron et al., *supra* note 471, at 767.

482.   *See, e.g.*, Loftus et al., *supra* note 52, at 55–62; Orchard & Yarmey, *supra* note 59, at 249–60.

Courts have recognized exposure duration as an estimator variable.[483]

The Minority View on exposure duration expressed below suggests that for the small subset of witnesses who make an initial identification of a suspect with high confidence, such identifications are likely accurate, regardless of the exposure duration. There are at least two problems with this claim. First, the Minority ignores the fact that an initial high-confidence identification must be made under pristine circumstances to have value; if not, the witness's high confidence may well be the result of suggestive conditions, such as feedback from a lineup administrator or the fact that the suspect stood out from the fillers.[484] Second, the Minority View simply has not been established by research. As Dr. Wixted and Dr. Wells explain, the suggestion that witnesses "appropriately adjust[] their confidence downward" to account for poor viewing conditions is a topic that needs "additional research," and so, "definitive conclusions cannot yet be drawn" and it "would be premature to make a definitive statement."[485] It is this type of premature conclusion that the Task Force declines to draw.

The single paper cited by the Minority does nothing to change this. The Minority View does not cite directly to the relevant research but rather quotes a paper by Dr. Mickes that describes an earlier study. A read of the actual study by Dr. Palmer et al. yields a different conclusion.[486] In addition, Dr. Wixted and Dr. Wells discussed the Dr. Palmer et al. study and did nothing to change their conclusion that "more work is needed to determine the effect of estimator variables on high-confidence accuracy."[487]

2.   Minority View

While Mr. Kravetz and Special Agent Zajac agree that a short exposure duration may weaken memory (and correspondingly decrease accuracy) under certain

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483.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (noting that the time the witness has to observe the suspect bears upon the risk of misidentification); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 332 (3d Cir. 2016) (McKee, C.J., concurring) (citing scientific research on exposure duration); Young v. Conway, 698 F.3d 69, 80 (2d Cir. 2012) (noting "five to seven minute[]" opportunity to observe); Young v. State, 374 P.3d 395, 422 (Alaska 2016) ("While there is no minimum amount of time necessary for a witness's observation of a suspect to result in an accurate identification, longer viewings are more likely to lead to accurate identifications. Relatedly, however, studies show that witnesses tend to overestimate the amount of time they had to view an incident, especially if conditions were stressful or involved other stimuli." (citations omitted)); Minor v. United States, 57 A.3d 406, 415 (D.C. 2012) (recognizing that exposure duration is beyond the ken of the average juror); State v. Cabagbag, 277 P.3d 1027, 1035 (Haw. 2012) (noting that "[r]esearchers have found that several variables tend to affect the reliability of an eyewitness's identification [including] . . . duration of exposure"); People v. Boone, 91 N.E.3d 1194, 1196 (N.Y. 2017) (noting that "exposure time, the amount of time a witness has to view a perpetrator, affects that person's ability to identify someone accurately as the perpetrator"); State v. Haugen, 392 P.3d 306, 318 (Or. 2017) (considering duration as an estimator variable); State v. Lawson, 291 P.3d 673, 701-02 (Or. 2012); State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009) (referring to "brief exposure time" as one of "many factors known to contribute to mistaken identifications").

484.   *See* Wixted & Wells, *supra* note 30, at 53.

485.   *Id.* at 52–53. Notably, Dr. Wells and Dr. Wixted declared that the research did not support definitive conclusions in 2017—after the publication of the 2015 paper by Dr. Mickes relied upon by the minority. *See* Minority Statement *infra*.

486.   In the original report by Palmer et al., the data show that high-confidence identifications from the 90s condition were accurate 81% of the time. In the 5s condition, high-confidence identifications were correct 69% of the time - a 12% difference in accuracy. See Palmer et al., supra note 289, at 69.

487.   Wixted & Wells, *supra* note 30, at 52–53 (describing Palmer et al., *supra* note 289, at 55).

circumstances, studies have shown that the variable's impact dissipates for witnesses who are highly confident at the time of the initial identification. For example, one study found that there was no exposure duration impact between high-confidence initial identifications made from the five-second condition and those made from the ninety-second condition.[488] That study suggested "that while participants in [the short exposure] condition were less likely to make relatively high-confidence IDs, when they did, they were as accurate as the high-confidence IDs from the long exposure condition."[489]

In addition, although the Report notes that "[r]esearch has not established . . . a specific amount of time for *optimal* identification accuracy,"[490] some perspective is helpful regarding what studies have labeled as a "short" or "fleeting" exposure. One meta-analysis cited in the Report reviewed thirty-three studies that measured accuracy levels between self-selected "short" and "long" exposure times that diverged significantly.[491] That study classified a five-second exposure as "moderate" and expressed an expectation "that relatively deep (versus shallow) encoding would help most at moderate exposure durations."[492] Another study concluded that significant cross-race effects "were not observed" when duration was increased from 0.1 to 0.5 seconds to 1.0 to 1.5 seconds.[493]

F.   Distance

Common sense, as well as research, dictates that people can view individuals (and events) better at shorter distances as opposed to longer distances.[494] Some research has found a linear relationship between accuracy and distance, with accuracy gradually declining as distance increases.[495] Other research suggests that distances greater than fifty feet make it difficult for a witness to make an accurate identification.[496] The dominant explanation for the effect of distance on accuracy is "distance-as-filtering."[497] That is, as a face is viewed at farther and farther distances, there is less ability to detect the details of the face, causing the facial details to become coarser or "filtered."[498]

Courts have recognized distance as an estimator variable.[499]

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488.   Mickes, *supra* note 462, at 96.

489.   *Id.*

490.   *See supra* note 480.

491.   Bornstein et al., *supra* note 57, at 478 tbl.1.

492.   *Id.* at 485.

493.   Macron et al., *supra* note 471, at 771–72.

494.   *See* Wells et al, *Policy and Procedure Recommendations*, *supra* note 11, at 28.

495.   *See* Lampinen et al., *supra* note 60, at 1489–94.

496.   *See* De Jong et al., *supra* note 60, at 87–97; Lindsay et al., *supra* note 60, at 526–35; Wagenaar & Van Der Schrier, *supra* note 60, at 321–32.

497.   Loftus & Harley, *supra* note 61, at 43.

498.   *Id.* at 43–65. One study found that accuracy is compromised, even for witnesses who were highly confident in their identification decision. *See* Wixted & Wells, *supra* note 30, at 53 (citing Lampinen et al., *supra* note 60, at 1489–94).

499.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (noting that distance bears upon the risk of misidentification); Dennis v. Sec'y, Dep't of Corrs., 834 F.3d 263, 332 (3d Cir. 2016) (McKee, C.J., concurring) ("As one would expect, exposure duration, distance, and lighting affect the accuracy of eyewitness

G.   *Lighting Conditions*

Like exposure duration and distance, lighting is an estimator variable known as a "viewing factor," which influences the "strength and quality of the initial memory that is encoded."[500] Specifically "low illumination . . . can lead to poorer quality person descriptions."[501]

Courts have recognized lighting as an estimator variable.[502]

H.   *Disguises and Other Clothing*

Not surprisingly, a disguise or even certain articles of clothing worn at the time of the witnessing event make subsequent identification more difficult. One study found that wearing a disguise as simple as a hat reduced identification accuracy.[503] A recent exploration of the impact of disguises on identification accuracy concludes that disguises, such as a stocking worn over the face, reduce identification accuracy and, surprisingly, that a perpetrator wearing sunglasses can have an even greater effect than wearing a stocking over the face.[504]

Courts have recognized the impact of this variable.[505]

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identifications."); Young v. State, 374 P.3d 395, 423 (Alaska 2016) ("[A] witness's identification will be less reliable when the perpetrator is seen from farther away or under worse lighting conditions . . . . People have difficulty estimating distances, which makes self-reports of proximity somewhat suspect."); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (citing research that reliability of an identification "diminish[es] . . . the greater the distance"); State v. Henderson, 27 A.3d 872, 906 (N.J. 2011) ("It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification. Scientists have refined those common-sense notions with further study. Research has also shown that people have difficulty estimating distances." (citations omitted)); State v. Lawson, 291 P.3d 673, 702 (Or. 2012) ("In the case of distance, unlike variables subject to probability determinations, scientists have identified certain dispositive endpoints beyond which humans with normal, unaided vision are physically incapable of discerning facial features.").

    500.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 99.
    501.   Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 28.
    502.   *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (considering lighting); *Dennis*, 834 F.3d. at 332 (McKee, C.J., concurring) ("As one would expect, exposure duration, distance, and lighting affect the accuracy of eyewitness identifications."); *Young*, 698 F.3d at 80 (noting "good lighting"); Dickerson v. Fogg, 692 F.2d 238, 245 (2d Cir. 1982) (taking into account that the crime occurred "in the dead of the night"); Sanchell v. Parratt, 530 F.2d 286, 295 (8th Cir. 1976) (considering lighting); *Young*, 374 P.3d at 423 (noting that "a witness's identification will be less reliable when the perpetrator is seen from farther away or under worse lighting conditions"); *Henderson*, 27 A.3d at 906 ("We . . . know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification. Scientists have refined th[is] common-sense notion[] with further study."); State v. Haugen, 392 P.3d 306, 318 (Or. 2017) (considering lighting as an estimator variable); *Lawson*, 291 P.3d at 744–45 (Or. 2012) ("The basic environmental conditions of distance and lighting, combined with any aspect of the viewing environment—fog, heavy rain or other weather conditions, cracked or dirty windows, glare, reflection, shadow, or even physical obstructions within the witness's line of sight—can potentially impair an eyewitness's ability to clearly view an event or a perpetrator.").
    503.   *See* Cutler et al., *supra* note 65, at 629–37.
    504.   *See* Mansour et al., *supra* note 65, at 513–26.
    505.   *See, e.g.*, Young v. Conway, 698 F.3d 69, 80 (2d Cir. 2012) ("[E]ven subtle disguises can . . . impair identification accuracy."); *Young*, 374 P.3d at 424 ("As one would expect, studies show that disguises reduce the accuracy of identifications. Masks, sunglasses, hats, hoods, and other things that hide the hair and hairline

I.   Retention Interval

   1.   Majority View

   There is a substantial agreement within the eyewitness research community that identifications are more accurate when they occur soon after the witnessing event.[506] Researchers have observed that as the length of time between the witnessing event and the identification increases, identification accuracy decreases.[507] As the National Research Council has reported, "the rate of forgetting for an unfamiliar face is greatest soon after the initial observation and tends to level off over time."[508] The Minority suggests that for witnesses who make an initial expression of the highest confidence, under pristine conditions, confidence is a valuable measure of accuracy. However, Dr. Wells and Dr. Wixted discussed the very same studies as the dissenting view and concluded only that this "may" be so but that "additional research is certainly needed" and that "it would be premature to make a definitive statement."[509]

   Courts have recognized the significance of the retention interval.[510]

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affect witnesses' ability to accurately identify a perpetrator." (citation omitted)); State v. Almaraz, 301 P.3d 242, 252 (Idaho 2013) (holding that "the use of disguises during the crime" "diminish[es] the reliability of a witness's identification"); People v. Lerma, 47 N.E.3d 985, 988 (Ill. 2016) (holding that trial court erred by excluding testimony about, *inter alia*, the effect "the wearing of partial disguises" has on identifications); *Henderson*, 27 A.3d at 907 ("Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator."); *Lawson*, 291 P.3d at 688 ("The use of a disguise negatively affects later identification accuracy."); *State v. Clopten*, 223 P.3d 1103, 1103, 1113 n.22 (Utah 2009) (permitting expert testimony in situations where, *inter alia*, a disguise is at issue).

   506.   *See* Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 28.

   507.   *See* Deffenbacher et al., *Forgetting the Once-Seen Face*, *supra* note 66, at 139–50.

   508.   NAT'L RESEARCH COUNCIL, *supra* note 6, at 99; *see also id.* at 110.

   509.   Wixted & Wells, *supra* note 30, at 52. It also bears noting that the Minority's conclusions are derived not from the studies themselves, but rather from Dr. Wixted's reanalysis of those studies, which employed a novel metric. In addition, one of those four studies requires special caution: the 1996 paper by Juslin et al. *See infra* Part V.I.1; *see also infra* note 512 (citing Peter Juslin et al., *Calibration and Diagnosticity of Confidence in Eyewitness Identification: Comments on What Can Be Inferred From the Low Confidence-Accuracy Correlation*, 22 J. EXPERIMENTAL PSCYHOL.: LEARNING, MEMORY, & COGNITION 1304 (1996)). This was an idiosyncratic study, and subsequent researchers have urged caution in relying upon it. *See, e.g.*, Sauer et al., *supra* note 294, at 339–40.

   510.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 243 (2012) (noting that the passage of time bears upon the risk of misidentification); Mason v. Brathwaite, 432 U.S. 98, 115–16 (1977) (noting that reliability was increased because "photographic identification took place only two days" after the crime); *id.* at 131 (Marshall & Brennan, JJ., dissenting) (explaining that "the greatest memory loss occurs within hours after an event. After that, the dropoff continues much more slowly"); Neil v. Biggers, 409 U.S. 188, 201 (1972) (holding that a seven month lapse in time "would be a seriously negative factor in most cases"); *Wade*, 388 U.S. at 241 (considering "the lapse of time between the alleged act and the lineup identification"); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 331–32 (3d Cir. 2016) (McKee, C.J., concurring) (describing memory decay); *Young*, 698 F.3d at 84 ("[R]esearch indicates that the passage of time both degrades correct memories and heightens confidence in incorrect ones."); United States v. Brownlee, 454 F.3d 131, 140 (3d Cir. 2006) (noting that identification was more reliable because relatively little time—approximately twenty-five minutes—passed between the crime and confrontation); United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("Memory and perception may be affected by factors such as . . . the retention interval, which concerns the rate at which a person's memory declines over time . . . ." (citation omitted)); United States v. Stevens, 935 F.2d 1380, 1391–92 (3d Cir. 1991) (noting that identification made "within about an hour of the attack" was a "brief interval of time, [such that] the image of the assailant remained fresh in the victims' minds"); *Young*, 374 P.3d at 424–25 ("Research has not

2.   Minority View

Mr. Kravetz and Special Agent Zajac assert that while a longer retention interval may impact the accuracy of an eyewitness identification, recent studies have demonstrated that highly confident witnesses make accurate initial identifications under both short- and long-retention interval conditions.[511]

For example, in a 2016 study, Professors John T. Wixted, Don Read, and Stephen Lindsay reanalyzed data from four prior studies involving the relationship between confidence and accuracy under different retention interval conditions. Applying a suspect identification accuracy formula, they found a strong correlation between high-confidence suspect initial identifications and retention intervals ranging from seconds through months.[512]

Citing the strong relationship between high-confidence suspect identifications and accuracy, even under longer retention intervals, the authors criticized the consensus view in the field (as expressed similarly in the Report): "[T]he message sent by the available

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identified a precise time after which a witness's identification is unreliable, but the more time that passes between the initial confrontation and the identification, the more reliability suffers. And studies show that memory decay is exponential rather than linear; that is, an eyewitness's memory vanishes more rapidly as time goes by."); State v. Guilbert, 49 A.3d 705, 721–22 (Conn. 2012) ("Courts across the country now accept that . . . a person's memory diminishes rapidly over a period of hours rather than days or weeks."); State v. Cabagbag, 277 P.3d 1027, 1035 (Haw. 2012) (noting that "[r]esearchers have found that several variables tend to affect the reliability of an eyewitness's identification [including] . . . passage of time"); *Almaraz*, 301 P.3d at 252 (noting that reliability is diminished "the greater the period of time between observation and identification to law enforcement"); Commonwealth v. Christie, 98 S.W.3d 485, 490 (Ky. 2002) (holding that trial court abused its discretion when it refused to consider testimony that a "person's memory diminishes over a period of hours rather than days or weeks"); Commonwealth v. Gomes, 22 N.E. 3d 897, 922 n.11 (Mass. 2015) ("The more time that elapses between an initial observation and a later identification procedure [a period referred to in eyewitness identification research as a 'retention interval'] . . . the less reliable the later recollection will be. . . . [D]ecay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time." (alteration in original) (citation omitted)); *Henderson*, 27 A.3d at 907 ("Memories fade with time . . . As a result, delays between the commission of a crime and the time an identification is made can affect reliability."); *Lawson*, 291 P.3d at 688 ("Memory generally decays over time. Decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time."); State v. Long, 721 P.2d 483, 489–90 (Utah 1986) ("Research demonstrates that both the length of time between the witness's experience and the recollection of that experience, and the occurrence of other events in the intervening time period, affect the accuracy and completeness of recall.").

511.   Wixted et al., *Effect of Retention Interval*, *supra* note 462, at 199.

512.   For example, the reanalysis of the results from a 1996 study supported that high-confidence suspect identification accuracy was 98.5% in the one-hour condition and 98.2% in the one-week condition. *Id*. (citing Juslin et al., *supra* note 509, at 1304–16). The reanalysis of the results from a 2010 study demonstrated that high-confidence suspect identification accuracy was 97.6% correct in the short-retention interval (ten seconds) and 96.8% correct in the long-retention interval (average delay of three weeks). *Id*. (citing Sauer et al., *supra* note 294, at 337). The reanalysis of results from a 2013 study showed that high-confidence suspect identification accuracy was 98.0% correct in the immediate condition and 97.3% correct in the delayed (one-week) condition. *Id.* (citing Palmer et al., *supra* note 289, at 63–64). And the reanalysis of results from a 1998 study using a smaller sample size, showed that high-confidence suspect identification accuracy showed that high-confidence suspect identification accuracy was over 98% even after retention intervals of three, six, and nine months. *Id*. (citing J. Don Read, D. Stephen Lindsay, & Tonia Nichols, *The Relation Between Confidence and Accuracy in Eyewitness Identification Studies: Is the Conclusion Changing?*, *in* EYEWITNESS MEMORY: THEORETICAL AND APPLIED PERSPECTIVES 107, 107–30 (Charles P. Thompson et al. eds.1998)).

empirical evidence turns out to be the exact opposite of the prevailing consensus view in the field, as conveyed by the [American Psychological Association] in its recent amicus briefs (and by many individual experts who testify in courts of law) . . . . "[513] Rather, even after a long retention interval, "confidence is a good predictor of identification accuracy" and "lay opinion may actually be closer to the truth, at least for an initial ID made from a fair lineup."[514]

Readers should have the benefit of these studies in examining the impact of retention intervals on accurate eyewitness identifications.

J.   *Changes in Appearance*

Changes in appearance can reduce reliability of an identification. One meta-analysis found that a change in appearance between the time of witnessing and the time of identification impaired identification accuracy.[515] Subsequent individual studies found that changing hairstyles reduced identification accuracy.[516]

Courts have acknowledged the impact of this estimator variable.[517]

K.   *Alcohol Intoxication*

It is unclear how much alcohol intoxication at the time of the witnessing event impairs witness memory and identification accuracy. Some research has demonstrated that intoxicated witnesses produce less accurate,[518] and less complete[519] recall for events, while other research has not found evidence of this effect.[520] Additionally, while one study demonstrated that alcohol reduced the accuracy of identification decisions,[521] other

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513.   Wixted et al., *Effect of Retention Interval*, *supra* note 462, at 194.

514.   *Id*. The authors stressed that their study also reinforced that "low-confidence IDs were much less reliable" and that it "seems particularly important that the judicial system not overlook this fact." *Id.* at 201.

515.   *See* Shapiro & Penrod, *supra* note 67, at 139–56.

516.   *See* Pozzulo & Marciniak, *supra* note 67, at 429–38.

517.   *See, e.g.*, Young v. State, 374 P.3d 395, 424 (Alaska 2016) (noting that "changes in the perpetrator's appearance between the time of the incident and the time of the identification (growing a beard, for example) may" reduce reliability of an identification); State v. Henderson, 27 A.3d 872, 907 (N.J. 2011) ("Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator."); State v. Lawson, 291 P.3d 673, 685, 706 (Or. 2012) (noting research finding "decreases in identification accuracy with longer viewing durations, in cases where the appearance of the person to be identified has changed significantly between the identification and the initial viewing").

518.   *See* J. Don Read et al., *Recollections of a Robbery: Effects of Arousal and Alcohol Upon Recall and Person Identification*, 16 Law & Hum. Behav. 425, 425–46 (1992); Nadja Schreiber Compo et al., *Witness Memory and Alcohol: The Effects of State-Dependent Recall*, 41 L. & HUM. BEHAV. 202, 202–15 (2016); Kim van Oorsouw & Harald Merckelbach, *The Effects of Alcohol on Crime-Related Memories: A Field Study*, 26 APPLIED COGNITIVE PSYCHOL. 82, 82–90 (2012).

519.   *See* Angelica Hagsand et al., *Bottled Memories: On How Alcohol Affects Eyewitness Recall*, 54 SCANDINAVIAN J. PSYCHOL. 188, 188–95 (2013); Read et al., *supra* note 518, at 425–46; Schreiber Compo et al., *supra* note 518, at 77–86; Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 28.

520.   *See* Read et al., *supra* note 518, at 425–46; Schreiber Compo et al., *supra* note 518, at 77–86.

521.   *See* Jennifer E. Dysart et al., *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups*, 87 J. APPLIED PSYCHOL. 170, 170–75 (2002).

studies have failed to find this effect.[522] While alcohol consumption has been demonstrated to impair visual perception and memory in some circumstances, determining the exact impact of various levels of intoxication (generally measured by blood alcohol content) and mechanism by which this effect occurs requires additional research.[523]

VI.   CONTINUING EDUCATION RECOMMENDATIONS

The science and law surrounding eyewitness identifications continue to evolve. This Report should not—and indeed cannot—be read as a final statement on the subject. As scientists, scholars, law enforcement officers, and lawyers discover new evidence about eyewitness identifications, and craft practices to prevent misidentifications, that information should be made available both to the public and those who practice in criminal law. To that end, the Continuing Education subcommittee makes two recommendations.

First, the Third Circuit should create and maintain a website containing information and resources about eyewitness identifications. This website should be administered by the Third Circuit Librarian and include links to seminal cases from federal and state courts, pertinent scientific research, academic articles, and any other selected resources that provide useful information about eyewitness identifications. A copy of this Report should also be made available on the website.

Second, the Third Circuit should establish a standing committee to curate content for the website. This committee should include prosecutors, defense attorneys, and social scientists with expertise in the area of eyewitness identification and memory who can assist in assessing the importance and value of the material selected for publication on the website. This standing committee should meet at least once a year to review developments in the field of eyewitness identifications and provide content to the Third Circuit librarians for inclusion on the website. To the extent that the committee elects to include best practices recommendations for law enforcement on the website, it should be made clear that the Third Circuit does not formally endorse such practices or require them as a prerequisite for a reliable identification, as any such determination is outside the purview of the committee. Similarly, it must be understood that the fact that any article or study appears on the Third Circuit's website is in no way intended as the imprimatur of the court, nor does it mean that the court accepts the methodology or conclusions of the researchers. Rather, the site will be maintained solely for the purpose of familiarizing interested entities and individuals with this developing area of the law.

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522.   *See* Wendy Kneller & Alistair J. Harvey, *Lineup Identification Accuracy: The Effects of Alcohol, Target Presence, Confidence Ratings, and Response Time*, 8 EUR. J. PSYCHOL. APPLIED TO LEGAL CONTEXT 11, 11–18 (2016); Read et al., *supra* note 518, at 425–46.

523.   *See* van Oorsouw & Merckelbach, *supra* note 518, at 88–90.

VII.   Jury Instruction Recommendations[524]

In *Perry v. New Hampshire*, the Supreme Court endorsed the use of jury instructions as a tool to prevent convictions based upon unreliable eyewitness identifications.[525] The Court held that "jury instructions on . . . the fallibility of eyewitness identification" are a means to test reliability of eyewitnesses.[526] These jury instructions, adopted by "many federal and state courts[,] . . . warn the jury to take care in appraising identification evidence."[527] They are a "safeguard[] built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability."[528] In keeping with *Perry*, the Third Circuit has adopted a model jury instruction on eyewitness identification, Section 4.15,[529] which is quite comprehensive. At the same time, it differs in significant respects from many state model jury instructions on eyewitness identification and, in parts, from the scientific research. For example, it highlights certainty on the witness stand.[530]

The Task Force studied whether the existing model instruction should be modified to minimize the risk of wrongful convictions, and if so, to what extent. Procedurally, the Task Force cannot itself amend the model jury instructions. This responsibility lies with the Third Circuit Committee on Model Criminal Jury Instructions (Committee), which is charged with drafting model instructions for use by courts within the Third Circuit. And the Committee's suggested model instructions are nonbinding and provide district court judges with options to employ or adapt in their discretion to fit the circumstances of a particular trial.[531] The Task Force chose to make no recommendation as to whether Instruction 4.15 should be amended, although the positions of individual members are noted below.

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524.   While the Report discusses the Third Circuit's Model Criminal Jury Instructions as they pertain to eyewitness identifications (Model Instruction 4.15), it should be noted that the Third Circuit's Committee on Model Criminal Jury Instructions is tasked with adding to or revising the Third Circuit Model Criminal Jury Instructions. Accordingly, the contents of the Report are in no way binding on that Committee. And, ultimately, it is, of course, in the sole discretion of a trial court whether or not to follow those instructions and to compose whatever instructions that court may deem appropriate in a given case.

525.   Perry v. New Hampshire, 565 U.S. 228, 233 (2012).

526.   *Id.*

527.   *Id.* at 246.

528.   *Id.* at 245.

529.   Comm. on Model Criminal Jury Instructions Third Circuit, Model Criminal Jury Instructions § 4.15 (2017) [hereinafter Third Circuit Model Criminal Jury Instructions]. Section 4.15 is attached to this Report as Appendix D.

530.   *See id.* ("[Y]ou should ask whether the witness is positive in the identification and whether the witness' testimony remained positive and unqualified after cross-examination.").

531.   *See id.* at Introduction.

A.   *Summary of Recommendations of the Honorable Theodore A. McKee and Professor Jules Epstein*[532]

Judge McKee and Professor Epstein recommend amending Section 4.15 in six ways. First, they recommend that the Committee add language regarding system variables, including lineups, photo arrays, and show-ups, which are not addressed in Section 4.15. Second, they recommend instructing jurors that an honest and sincere witness may be mistaken.[533] Third, they recommend removing the existing language in Section 4.15 directing jurors to consider whether the witness was certain on the stand or shaken by cross-examination.[534] Fourth, they recommend adding to the list of estimator variables two that are not now included: "weapon focus" and changes in appearance or the use of disguises.[535] Fifth, they recommend instructing the jury that when certain estimator variables are present, an identification should be received with caution, for example, as with cross-racial identifications. Sixth, they recommend instructing the jury that memory may be affected by suggestive influences, such as multiple identification procedures.[536] These influences may be unintentional and the officer/agent conducting the identification procedure may not be aware of the danger.

Judge McKee and Professor Epstein note that these changes are consistent with the nature of the Third Circuit model jury instructions. The Circuit's current model instructions already provide district court judges with nonbinding options, are inclusive, follow and anticipate Third Circuit law, draw upon a range of sources, instruct the jury to receive certain evidence with caution, and occasionally inform the jury that it may draw inferences from the evidence. Judge McKee and Professor Epstein posit that their recommendations are consistent with the scientific agreement described in the Task Force Report. They further note that these scientific principles have been recognized in

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532.   Judge Shwartz agrees that the current instruction is adequate and that any proposed modifications should be limited to those that Mr. Kravetz and Special Agent Zajac suggest. In addition, the contents of the instruction should not serve as a substitute for evidence adduced at trial on the topic.

533.   Judge Rice agrees with this recommendation.

534.   Mr. Kravetz and Special Agent Zajac agree with the recommendation to omit the instruction regarding certainty on the witness stand but recommend replacing it with a new instruction on eyewitness certainty. Judge McKee and Professor Epstein disagree. The jury instructions should remain silent on eyewitness certainty, given the weight such an instruction would have to bear. Specifically, instructing on eyewitness certainty would require instructing jurors on the need for an initial statement of certainty to be taken under pristine testing conditions, with no prior suggestiveness. Such an instruction, furthermore, would require instructing jurors that an initial statement of certainty not taken under pristine conditions may be the product of suggestiveness. And such an instruction would require instructing jurors that an initial statement of noncertainty, defined broadly, is a reason for great caution. While Mr. Kravetz and Special Agent Zajac note that one of the *Biggers* factors is "the level of certainty demonstrated at the confrontation," the Supreme Court did not set out this factor in a vacuum; against it must "be weighed the corrupting effect" of suggestiveness. Manson v. Brathwaite, 432 U.S. 98 (1977). Judge Rice agrees with this recommendation as proposed by Judge McKee and Professor Epstein.

535.   Mr. Kravetz and Special Agent Zajac agree with this recommendation but propose different language. Judge Rice agrees with this recommendation as proposed by Judge McKee and Professor Epstein.

536.   Mr. Kravetz and Special Agent Zajac agree with this recommendation but propose different language. Judge Rice agrees with this recommendation as proposed by Judge McKee and Professor Epstein.

many court cases—decisions of the Supreme Court[537] and Third Circuit,[538] as well as persuasive decisions of other federal and state courts. Their recommendations are in keeping with jury instruction reform in many states including: Connecticut, Maryland, Massachusetts, New Jersey, New York, and North Carolina.[539] Judge McKee and Professor Epstein also draw, to a lesser extent, upon the model jury instructions of other circuits.[540] They note that jurors (1) often do not appreciate that some eyewitness identifications are unreliable though the witness is sure, or (2) believe that certain estimator variables increase accuracy when the opposite may well be true. They recommend that jury instructions be used to supplement expert testimony on eyewitness identification.[541] They suggest that expert testimony alone may well be insufficient because of the practical obstacles to hiring eyewitness identification experts and because there is a need to assist the jury in making sense of what they have heard. Instructions that are carefully tailored to a given case may well help jurors assess the testimony of the eyewitness and evaluate how to assess the expert's opinion.

B.   *Summary of Recommendations of Minority View*

Mr. Kravetz and Special Agent Zajac recommend only minor changes to Section 4.15, which they reiterate is already comprehensive. They suggest that substantial reform of Section 4.15 is unwarranted. Mr. Kravetz and Special Agent Zajac begin with the premise that there is not an absolute consensus or unanimity on the underlying scientific research—and as such significant revisions to Section 4.15 should not occur given the uncertainty in the field. While there are some factors in eyewitness identification for which there is consensus, rapidly evolving science has resulted in ongoing academic debate for others. Moreover, they note that any revisions to Section 4.15 should objectively list the relevant eyewitness identification factors for the jury's consideration (based on the trial evidence and arguments of counsel), rather than suggest how the jury

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537.   *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 243–44 (2012) (citing Brief for American Psychological Association as Amicus Curiae at 9–12, Perry v. New Hampshire, 565 U.S. 228 (2012)).

538.   *See, e.g.*, Bey v. Superintendent Greene SCI, 856 F.3d 230, 239 n.45, 240 & n.50 (3d Cir. 2017); Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 270 n.4, 299 nn.24-25 (3d Cir. 2016); United States v. Brownlee, 454 F.3d 131, 138, 140 (3d Cir. 2006); United States v. Mathis, 264 F.3d 321, 341–42 (3d Cir. 2001); United States v. Stevens, 935 F.2d 1380, 1392 (3d Cir. 1991); United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985).

539.   *See* STATE OF CONN. JUDICIAL BRANCH CRIMINAL JURY INSTRUCTIONS § 2.6-4 (2015); MD. CRIMINAL JURY INSTRUCTIONS AND COMMENTARY §§ 2.56, 2.57, 2.61 (2017); MASS. CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT § 9.160 (2017); N.J MODEL CRIMINAL JURY CHARGES, IDENTIFICATION: IN-COURT AND OUT-OF-COURT IDENTIFICATIONS (2012); N.J MODEL CRIMINAL JURY CHARGES, IDENTIFICATION: IN-COURT IDENTIFICATION ONLY (2012); N.J MODEL CRIMINAL JURY CHARGES, IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY (2012); N.Y. CRIMINAL JURY INSTRUCTIONS, IDENTIFICATION–ONE WITNESS (2018); N.Y. CRIMINAL JURY INSTRUCTIONS, IDENTIFICATION–WITNESS PLUS (2018); N.C. PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES §§ 105.65, 105.70 (2018).

540.   *See, e.g.*, PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 2.22 (2017) ("risks of cross-racial identification" and "risks of identification under stress"); COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE EIGHT CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 4.08 (2017) (show-up less accurate than lineup or photo array); JUDICIAL COUNCIL OF THE U.S. ELEVENTH JUDICIAL CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 3 (2017) (honest mistake).

541.   *See Brownlee*, 454 F.3d at 144; *Downing*, 753 F.2d at 1242.

should interpret those factors. In that respect, they assert that some of the recommended changes to Section 4.15 are akin to judicially noticing "dispute[d]" facts—something that is inappropriate under Rule 201(b) of the Federal Rules of Evidence.[542]

Mr. Kravetz and Special Agent Zajac further suggest that even if scientific consensus did exist, Section 4.15 should not be substantially amended because doing so would not be helpful to jurors. Rather, they note that some eyewitness identification jury instructions, like those in New Jersey, do not assist jurors in evaluating the evidence, but rather cause jurors to question all eyewitness identification testimony, thereby increasing the rate of acquittal regardless of the circumstances.[543] In addition, they posit that expert testimony is a better mechanism to educate jurors on eyewitness identification issues.[544]

As to those minor modifications they do recommend, they first recommend adding the presence of a visible weapon and the use of disguises to the list of estimator variables.[545] Second, they recommend adding examples of suggestive influences, for example, the use of a show-up.[546] Third, they recommend amending the instruction on eyewitness certainty. On this point, they recommend removing the current instruction regarding certainty on the witness stand and replacing it with an instruction regarding certainty at the time of the initial identification.[547]

The competing views on this subject will be made known to the Committee which is currently chaired by Judge Goldberg.

VIII. CONCLUSION

The Third Circuit Task Force on Eyewitness Identification was the first such project undertaken by a federal court on the issue of eyewitness identification, but the national effort to deter the use of suggestive practices that result in wrongful convictions of innocent people has long preceded the Task Force's work.[548] A substantial body of scientific research has identified factors that contribute to wrongful convictions, and the corresponding best practices have robust, nationwide support. The Task Force is proud to contribute to this vital endeavor.

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542.   FED. R. EVID. 201(b); *see also* LaSalle Nat'l Bank v. First Conn. Holding Grp., LLC, 287 F.3d 279, 290 (3d Cir. 2002).

543.   *See* Angela M. Jones et al., *Comparing the Effectiveness of* Henderson *Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence?*, 13 J. EXPERIMENTAL CRIMINOLOGY 20–21 (2017); Athan P. Papailiou et al., *The Novel New Jersey Eyewitness Instruction Induces Skepticism But Not Sensitivity*, 10 PLOS ONE 9 (2015).

544.   *See Brownlee*, 454 F.3d at 144; *Downing*, 753 F.2d at 1242. Judge McKee and Professor Epstein agree that expert witnesses are very important but remain concerned that jurors be informed about how to weigh and assess the expert's testimony as it will certainly be the subject of vigorous cross-examination.

545.   Judge McKee and Professor Epstein agree with this recommendation but propose different language.

546.   Judge McKee and Professor Epstein agree with this recommendation but propose different language.

547.   Judge McKee and Professor Epstein agree with the recommendation to omit the existing instruction regarding certainty on the witness stand but do not recommend replacing it with a new instruction on eyewitness certainty.

548.   As noted, the Third Circuit has convened several such task forces over the last three decades. *See supra* note 3.

MINORITY STATEMENT

Robert F. Kravetz and Christian D. Zajac[*]

We write separately to express our views regarding the relationship between initial confidence and accuracy, as well as to express caution regarding the unqualified best practices recommendations outlined in the Report.[549]

I. THE REPORT DOES NOT FULLY CONSIDER DIVERGENT STUDIES REGARDING THE RELATIONSHIP BETWEEN INITIAL CONFIDENCE AND ACCURACY

The most important recent development in eyewitness identification research is the emergence of studies demonstrating a strong relationship between a witness's initial confidence and accurate identifications. Although the Report includes a Section on "Initial Confidence and a Correlation with Accuracy,"[550] we believe that Section should have provided a more complete portrayal of the extent of the research regarding the confidence/accuracy relationship – including studies suggesting that confidence may be a more important indicator of accuracy than any of the estimator variables.[551]

There are "a growing number of studies [showing that] the magnitude of an individual's confidence rating in a lineup decision can be well calibrated with its likely accuracy."[552] A number of prominent memory researchers now agree that "[d]espite claims to the contrary, the confidence expressed by the witness at the time of the identification is a very strong and reliable indicator of the accuracy of the witness's identification."[553]

The Report states that "[a]ll Task Force members were . . . encouraged to consult with experts in the field of eyewitness identification and to solicit critical review and input from recognized scholars in the field, as appropriate." *See supra* Part I.A. Consistent with that directive, we provided the Majority findings to several leading memory researches across the United States (Reviewers). Those Reviewers criticized several key Majority findings and offered suggestions for the Task Force to revise those findings in line with emerging research. Their disagreements were consistent with other scientific studies (many of which are referenced herein and within the "Minority View" subsections), as well as a recent law review article in June 2018, which challenges several of the Majority findings relating to the impact of system variables as described in the Report. Because the Report did not incorporate the substance of these responses, we included them separately within the "Minority View" subsections of the Report's discussion of specific system and estimator variables. Our position is that Report readers should have the benefit of all studies in making informed decisions regarding identification procedures and the use of eyewitness evidence in court proceedings.

550. *See supra* Part IV.E.ii.

551. Judge Shwartz agrees with the Minority Report on this subject.

552. David G. Dobolyi & Chad S. Dodson, *Eyewitness Confidence in Simultaneous and Sequential Lineups: A Criterion Shift Account for Sequential Mistaken Identification Overconfidence*, 19 J. EXPERIMENTAL. PSYCHOL. APPLIED 345, 345 (2013).

553. Clark et al., *supra* note 130, at 78 (citation omitted).

For example, in a 2015 study, Professors John T. Wixted, Laura Mickes, Steven E. Clark, Scott Gronlund, and Henry L. Roediger III, examined data from nine separate laboratory studies between 2002 and 2013. They concluded these "studies have established beyond any reasonable doubt that, for adults who make an ID from a lineup, the relationship between initial confidence and accuracy in a typical forensically relevant lab study—*precisely the kind that once convinced the field that the relationship is weak*—is in fact strong."[554] Reviewing data from a large-scale 2013 study, the authors concluded that high-confidence witnesses were ninety-eight percent accurate, moderate-confidence witnesses were ninety-four percent accurate, and low-confidence witnesses were eighty-three percent accurate.[555] And the 2017 Wixted and Wells study cited in the Report also found a strong relationship between confidence and accuracy under "pristine lineup conditions," concluding that a review of prior studies demonstrated that "in most cases, high confidence accuracy is very high (95%–100% correct), whereas low-confidence accuracy is obviously lower."[556]

Some researchers are increasingly acknowledging that initial confidence may be the most important factor regarding accurate eyewitness identifications. Drs. Wixted and Mickes informed the Task Force that research demonstrates that estimator variables are "largely irrelevant" on confident witnesses.[557] They submit that estimator variables may weaken memory and thus impact a witness's initial level of confidence, but that they do not impact the reliability of high-confidence identifications.[558] Dr. Wells agreed with Dr. Wixted in their joint 2017 study that high confidence identifications might eliminate the impact of estimator variables, although he cautioned that further study was necessary:

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554. Wixted et al., *Initial Eyewitness*, *supra* note 290, at 518 (emphasis in original).

555. *Id*. at 520.

556. Wixted & Wells, *supra* note 30, at 30. The "pristine" conditions are: (1) only one suspect per lineup; (2) the suspect should not stand out; (3) pre-lineup instructions should be unbiased; (4) the lineup should be administered in a double-blind fashion; and (5) officers should collect the confidence judgment at the time of the initial identification. *Id*. at 20.

557. One of principal criticisms of the Subcommittee Report on Scientific Consensus leveled by former Task Force member Dr. Karen Amendola was its inability to define the impact of certain estimator variables on accurate identifications. As Dr. Amendola explained to the Task Force:

> Among the assertions made in the subcommittee report are: that unexpected weapons presence *can* reduce recall accuracy, that stress *can* interfere with accurate recall of event details, and that exposure duration *can* impact memory accuracy. This is true, but only partially, and does not tell the whole story. The extent to which these influences come into play and the conditions under which they don't are left out of this argument. As such, ascribing these generalizations, as if they represented "scientific consensus," is misleading. Indeed, for many of the categories . . . , the actual impact is much lower than one would expect if they simply heard that weapons focus, stress, and exposure duration can influence recall accuracy. And it now appears that for highly confident witnesses, there is virtually no effect at all.

> Some of those same issues remain in the final draft of the Report, which, as written, at times may leave the reader with the misimpression that eyewitnesses are always unreliable. Dr. Joseph S. Cecil echoed these concerns in his submission to the Task Force, noting that the Subcommittee Report's "lack of information regarding effect sizes and the interactions among the various estimator variables" provided "little specific guidance concerning the relative importance of these variables and how the identification may be affected by combinations of variables." The result, explained by Drs. Wixted and Mickes, is that the Report tends to overinflate the importance of estimator variables, which some prominent researchers believe "are much less relevant than they were once thought to be."

558. *See generally* Mickes, *supra* note 462, at 93.

If these results generalize to the real world, they suggest that these estimator variables may not be particularly relevant to the reliability of an initial ID made with high confidence. Although definitive conclusions cannot yet be drawn, the overall pattern of results suggests that under pristine testing conditions, estimator variables that have long been thought to compromise the reliability of a suspect ID may not do so (because eyewitnesses appropriately adjust their confidence under poorer estimator-variable conditions). Still, it would be premature to make a definitive statement regarding the effect of different estimator variables on the accuracy of IDs made with high confidence because the issue has only recently been addressed using [confidence-accuracy characteristic] analysis.[559]

Dr. Joseph S. Cecil, the former Project Director of the Federal Judicial Center's Program on Scientific and Technical Evidence and a member of the Subcommittee that prepared the 2014 National Academies of Sciences (NAS) Report on eyewitness identification evidence,[560] stressed in his submission to the Task Force that "research is presently undergoing a reassessment, particularly regarding the relationship between expressions of confidence at the time of the initial identification and accuracy of identification." In his view, the "primary shortcoming" of the Majority findings was the Task Force's "lack of attention to the importance of the statement of confidence by the eyewitness at the time of the initial identification in assessing the accuracy of the identification."

The emerging scientific research regarding initial confidence and accuracy may be controversial because it challenges long-held assumptions about the impact (or lack thereof) of system and estimator variables on accurate identifications.[561] But that does not mean that it should be ignored. As Dr. Cecil also explained:

As the Task Force is aware, views among scientists differ on the extent to which the emerging research regarding confidence statements may diminish the importance of the presence of estimator variables in estimating the accuracy of an eyewitness identification. And that itself is the important point—the consensus that existed just five years ago regarding the relationship between confidence statements and accuracy has been upended, due in large part to the use of novel statistical methodologies that allow a more precise parsing of the effect of such variables. It is likely that even greater turmoil is in the offing. The National Academies and the [Laura and John] Arnold Foundation have recently solicited proposals for new research studies on the interrelationship between system and estimator variables, along with the development of new statistical methodologies that will allow a more precise estimate of effects.[562]

The Report downplays the recent initial confidence research. First, it concludes that initial confidence is only reliable if obtained under so-called "pristine" conditions, citing

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559.   Wixted & Wells, *supra* note 30, at 53.

560.   NAT'L RESEARCH COUNCIL, *supra* note 6.

561.   It also challenges prior Circuit decisional law. *See* Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 335 (3d Cir. 2016) (McKee, J., concurring) ("We now know that a witness's subjective confidence in the accuracy of her identification has limited correlation to the reliability of her identification."); Bey v. Superintendent Green SCI, 856 F.3d 230, 240 & n.50 (3d Cir. 2017) ("The scientific community has understood for decades that eyewitness identifications that are certain and confident are not necessarily accurate.").

562.   *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 117–19.

in support of the 2017 Wixted and Wells study.[563] Everyone on the Task Force agrees that the administration of a fair photo or array or lineup is a necessary requirement to yield accurate eyewitness identification evidence. The dispute relates to the Majority's insistence to discount initial confidence absent the "pristine" conditions.

In so doing, the Majority provides an incomplete portrayal of recent studies on the confidence/accuracy relationship. In fact, the 2017 Wixted and Wells study itself drew a distinction between "fair" and "unfair" lineups, and it defined the latter as "one in which the suspect stands out from the fillers such that the suspect (innocent or guilty) resembles the perpetrator to a noticeably greater extent than the fillers."[564] An "unfair" lineup, thus, does not necessarily result when law enforcement fails to provide specific pre-lineup instructions, selects fillers based on their similarity to the suspect, or fails to conduct the lineup in a blinded fashion.[565] Dr. Wixted, one of the authors of the cited study, reinforced in his submission to the Task Force that "there is no evidence that confidence is not strongly related to accuracy when non-blind procedures [a type of 'pristine condition'] are used. Thus, it is misleading to suggest otherwise."[566] And other reviewers criticized the Report's "pristine conditions" requirement as failing to acknowledge the essential role of confidence as highly predictive of accuracy across all types of lineups and not just limited to double-blind administered lineups.

The Report cites a White Paper on eyewitness identification procedures as support for its conclusion that confidence is *only* relevant under pristine conclusions.[567] Dr. Wixted, a reviewer who criticized some of the Report's Majority findings (and reviewed this Statement of Opposition), is one of the authors of the White Paper. Dr. Wixted favors use of the recommended pristine procedures as a prudential matter—not because they all increase reliability but because they decrease the likelihood that defense attorneys and prosecutors will be arguing about eyewitness evidence in court. Yet he does not agree

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563. *See supra* note 277 (citing Wixted & Wells, *supra* note 30, at 14–20).

564. Wixted & Wells, *supra* note 30, at 30, 37. "A fair lineup is one in which everyone in the lineup resembles the perpetrator to the same approximate degree, so the suspect would not be identified more often than chance by a group of mock witnesses provided with the perpetrator's description." *Id*. at 30. The authors explained that "[i]f an unfair lineup is used, then the take-home message in this article does not apply." *Id*. at 51.

565. For example, in a 2018 study, Professors Wixted and Mickes, along with Professor Ronald P. Fisher, set forth five conditions, if met, will likely yield a "very reliable" identification:

> (a) Witnesses were not previously exposed to distorting or contaminating information; (b) the witness's memory is being probed for the first time; (c) witnesses are not "tricked" into providing desired information (e.g., through the use of biased lineups or suggestive interview questions); (d) the witness's metacognitive monitoring guides his or her responding (either by withholding a response if uncertain or explicitly reporting his level of confidence); and (e) the investigator is sensitive to the witness's level of confidence (*i.e.*, relying on high-confidence responses while attaching less weight to low-confidence responses).

Wixted et al., *Rethinking the Reliability*, *supra* note 290, at 333. Absent from these conditions are several of the "pristine" factors referenced in the Report.

566. Dr. Cecil agreed, stating that the Report "wrongly suggests" that pristine conditions such as double-blinded administered arrays are a "prerequisite for relying on a witness's initial statement of confidence . . . It is quite possible that the effect of a statement of confidence may be a sufficiently robust indicator of accuracy to justify reliance even in the absence of such a procedure."

567. Wells et al., *Policy and Procedure Recommendations*, *supra* note 11.

that the existing scientific research supports every recommendation in the White Paper.[568]

Second, the Report states that "relatively few eyewitnesses make identification decisions with high levels of confidence and thus confidence will be less informative as an indicator of accuracy in most cases."[569] A 2013 field study conducted in the Robbery Division of the Houston Police Department, however, contradicts the Report's assertion.[570] That study analyzed the results of 348 eyewitnesses who were presented with photo arrays between January 22, 2013, and December 5, 2013.[571] Out of the 348 photo arrays, witnesses made 114 suspect identifications.[572] A total of seventy-two of those identifications, or sixty-three percent, were made with high-confidence.[573] The fact that most witnesses made suspect identifications with high confidence refutes the Report's conclusion that "relatively few" eyewitnesses make identification decisions with high-confidence.

Finally, we note that we agree with the Majority that a witness's expression of confidence *at trial* is immaterial: "Clearly, post-identification events can contaminate memory and distort the information value of eyewitness confidence, thereby rendering any later expression of confidence unreliable."[574] As Wixted and Wells stated in their 2017 study, "post-identification feedback appears to be a pernicious problem."[575] In fact, scientists now recognize that "a shift in focus from courtroom confidence to initial confidence could avert wrongful convictions."[576]

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568. *See, e.g.,* Laura Mickes et al., *Distilling the Confidence-Accuracy Message: A Comment on Wixted and Wells*, 18 PSYCHOL. SCI. PUB. INT. 6, 6 (2017) (noting that "although there may be good reason to adopt [pristine] standards, there is very little evidence that they increase the diagnostic accuracy of a suspect identification").

569. It is unclear as to which "eyewitnesses" the Report is referring: all eyewitnesses who participate in lineups, including those who do not identify the target (and do not testify at trial); or only those eyewitnesses who actually identify the target (and testify at trial). What matters in ensuring the integrity of convictions is not the error rate of the former category (the false negatives), but the error rate within the latter (the false positives). *See* United States v. Mitchell, 365 F.3d 215, 239–40 (3d Cir. 2004) (noting that "in the courtroom the rate of false negatives is immaterial to the *Daubert* admissibility of latent fingerprint identification offered to prove positive identification because it is not probative of the reliability of the testimony for the purpose for which it is offered (i.e., for its ability to effect a positive identification)"). That is because "[t]o a judge or juror contemplating the innocence or guilt of a suspect who has been identified by an eyewitness, the relevant scientific evidence about the relationship between confidence and accuracy involves choosers who make *suspect* IDs, not choosers who make filler IDs, because filler IDs do not result in the prosecution of anyone in the lineup." Wixted et al., *Initial Eyewitness*, *supra* note 290, at 517–18.

570. Wixted et al., *Estimating the Reliability*, *supra* note 278, at 304

571. *Id.* at 309.

572. *Id.*

573. *Id. at* 304. The estimated suspect ID accuracy for high-confidence suspect identifications was ninety-seven percent.

574. Wixted et al., *Effect of Retention Interval*, *supra* note 462, at 193; *see also* Mickes et al., *supra* note 568, at 6–7 (stating that taking an initial confidence statement is more important than the other "pristine" conditions, that there is a "compelling argument that confidence can change over time as witnesses are exposed to other sources of information that could influence their confidence," and "the first expression of confidence made at the time of the identification is likely to be more informative than expressions of confidence made weeks, months, or years later when the witness testifies in court").

575. Wixted & Wells*, supra* note 30, at 19.

576. Wixted et al., *Initial Eyewitness*, *supra* note 290, at 516.

The Report itself includes some specific examples of improper confidence inflation, such as:

- *Ronald Cotton*—the victim "[w]ith some difficulty" identified two possible assailants in a photo array; finally stated "I think this is the guy," with respect to Cotton; received improper post-identification feedback from the detective who told her that she "did great"; unsurprisingly picked Cotton (the only repeat subject) from a live lineup, but only after expressing difficulty with her pick and telling the police that Cotton "looks the most like" her assailant; yet testified at trial that she was "absolutely sure" that Cotton had raped her.[577]

- *John Jerome White*—an elderly witness who described her assailant as a "well-built" man was unable to identify White (a short, thin man) in a photo array; only later identified him in a lineup, when he was the only person repeated in the second procedure; yet expressed confidence in her identification of him for the first time at trial, when she walked off the witness stand and said, "That's him."[578]

- *James A. Dennis*—only four of the nine eyewitnesses were able to make any identification from the photo arrays and "none of these witnesses was initially certain about their 'identification.'"[579]

These examples are consistent with other wrongful identification cases reviewed by the Innocence Project and Professor Brandon Garrett, who found in his groundbreaking study that "[m]ost of the DNA exonerees who were misidentified by an eyewitness were, at the outset of the investigation, identified with low confidence."[580]

To that end, we agree with a Task Force recommendation to eliminate the existing Model Jury Instruction's reference to "time of trial confidence." But that does not mean that the jury instruction should omit reference to *initial confidence* altogether, as recommended by Judge McKee and Professor Epstein.[581] That is because the

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577. NAT'L RESEARCH COUNCIL, *supra* note 6, at 10.

578. Brandon L. Garrett, *Introduction:* New England Law Review *Symposium on "Convicting the Innocent,"* 46 NEW ENG. L. REV. 671, 671–72 (2012).

579. Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 319 (3d Cir. 2016) (McKee, J., concurring). For an historical example of an initial low-confidence identification that was inflated substantially by the time of trial, see Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC (March 1927), http://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/ [https://perma.cc/HRS4-8RXN].

580. Wixted & Wells, *supra* note 30, at 13 (citing Brandon Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011)). The Report does not identify any situations in which a witness made an initial high-confidence misidentification under nonpristine conditions.

581. We have substantial concerns in modifying the Third Circuit jury instruction akin to the instruction given in the State of New Jersey following the New Jersey Supreme Court's decision in *State v. Henderson*, 27 A.3d 872 (N.J. 2011). We think that the Majority relies too much on *Henderson* in shaping its recommendations in the Report. Readers should approach some of the recommendations in the *Henderson* report with skepticism, as a judge on the District of Columbia Superior Court noted in response to a government objection to a "*Henderson*-type" jury instruction being given at trial. *See* Order at 2, State v. Byrd, No. 2016 CF3 008456 (D.C. Super. Ct. Nov. 6, 2017) (noting that "[t]he government convincingly demonstrates that the *Henderson* instruction does not capture the full range of this [emerging] research (some of which was completed after *Henderson* was decided) and that a substantial portion of this research indicates that factors that *Henderson* suggests makes identifications less reliable may make them more reliable depending on the circumstances"). Dr. Cecil advanced a similar argument in his submission, stating that the *Henderson*-type jury instruction includes

confidence/accuracy relationship is relevant and will be the subject of virtually every examination of an eyewitness identification expert witness. Given the multitude of scientific studies supporting the initial confidence/accuracy relationship, as well as Supreme Court precedent stating that "the level of certainty demonstrated by the witness at the confrontation" is a valid consideration for the jury.[582] The Model Jury Instruction should include an objectively neutral instruction stating that the jury may consider initial confidence in evaluating the accuracy of an eyewitness identification.[583]

II.   THE REPORT AT TIMES MAKES DEFINITIVE BEST PRACTICES RECOMMENDATIONS BASED UPON UNSETTLED OR INCOMPLETE SCIENTIFIC RESEARCH

We agree that it may be sound policy for law enforcement agencies and prosecutorial bodies, such as the Department of Justice, to take an overly conservative approach to guard against eyewitness misidentifications in the face of an uncertain scientific landscape. That approach is reflected in the Report's recommended best practices.

We disagree, however, that an identification procedure that does not comply with all of the Report's best practices must automatically be called into question.[584] As reflected above and within our "Minority View" subsections throughout the Report, the Report at times overstates the level of scientific agreement in some areas without giving Report readers the benefit of all of the scientific literature on particular topics. And the Report should have more directly informed readers that the science cannot, at present, measure the impact of certain variables on particular identifications. Yet the Report's prudential recommendations, included within the same Section of the Report as its scientific explanation of the impact of certain system variables, received the unqualified support of many respected Task Force members—including prominent District and Circuit Judges.

While we appreciate the Task Force's inclusion of a disclaimer regarding litigants' use of the Report, we worry that the definitive nature of the best practices recommendations may be considered as persuasive authority by courts deciding eyewitness identification issues in individual cases.[585] And we remain concerned that the

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statements that "seem[] incomplete, if not misleading." And an academic study noted that *Henderson*-type instructions may increase the rate at which jurors may acquit guilty defendants because "they indiscriminately discount any and all eyewitness identification testimony." Papailiou et al., *supra* note 543, at 9. Unfortunately, *Henderson's* findings have been adopted by a number of other courts, without recognition of its limitations and subsequent changes in the research.

   582.   Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

   583.   Given the emerging confidence/accuracy research, a relevant question that courts will need to address is how to approach the introduction of low-confidence identifications, which clearly have led to a number of wrongful convictions. One study concluded that although "even low confidence suspect IDs are fairly likely to be correct (about 83%), though most would probably agree that the 17% error rate is *too high to justify a conviction based on a low-confidence ID alone*." Wixted et al., *Initial Eyewitness*, *supra* note 290, at 519 (emphasis added).

   584.   Judge Shwartz agrees that a failure to comply with all of the practices set forth in the Report should not lead to automatically questioning the identification.

   585.   Most eyewitness identification issues will arise in the context of expert testimony. We note that district courts may not resolve factual disputes regarding the correctness of expert testimony—even where a Judicial Task Force has determined such a fact to be supported by "consensus science" *See* United States v.

portions of the Report that conflate the Majority's scientific findings and best practices may result in unnecessary reader confusion regarding the impact of system variables in a particular case where a law enforcement agency did not follow a "best practice." Because the scientific basis for several of the recommendations is not yet settled, we think that the Report should have made clear that the adoption of conservative eyewitness identification policies and practices, some of which involve choices between competing approaches (i.e., filler selection and pre-lineup instructions), is a separate issue from whether such policies and practices are scientifically *required* to ensure accurate identifications.

III.   CONCLUSION

Although we disagree with our Task Force colleagues on several of the Majority's conclusions, our criticisms should not be viewed as attacking the importance of eyewitness identification evidence or as discounting the clear evidence that misidentifications have resulted in wrongful convictions.[586] We applaud the efforts law enforcement agencies, including the Department of Justice and many state and local departments, have taken to remedy prior flaws in eyewitness identification procedures. And we strongly support the continuing efforts of the scientific community to further research the science behind eyewitness identifications and to develop procedures that will best result in accurate identifications.[587]

Mitchell, 365 F.3d 215, 245 (3d Cir. 2004). Rather, factual determinations must be left to the jury as tested through the adversarial process. That is because "[e]xperts with diametrically opposed opinions may nonetheless both have good grounds for their views," and a "district court may not make winners and losers through its choice of which side's experts to admit, when all experts are qualified." *Id*. at 244. Doing so would result in impermissible judicial notice of a contested fact. *Id*. at 252 (holding that the district court erred in taking judicial notice, during the testimony of the primary government expert, of a key fact that was in dispute between the parties: that human fingerprints are "unique and permanent").

586.   As we describe above, many of these wrongful convictions stemmed from unfair lineup procedures and a reliance on witnesses who were not confident at the time of their initial identification of the suspect.

587.   To that end, in February 2019, the Department of Justice's National Institute of Justice sought proposals to provide research grants "to examine the impact of current or newly created police practices, protocols, or procedures being implemented in police agencies on eyewitness evidence accuracy and reliability." *See* U.S. DEPT. OF JUSTICE, RESEARCH AND EVALUATION ON THE ADMINISTRATION OF JUSTICE (2019), http://nij.gov/funding/Documents/solicitations/NIJ-2019-15645.pdf. Grant topics include a number of key issues identified in the Report and this Minority Statement.

APPENDIX A

Members, Third Circuit Task Force on Eyewitness Identifications

The Honorable D. Brooks Smith (Chief Judge, Third Circuit Court of Appeals), *Ex Officio*

The Honorable Theodore A. McKee, Co-Chair (Third Circuit Court of Appeals)

Judge Theodore A. McKee graduated magna cum laude from Syracuse University College of Law in 1975 and began his legal career at a large law firm in Philadelphia. He left the firm in 1977 to become an Assistant U.S. Attorney for the Eastern District of Pennsylvania. This was the beginning of a long career devoted to public service. He left the U.S. Attorney's Office to become Deputy City Solicitor in the Law Department of the City of Philadelphia. He served in that capacity until then Mayor William Green appointed him to be the first General Counsel to the Philadelphia Parking Authority. He served there only briefly until being elected to the Court of Common Pleas for the First Judicial District of Pennsylvania (Philadelphia) where he sat for eleven years before President Clinton appointed him to the U.S. Court of Appeals for the Third Circuit on June 20, 1994.

While a judge on the Court of Common Pleas he served on the Pennsylvania Sentencing Commission, and he chaired that Commission for several years before his appointment to the Third Circuit. He became Chief Judge of the Third Circuit in May, 2010, and served in that capacity until September, 2016. His service on the U.S. Court of Appeals includes serving as a member of the Third Circuit Task Force on Equal Treatment in the Courts and co-chairing the Commission on Racial and Ethnic Bias of the Task Force. Chief Justice John Roberts also appointed him to serve on the Criminal Law Committee of the United States Judicial Conference before he became Chief Judge.

McKee frequently serves on panels discussing subliminal bias in the judiciary and he lectures on that topic. He is active in the community and has served on the board of directors of several nonprofit organizations, including PAR Recycling Works, a nonprofit that is focused on helping persons reentering society from prison successfully return to their communities. He has worked with Concerned Black Men, a group of older males dedicated to mentoring at risk youth and was one of the original members of the Advisory Board of City Year of Greater Philadelphia. He now sits on the Board of Trustees of Temple University and Syracuse University and was an advisor to the American Law Institute's Committee on Revising the Sentencing Provisions of the Model Penal Code. He was also a member of the ABA Commission on Effective Criminal Sanctions and has served on the Council of the Criminal Justice Section of the ABA. He has worked internationally to promote the rule of law including traveling to Russia and Ghana to address the Council of the Russian Judiciary and to work with Ghanaian judges including members of the Supreme Court of Ghana.

In addition, McKee is currently a member of the board of Trustees of the VERA Institute of Justice and serves on VERA's Research Advisory Board. He has been a member of VERA's Stop and Frisk Task Force Review Group, that reviewed the stop and frisk policy of the New York City Police Department and was an original member

of the advisory board of City Year of Greater Philadelphia. Most recently, Judge McKee has been appointed to the National Academy of Sciences Committee on Law and Justice.

The Honorable Mitchell S. Goldberg, Co-Chair (Eastern District of Pennsylvania)

Mitchell S. Goldberg is a United States District Court Judge in the Eastern District of Pennsylvania. Judge Goldberg is a former state and federal prosecutor and also worked at a large Philadelphia law firm where he concentrated on commercial litigation. Judge Goldberg frequently teaches trial advocacy at Temple Law School and currently chairs the Third Circuit committee on Model Criminal Jury Instructions.

The Honorable Patty Shwartz (Third Circuit Court of Appeals)

Judge Patty Shwartz is a judge of the United States Court of Appeals for the Third Circuit. Following law school, Judge Shwartz was an associate at a Philadelphia law firm and thereafter served as a law clerk to the Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey. After her clerkship, Judge Shwartz served as an Assistant U.S. Attorney in the District of New Jersey, where she held various supervisory positions, including Criminal Chief and Executive Assistant U.S. Attorney. Following her tenure at the U.S. Attorney's Office, Judge Shwartz served as a United States Magistrate Judge for the United States District Court for the District of New Jersey and held that position until her appointment to the Court of Appeals.

Judge Shwartz is a member of the Committee on Criminal Law of the Judicial Conference of the United States and several Third Circuit court committees, including the Circuit's Executive Committee. Judge Shwartz teaches at Fordham Law School and Rutgers - Newark, School of Law. Judge Shwartz earned her B.A., with highest honors, from Rutgers College and her J.D. from the University of Pennsylvania Law School.

The Honorable L. Felipe Restrepo (Third Circuit Court of Appeals)

Luis Felipe Restrepo was born in Medellin, Colombia; was raised in Northern Virginia; and took the oath of United States citizenship on September 7, 1993. He worked as a public defender in Philadelphia for six years and was in private practice for thirteen years. In June of 2006, he was appointed United States Magistrate Judge for the Eastern District of Pennsylvania. President Barack Obama nominated Judge Restrepo to be a United States District Court Judge in November of 2012. He was confirmed by the United States Senate on June 17, 2013 and received his commission on June 19, 2013.

In November of 2014 President Obama nominated Judge Restrepo to the United States Court of Appeals for the Third Circuit. He was confirmed by the Senate on January 11, 2016 and received his commission on January 13, 2016. On March 1, 2018, President Trump nominated Judge Restrepo to serve as a Commissioner on the United States Sentencing Commission.

The Honorable Jerome B. Simandle (District of New Jersey)*

Judge Jerome B. Simandle was a United States District Judge for the District of New Jersey, sitting in Camden since 1992, and also served as Chief Judge from 2012–2017. He served as Magistrate Judge for nine years, as law clerk to the late Judge John F. Gerry in Camden, and as an Assistant U.S. Attorney. He served on the U.S. Judicial Conference Committees on Court Administration and Case Management and on Codes of Conduct. He chaired the Third Circuit's Rules Committee and also the Rules Committee and Judicial Wellness Committee of the District of New Jersey. He was a graduate of Princeton University; University of Pennsylvania Law School; and the University of Stockholm, Sweden's International Graduate School.

The Honorable Wilma A. Lewis (Chief Judge, District of the Virgin Islands)

With her appointment to the District Court of the Virgin Islands in 2011, Chief Judge Wilma A. Lewis became the first woman to serve as a federal judge in the United States Virgin Islands. Chief Judge Lewis's appointment to the bench was her fourth Presidential appointment with Senate confirmation, having previously served as Assistant Secretary for Land and Minerals Management at the United States Department of the Interior, United States Attorney for the District of Columbia, and Inspector General for the Department of the Interior. In addition to these and other positions with the U.S. Attorney's Office and the U.S. Department of Interior, Chief Judge Lewis worked in the private sector as an Associate with Steptoe & Johnson, LLP and as a Partner with Crowell & Moring, LLP; in the corporate sector as a Managing Associate General Counsel for Litigation with Freddie Mac; and in academia as an adjunct faculty member in trial advocacy at the George Washington University Law School. Chief Judge Lewis earned a Bachelor of Arts degree in Political Science, *with distinction*, from Swarthmore College in 1978—where she was elected to *Phi Beta Kappa*—and a Juris Doctor degree from Harvard Law School in 1981.

The Honorable Yvette Kane (Middle District of Pennsylvania)

Nominated to the District Court bench by President William Clinton, Judge Yvette Kane has served on the bench of the Middle District of Pennsylvania since October 1998, and as Chief Judge of the district from 2006 to 2013. During her tenure as Chief Judge, Judge Kane was instrumental in establishing the Middle District's offender reentry program, over which she continues to preside. Prior to her appointment Judge Kane served as a trial attorney with the EEOC and as a Deputy Attorney General in Colorado and Pennsylvania. On her nomination to the bench she served as Pennsylvania's Secretary of the Commonwealth. Judge Kane is a 1976 graduate of Tulane University School of Law.

The Honorable Cathy Bissoon (Western District of Pennsylvania)

Judge Cathy Bissoon was sworn in as a U.S. District Court Judge for the Western District of Pennsylvania in October 2011, after having previously served as a U.S.

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* Judge Simandle served on the Task Force from its inception until his death in July of 2019. Although he passed before he was able to vote to accept the Final Report, he made numerous and substantial contributions to the work of the Task Force and to the preparation of the Report.

Magistrate Judge on that same court. With her appointment, Judge Bissoon became the first Hispanic female Article III judge in Pennsylvania, the first Asian American Article III judge in Pennsylvania, and the first South Asian American female Article III judge in the United States.

Prior to her appointment, Judge Bissoon clerked for the Honorable Gary L. Lancaster of the Western District of Pennsylvania. Judge Bissoon also was a partner at Reed Smith, where she served as both its Director of Diversity for several years, as well as the Chair of its Labor & Employment Group. Judge Bissoon later became a Director at Cohen & Grigsby, where she also headed the Labor & Employment Group. Judge Bissoon graduated *summa cum laude* from Alfred University in 1990 and received her law degree from Harvard Law School in 1993.

The Honorable Timothy R. Rice (Magistrate Judge, Eastern District of Pennsylvania)

Before his appointment in 2005, United States Magistrate Judge Timothy R. Rice worked as a newspaper reporter and graduated from Temple University School of Law in 1986. He spent most of his legal career as a criminal prosecutor at the U.S. Attorney's Office for the Eastern District of Pennsylvania. In addition to working with a reentry program to assist men and women upon their release from prison, he attempts to make federal court litigation a kinder and less stressful experience.

James V. Wade (Federal Defender, Middle District of Pennsylvania) (Retired)

James V. Wade was the former Federal Public Defender for the Middle District of Pennsylvania. He served as the Defender from 1989 until his retirement in September 2017. Prior to becoming the Defender, he served as an Assistant Federal Public Defender in both the Middle and Western Districts of Pennsylvania. He also served as a law clerk to the Honorable Joseph S. Walko of the Beaver County Court of Common Pleas. Mr. Wade taught Trial Practice and Legal Methods courses as an Adjunct Professor of Law at Widener University's Harrisburg Campus.

Mr. Wade has served on various committees and working groups of the Administrative Office of United States Courts, the Third Circuit Court of Appeals, and the District Court for the Middle District of Pennsylvania. These entities include the Defender Services Advisory Committee; the Merit Selection Committees to fill the Defender positions in Delaware, New Jersey, and the Western District of Pennsylvania; and the Middle District of Pennsylvania's Reentry Program. Mr. Wade served as a board member of the York, Pennsylvania based Immigration Resource Center (PIRC). He was President of the Board between 2002 and 2010. He was also a board member of the Pennsylvania Death Penalty Resource Center. Mr. Wade graduated from Grove City College in 1977 and Ohio Northern University College of Law in 1980.

William G. Brooks, III (Chief of Police, Norwood Police Department)

William G. Brooks III is the Chief of the Norwood, Massachusetts Police Department and has been a police officer for forty-two years. He was a member of the Massachusetts Supreme Judicial Court's Study Committee on Eyewitness Identification and served on the committee at the National Academy of Sciences that issued the 2014 report "Identifying the Culprit, Assessing Eyewitness Identification." He was the 2012

recipient of the Innocence Network's Champion of Justice Award and received the Civil Rights Award for Individual Achievement from the International Association of Chiefs of Police in 2015. Chief Brooks sits on the Board of Directors of the International Association of Chiefs of Police. He is a graduate of the FBI National Academy.

Christian Zajac (Assistant Special Agent-in-Charge, FBI, Philadelphia)

Christian D. Zajac is currently an Assistant Special Agent in Charge in Philadelphia Division of the FBI. He has oversight of the FBI's White Collar Crime Program. He has over twenty-one years of experience in the FBI having worked Counterintelligence, Crimes Against Children, Organized Crime, Violent Crime and Gangs. His first office of assignment was the FBI's Washington DC Field Office where, in addition to his investigative duties, he was an operator on the FBI's enhanced SWAT team.

Robert Czepiel, Jr. (Supervising Deputy Attorney General, New Jersey)

Senior Deputy Attorney General (SDAG) Robert Czepiel has been a prosecutor at the county and state levels in New Jersey for over twenty-three years. Mr. Czepiel has been employed at the New Jersey Office of Attorney General, New Jersey Division of Criminal Justice in the Official Corruption Bureau and Prosecutors Supervision & Training Bureau. Previously, Mr. Czepiel was employed at the Burlington County Prosecutor's Office as an Assistant Prosecutor. Mr. Czepiel's responsibilities, as Chief of the Prosecutors Supervision & Training Bureau, include oversight of the twenty-one county prosecutors and municipal prosecutors on behalf of the Director of the Division of Criminal Justice and Attorney General of the State of New Jersey.

Mr. Czepiel is also responsible for immunity petitions, supersession requests, bid waivers, citizen complaints, and policy development; the creation and oversight of mandatory of training programs for law enforcement officers; oversight of the Police Training Commission and Police Academies; creation of curriculum for mandatory continuing education courses for law enforcement officers; and community outreach on behalf of the Division of Criminal Justice. Mr. Czepiel is an adjunct professor of law at Widener University School of Law in Delaware and an adjunct professor at Rowan College at Burlington County.

Dr. Jennifer E. Dysart (Associate Professor of Psychology, John Jay College of Criminal Justice)

Dr. Jennifer Dysart is a tenured Associate Professor of Psychology at John Jay College of Criminal Justice in New York City. She holds a PhD in Psychology from Queens University and has been conducting research on eyewitness identification for over twenty years. Her research primarily examines how eyewitness identification procedures can influence accuracy and how the implementation of safeguards may reduce eyewitness errors. Dr. Dysart has published her research in peer-reviewed journals and has written several book chapters on eyewitnesses. She is also a co-author of the book *Eyewitness Testimony: Civil and Criminal* with Dr. Elizabeth Loftus and Mr. James Doyle.

Over the past two decades, Dr. Dysart has been invited to speak about the fallibility of eyewitness identification at over 100 conferences or seminars attended by judges, prosecutors, law enforcement, defense attorneys, investigators, in addition to testifying

before legislative committees on the topic of eyewitness identification procedures. Dr. Dysart also testifies as an expert witness on eyewitness memory in both state and federal courts.

Jules Epstein (Professor of Law, Temple University Beasley School of Law)

Jules Epstein is Professor of Law and Director of Advocacy Programs at Temple Beasley School of Law. He is faculty for the National Judicial College and has lectured on evidence and forensics issues to judges and attorneys across the country at the state and federal level and for the United States military.

At the intersection of eyewitness identification law and science, he has researched, published and litigated extensively; served as an expert witness; conducted training for judges, prosecutors, defense counsel and members of law enforcement; and participated as a reviewer of the National Academy of Sciences Report, *Identifying the Culprit*.

John Hollway (Executive Director of the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School)

John F. Hollway (C'92, MAPP '18) is Associate Dean and Executive Director of the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School. His research helps organizations confront challenges and turn negative occurrences into opportunities for quality improvement. He is a national thought leader on the use of root cause analysis in criminal justice and is a frequent consultant to criminal justice agencies and corporations on quality improvement and measurement issues.

Dr. Amanda Bergold (Assistant Professor of Criminal Justice at Marist College)

Dr. Amanda Bergold is a social psychologist who studies the application of psychological principles to the legal system. Specifically, her work has focused on eyewitness identifications, judicial instructions on eyewitness testimony, and jury and juror decision-making. She was recently a fellow with the Quattrone Center for the Fair Administration of Justice and is currently an Assistant Professor of Criminal Justice at Marist College.

Robert F. Kravetz (Assistant Professor of Law, Duquesne University School of Law; Special Assistant United States Attorney, District of Delaware)[588]

Robert F. Kravetz is an Assistant Professor of Law at Duquesne University School of Law and Special Assistant United States Attorney for the District of Delaware. He was formerly an Assistant United States Attorney for the District of Delaware, where he served as Chief of Appeals and Counsel to the United States Attorney. Over his thirteen years as an AUSA, Mr. Kravetz investigated and prosecuted a wide variety of federal criminal offenses. Prior to joining the United States Attorney's Office, Mr. Kravetz served as a judicial law clerk to the Honorable D. Michael Fisher on the United States Court of Appeals for the Third Circuit and the Honorable Joy Flowers Conti on the

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588.   At the time that this Report was prepared, Mr. Kravetz was an Assistant United States Attorney and the Chief of Appeals for the District of Delaware.

United States District Court for the Western District of Pennsylvania. Mr. Kravetz is a graduate of Duquesne University and Duquesne University School of Law.

Abigail Horn (Assistant Federal Defender, Eastern District of Pennsylvania)

Abigail Horn is an Assistant Federal Defender at the Federal Community Defender Office for the Eastern District of Pennsylvania in the appellate unit. Ms. Horn was previously an assistant public defender at the Defender Association of Philadelphia in the appeals and trial divisions. She is a recipient of the Alan Jay Josel Advocacy Award and the Bernard L. Siegel Award of the Pennsylvania Association of Criminal Defense Lawyers, and an honoree of the Juvenile Law Center.

Ms. Horn was a law clerk to the Honorable L. Felipe Restrepo of the United States Court of Appeals for the Third Circuit and the Honorable Jan E. DuBois of the United States District Court for the Eastern District of Pennsylvania. Ms. Horn received her B.A., *summa cum laude*, from Duke University and is a graduate of Yale Law School.

APPENDIX B

Show-Up Instructions: International Association of Chiefs of Police

Caution the witness that the person he or she is about to see may or may not be the perpetrator—and it is equally important to clear an innocent person. The witness should also be advised that the investigation will continue regardless of the outcome of the show-up.[589]

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589.   INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(A)(7).

APPENDIX C

Lineup and Photo Array Instructions: International Association of Chiefs of Police

The witness shall be given a copy of the following instructions prior to viewing the lineup or photo array and the administrator shall read the instructions aloud before the identification procedure.

You will be asked to look at a series of individuals.

The perpetrator may or may not be present in the identification procedure.

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

I don't know whether the person being investigated is included in this series.

. . .

You should not feel that you have to make an identification. If you do identify someone, I will ask you to describe in your own words how certain you are.

The individuals are not configured in any particular order.

(If presenting the lineup or photo array sequentially): If you make an identification, I will continue to show you the remaining individuals or photos in the series.

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

Since this is an ongoing investigation, you should not discuss the identification procedures or results.[590]

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590.   INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY, *supra* note 21, § IV(B)(10) (emphasis omitted). Omitted from this model instruction as quoted is an instruction that "Individuals present in the series 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." *Id.* This instruction has been omitted because it was explicitly not recommended by the American Psychology-Law Society White Paper on eyewitness identification because research demonstrated that it "increased false identifications but did not increase culprit identifications." Wells et al., *Policy and Procedure Recommendations*, *supra* note 11, at 57–58.

APPENDIX D

Third Circuit Pattern Jury Instructions (Criminal Cases) § 4.15

4.15   Eyewitness Identification of the Defendant - <u>See Note below</u>

One of the *(most important)* **issues in this case is whether** *(name of defendant)* **is the same person who committed the crime***(s)* **charged in** *(Count(s) ___ of)* **the indictment. The government, as I have explained, has the burden of proving every element, including identity, beyond a reasonable doubt. Although it is not essential that a witness testifying about the identification** *(himself)(herself)* **be free from doubt as to the accuracy or correctness of the identification, you must be satisfied beyond a reasonable doubt based on all the evidence in the case that** *(name of defendant)* **is the person who committed the** *crime(s)* **charged. If you are not convinced beyond a reasonable doubt that** *(name of defendant)* **is the person who committed the crime***(s)* **charged in** *(Count(s) ___ of)* **the indictment, you must find** *(name of defendant)* **not guilty.**

Identification testimony is, in essence, the expression of an opinion or belief by the witness. The value of the identification depends on the witness' opportunity to observe the person who committed the crime at the time of the offense and the witness' ability to make a reliable identification at a later time based on those observations.

You must decide whether you believe the witness' testimony and whether you find beyond a reasonable doubt that the identification is correct. You should evaluate the testimony of a witness who makes an identification in the same manner as you would any other witness. In addition, as you evaluate a witness' identification testimony you should consider the following questions as well as any other questions you believe are important *(include only those called for by the facts of the case)*:

**   *(First)*, you should ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crime charged. Many factors affect whether a witness has an adequate opportunity to observe the person committing the crime; the factors include the length of time during which the witness observed the person, the distance between the witness and the person, the lighting conditions, how closely the witness was paying attention to the person, whether the witness was under stress while observing the person who committed the crime, whether the witness knew the person from some prior experience, whether the witness and the person committing the crime were of different races, and any other factors you regard as important.**

**   *(Second)*, you should ask whether the witness is positive in the identification and whether the witness' testimony remained positive and unqualified after cross-examination. If the witness' identification testimony is positive and unqualified, you should ask whether the witness' certainty is well-founded.**

[(Third), you should ask whether the witness's identification of (name of defendant) after the crime was committed was the product of the witness' own recollection. You may take into account both the strength of the later identification and the circumstances under which that identification was made. You may wish to consider how much time passed between the crime and the witness' later identification of the defendant. You may also consider (whether the witness gave a description of the person who committed the crime) (how the witness' description of the person who committed the crime compares to the defendant). (You may also consider whether the witness was able to identify other participants in the crime.) If the identification was made under circumstances that may have influenced the witness, you should examine that identification with great care. Some circumstances which may influence a witness' identification are whether the witness was presented with more than one person or just (name of defendant); whether the witness made the identification while exposed to the suggestive influences of others; and whether the witness identified (name of defendant) in conditions that created the impression that (he)(she) was involved in the crime.]

[(Fourth), you should ask whether the witness failed to identify (name of defendant) at any time, identified someone other than (name of defendant) as the person who committed the crime, or changed his or her mind about the identification at any time.]

[The court should also give the following admonition if the witness' opportunity to observe was impaired or if the witness' identification is not positive, was shaken on cross-examination, or was weakened by a prior failure to identify the defendant or by a prior inconsistent identification:

You should receive the identification testimony with caution and scrutinize it with care.]

If after examining all of the evidence, you have a reasonable doubt as to whether *(name of defendant)* **is the individual who committed the crime***(s)* **charged, you must find** *(name of defendant)* **not guilty.**

Comment

Note: The Third Circuit has appointed a Task Force on Eyewitness Identification. The Task Force has been directed to "make recommendations regarding jury instructions, use of expert testimony, and other procedures and policies intended to promote reliable practices for eyewitness identification and to effectively deter unnecessarily suggestive identification procedures, which raise the risk of a wrongful conviction." The press release announcing the formation of the Task Force can be found at http://www.ca3.uscourts.gov/news/press-release-establishing-third-circuit-task-force-eyewitness-identifications. An order extending the term of the Task Force can be found at http://www.ca3.uscourts.gov/sites/ca3/files/extend_TF_eyewitness.pdf.

This instruction is derived from O'Malley et al., supra, § 14.10, which is based on the instruction recommended in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (set out below), which the Third Circuit cited with approval in *United States v. Wilford*, 493 F.2d 730, 734 n.9 (3d Cir. 1974).

This instruction should be given in any case in which eyewitness identification of the defendant is an issue. The Third Circuit has recognized the problems with eyewitness identification testimony as well as the important role of expert testimony in helping jurors evaluate eyewitness identification of the defendant in a criminal case. *See United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). In *Brownlee*, the court held that the exclusion of portions of the defense expert's proffered testimony on eyewitness identification required reversal of the defendant's conviction even though the trial court permitted the expert to testify as to some factors that challenged the government's identification witnesses. 454 F.3d at 144. The court emphasized that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." 454 F.3d at 142 (quoting Rudolph Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell Law Review 1097, 1099 n.7 (2003)).

In *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), the Third Circuit addressed the importance of instructing the jury on identification testimony:

> [W]e recognize a compelling need for guidelines which will obviate skeletal, pattern instructions and assure the essential particularity demanded by the facts surrounding each identification. Accordingly, we approve for use in this circuit the approach taken by the Pennsylvania courts concerning jury instructions on identification, and require, for prospective application only, that such instructions satisfy the following:

> In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict or uncertainty on the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.

> 442 F.2d at 528 (citations omitted).

In *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), the D.C. Circuit, building on Barber, recommended that the following instruction be adapted to the facts

of the case and given in any case where eyewitness identification of the defendant is an issue:

Appendix: Model Special Instructions on Identification

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past. [In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight-but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

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. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony. I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

See United States v. Wilford, 493 F.2d 730, 734 n.9 (3d Cir. 1974) (citing with approval *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

(Note added 2016 and revised 2017)