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TRI-STATE VAGARIES: THE VARYING RESPONSES OF DELAWARE, NEW JERSEY, AND PENNSYLVANIA TO THE PHENOMENON OF MISTAKEN IDENTIFICATIONS

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I. INTRODUCTION

*The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.*¹

*I'll never forget that face.*²

Despite the indisputable incompatibility of these two statements, the fear of eyewitness unreliability and the uncritical³ acceptance of witness assertions of identity are the two-headed beast that governs the law of identification. The concern over eyewitness unreliability (at least in police-controlled procedures such as show-ups, photo arrays, and line-ups),⁴ led to the constitutionalization

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

2. This is the typical, if not paradigmatic, proclamation of a crime victim or witness describing his/her memory of the perpetrator's features. "I could be dead and born again, and I will never forget that face. It's that gentleman sitting over there. I would never forget those eyes. I would never forget those looks." *United States v. Dowling*, 855 F.2d 114, 123 (3d Cir. 1988), *aff'd*, 493 U.S. 342 (1990). The pervasiveness of this phrase and its acceptance as a part of our common belief structure is shown by its adoption into comedy. Groucho Marx intoned, "I never forget a face, but in your case I'll be glad to make an exception." Watchful Eye, Quotes from Groucho Marx, <http://watchfuleye.com/groucho.html> (last visited Feb. 19, 2006).

3. *See, e.g., Brown v. Davis*, 752 F.2d 1142 (6th Cir. 1985) (rejecting a Due Process challenge and affirming a conviction based on questionable identification testimony from only one witness and with no corroboration).

4. *Wade*, 388 U.S. at 233 (reporting instances of police-generated suggestiveness at lineups as part of the Court's rationale for extending the right to counsel to such proceedings). At least one commentator has noted that the Court's focus in its early Warren-era identification

of pre-trial identification procedures, albeit in an ascientific fashion,⁵ while at the same time, convictions are sustained solely on identification testimony and, in many jurisdictions, with jury instructions⁶ and prosecutorial argument⁷ directly at odds with clear scientific findings.

That this self-contradictory structure produces frightening results cannot be denied. The advent of DNA testing and the resulting exonerations have shown that in a large percentage of those cases, one or several witnesses identified the wrong person *and the identification testimony was credited by juries*.⁸

decisions was on preventing police misconduct and manipulation of witnesses. JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION 72-74 (2005) [hereinafter DOYLE, TRUE WITNESS].

5. See sections IIB and IIBB, *infra*, discussing, respectively, the science of perception and memory as applied to eyewitness identifications and the problems posed by the current Due Process test for determining the reliability of eyewitness identification testimony.

6. In some jurisdictions, jurors are told that eyewitness testimony, in the absence of specified conditions such as a prior failure to identify, are to be taken as "fact." See, e.g., Commonwealth v. Kloiber, 106 A.2d 820, 826 (Pa. 1954)

Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution -- indeed the cases say that 'his [positive] testimony as to identity may be treated as the statement of a fact.

Elsewhere, jurors have been told that an eyewitness' confidence in his/her identification is a relevant factor. See, e.g., United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972) (proposing a model instruction that charges, *inter alia*, that jurors "may take into account both the strength of the identification, and the circumstances under which the identification was made."). The science repudiating these instructions is detailed in section IIB, *infra*.

7. Prosecutorial argument in mistaken identification defense cases often focuses on the difference between "description" and "recognition," exalting the latter; the lack of motive for the witness to 'falsely' accuse the defendant, since the witness/victim has only one desire, to see the correct person convicted; the claimed phenomenon of "never forgetting a face" because of the intensity of the crime; and the witness' stated confidence or level of certainty. See generally Jules Epstein, *Identification Evidence: Constitutional and Evidentiary Principles*, in 1 CRIMINAL DEFENSE TECHNIQUES §2.06[7] (Ellen Smolinsky Pall ed., 2003). Again, these contentions are without scientific support and are largely refuted by the study of the science of perception and memory.

8. According to the Innocence Project, 101 of the first 130 DNA exoneration cases involved mistaken identification testimony. The Innocence Project, Factors Leading to Wrongful Convictions, <http://www.innocenceproject.org/causes/index.php> (last visited Feb. 20, 2006). As the exonerations grew in number, the role of mistaken identification testimony retained its prominence. A study of the first 110 exonerations led the Associated Press to report that "[n]early two-thirds were convicted with mistaken eyewitness testimony from victims and bystanders." Gary Wells, <http://www.psychology.iastate.edu/faculty/gwells/DNAcasesAPstudy.htm> (last visited Feb. 20, 2006). The Innocence Project has found that mistaken eyewitness identification played a role in the vast majority of the more than 150 mistaken convictions in the United States overturned by DNA evidence. Innocence Project, Eyewitness Fact Sheet 3, http://www.innocenceproject.org/docs/Eyewitness_ID_FactSheet.pdf (last visited Feb. 20, 2006). Estimates by professors Brian Cutler and Steven Penrod in their 1995

Recent cases of misidentification in the tri-state area demonstrate that the problem is more vexing and the need for solutions beyond DNA testing more essential.

Juan Covington

In May 2005, the Philadelphia area was shocked by the murder of Patricia McDermott, a hospital employee shot on her way home from work. After extensive investigation, including leads developed from video surveillance cameras, police arrested Juan Covington for the crime.

Covington's guilt was soon shown to be not in doubt. A confession was buttressed by discovery of a firearm that ballistically matched that used in the crime. But, Covington then led the police to compelling evidence⁹ of his responsibility for a series of other shootings, two of which had already been "cleared" by arrests.

In the first instance, Morris Wells was charged with the shooting death of Odies Bosket. Wells was arrested based upon photo display identifications by two eyewitnesses, one of whom claimed prior acquaintanceship with Wells, knowing him by the name of "Junnie."¹⁰ After Covington's arrest and confession to the shooting of Bosket, and a ballistics determination that Covington's gun was used in the killing of Bosket,¹¹ Wells' charges were dismissed.¹²

The second case is that of Clyde Johnson IV, a forty-two year old social worker who spent a year in jail pre-trial before the exoneration arising from Covington's confession and the subsequent ballistics testing.¹³ Johnson was

book, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW*, put the error rate at close to 0.5%, or 4,500 of the one million convictions a year. [7-8 (1995), hereinafter CUTLER & PENROD]. That this recurrence of mistaken identification convictions is constant over time is clear. EDWIN M. BORCHARD, *CONVICING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* xiii-xv (Garden City Publishing Co. 1932) (forty-four defendants out of a case study of sixty-five exonerated individuals were convicted primarily on the basis of mistaken identification evidence). As of August 11, 2005, the reported number of DNA exonerations was 161. William Fisher, *DNA Crusader*, Znet—Criminal Justice System, (2005), <http://www.zmag.org/content/showarticle.cfm?SectionID=104&ItemID=8498>.

9. Covington confessed and provided police with firearms traceable to several crimes. Theresa Conroy, *Hug from Mom Awaits Soon-To-Be-Freed Suspect*, PHILA. DAILY NEWS, July 30, 2005, at 4, available at <http://www.philly.com/mld/dailynews/news/local/12262084>; see *infra* notes 12-15. On March 3, 2006, Covington pled guilty to these and other crimes. *Triple Killer Given Three Life Terms*, PHILA. INQUIRER, Mar. 4, 2006, at Metro p.1.

10. Arrest Warrant 290427, Affidavit of Probable Cause for the Arrest of Morris Wells (Mar. 5, 2005).

11. Natalie Pompilio & Jacqueline Soteropoulos, *Alleged Confession Offers Hope to Jailed Man's Mother*, PHILA. INQUIRER, July 22, 2005, at B1, available at <http://www.philly.com/mld/inquirer/inquirer/news/local/12192443.htm> (last visited Feb. 2, 2006).

12. *Charges Dropped Against Man Held in Subway-Stop Slaying*, PHILA. DAILY NEWS, July 28, 2005, at 5; Jennifer Lin, *Man Arrested for Shooting Linked to Juan Covington Released from Jail*, <http://www.apria.com/resources/1,2725,494-35835700.html> (last visited Feb. 19, 2006).

13. William Bunch, *Wrongly ID'd in Shooting, He's Cleared*, PHILA. DAILY NEWS, Oct. 8, 2005, at 4.

charged with the April 2004 shooting of one William Bryant, Jr., a crime that left the victim in critical condition. The initial police report, made by an on-the-scene officer, recorded the description of the shooter as a black male, "30's, 5'6"-5'8", 200-230 lbs."¹⁴ Two eyewitnesses described the shooter as a "dark" skinned black male;¹⁵ a third witness used the term "medium complexion."¹⁶ This witness estimated the shooter's height to be six feet.¹⁷

Within two months of the crime, police showed a display of eight photographs to one eyewitness and to the victim. Each identified Johnson.¹⁸ The victim, Bryant, knew Johnson; the two had been acquaintances.¹⁹ Due to the critical injuries caused by the shooting, police had been unable to conduct an interview with Bryant. The identification of Johnson's photo as the shooter occurred by police asking questions and Bryant gesturing. Upon arrest in July, 2004, police recorded Johnson's appearance as 5'6," with a weight of 185 pounds, "light" complexion, and having a moustache and goatee.²⁰ No witness had mentioned any facial hair when describing the shooter.

What does the Covington case confirm? Mistaken identifications remain prevalent, DNA is not available in many cases to clear the innocent, and preventative steps must be taken to reduce the incidence of erroneous identification prosecutions and convictions. This article will survey the history of the phenomenon of mistaken identification and scientific study of its causes; identify several discrete issues of identification law and the treatment of each in the three states under review; present a 'report card' maintaining that (except for New Jersey) the response is a failure; and conclude with a prediction of where litigation will turn to next on this issue and with a proposal for reform.

II. THE HISTORY AND SCIENCE OF MISTAKEN IDENTIFICATION

A. The Historic Awareness of the Risk and Actuality of Mistaken Identification

In the United States, the awareness of the risk and likelihood of mistaken identification convictions in criminal cases is traceable first to a confluence of legal scholarship and psychological studies and, only more recently, to court

14. Philadelphia Police Incident Report, DC 04-35-31722 (Apr. 26, 2004). The police reports in this matter were made available to this author for review.

15. Interview by Philadelphia Police with Albertha Barr, Witness (Apr. 26, 2004); Interview by Philadelphia Police with Joseph Oliver, Witness (Apr. 26, 2004).

16. Interview by Philadelphia Police with Bernice Oliver, Witness (Apr. 26, 2004).

17. *Id.*

18. Philadelphia Police Investigation Report, DC 04-35-31722 (July 15, 2004). The witness who identified Johnson's photo, Barrett Tunsil, is one of those interviewed by the initial on-the-scene officer. *See* Philadelphia Police Incident Report, DC 04-35-31722 (Apr. 26, 2004).

19. Philadelphia Police Investigation Interview Record (June 3, 2004).

20. Philadelphia Police Biographical Information Report, DC 04-35-31722 (July 15, 2004).

and governmental responses. The initial focus on this problem came from the writings of two men, Edwin Borchard and Hugo Münsterberg.

In 1912, Borchard, then a Law Librarian of Congress, authored a paper endorsing indemnification for the wrongly convicted.²¹ Building upon this work, in 1932 as a Yale law professor, he published his principal contribution to the field, *Convicting the Innocent*,²² which documented sixty-five cases of wrongful conviction. Beyond detailing the facts of each case²³ and the subsequent exoneration, Borchard drew conclusions, particularly as to the problem of identification evidence:

Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence . . . Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused . . . [T]he emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy . . . How valueless are these identifications by the victim . . . is indicated by the fact that in eight of these cases the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other.²⁴

Borchard's work was echoed and elaborated on in the 1950s by Judge Jerome Frank. In *Not Guilty*,²⁵ Judge Frank and his co-authors studied thirty-six cases of wrongful conviction. Addressing the problems of mistaken identification, Frank posited the risk of error at each of three stages—the perception of events at the time of the crime, the retention in the witness' memory, and the reporting of the event in court. He then concluded:

21. Edwin M. Borchard, *European Systems of State Indemnity for Errors of Criminal Justice*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 684 (1912). Borchard's work includes an editorial preface by the Dean of the Northwestern University Law School meant to accompany Bill Section 7675, asking for relief to persons erroneously convicted in court. John H. Wigmore, *The Bill to Make Compensation to Persons Erroneously Convicted of Crime*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 665 (1912).

22. BORCHARD, *supra* note 8.

23. In one case, Borchard showed how seventeen witnesses identified the same (and wrong) person as the passer of bad checks. When the real check fraud perpetrator was caught, it was found that he did not resemble the wrongly-accused person. The prosecutor in the case subsequently wrote:

As the two men stood at the bar I wondered how so many persons could have sworn that the innocent man was the one that had cashed the bad checks. The two men were as dissimilar in appearance as could be. There was [sic] several inches difference in height and there wasn't a similarity about them.

Id. at 5.

24. *Id.* at 367 (footnote omitted).

25. JUDGE JEROME FRANK & BARBARA FRANK, IN ASSOCIATION WITH HAROLD M. HOFFMAN, *NOT GUILTY* (1957).

The great body of honest testimony is subjectively accurate but objectively false . . . observation is a complex affair; it is mingled with inferences, judgments (and) interpretations . . . What is lost from memory is often replaced by products of the imagination . . . [and] witnesses who are perfectly honest are in danger of turning inferences into recollections.²⁶

Studies continued, including the 1987 review of cases of convicted persons subsequently proved to be innocent.²⁷ Again, the conclusion was that mistaken eyewitness testimony was a substantial causative factor:

By far the most frequent cause of erroneous convictions in our catalogue of 350 cases was error by witnesses; more than half of the cases (193) involved errors of this sort. Sometimes such errors occurred in conjunction with other errors, but often they were the primary or even the sole cause of the wrongful conviction.²⁸

And, over the same time period, as these studies documented the phenomenon of mistaken identification,²⁹ science began to identify causes inherent in the psychology of perception and memory.

B. *Science, Eyewitnesses, Police Processes, and the Courtroom*³⁰

The first serious attempt at developing and publicizing a science of perception, memory, and recall was made in the early twentieth century by Hugo Münsterberg, a Professor of Psychology at Harvard University. In his *On The Witness Stand*,³¹ Münsterberg detailed studies on witness observation

26. *Id.* at 210-13.

27. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

28. *Id.* at 60.

29. For a complete chronicle of the various legal and governmental studies of mistaken identification cases in the United States and other English-speaking nations, see DEPARTMENT OF JUSTICE CANADA, FPT HEADS OF PROSECUTIONS COMMITTEE WORKING GROUP, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 5-27, <http://canada.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf> (last visited Feb. 19, 2006). Further anecdotal evidence is found in BARRY SCHECK, PETER NEUFIELD & JIM DWYER, *ACTUAL INNOCENCE* (2000).

30. It is well beyond the scope of this Article to detail the growth and breadth of the study of eyewitness testimony from the psychologist's perspective, as well as its linkage to developments in the law, in particular the role of experts in mistaken identification trials and the development of model identification procedures. That history is told, at length, in JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* Chs. 4, 6, 7, 10 (2005). The purpose here is to summarize that history, highlighting signal developments and the trends, in particular the research used by experts who testify at criminal trials and who are involved in designing and implementing model identification procedures.

31. HUGO MÜNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (Doubleday, Doran & Co., Inc. 1923) (1907).

and recall, including one where a convention of jurists, psychologists, and physicians was interrupted when a clown and a “negro” with a revolver entered the room. The two intruders shouted; one fell to the ground and the other jumped atop him; a shot was heard, and both ran from the room. Asked by the meeting’s president to write down what each had seen, because the matter would likely go to the courts, the attendees made errors of substantial dimension in two categories: critical facts were omitted *and*

there were only six among the forty which did not contain positively wrong statements; in twenty-four papers up to ten percent of the statements were free inventions, and in ten answers—that is, in one-fourth of the papers,—more than ten per cent. of the statements were absolutely false . . . [Although the “negro” had nothing on his head], the others [other than four who perceived this correctly] gave him a derby, or a high hat, and so on. In addition to this, a red suit, a brown one, a striped one . . . and similar costumes were invented for him. He wore in reality white trousers and a black jacket with a large red necktie.³²

Münsterberg also reported studies showing no correlation between a witness’ declared level of certainty and his or her accuracy.³³

Münsterberg’s ultimate claim, that scientists should be used to evaluate witness accuracy, was vividly contested by Dean Wigmore, who focused on the inability of the scientist to assess whether *this* witness was inaccurate on *this* occasion.³⁴ Designed as a cross-examination of the psychologist at a trial for libeling American lawyers, the libel being the claim by Münsterberg that lawyers were unwilling to use the findings of science to enhance fact-finding, Wigmore attacked on the ground that the findings failed to show whether a particular witness was in fact reliable (and made the Professor concede the same):

Q: Or suppose that two honest witnesses were to testify, of a man found dead on Thursday morning, that they being together had seen him alive, but one placed it on Wednesday and the other on Tuesday; do you say that this “experimental psychology” which in your words “can furnish amply everything which the court demands,” can tell the court which witness is correct in his memory?³⁵
A: No.

After this potent³⁶ attack, Münsterberg steered his research to other matters,³⁷ and his findings (now confirmed by extensive research) were essentially discarded and forgotten.

32. MÜNSTERBERG, *supra* note 31, at 52-53.

33. *Id.* at 55.

34. John H. Wigmore, *Professor Münsterberg and the Psychology of Testimony: Being a Report of the Case of Cokestone v. Münsterberg*, 3 U. ILL. L. REV. 399 (1909).

35. *Id.* at 421. Again, at page 423, Wigmore made the witness accept the statement that the “new psychology cannot by this method obtain a criterion for the truth or error of *individual* witnesses[.]”

The pursuit of scientific understanding of perception and memory, somewhat dormant for several decades, was resurrected in the 1970s. One prominent researcher (and courtroom expert) was Robert Buckhout, a professor who gained notoriety when he testified on behalf of Angela Davis when she was charged with participating in a courthouse shoot-out.³⁸

Buckhout's testimony in the Davis trial effectively initiated the litigation of the admissibility of expert testimony in mistaken identification cases.³⁹ As this continued over a thirty year period, the study of eyewitness perception, memory, and recall exploded. The most significant researchers in a field with many important contributors were Professors Elizabeth Loftus and Gary Wells.

Loftus' contributions came in both the research laboratory and the courtroom. In the former, her studies examined and confirmed various weaknesses in perception and memory, such as "weapons focus,"⁴⁰ the phenomenon of a crime witness or victim unconsciously directing his or her attention away from the perpetrator's face and toward an actual or perceived weapon. Professor Loftus also turned her attention, and scientific research, to post-crime activity and its impact on degrading memory, and demonstrated in particular the impact of post-event questioning on altering memory.⁴¹ By the mid-1980s, two courts had found it an abuse of discretion to bar her testimony

36. Although powerful, the attack was misdirected, addressing Münsterberg's hubris rather than the knowledge his experiments could impart. The issue was not the credibility of the particular witness; rather, it was the dispelling of myths about perception and the provision of useful criteria for identifying weaknesses in witnesses' statements and lawyers' arguments.

37. DOYLE, *supra*, note 30, at 32-33.

38. *Id.* at 53-59.

39. The controversy over admitting expert testimony will not be addressed here in detail. Its two main bases are that the experts can give no useful information about the individual witness' capacity and memory, and that the knowledge being shared is commonly known to jurors and thus unnecessary (or, in the terms of the Federal Rules of Evidence, not helpful to the trier of fact. FED. R. EVID. 702). See, e.g., Ebbe B. Ebbesen & Vladimir J. Konecni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, 5 EXPERT EVIDENCE: THE INT'L DIGEST OF HUMAN BEHAV. SCI. & THE LAW 2 (1996), available at <http://www-psy.ucsd.edu/~eebbesen/prejvprob.html>; Michael McCloskey & Howard Egeth, *Eyewitness Identification - What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOLOGIST 550, 550 (1983). As to the first criticism, I simply note here that evidence need not be conclusive as to the facts of a particular case to be considered relevant and helpful; and, as is developed below, see *infra* notes 90-104 and accompanying text, jurors continue to hold many myths and misperceptions about identification testimony and its strength.

40. Elizabeth F. Loftus, Geoffrey R. Loftus & Jane Messo, *Some Facts About "Weapon Focus"*, 11 L. & HUM. BEHAV. 55 (1987).

41. DOYLE, *supra* note 30, at 90-92. See Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOLOGIST 867 (2003) (describing her early research on how tainted questioning of a witness can corrupt her or his memory); E. F. Loftus & H. G. Hoffman, *Misinformation and Memory, The Creation of New Memories*, 117 J. EXPERIMENTAL PSYCHOL.: GEN. 100-104 (1989).

as a trial expert.⁴² Today, the acceptance of such expert testimony is much greater.⁴³

Wells took the study to a new dimension, one remedial in nature. He categorized identification testimony (and the mistakes such witnesses make) as the result of either *estimator* or *system* variables, the former being those variables that affect the individual perceiver (*e.g.*, the stress attendant to a particular criminal episode, the presence of a weapon, the particular witness' susceptibility to own race bias, the duration of the crime or/event) and the latter the processes of criminal investigation (*e.g.*, the first interview with police, the manner in which a description is elicited, the conduct of a police-crafted identification procedure, and the feedback given to the witness at each stage).⁴⁴

The significance of Wells' approach (and his determination to focus on the *system* variables) cannot be disputed. Research designed to prevent mistaken identifications (rather than to simply explain the vagaries of memory and perception and thus, seemingly, benefit only the defense in a criminal trial) led to a constructive dialogue among prosecutors, police, defense counsel, and scientists and the beginning of institutional change, on both the national and state levels. Wells himself played a significant role as contributor to the National Institute of Justice's 1999 publication, *Eyewitness Evidence: A Guide for*

42. DOYLE, *supra* note 30, at 97-98; *State v. Chappel*, 660 P.2d 1208, 1218-24 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709 (Cal. 1984) (reviewing *Chappel* and deeming it an abuse of discretion to exclude an expert who would have testified, *inter alia*, in regard to Loftus' work).

43. A significant number of jurisdictions accept expert testimony in identification cases as admissible, subject to an abuse of discretion standard for review of orders of exclusion. Federal decisions include: *United States v. Smithers*, 212 F.3d 306, 310, 314 (6th Cir. 2000); *United States v. Kime*, 99 F.3d 870, 883 (8th Cir. 1996), *cert. denied*, 519 U.S. 1141 (1997); *United States v. Daniels*, 64 F.3d 311, 315 (7th Cir. 1995), *cert. denied*, 516 U.S. 1063 (1996); *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995), *cert. denied* 516 U.S. 953 (1995); *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994), *cert. denied* 513 U.S. 1029 (1994); *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993); *United States v. Curry*, 977 F.2d 1042, 1050 (7th Cir. 1992); *United States v. George*, 975 F.2d 1431 (9th Cir. 1992); *United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986); *United States v. Brown*, 540 F.2d 1048, 1053 (10th Cir. 1976).

State courts admitting such evidence include *Ex parte Williams*, 594 So. 2d 1225 (Ala. 1992); *State v. Chapple*, 660 P.2d 1208, 1218 (Ariz. 1983); *Jones v. State*, 862 S.W.2d 242 (Ark. 1993); *People v. Campbell*, 847 P.2d 228 (Colo. Ct. App. 1992); *State v. Kemp*, 507 A.2d 1387 (Conn. 1986); *McMullen v. State*, 714 So. 2d 368, 370 (Fla. 1998); *State v. Gaines*, 926 P.2d 641 (Kan. 1996); *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002); *People v. Enis*, 564 N.E.2d 1155 (Ill. 1990); *Commonwealth v. Santoli*, 680 N.E.2d 1116 (Mass. 1997); *White v. State*, 926 P.2d 291 (Nev. 1996); *People v. Mooney*, 559 N.E.2d 1274 (N.Y. 1990); *State v. Gardiner*, 636 A.2d 710 (R.I. 1994); *State v. Whaley*, 406 S.E.2d 369 (S.C. 1991); *State v. Percy*, 595 A.2d 248 (Vt. 1990); *State v. Moon*, 726 P.2d 1263 (Wash. Ct. App. 1986); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991).

A limited number of jurisdictions exclude such testimony categorically. *See* *United States v. Holloway*, 971 F.2d 675 (11th Cir. 1992); *State v. Goldsby*, 650 P.2d 952 (Or. Ct. App. 1982); *Commonwealth v. Simmons*, 662 A.2d 621 (Pa. 1995), *cert. denied*, 516 U.S. 1128 (1996); *State v. Wooden*, 658 S.W.2d 553 (Tenn. Ct. Crim. App. 1983).

44. Gary Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978).

Law Enforcement,⁴⁵ and the design of the New Jersey Identification Guidelines,⁴⁶ both systemic approaches to guiding police investigation and reducing the likelihood of mistaken identifications.⁴⁷

These two researchers were not alone, and their contributions and those of others cross-fertilized research and established a body of confirming scientific studies. By 1995, Cutler and Penrod had identified more than 2,000 articles reporting research in this field,⁴⁸ and Kassin,⁴⁹ seeking to identify where there was “general acceptance” of principles, found that among well-established researchers there was substantial agreement on numerous principles of psychology as applied to eyewitness testimony. In particular, Kassin sought an evaluation of whether experts accepted the following principles:⁵⁰

- Stress—Very high levels of stress impair the accuracy of eyewitness testimony;
- Weapons Focus—The presence of a weapon impairs an eyewitness’ ability to accurately identify the perpetrator’s face;
- Lineup Instructions—Police instructions can affect an eyewitness’ willingness to make an identification;
- Wording of Questions—An eyewitness’ testimony about an event can be affected by how the questions put to that witness are worded;
- Confidence Malleability—An eyewitness’ confidence can be influenced by factors that are unrelated to identification accuracy;
- Attitudes and Expectations - An eyewitness’ perception and memory for an event may be affected by his or her expectations and attitudes;

45. <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

46. The New Jersey Guidelines are discussed, *infra*, at note 75.

47. Similar guidelines have been endorsed by the American Bar Association, which call for:

- the person conducting the lineup or photo display to be unaware of who the suspect is;
- instructions to the witness(es) that the perpetrator may or may not be in the display;
- eliciting a statement of the witness’ confidence in his or her identification;
- using a sufficient number of foils and ensuring that foils resemble the witness’ initial description of the perpetrator; and
- creating a photographic record of the lineup.

American Bar Association, Resolution adopted August 9-10, 2004, Report 5-6, <http://www.abanet.org/leadership/2004/annual/dailyjournal/111f.doc>.

48. CUTLER & PENROD, *supra* note 8, at 68.

49. Kassin et. al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 412 (2001).

50. *Id.* at 407, Table 1. Kassin tested more than thirty propositions. Those reproduced above are the ones with the highest rate of concurrence among experts.

Discrete Judgments and Opinions Concerning the Thirty Eyewitness Topics Tested				
Topic	Is it reliable?	Would you testify?	Research basis?	Common Sense?
Wording of questions	98	84	97	25
Lineup instructions	98	79	95	39
Confidence malleability	95	79	95	10
Mug-shot induced bias	95	77	97	13
Postevent information	94	83	98	17
Child suggestibility	94	81	100	73
Attitudes and expectations	92	70	94	31
Hypnotic suggestibility	91	76	90	19
Alcohol intoxication	90	61	76	95
Cross race bias	90	72	97	65
Weapons focus	87	77	97	34
Accuracy-Confidence	87	73	97	5

- Post-event Information—Eyewitness testimony about an event often reflects not only what they actually saw but information they obtained later on;
- Cross-Race Bias—Eyewitnesses are more accurate when identifying members of their own race than members of other races;
- Accuracy-Confidence—An eyewitness' confidence is not a good predictor of his or her identification accuracy.

The polling results⁵¹ on stress as a factor were less conclusive. Sixty percent of the respondents find the statement reliable, with only fifty percent willing to testify to this in court. These 2001 data may be less significant in light of new research on the severe impact on identification reliability occasioned by heightened stress.⁵²

Kassin's accumulation of studies and search for consensus made clear that, whether applying the *Frye*⁵³ or *Daubert*⁵⁴ standard for admitting expert testimony, the methodology and conclusions of these experts had sufficient

51. Kassin et al., *supra* note 49, at 412, Table 4.

52. See text accompanying note 95, *infra*, discussing C.A. Morgan, G. Hazlett, A. Doran, S. Garrett, G. Hoyt, P. Thomas, M. Baranoski & S.M. Southwick, *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J. PSYCHIATRY & L. 265-279 (2004).

53. *Frye v. United States*, 293 F. 1013, 1014 (D.C. 1923) (“[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”). The *Frye* test has been applied to approve admission of eyewitness expert testimony.

54. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592-95 (1993) (requiring that a court determine whether the expert's “reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue,” and also whether it is relevant and will assist the trier of fact).

reliability to be admissible in court. As well, they constitute a sound empirical basis for re-evaluating long-standing police and court procedures in mistaken identification cases.⁵⁵ With those scientific principles in mind, this article turns to an evaluation of three states—Delaware, New Jersey, and Pennsylvania—in their pre-trial and trial identification practices.

III. SPECIFIC PROCESSES AND PROCEDURES IN IDENTIFICATIONS

A. Pre-trial Procedures—*Show-ups, Line-Ups, and Photo Arrays*

1. The Law and Research

The Constitution gives a criminal accused no entitlement to request that he or she be placed in a line-up.⁵⁶ It does not bar police from conducting an uncounseled, one-on-one show-up *pre-indictment*;⁵⁷ a line-up (which must have counsel post-indictment);⁵⁸ or a photo array at any time prior to or even during trial.⁵⁹ Other than the limited right to counsel (and in the absence of a Fourth Amendment violation that led to the pre-indictment confrontation),⁶⁰ the sole determinant of constitutionality is whether the resulting identification is judged reliable.⁶¹

55. *United States v. Burton*, No. 3:97-cr-154, 1998 U.S. Dist. LEXIS 18730, at *48-49 (E.D. Tenn. Nov. 17, 1998). Critics of expert testimony regarding eyewitnesses maintain that laboratory experiments cannot replicate the reality of a crime and the encounter between victim/witness and perpetrator. See, e.g., Ebbesen & Konecni, *supra* note 39; Robert G. Pachella, *Personal Values and the Value of Expert Testimony*, 10 L. & HUM. BEHAV. 145 (1986); Michael McCloskey & Howard Egeth, *Eyewitness Identification—What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOL. 550, 550 (1983). A review of the contrasting positions as of 1995 is detailed in Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237 (1995).

56. See *Moore v. Illinois*, 434 U.S. 220, 230 note 5 (1977) (“Such requests ordinarily are addressed to the sound discretion of the court.”); *United States v. King*, 461 F.2d 152, 155 (D.C. Cir. 1972).

57. *Stovall v. Denno*, 388 U.S. 293, 299 (1967). The significance of the occurrence being pre-indictment is that no right to counsel is implicated for any corporeal display of the accused. Post-indictment, counsel must be present. *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972).

58. *United States v. Wade*, 388 U.S. 218, 222 (1967) (“We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance.”).

59. *United States v. Ash*, 413 U.S. 300, 321 (1973).

60. *United States v. Crews*, 445 U.S. 463, 471 (1980) (Fourth Amendment violation can lead to suppression of out-of-court police-generated identification).

61. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The *Manson* standard addresses suggestivity but offsets that with an assessment of reliability:

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall*

It is the manner in which such identification procedures have been conducted that science has examined and questioned. The areas of concern are:

- The instructions given before or at a line-up;⁶²
- Whether the line-up is a “blind” one, i.e., one where the detective conducting the process is unaware of which person is the suspect, and can therefore avoid inadvertently indicating this to the witness(es);⁶³
- Whether the line-up is “simultaneous” or “sequential;” and
- What the witness is told after an identification is made.⁶⁴

confrontations. The factors to be considered are set out in *Biggers* 409 U.S. at 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

62. NATIONAL INSTITUTE OF JUSTICE, *EYEWITNESS EVIDENCE: A TRAINER’S MANUAL FOR LAW ENFORCEMENT* (2005), http://www.ncjrs.org/nij/eyewitness/eyewitness_id.html. The concern with instructions is that the language used may point the witness toward a particular suspect or encourage the assumption that the perpetrator is, indeed, in the line-up. When language suggests that the perpetrator is among the persons being displayed, the risk of a false or mistaken identification is increased. CUTLER & PENROD, *supra* note 8, at 122. (“The research shows that biased instructions substantially increase the likelihood of false identifications.”). To avoid this, the National Institute of Justice’s Guidelines on Identification suggest the following advisories be given:

- Advise the witness that he or she will be asked to view a group of individuals.
- Advise the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
- Advise the witness that individuals present in the lineup may not appear exactly as they did on the date of the incident, as features such as head and facial hair are subject to change.
- Advise the witness that the person who committed the crime may or may not be present in the group of individuals.
- Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.

63. Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36 (2003), available at <http://www.abanet.org/crimjust/spring2003/eyewitness.html> (“The rationale for this procedure is that blind presentation will eliminate the possibility that police officers administering identification procedures can wittingly or unwittingly communicate something to a witness about which member of an identification parade is the suspect.”).

64. The concern here is that of inflating the eyewitness’ confidence, a particular problem, because jurors weigh as significant a testifying witness’ expression of the confidence (level of certainty) in his or her own identification when determining guilt. Neil Brewer & Anne Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments*, 26 L. & HUM. BEHAV. 353, 353 (2002). Where feedback is given, deliberately or inadvertently (and even non-verbally), that suggests the witness picked the “right” person, the confidence is in fact inflated, thus potentially increasing the likelihood of a jury verdict based upon improper or

Of these four areas, that involving the sequential line-up is the most controversial. The sequential line-up (or photo display) is one where the witness views each person in isolation, rather than observing a several person line-up or photo display at once.⁶⁵ The theoretical basis for the sequential procedure is to avoid “relative judgment,” the process by which a witness judges the multiple persons to see (and potentially select) who most closely resembles the witness’ memory of the perpetrator.⁶⁶ In a sequential line-up or photo array, the witness compares each individual (shown alone) to the witness’ memory of the perpetrator without the interference of the relative comparison to others in the line-up.⁶⁷

What is the controversy? A meta-study of the research on sequential line-ups demonstrates a significant reduction in false identifications when this process is used.⁶⁸ However, the sequential line-up also results in fewer *correct* identifications than does the simultaneous line-up.⁶⁹ This means the sequential

unreliable factors. Carolyn Semmler, Neil Brewer & Gary L. Wells, *Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification Confidence*, 89 J. APPLIED PSYCHOL. 334, 334 (2004).

65. Nancy Steblay, Jennifer Dysart, Solomon Fulero & R. C. L. Lindsay, *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 L. & HUM. BEHAV. 459, 459 (2001). For differing views of the psychological underpinnings of this technique, see Scott D. Gronlund, *Sequential lineups: Shift in Criterion or Decision Strategy*, 89 J. APPLIED PSYCHOL. 362 (2004); Ebbe B. Ebbesen & Heather D. Flowe, *Simultaneous v. Sequential Lineups: What Do We Really Know?*, <http://www-psy.ucsd.edu/~ebbesen/SimSeq.htm> (last visited Feb. 21, 2006).

66. Steblay et al., *supra* note 65, at 459-60.

67. *Id.* at 460.

68. *Id.* at 464. More recently, one study calls this into question. REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Report.pdf. The study of actual lineups concluded:

The Illinois data did not bear out the research experiments that sequential double-blind lineups produce a lower rate of known false identifications . . . The Illinois data showed that the sequential, double-blind lineups, when compared with the simultaneous method, produced a higher rate of known false picks and a lower rate of “suspect picks.”

Steblay et al., *supra* note 65, at iv-v. The Report has been criticized by Professor Wells: “It does not permit clear conclusions is because the simultaneous lineups never used the double-blind procedure whereas the sequential lineups always used the double-blind procedure.”

Wells, 4/6/2006 Comments on the Illinois Report, http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Pilot_Program_on_Sequential_Double-Blind_Identification_Procedures_reactions.pdf.

69. *Id.* As Professor Wells has summarized the results:

Correct identification rates of the culprit when the culprit is in the lineup are 50% for the simultaneous and 35% for the sequential. So, the sequential yields only 70% of the “hits” that the simultaneous does . . . Mistaken identification of an

line-up may actually generate an increased “false rejection” rate, the failure to identify an actual perpetrator (who would have been identified had the simultaneous procedure been in place).

Here, in sum, the trade-off represents a public policy choice—if the meta-study conclusions hold up, is it better to catch more criminals but risk a greater number of mistaken identification convictions? Professor Wells’ analysis bears consideration here:

[I]t should be noted that the odds of an identification of the suspect being accurate are approximately doubled by the use of the sequential lineup in spite of some loss of accurate identifications. In addition, it seems clear that policy makers should not favor a particular method of conducting lineups merely because it yields more hits. Consider, for instance, a method in which witnesses who claim that they do not recognize anyone are told to guess instead. This guessing method would yield more hits than would a method that discouraged guessing, but surely policy makers would not want such a method used.⁷⁰

2. The States’ Responses

Delaware: Delaware has no reported decisional law, and no institutionalized practice⁷¹ for regulating line-ups using any of these criteria.

Pennsylvania: Similarly, Pennsylvania has neither decisional law nor legislation governing identification processes at lineups and photo arrays. To date, one appellate court ruling has declined to consider whether a trial judge has the authority to order a sequential lineup.⁷²

innocent “stand in” for the culprit is 27% for the simultaneous and 9% for the sequential. So, the sequential yields only 33% of the “false alarms” that the simultaneous yields.

Gary L. Wells, *Does the Sequential Lineup Reduce Accurate Identifications in Addition to Reducing Mistaken Identifications? Yes, but...*, <http://www.psychology.iastate.edu/faculty/gwells/SequentialNotesonlossofhits.htm> (last visited Feb. 21, 2006).

70. Wells, *supra* note 68.

71. The jurisdictions which do have institutionalized pre-trial identification procedures include New Jersey; most of North Carolina; Santa Clara County, Calif.; Suffolk county in Massachusetts, which includes Boston; and parts of Hennepin County, Minn., including Minneapolis. Scott Ehlers, *Eyewitness Identification: State Law Reform*, 29 CHAMPION 34, 36 note 1 (2005). States with pending legislation to consider or adopt such practices are Hawaii, Massachusetts, Maryland, Missouri, New York, Rhode Island, and Virginia. *Id.* at 35-6. In 2005, the Wisconsin Department of Justice issued eyewitness identification recommendations. State of Wisconsin, Office of the Attorney General, Model Policy and Procedure for Eyewitness Identification, (2005), <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>. Virginia has passed legislation requiring police agencies to adopt written guidelines for identification procedures. VA. CODE ANN. § 19.2-390.02 (2005) (“The Department of State Police and each local police department and sheriff’s office shall establish a written policy and procedure for conducting in-person and photographic lineups.”).

72. *Commonwealth v. Montgomery*, 799 A.2d 149, 155 (Pa. Super. Ct. 2002) (declining to consider the merits because the issue, raised on pre-trial appeal, was subject to dismissal under the “collateral order” doctrine). The *Montgomery* court described the defense efforts as “commendably seek[ing] to effectuate changes in the criminal justice system by

Pennsylvania does provide a remedy if a line-up has not been held in a case where one should have been conducted.⁷³ The jury is to be instructed that the accused “had been denied the opportunity for a more objective identification and for that reason the subsequent less reliable identification could be viewed with caution.”⁷⁴

New Jersey: Through guidelines promulgated by its Attorney General, New Jersey has mandated state-wide implementation of “blind,” “sequential” identification procedures whenever practical:⁷⁵

A. In order to ensure that inadvertent verbal cues or body language do not impact on a witness, whenever practical, considering the time of day, day of the week, and other personnel conditions within the agency or department, the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case. The Attorney General recognizes that in many departments, depending upon the size and other assignments of personnel, this may be impossible in a given case. In those cases where the primary investigating officer conducts the photo or live lineup identification procedure, he or she should be careful to avoid inadvertent signaling to the witness of the “correct” response

requesting that line-up procedures be modified to reflect the NIJ’s recent findings regarding eyewitness identification.” *Id.*

The response of other courts nationally, on whether to order (and whether they have the authority to order) a specific line-up procedure has been mixed. In *re* Thomas, 733 N.Y.S.2d 591 (N.Y. Sup. Ct. 2001), a trial court ordered a lineup to be held sequentially and “double-blind” even after noting that a simultaneous lineup was constitutional, concluding that it had the discretionary authority to order these conditions. In *People v. Wilson*, 741 N.Y.S.2d 831 (N.Y. Sup. Ct. 2002), the trial court denied a request for a sequential lineup, relying on concerns of a slight decrease in positive identifications with that procedure, but did order that the simultaneous lineup be conducted “double-blind.” More recently, another New York court declined to order either condition, emphasizing that it should play no role in the management of the prosecutorial function and instead redress constitutional error (if any) at a suppression hearing. *People v. Aspinall*, 756 N.Y.S.2d 397, 398 (N.Y. Sup. Ct. 2003); *Cf. State v. Osborn*, No. 5-214/04-0546, 2005 Iowa App. LEXIS 464, at *6, *9 (Iowa Ct. App. June 15, 2005) (noting the heightened reliability of sequential photo displays but holding a simultaneous display to be constitutional); *State v. Shomberg*, No. 04-0630-CR, 2004 WL 2964646, at *1 (Wis. Ct. App. Dec. 23, 2004) (holding the exclusion of expert testimony on the superiority of sequential lineups over simultaneous lineups to be harmless error). *See generally* Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507 (2001-2002).

73. *Commonwealth v. Sexton*, 400 A.2d 1289, 1292 (Pa. 1979). In *Sexton*, the Court found the need for a line up, because the victim “had no knowledge of [Sexton] before the incident, observed the culprit briefly before and during the crime, had no contact with [Sexton] between the arrest and the certification hearing, and had not been presented with an opportunity of a photographic identification.” *Id.*

74. *Id.* at 1293.

75. Office of the Attorney General, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures and Opening Memo (2001), <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

B. The witness should be instructed prior to the photo or live lineup identification procedure that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification.

C. When possible, photo or live lineup identification procedures should be conducted sequentially, *i.e.*, showing one photo or one person at a time to the witness, rather than simultaneously.⁷⁶

To ensure that investigators do not artificially inflate a witness' confidence in his/her identification, the Guidelines require "[i]f an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty."⁷⁷ The Guidelines also contain procedures for conducting simultaneous displays when the sequential process cannot be used.⁷⁸

B. Standards for Suppressing Pre-trial Identifications

1. The Law and Research:

The federal constitutional standard for admitting testimony concerning a suggestive out-of-court identification is well-settled. Suggestivity itself does not preclude admission; rather, any potential corrupting effect of the suggestive procedure must be weighed against,

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.⁷⁹

This test emerged from one that initially focused on suggestiveness. As explained by the Wisconsin Supreme Court, "the test for showups evolved from an inquiry into unnecessary suggestiveness to an inquiry of impermissible suggestiveness, while forgiving impermissible suggestiveness if the identification could be said to be reliable."⁸⁰ The problem is that the standard is a-scientific. As explained by Professor Wells,

suggestive identification procedures, even seemingly subtle ones, can be very powerful direct contributors to mistaken identification. [Additionally], four of the five criteria for assessing accuracy in the second prong of the Manson test

76. *Sexton*, 400 A.2d at 1293.

77. *Id.*

78. *Id.*

79. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *See also* *Manson v. Braithwaite*, 432 U.S. 90, 114-15 (1977).

80. *State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005).

are self-reports that can actually be distorted by the suggestive procedures present in the first prong of the Manson test.⁸¹

Part of Wells' concern arises from the fact that the *Manson* criteria are based on the eyewitness' self-reporting and subject to great distortion. Studies confirm that eyewitnesses overestimate an event's duration, particularly when stress is elevated;⁸² and that "the empirical evidence does not show a close correspondence between the description given by the eyewitness and the likelihood that the identification is accurate."⁸³

To date, two courts have rejected this standard precisely because of its incompatibility with the now well-developed science of perception and memory. In *State v. DuBose*,⁸⁴ the Wisconsin Supreme Court returned to the suggestivity standard for determining the admissibility of show-up identifications:

we recognize that our current approach to eyewitness identification has significant flaws . . . Studies have now shown that approach is unsound, since it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable . . . Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness.⁸⁵

The court concluded by ordering that suggestive out-of-court identifications would be suppressed unless the use of such procedures was "necessary," and any subsequent in-court identification would be admissible "if that identification is based on an independent source."⁸⁶ Similar reasoning drove the Utah Supreme Court to reject the federal standard.⁸⁷

81. Gary L. Wells, *What is Wrong with the Manson v. Braithwaite Test of Eyewitness Identification Accuracy?* 3, <http://www.psychology.iastate.edu/faculty/gwells/Mansonproblem.pdf> (last visited Feb. 21, 2006).

82. *Id.* at 7. Major Thomas J. Feeney, *Expert Psychological Testimony on Credibility Issues*, 115 MIL. L. REV. 121, 145 n.154 (1987) (emphasizing observer overestimation of an event's duration and reporting one study where the overestimation was by a factor of three).

83. Wells, *supra* note 81, at 7-8. Two other states rejected the *Manson* standard without reliance on the scientific studies, focusing instead on the need to adhere to the suggestiveness test. *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260 (Mass. 1995); *People v. Adams*, 53 N.Y.2d 241 (N.Y. 1981).

84. *Dubose*, 699 N.W.2d at 582. Connecticut considered but rejected this stance in *State v. Ledbetter*, 881 A.2d 290, 307 (Conn. 2005).

85. *Dubose*, 699 N.W.2d at 592.

86. *Id.* at 596.

87. *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991).

2. The States' Responses

Delaware: Delaware adheres to the federal constitutional standard.⁸⁸

New Jersey: New Jersey adheres to the federal constitutional standard.⁸⁹

Pennsylvania: Pennsylvania adheres to the federal constitutional standard.⁹⁰

C. *The Use of Expert Testimony at Trial*

1. The Law and Research

As developed above,⁹¹ the use of experts to educate jurors regarding the psychology of perception, memory, and recall has gained substantial acceptance nationally. Of particular importance is testimony about weapons focus,⁹² the lack of a correlation between confidence and accuracy,⁹³ the difficulties inhering in cross-racial identifications,⁹⁴ and the impact of stress on diminishing eyewitness accuracy.⁹⁵ The issue of stress as a significant factor in eyewitness accuracy received a substantial boost in the research on publication of Morgan et al's work.⁹⁶ Morgan and colleagues studied 530 active duty military personnel enrolled in a military survival training program and who were tested on their ability to identify their interrogators who used either high-stress or low-stress techniques. In either photo displays or lineups conducted twenty-four hours after the interrogations, high-stress interrogations produced

88. *Richardson v. State*, 673 A.2d 144 (Del. 1996). See *Hickman v. State*, No. 455, 2003, 2004 Del. LEXIS 146, at *4-5 (Del. March 24, 2004).

89. *State v. Ruffin*, 853 A.2d 311, 328 (N.J. Super. Ct. 2004). If the photographic array shown to the witness has not been preserved, that may effect the weight to be given to identification testimony or, in some cases, bar admission of the out-of-court identification. See *id.* at 325.

90. *Commonwealth v. Edwards*, 762 A.2d 382, 391 (Pa. Super. Ct. 2000).

91. See text at note 30, *supra*. The countervailing view that the science is not appropriate for expert testimony is detailed in note 43, *supra*.

92. See, e.g., *United States v. Mathis*, 264 F.3d 321, 338 (3d Cir. 2001) (recognizing the importance of such testimony even when the identifying witness is a police officer).

93. *Id.* at 337; *United States v. Stevens*, 935 F.2d 1380, 1400 (3d Cir. 1991) (approving testimony of the low correlation “[t]o rebut the natural assumption that such a strong expression of confidence indicates an unusually reliable identification”); *Burton*, 1998 U.S. Dist. LEXIS 18730, at *57 (approving testimony by Dr. Wells “regarding the relation between the level of confidence with which the eyewitness proclaims her identification and the accuracy of the identification”).

94. *United States v. Norwood*, 939 F. Supp. 1132, 1137 (D.N.J. 1996) (collecting cases admitting such evidence and approving admission because such testimony would be “helpful” to the jury); *but see United States v. Lester*, 254 F. Supp. 2d 602, 613-14 (E.D. Va. 2003) (excluding such testimony as proffered because of a substantial risk of juror confusion).

95. *Lester*, 245 F. Supp. 2d at 614; *but see United States v. Nguyen*, 793 F. Supp. 497, 520 (D.N.J. 1992) (excluding such testimony because of the lack of proof that the particular witness was under stress and the resulting lack of “fit” between the expert testimony and the facts of the case).

96. C. A. Morgan, G. Hazlett, A. Doran, S. Garrett, G. Hoyt, P. Thomas, M. Baranoski & S. M. Southwick, *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J. PSYCHIATRY & L. 265 (2004).

accurate identification rates less than half the time of the low-stress interrogations; perhaps more significantly, the rate of mistaken identifications nearly doubled in the high-stress cases.

The question of admitting expert testimony turns not only on the state of the science and its “fit” in the particular case, but whether such testimony will be “helpful” to the finders of fact.⁹⁷ The persistence of misperceptions about eyewitness accuracy has been documented,⁹⁸ and shows the need for expert testimony in these cases. In *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia*,⁹⁹ the need for systematic studies of what jurors actually know about perception, memory and the process of identification has been acknowledged. Professor Loftus and two colleagues documented the following:

How Memory Works: 66% of the survey respondents “thought the statement ‘I never forget a face’ applied ‘very well’ or ‘fairly well’ to them.”¹⁰⁰

Weapons Focus: 37% thought the presence of a weapon makes a witness’ memory *more* reliable, while 33% either thought there would be no effect or were uncertain as to the impact.¹⁰¹

Stress: 39% thought violence in a crime *enhanced* reliability, and 33% either found this to be a neutral factor or were uncertain of its impact.¹⁰²

Witness: Estimates of Time: While 40% of the respondents assumed that witnesses were accurate when estimating time or were uncertain on this issue, nearly 25% believed that witnesses actually *underestimate* the amount of time an event involved.¹⁰³

97. See, e.g., FED. R. EVID. 702 (providing for the admission of testimony if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.”).

98. See, e.g., CUTLER & PENROD, *supra* note 8, at 195 (surveying numerous studies and concluding that jurors “over-believe” eyewitnesses, over-rely on witness statements of confidence, and are not attuned to those factors besides confidence that are “arguably better predictors of witness accuracy”).

99. Elizabeth F. Loftus, Timothy P. O’Toole, Catharine F. Easterly, *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia*, <http://www.pdsdc.org/SpecialLitigation/SLDSystemResources/Article%20by%20Dr.%20Elizabeth%20Loftus%20and%20Tim%20O%27Toole.pdf> (last visited Feb. 22, 2006). But see Jeremy C. Bucci, *Revisiting Expert Testimony on the Reliability of Eyewitness Identification: A Call for a Determination of Whether it Offers Common Knowledge*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2002).

100. Loftus et al., *supra* note 99, at 6.

101. *Id.* at 8.

102. *Id.* at 9.

103. *Id.* at 11.

Confidence: Only 17% of the respondents were aware of the lack of correlation between a witness' stated confidence and the accuracy of his/her identification.¹⁰⁴

Cross-Racial Identifications: 48% of those surveyed believed there was no difference in reliability between same-race and cross-racial identifications.¹⁰⁵

Further data showed the respondents' unfamiliarity with the potential suggestivity in show-up and line-up procedures.¹⁰⁶

2. The States' Response

Delaware: Delaware admits such testimony, including testimony regarding confidence, stress levels, cross-racial identification, and weapons focus.¹⁰⁷

New Jersey: New Jersey has approved the admission of such testimony, upon a proper showing of scientific reliability and "fit," since 1989.¹⁰⁸

Pennsylvania: Pennsylvania bans all expert testimony regarding identification and eyewitnesses.¹⁰⁹ The stated rationale is that the expert is commenting on witness credibility, a consideration that is the exclusive province of jurors.¹¹⁰ The Pennsylvania Supreme Court made no analysis of juror knowledge and simply assumed the efficacy of cross-examination.¹¹¹

104. Loftus et al., *supra* note 99, at 13.

105. *Id.* at 15.

106. *Id.* at 15-20

107. *Garden v. State*, 815 A.2d 327, 338-39 (Del. 2003) (finding an abuse of discretion in excluding expert testimony on the relationship between accuracy and confidence, but finding any such exclusion to be harmless error in light of other admitted expert testimony); *cf.*, *Walls v. State*, 571 A.2d 788 (Del. 1990) (finding no abuse in denying funds for an eyewitness identification expert but also noting that "defendant has made no persuasive showing that through cross examination and argument to the jury he could not adequately address matters of human perception and memory").

108. *State v. Gunter*, 554 A.2d 1356, 1363 (N.J. Super. Ct. App. Div. 1989). *See, e.g.*, *State v. Grant*, 604 A.2d 147 (N.J. Super. Ct. App. Div. 1992) (discussing trial testimony of eyewitness expert); *but see State v. Long*, 575 A.2d 435, 463 (N.J. 1990) (affirming the exclusion of expert testimony where it was not shown to be helpful to the jury, there was ample cross-examination, and the defense failed to demonstrate that the issues were beyond the typical juror's understanding).

109. *Commonwealth v. Simmons*, 662 A.2d 621, 630-31 (Pa. 1995).

110. *Id.* at 631.

111. *Id.* ("Moreover, appellant was free to and did attack the witnesses' credibility and point out inconsistencies of all the eyewitnesses at trial through cross-examination and in his closing argument.")

This insistence on the efficacy of cross-examination is inapposite when the witness being cross-examined is not the hostile, biased witness but instead the mistaken but sincere one. In such instances, the typical tools of cross-examination—impeachment by proof of bias, dishonest character, and prior inconsistent statement—are simply unavailable. Research has confirmed that "cross examination fails to uncover differences between eyewitnesses who have made accurate identifications and eyewitnesses who have made mistaken identifications..." Wells, *supra*, note 81, at 6. As well, cross-examination cannot establish the phenomenon (a subconscious one) of "weapons focus;" prove the problem of cross-racial identification; or show the lack of a relationship between confidence and accuracy. CUTLER & PENROD, *supra*

*D. Cross-Racial Identification*¹¹²

1. The Law and Research

The perception that race “counts” in making accurate identifications has been tacitly acknowledged by the United States Supreme Court.¹¹³ Psychological research has persuasively demonstrated a heightened risk of mistaken identifications when the victim or witness and the perpetrator are of different races.¹¹⁴ A compounding problem is that the limited social science studying popular belief shows that a significant portion of the public is unaware of or rejects this proposition.¹¹⁵

The judicial response nationally to this issue has been mixed. Several states have approved of defense closing argument that emphasizes the problems

note 8, at 209 (“the effectiveness of cross-examination as a safeguard is still questionable in light of the lack of juror sensitivity to factors that are known to be diagnostic of eyewitness reliability.”).

112. Although this issue arises in the context of both the admissibility and scope of expert testimony and the content of jury instructions, it is addressed here separately, as it also implicates jury selection, opening statements and closing argument practices, and is an area developing its own jurisprudence.

113. “Glover himself was a Negro and unlikely to perceive only general features of ‘hundreds of Hartford black males.’” *Manson & Braithwaite*, 432 U.S. 98, 115 (1977).

114. See generally 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 (2001). See also Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 280-81 (2003) (“the evidence is now quite clear that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group.”); Otto H. MacLin, M. Kimberly MacLin & Roy S. Malpass, *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCHOL., PUB. POL’Y & L. 134, 135 (2001); Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Identifications*, 78 N.Y.U. L. REV. 1821 (2003).

In *State v. Cromedy*, 727 A.2d 457, 461-462 (N.J. 1999), the New Jersey Supreme Court surveyed the literature available to that date and maintained that the science was not conclusive but that it did reflect a substantial risk of such mis-identifications, especially in identifications made by caucasian witnesses of African-American suspects. A more recent decision concluded that “there is a strong consensus among researchers conducting both laboratory and field studies on cross-racial identification that some witnesses are more likely to misidentify members of other races than their own. *Smith v. State*, 880 A.2d 288, 296 (Md. 2005).

115. A survey of approximately 1,000 potential jurors in the District of Columbia showed that “[o]ver 55 percent of potential jurors questioned . . . mistakenly thought that cross-racial identifications are as reliable or more reliable as same-race identifications when given a concrete scenario.” Timothy P. O’Toole et al., *District of Columbia Public Defender Survey: What Do Jurors Understand About Eyewitness Reliability? Survey Says...*, 29 CHAMPION 28, 31 (2005). As two justices of the Massachusetts Supreme Court concluded, the unreliability of cross-racial identification is a subject “beyond the ordinary experience and knowledge of the average juror.” *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 344 (Mass. 2004) (Cordy, J., concurring).

inherent in cross-racial identifications.¹¹⁶ As to the right to a jury instruction on the potential problems inherent in cross-racial identification cases, there is no consensus, with several courts approving of such instructions¹¹⁷ and others rejecting their use outright or approving them only in limited circumstances.¹¹⁸

The response of the three states under study has been wildly divergent—from silent to tacit acknowledgment of the problem to a full remedial response.

2. The States' Responses

Delaware: As noted above,¹¹⁹ Delaware permits expert testimony on the problems inherent in cross-racial identification cases. There is no jury instruction on this issue, and no decisional law discusses whether counsel may include this in a closing argument in the absence of expert testimony.

New Jersey: After an extensive review of scientific studies, national decisional law, and a report by a court-appointed commission, the New Jersey Supreme Court concluded in 1999 that “[a] cross-racial instruction should be given only when . . . identification is a critical issue in the case, and an eyewitness’s cross-racial identification is not corroborated by other evidence

116. *Smith*, 880 A.2d at 300 (conferring a limited right, depending on the facts of the particular case, for defense counsel to argue the frailties of cross-racial identification); *People v. Carrieri*, 777 N.Y.S.2d 627, 629 (N.Y. Sup. Ct. 2004); *State v. Wiggins*, 813 A.2d 1056, 1059 (Conn. App. Ct. 2003) (“closing argument may be employed to demonstrate the problems that might arise as a result of cross-racial identification”); *People v. Sanders*, 905 P.2d 420, 436 (Cal. 1995); *State v. Cunningham*, 863 S.W.2d 914, 923 (Mo. Ct. App. 1993) (noting that counsel may discuss the problems with cross-racial identification in closing argument); *State v. Patterson*, 405 S.E.2d 200, 207 (N.C. Ct. App. 1991).

117. *Cromedy*, 727 A.2d at 464. As the New Jersey Supreme Court summarized:

Omission of such a cautionary instruction has been held to be prejudicial error where identification is the critical or central issue in the case, there is no corroborating evidence, and the circumstances of the case raise doubts concerning the reliability of the identification. *See United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990) (calling for cross-racial identification instruction when requested by counsel and when cross-racial identification is a “primary issue”); *People v. Wright*, 45 Cal.3d 1126, 248 Cal.Rptr. 600, 755 P.2d 1049 (1988); *People v. West*, 139 Cal.App.3d 606, 189 Cal.Rptr. 36, 38-39 (1983); *Commonwealth v. Hyatt*, 419 Mass. 815, 647 N.E.2d 1168 (1995); *State v. Long*, 721 P.2d 483 (Utah 1986).

118. *Lenoir v. State*, 72 S.W.3d 899, 905 (Ark. Ct. App. 2002) (due process not violated by court’s refusal to give cross-racial instruction); *Wiggins*, 813 A.2d at 1058-59 (finding no abuse of discretion in denying such an instruction but noting that “trial courts may, in the proper exercise of discretion, weigh the unique facts of a particular case in relation to an appropriate charge and conclude that an instruction on cross-racial identification is appropriate”); *Miller v. State*, 759 N.E.2d 680 (Ind. Ct. App. 2001) (court properly refused to give jury instruction on cross-racial identification where requested instruction singled out eyewitnesses’ testimony).

119. *See supra* text accompanying note 107.

giving it independent reliability.”¹²⁰ The jury charge developed as a result of *Cromedy* provides as follows:

The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness' original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.¹²¹

Pennsylvania: As noted above,¹²² Pennsylvania bars all expert testimony on the potential problems with eyewitness identification evidence. The *Pennsylvania Suggested Standard Jury Instructions*¹²³ contain no proposed instruction on this point. No decisional law has addressed the permissibility of closing argument on this issue, although Pennsylvania law generally precludes argument on matters not of record.¹²⁴

E. *The Right to an Identification Jury Instruction*

1. The Law and Research

There is no constitutional requirement that a specific charge be given on the issue of identification,¹²⁵ and many courts have held that state law does not require such an instruction.¹²⁶ Nonetheless, several federal courts,¹²⁷ and

120. *Cromedy*, 727 A.2d at 467.

121. N.J.S.A. Identification: In-Court Identification Only, Non 2C Instructions, paragraph 8.

122. *See supra* text accompanying note 109.

123. STANDARD PENNSYLVANIA PRACTICE 2d.

124. *Commonwealth v. Smith*, 861 A.2d 892, 896 (Pa. 2004) (“It is axiomatic that a prosecutor is ‘limited to making comments based upon the evidence and fair deductions and inferences therefrom’”).

125. *United States v. Smith*, 41 F.3d 1565, 1568 (D.C. Cir. 1994) (lack of specific instruction on issue of eyewitness identification did not preclude defendant from full and fair presentation of defense, where court did charge that identity had to be proved beyond reasonable doubt); *United States v. Boyd*, 620 F.2d 129, 131-32 (6th Cir. 1980), *cert. denied*, 449 U.S. 855 (1980) (no right to identification instruction, which is left to discretion of court; and no need to give instruction except where there is chance of misidentification due to lack of corroboration); *United States v. Johnson*, 848 F.2d 904, 906 (8th Cir. 1988) (no specific identification instruction necessary where nothing points to unreliability of identification); 9TH CIR. CRIM. JURY INSTR. 4.14 (2003) (Committee on Jury Instructions recommends against giving an eyewitness jury instruction; instructions on witness credibility and the government burden to prove identity are sufficient).

126. *Hopson v. State*, 940 S.W.2d 479, 481 (Ark. 1997) (no special instruction in identification cases); *Campbell v. People*, 814 P.2d 1, 5 (Col. 1991) (no error to refuse request for special identification charge); *Weems v. State*, 491 S.E.2d 325, 327 (Ga. 1997) (no right to specific identification instruction); *State v. Vinge*, 916 P.2d 1210, 1217-18 (Haw. 1996) (no right to special identification instruction); *Hopkins v. State*, 582 N.E.2d 345, 353 (Ind. 1991) (no right

some state courts,¹²⁸ have developed instructions to be given in cases where there has been some challenge to the identification's validity, that require jurors to scrutinize identification evidence and treat it with caution. Among the circumstances that may give rise to such an instruction are the witness' limited opportunity to observe, a description at variance with the defendant's appearance, or a failure to positively identify the suspect at a photo display or lineup. In Massachusetts, a cautionary instruction is also required when there is no corroboration in a one-witness identification case.¹²⁹ Most recently, the Connecticut Supreme Court imposed a requirement that jurors receive a cautionary instruction where an identification procedure occurred but the witness was not advised that the perpetrator might *or might not* be in the line-up or array.¹³⁰

to special identification instruction); *State v. Hohle*, 510 N.W.2d 847, 849 (Iowa 1994) (no right to special identification instruction; generally credibility instruction will suffice); *State v. Hall*, 797 P.2d 183, 189-90 (Mont. 1990) (no right to special identification instruction); *State v. Dodd*, 412 S.E.2d 46, 49 (N.C. 1992) (no right to special identification instruction; credibility instruction is sufficient); *State v. Simmons*, 417 S.E.2d 92, 94 (S.C. 1992) (instruction that state has burden of proving identification beyond reasonable doubt is sufficient); *Satcher v. Commonwealth*, 421 S.E.2d 821, 843 (Va. 1992) (if jury is instructed on presumption of innocence and need for proof beyond reasonable doubt, no right to special identification instruction).

127. *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972); *United States v. Barber*, 442 F.2d 517, 528 (3rd Cir. 1971), *cert. denied*, 404 U.S. 958 (1971); 6TH CIR. PATTERN CRIM. JURY INSTR. §7.11 (2005), *available at* http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/chap7_14.pdf; 7TH CIR. PATTERN FED. JURY INSTR. § 3.08 (1998), *available at* <http://www.ca7.uscourts.gov/jury.pdf>; JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, SECTION 4.08, EYEWITNESS TESTIMONY (2000), *available at* <http://www.ca8.uscourts.gov/rules/criminal2000.pdf>; 11TH CIR. PATTERN JURY INSTR. (CRIM. CASES) § 3 (2003), *available at* <http://www.ca11.uscourts.gov/documents/jury/crimjury.pdf>.

128. *State v. Cerilli*, 610 A.2d 1130, 1136 (Conn. 1992) (right to cautionary instruction in cases where there are inconsistencies and defense is mistaken identification); *State v. Noriega*, 932 P.2d 940, 946 (Kan. 1997) (cautionary instruction should be given in cases where identification testimony is critical to prosecution case and there is serious question about reliability); *Gunning v. State*, 701 A.2d 374, 380-82 (Md. 1997) (cautionary instruction is generally left to discretion of trial court, but it is necessary in some cases); *Commonwealth v. Ashley*, 694 N.E.2d 862, 869 (Mass. 1998) (right to cautionary instruction on possibility of mistaken identification if facts support such claim); *Commonwealth v. Gibson*, 720 A.2d 473, 480 (Pa. 1998) (right to instruction where identification is not "positive and unequivocal"); *State v. Cribbs*, 967 S.W.2d 773, 779 (Tenn. 1998) (right to jury instruction whenever identification is a "material" issue); *State v. Maestas*, 984 P.2d 376, 380 (Utah 1999) (right to cautionary instruction in any case where identification is central issue); *State v. Waits*, 462 N.W.2d 206, 209 (Wis. 1990) (lower court determination of whether to give cautionary instruction is subject to abuse of discretion standard, but such instruction is appropriate in some identification cases).

129. *Commonwealth v. Monteiro*, 747 N.E.2d 721 (Mass. App. Ct. 2001).

130. *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005):

[U]nless there is no significant risk of misidentification, we direct the trial courts of this state to incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification, in those cases where: (1) the state has offered eyewitness identification evidence; (2) that evidence resulted from an identification

2. The States' Responses

Delaware: Delaware law requires only a general instruction on identification, one telling jurors that they must be satisfied "beyond a reasonable doubt that the defendant has been accurately identified" and that an acquittal is required "if there is any reasonable doubt about his identification."¹³¹ A defendant does not have the right to more specific language, *e.g.*, an instruction telling jurors to treat identification testimony with caution based on the circumstances of the offense or a suggestive identification procedure.¹³²

New Jersey: New Jersey requires an identification instruction whenever identification is a "key" issue, *i.e.*, when it is the "major . . . thrust of the defense,' . . . even when defendant's misidentification argument is 'thin.'"¹³³ The instruction must tell jurors that identification, like an element of the offense, must be proved beyond a reasonable doubt.¹³⁴ It is optional for the trial judge to give further information, but the suggested instructions do include the list of reliability factors derived from *Neil v. Biggers*¹³⁵ and *Manson v. Braithwaite*,¹³⁶ including, *inter alia*, the witness' opportunity to observe the criminal, the witness' degree of attention during the episode, and the witness' degree of certainty.¹³⁷ Although permitting the jurors to be told that a witness' confidence is an appropriate consideration, New Jersey law recognizes the unreliability of this factor.¹³⁸ As was noted above, New Jersey law mandates a cautionary instruction in cases of cross-racial identification.¹³⁹

procedure; and (3) the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure.

131. DELAWARE STANDARD JURY INSTRUCTION CR.JI.4F (1974). New jury instructions are in the process of being drafted but, as of February, 2006, have not been published.

132. *Stones v. State*, No. 61, 1995, 1996 LEXIS 123, at *7-8 (Del. Feb. 23, 1996); *Jackson v. State*, No. 335, 1992, 1994 LEXIS 222, at *7 (Del. June 30, 1994) ("Furthermore, special instructions on identification are not necessary, even if requested, where the instructions correctly state the law on identification.").

133. *State v. Cotto*, 865 A.2d 660, 665-66 (N.J. 2005) (internal citations omitted). The failure to give such an instruction will be plain error unless the state presents "overwhelming corroborative evidence" *Id.* at 666.

134. *Id.*; *see also* N.J.S.A. IDENTIFICATION: IN-COURT IDENTIFICATION ONLY, NON 2C INSTRUCTION ¶1; N.J.S.A. IDENTIFICATION: Out-Of-Court Identification Only, Non 2C Instructions, ¶1; N.J.S.A. IDENTIFICATION: In-Court and Out-Of-Court Identifications, Non 2C Instructions, ¶ 1.

135. 409 U.S. 188, 199-200 (1972).

136. 432 U.S. 98, 114-15 (1977).

137. N.J.S.A. IDENTIFICATION: In-Court Identification Only, Non 2C Instructions 1; N.J.S.A. IDENTIFICATION: Out-Of-Court Identification Only, Non 2C Instructions; N.J.S.A. IDENTIFICATION: In-Court and Out-Of-Court Identifications, Non 2C Instructions.

138. *State v. Madison*, 536 A.2d 254, 263 (N.J. 1988) ("a witness' feeling of confidence in the details of memory generally do not validly measure the accuracy of the

Pennsylvania: Pennsylvania has required a jury instruction in identification cases since 1954.¹⁴⁰ While listing cautionary factors a jury is to consider, such as an inability to clearly see the perpetrator, a “qualified” identification of the accused, or a prior failure to make an identification,¹⁴¹ the instruction does not require the statement that identification be proved beyond a reasonable doubt.¹⁴² Pennsylvania law also permits the jury to treat an identification without any of these factors as a statement of “fact.”¹⁴³ The cautionary instruction is required, however, only when one or more of the delineated factors is present.¹⁴⁴

IV. CONCLUSION

1. A “Scorecard” on Identification Practices

The above survey demonstrates, first, that none of the three states studied has procedures in place that fully acknowledge the science of perception, memory, and recall. Although New Jersey’s approach is the most comprehensive and far-reaching, especially with its guidelines for pre-trial identification procedures, it still adheres to the *Manson* standards for suppression issues and continues to instruct jurors to consider witness

recollection. In fact, witnesses frequently become more confident of the correctness of their memory over time while the actual memory trace is probably decaying.”) (internal quotation marks and citations omitted).

139. *State v. Cromedy*, 727 A.2d 457 (N.J. 1999).

140. *See Commonwealth v. Kloiber*, 106 A.2d 820, 826-27 (Pa. 1954).

141. *Id.* at 826.

142. *Id.* at 827. The most recent (2005) version of the *Pennsylvania Suggested Standard Jury Instructions*, Criminal, does include an instruction that identity must be proved beyond a reasonable doubt, but only for cases where any of the *Kloiber* cautionary factors is present. PROPOSED INSTRUCTION 4.07(b), PA. SSJI (Crim.). In a case where none of those factors appears, the proposed instruction omits the language discussing the requirement that identity be proved beyond a reasonable doubt. Proposed Instruction 4.07(a).

143. *Kloiber*, 106 A.2d at 826; *Commonwealth v. Sharpe*, 10 A.2d 120, 121 (Pa. Super. Ct. 1939). Sharpe explained that identifications by strangers are mere statements of “opinion.” *Id.* *Commonwealth v. Rollins*, 738 A.2d 435, 448 (Pa. 1999) (rejecting a challenge to use of this language). *The 2005 Pennsylvania Suggested Standard Jury Instructions*, Criminal, do not include this “fact” language. PROPOSED INSTRUCTIONS 4.07(a), 4.07(b).

The approval of the “fact” language, found in *Commonwealth v. Kloiber*, is particularly troubling as a case of selective quotation. *Kloiber* cites to *Commonwealth v. Sharpe*, 10 A.2d at 121, for this proposition, but *Sharpe* has a limiting factor that *Kloiber* omits: “*Where a witness has been acquainted with the subject of identification or has had the opportunity of observing him on prior occasions, his testimony as to identity may be treated as the statement of a fact.*” (emphasis added).

144. *Commonwealth v. Bormack*, 827 A.2d 503, 508 (Pa. Super. Ct. 2003) (fact that eyewitness claimed to have seen defendant once, post-crime, with facial hair when in fact defendant never had facial hair, does not entitle him to cautionary instruction); *Commonwealth v. Smith*, 495 A.2d 543, 548-49 (Pa. Super. Ct. 1985) (where rape victim initially told the police that she had not seen her attacker’s face but later maintained this was due to fear, no entitlement to cautionary identification instruction); *Commonwealth v. Desabetino*, 535 A.2d 169, 173 (Pa. Super. Ct. 1987) (where witness testified that “he was ‘75% to 80% sure’ that defendant was the man he saw,” no cautionary instruction required).

confidence, even as it permits expert testimony to the contrary. Delaware admits expert testimony to ensure that jurors have some knowledge of the potential weaknesses of identification testimony, but retains the *Manson* test and offers virtually no guidance in its jury instructions. Pennsylvania identification law has been in stasis for more than fifty years. The Commonwealth, which like Delaware has no guidelines for pre-trial identification procedures, precludes expert testimony and offers jurors no assessment tools for evaluating eyewitness testimony other than those developed in 1954, well before the science detailed in this article was developed.

2. Likely Areas of Litigation and Legislative Reform

With the national trend being the acknowledgment of both the problem of mistaken identifications and the need for incorporating the science into policy and practice, one can anticipate challenges in the following areas:

- In Pennsylvania, a renewed push for the admission of expert testimony or instructions that inform jurors of the science and explain the potential errors in identification testimony. This may arise in individual cases, with a predicate of surveys of public knowledge concerning the reliability of identification testimony to establish the need for such reforms.
- In all three states, challenges to the continued reliance on the *Manson* standards.
- In all three states, Due Process challenges to prosecutors' closing arguments that seek convictions based on contentions (*e.g.*, that the witness' identification must be accurate because of her expression of confidence) refuted by science.¹⁴⁵
- In all three states, challenges to exclude witness statements of confidence as unreliable and non-helpful "opinion" testimony.¹⁴⁶
- In Delaware, cautionary instructions for identification cases.
- In Delaware and Pennsylvania, a push for uniform guidelines for conducting pre-trial identification procedures.
- In all three states, proposals for additional jury instructions as science develops further knowledge about eyewitness perception and identification procedures.¹⁴⁷

145. The federal constitutional standard for a Due Process violation in closing argument, as pertinent to this claim, is whether the prosecutor made "knowing use of false evidence." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974) (citation omitted). Such claims are subject to a harmless error analysis. *Id.*

146. In *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005), the Georgia Supreme Court rejected a jury instruction telling jurors to weigh an eyewitness' stated confidence in determining the reliability of that witness' identification. The Georgia court surveyed both the scientific literature and decisional law to sustain its conclusion that such a correlation was unfounded and that its inclusion in a jury charge constituted harmful error. *Id.* at 769-71.

3. The Process of Reform

What will be the means of effectuating change in identification procedures and law? The litigation model is flawed—it occurs piecemeal, and most litigants lack the funds and resources for such a task, one requiring extensive assistance from and testimony by experts. As well, trial courts may feel hamstrung by appellate court decisions and preclude or hinder the development of an appropriate record. However, an effort by a public defender office or similar agency may be able to marshal the necessary resources.

Even if resources become available, the adversary process has a second flaw. The fight for reform occurs in the context of a trial, where the prosecution is seeking a conviction and thus less likely to want to weigh reforms, in particular reforms that might require suppression of evidence in a particular case.

The New Jersey model of Attorney General Guidelines cannot succeed in either Delaware or Pennsylvania, as in neither jurisdiction does the Attorney General have authority to regulate pre-trial procedures in individual police departments, of which Pennsylvania has more than 1,200.¹⁴⁸

What remains is a working group, one convened by the state legislature or the courts. The models exist, in particular the National Institute of Justice's Technical Working Group on Eyewitness Identification¹⁴⁹ and the New Jersey Supreme Court's task force on electronic recordation of interrogations, the Special Committee on Recordation of Custodial Interrogations.¹⁵⁰ This latter group was the indirect product of litigation—when the defendant in *State v.*

147. *See, e.g., State v. Ledbetter*, 881 A.2d 290, 318-19 (Conn. 2005). Connecticut has recently amended its required jury instructions to reflect scientific findings on suggestiveness in identification procedures:

[W]e direct the trial courts of this state to incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification, in those cases where: (1) the state has offered eyewitness identification evidence; (2) that evidence resulted from an identification procedure; and (3) the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure.

148. A. J. Panian, *Police chief looks for more communities to join department*, TRIBUNE-REVIEW, Dec. 4, 2004 (reporting that while most states average 300 to 400 police departments, Pennsylvania has more than 1,200).

The problem this decentralization creates is that reform procedures often are not made known to local authorities. *See, e.g., Bill Moushey & Nathan Crabbe, Most Local Police Unaware of Witness Guidelines*, PITTSBURGH POST-GAZETTE, May 9, 2005, at A1 (noting that many area police departments are unaware of the National Institute of Justice identification guidelines).

149. National Institute of Justice, Technical Working Group for Eyewitness Evidence: Training Teams, http://www.ncjrs.org/nij/eyewitness/tech_working_group.html (last visited Feb. 22, 2006). The story of “twgeyee” is told in DOYLE, TRUE WITNESS, *supra*, note 4 at 169.

150. <http://www.judiciary.state.nj.us/pressrel/pr050504b.htm>.

*Cook*¹⁵¹ challenged his confession because the interrogation process had not been recorded electronically, the court denied relief to the individual but directed the formation of a task force to examine the problem and recommend solutions.¹⁵² The task force's report is a model of collaboration across the constituent groups of the criminal justice system.¹⁵³

Delaware, New Jersey, and Pennsylvania are in an enviable position, able to reap the benefit of an accumulation of a century of scientific research and at least two decades of judicial, legislative, and executive experimentation nationwide. The data and experiences are available.

4. The Cost of Inaction

The problem of mistaken identifications is nothing new. More than a century ago, the Pennsylvania Supreme Court recognized as much:

There are few more difficult subjects with which the administration of justice has to deal [than the question of identity]. The carelessness or superficiality of observers, the rarity of powers of graphic description, and the different force with which peculiarities of form or color or expression strike different persons, make recognition or identification one of the least reliable of facts testified to even by actual witnesses who have seen the parties in question; and, where they have not, there is the added obstacle of the inadequacy of language to describe the minute variations of feature and color which go to make up the individual personality.¹⁵⁴

Institutionally, except in New Jersey, too little has been done to address these frailties. The experience of the Juan Covington case, and others like it,¹⁵⁵

151. 847 A.2d 530 (N.J. 2004).

152. The Court concluded that it needed "to evaluate fully the protections that electronic recordation affords to both the State and criminal defendants" and proceeded to "establish a committee to study and make recommendations on the use of electronic recordation of custodial interrogations." *Id.* at 562.

153. See SPECIAL COMM. ON RECORDATION OF CUSTODIAL INTERROGATIONS, REPORT OF THE SUPREME COURT SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS (2005), available at <http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf>. On October 14, 2005, the New Jersey Supreme Court adopted some of the Committee's recommendations. See N. J. CT. R. 3:17, available at <http://www.judiciary.state.nj.us/notices/reports/recordation.pdf>.

154. *In re Bryant's Estate*, 35 A. 571, 577 (Pa. 1896). An early documented case of mistaken identification in Pennsylvania is that of Andrew Toth, convicted in 1890, and exonerated years later only through the efforts of industrialist Andrew Carnegie. See John T. Rago, *The Shame of a Nation Thomas Doswell Became a Free Man Last Week After Being Wrongfully Imprisoned for 19 Years. Celebrate His New Life, Says John T. Rago, and Insist That Pennsylvania Enact Real Reforms to Prevent Future Miscarriages of Justice*, PITTSBURGH POST-GAZETTE, Aug. 7, 2005.

155. Thomas Doswell, a man with only a mustache, was convicted of the 1986 rape of a woman who described her attacker as having a full beard. The police photo array had Doswell's photo marked with an "R" because he had been a suspect in a previous rape. DNA

show that the problem of mistaken identification persists to this day. Current practices, especially in Pennsylvania and Delaware, do too little to prevent miscarriages of justice. Inaction will prove no cure.

exonerated him in 2005. Bill Moushey, *Wrongly Jailed for 20 Years, Man to Go Free. Father of 2 Will Finally Go Free After Wrongful Rape Conviction*, PITTSBURGH POST-GAZETTE, July 30, 2005, available at <http://www.post-gazette.com/pg/05211/546262.stm>. For additional instances of questionable identification practices, see Bill Moushey & Nathan Crabbe, *Questionable Identifications Sent 2 to Jail*, PITTSBURGH POST-GAZETTE, May 9, 2005, at A4 (documenting suggestive pre-trial identification procedures resulting in convictions).