

# “It Was Him!”: Nuts and Bolts of Handling Eyewitness Identification

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## I. Introduction

### A. Eyewitness Identification and Due Process

It is well established that due process applies to identification procedures because of the serious consequences connected with the identification of a suspect. *Stovall v Denno*, 388 US 293, 297; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). Further, positive identification by a witness may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 705; 617 NW 2d 381 (2000). The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. *United States v Wade*, 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

The case of Adolf Beck is an infamous example of wrongful conviction by mistaken identity, buttressed by unreliable methods of identification, erroneous eyewitness testimony, and a rush to convict the accused. It resulted in the creation of the English Court of Criminal Appeal in 1907<sup>1</sup>.

In sum, the shortcomings of eyewitness identification are not constrained by borders and they have sustained for centuries. Eyewitness misidentification enjoys the dubious distinction of being the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide. These materials aim to raise the basic awareness of problems in general with eyewitness identification and to comment on relevant areas.

### B. The Main Dictates

Pretrial identifications exist in three primary forms. These are the showup, lineup, and photographic identification. A showup consists of the accused being exhibited alone

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<sup>1</sup> A prostitute accused Beck of tricking her out of two watches and several rings. He was convicted and sent to prison. A similar incident occurred shortly upon his release. Fortunately, the judge postponed sentencing after the second trial. The case was solved 10 days later. John Smith was the true culprit; Beck was in South America when the crime occurred.

to the witness. In a lineup, the accused is placed with several people, and the witness is then tasked with identifying which person is the perpetrator. Photographic identification can be based on showing the witness several photos, or just one. The showup and lineup are the main focus of these materials. The term lineup is sometimes used loosely to describe live as well as photographic identifications.

To sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972). A few of the primary considerations are outlined here.

### 1. Lineups

As explained, lineups can be conducted in person or with a set of photos. Live lineups are sometimes called *corporeal lineups*, and photographic ones are often called *photo arrays*. The latter typically include six pictures. Hence the colloquialism, *six pack*. Arrays are the pictorial equivalent of a lineup. Doubtless, they are preferred over showing the witness a single photo and asking him or her to make an identification.

The right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings. *People v Hickman*, 470 Mich 602, 609; 684 NW 2d 267 (2004).

*Hickman* overruled *People v Anderson*, 389 Mich 155, 187; 205 NW 2d 461 (1973), which held that identification by photograph should not be used where the accused is in custody. Further, the right to counsel applied with equal force to photograph identification of an in-custody accused as it did to corporeal identification procedures. *Id.*

While portions of *Anderson* may not be good law, it is worth a read for anybody litigating a case involving an eyewitness identification. *Anderson* cites several experiments and its historical overview discusses the miscarriage of justice which happened to Adolf Beck. More importantly, the case provides a thorough explanation of the factors underlying the tension involved in eyewitness identification in criminal cases. Those factors follow.

- (1) The natural and usually necessary reliance on eyewitness identification of defendants by the police and prosecution;
- (2) The scientifically and judicially recognized fact that there are serious limitations on the reliability of eyewitness identification of defendants;
- (3) The scientifically and judicially recognized fact that frequently employed police and prosecution procedures often (and frequently unintentionally) mislead eyewitnesses into misidentification of the defendant; and

- (4) The historical and legal fact that a significant number of innocent people have been convicted of crimes that they did not commit and the real criminals were left at large.

Corporeal lineups have become less common since the abrogation of the right to counsel for suspects in photo arrays. The Supreme Court is not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required. *United States v Ash*, 413 US 300, 321; 93 S Ct 2568; 37 L Ed 2d 619 (1973).

## **2. Sincerely Wrong**

Witnesses can distort their own memories without the help of examiners, the police, or lawyers. Once witnesses state facts in a particular way or finger someone as a perpetrator, they are unwilling or even unable to reconsider their initial understanding. This is often the result of memory reconstruction.

## **3. Expert Testimony**

In certain cases, such testimony may not be necessary or even helpful. Given that the very act of forming a memory creates distortion, it might be impossible to uncover the truth behind a person's perceptions. Should you need one, be sure to engage the right type of expert early in your case.

# **II. Issues**

Despite its checkered history, the use of eyewitness identification will continue to be a basis for the issuance of criminal charges and prosecutions. A sampling of the attendant issues follows.

## **A. Human Factors**

### **1. Scientific Grounds**

Visibility can be affected by poor lighting and weather. Many studies have found that humans are poor at facial identification, even under good visibility. Additionally, the procedures used to obtain the identification may be biased.

### **2. A Few Studies**

- a. A 1982 study cited in Loftus and Doyle involved the demonstration of eyewitness testimony in a mock trial. The addition of an eyewitness raised the percentage of guilty verdicts from 18% to 72%. Even when the identification was impeached, the guilty rate was still a staggering 68%.
- b. Eyewitness identification is crucial in approximately 5% of all trials. (Lohl, 1981.) Still, a study of 500 wrongful convictions concluded that mistaken eyewitness identification occurred in 60% of the cases. (Huff, 1987.)

c. Cutler and Penrod's 1995 study on identifying strangers suggests that eyewitnesses are almost as likely to go wrong as be correct when identifying strangers.

### **3. Memory**

a. Low Resolution

Determine whether the witness actually viewed the face that he or she is identifying. A remembered face would not be as clear as one actually seen.

b. Constructed Memories

The police, newspapers, television, and even other witnesses are potential sources for missing information.

c. Perceptual Distortions

Small sizes and distances grow while larger ones shrink. Colors are often recalled as brighter.

d. Glance or Stare?

The amount of time that the witness spent looking at the accused is of paramount importance. This is especially true when the accused is a stranger or a member of a different race.

e. Weapon Focus

It is not unusual for a witness to a crime to focus his or her attention squarely on the weapon that a perpetrator is holding, rather than the face, thus leaving less attention for other pertinent details about the scene.

### **B. Cross Racial Identification**

#### **“The Other Race” Effect**

This refers to the greater difficulty that people have in distinguishing between members of a race other than their own. Be mindful of the fact that every person has eyes, a nose, and several other similar features. As such, only subtle aspects distinguish one person from another. It takes practice to fine tune the ability to do this effectively. Consider a sommelier's ability to distinguish wines versus that of an occasional wine drinker.

### **C. Police Lineups**

The Supreme Court has explained that the trial which might determine the accused's fate may well not be in the courtroom but that at the pretrial confrontation, with the state aligned against the accused, the witness as the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness – “that's the man.” *Moore v Illinois*, 434 US 220, 225; 98 S Ct 458; 54 L Ed 2d 424 (1977).

## **III. Motions**

In all its forms, eyewitness identification is subject to manipulation. Gone are the days when it was constitutional error to admit in-court identifications without first determining whether they arose from an independent source. The need for effective cross examination and cogent pretrial motions could not be more acute.

### **A. Challenging Identification Procedures**

Several easy-to-adopt procedures have been shown to provide safeguards against misidentification.

#### **1. Blind Administration**

The officer administering the lineup or array does not know who the suspect is. This prevents suggestive comments and unconscious gestures or vocal cues that could influence the witness. The “folder shuffle” can relieve manpower constraints for small agencies.

#### **2. Lineup or Array Composition**

“Fillers” should resemble the eyewitness’s description of the perpetrator. The suspect should also look like the fillers. Further, eyewitnesses should not view more than one identification procedure with the same suspect.

#### **3. Instructions**

The person viewing the lineup or array should be told that the perpetrator may or may not be in the lineup or array and that the investigation will continue irrespective of the procedure’s outcome. The witness should be told not to look to the administrator for help.

· “Which of the men” versus “are any of the men?”

#### **4. Confidence Statements**

Law enforcement should elicit and document a statement from an eyewitness articulating his or her level of confidence in the identification made.

#### **5. Recording**

Identification procedures should be videotaped and audiotaped whenever possible.

· Fourteen states have implemented these reforms through laws, court action, and policy directives. Jurisdictions like Baltimore, Boston, Minneapolis, Oklahoma City, Philadelphia, San Diego, San Francisco, and Tucson have made reform procedures part of their standard practice.

### **B. Motion for Jury View**

Consider filing a motion for the jury to view the scene of the alleged crime so that the jury may assess the witness’ ability to identify the perpetrator under the circumstances as closely as possible to those that occurred. Also consider whether a videotape of the scene may be helpful.

### **C. Enlisting Expert Help**

### **1. Why Do I Need One?**

Many factors that influence identification are subconscious or hard to identify. *People v Hill*, 84 Mich App 90, 94; 269 NW2d 492 (1978); thus, the process by which a person identifies another is not within the purview of the lay person.

### **2. My Client Can't Afford One**

An indigent defendant is entitled to the assistance of an expert witness to ensure his due process right to present a defense. US Const, amend V; US Const XIV; Const 1963, art 1, § 17; *Ake v Oklahoma*, 470 US 68, 76; 105 S Ct 1087; 84 L Ed 2d 53 (1985).

### **3. What Must I Prove?**

An indigent defendant must convince a court by using a multi-step test that an expert witness is warranted. *People v Tanner*, 469 Mich 437, 442-443; 671 NW 2d 728 (2003).

a. First, a defendant must demonstrate that there is a nexus between the facts of the case and the need for an expert. *Id.* at 443.

b. But the defendant must not show just a possibility of assistance; a defendant must show that the expert witness would likely benefit the defense. *Id.*

### **4. How Much Benefit is Enough?**

In this case, the government's DNA expert testified that the DNA evidence was "inconclusive" with respect to whether the accused had touched the gun, but the defendant's proposed expert witness could not altogether exclude him as a donor. *People v McDonald*, 303 Mich App 424, 435; 844 NW 2d 168 (2013). The court found that any presumed error was harmless, given the questionable beneficial impact of the expert's prospective testimony when contrasted with the overwhelming direct and circumstantial evidence of guilt. *Id.* at 436. It was thus not error to refuse the additional funding.

### **5. What if I Don't Ask for One?**

The Supreme Court has recognized that the threat of wrongful convictions is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses. *Hinton v Alabama*, \_ US \_; 134 S Ct 1081, 1090; 188 L Ed 2d 1 (2014). More recently, the Michigan Supreme Court held that defense counsel's failure to attempt to consult an expert with the scientific training to support the defendant's theory of the case, fell below an objective standard of reasonableness, thereby creating a reasonable probability that this error affected the outcome of the defendant's trial. *People v Ackley*, 497 Mich 381, 383; 870 NW 2d 858 (2015).

## **D. Standard of Review**

On review, a trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW 2d 528 (1993). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

### **E. Writ of Habeas Corpus**

This is a court order to a person or agency holding someone in custody to “produce the body” to the court issuing the order. Note that the individual seeking such relief must exhaust all state court options before he or she will be permitted to seek relief in federal courts. The process is a complicated and time consuming one.

#### **1. Antiterrorism and Effective Death Penalty Act**

The standard for reviewing state court determinations on a habeas petition is governed by the AEDPA, codified in 28 U.S.C. §§ 2241-2256 (1996). A federal court may not grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in a state court proceeding unless the adjudication of the claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .” *Id.* at (d)(1).

#### **2. Clear and Convincing Error**

The state court's application of Supreme Court legal principles must be objectively unreasonable, and not merely incorrect or erroneous. *Ramonez v. Berghuis*, 490 F.3d 482, 486 (6th Cir. 2007).

#### **3. *Ferensic v Birkett*, 501 F.3d 469 (6th Cir. 2007)**

Exclusion of the defense expert's testimony for failure to comply with the trial court's production order violated the petitioner's right to present a defense and such error was not harmless. *Id.* at 484. This opinion examines the right to present a defense at length. The importance of federalizing one's arguments cannot be overstated.

## **IV. Case Law**

### **A. United States Supreme Court Opinions**

#### **1. The Wade Trilogy**

These cases established that the denial of counsel to a defendant appearing in a pretrial identification was a violation of the Sixth Amendment right to counsel, and that suggestive identification procedures could also be violative of due process.

*United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). The *Wade Rules* were promulgated because of the established dangers of irreparable

misidentification coupled with the inability to accurately reconstruct what happens at corporal lineups. *Id.* at 230. Following this case, the accused in a federal prosecution was entitled to counsel at a pretrial lineup in order to protect the right to meaningfully cross examine an identifying witness at trial. *Id.* at 235. When a lineup was held without counsel, any subsequent in-court identification had to be preceded by an evidentiary hearing outside of the presence of the jury at which the prosecutor had to show by clear and convincing evidence that the in-court identification had a basis independent of the illegal line-up. *Id.* at 214.

*Gilbert v California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967). This post-indictment case expanded the rule above and held further that when the corporeal lineup was had without counsel, any direct evidence relating to prior, pretrial lineup identification was per se inadmissible. *Id.* at 273. Thus, *Wade*, which only required foundation for admissibility of identification evidence, was extended to separate class of ‘hearsay’ evidence to provide a per se exclusionary rule irrespective of adequate foundation. *Id.* If evidence was improperly admitted in violation of constitutional rights, any resulting conviction had to be reversed unless it was determined beyond a reasonable doubt that such evidence did not affect the verdict. *Id.* at 274.

*Stovall v Deno*, 388 US 293, 299; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). Here, the Court decided that *Wade* wasn’t retroactive, unless there was an independent ground of constitutional attack where the procedures used were so unnecessarily suggestive and conducive to irreparable mistaken identification that it amounted to denial of due process.

## **2. Erosion Begins**

*Simmons v United States*, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968). The principles of *Stovall* were applied to identification by photograph of an unapprehended suspect. *Id.* at 384. The Court noted that the right to counsel wasn’t raised but recognized the dangers in photographic identification. *Id.* at 383-384. Nevertheless, it was unwilling to prohibit altogether the initial identification of unapprehended suspects by photos, but would subject all such permissible photo identification to the *Stovall* standard of due process. *Id.* at 384. Hence, convictions based on eyewitness identification at trial following initial identification by photograph would be set aside on that ground only if the procedures used were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Id.* at 389.

*Kirby v Illinois*, 406 US 682, 690; 92 S Ct 1877; 32 L Ed 2d 411 (1972) first held that a suspect in a pre-indictment, as opposed to post-indictment, lineup did not yet enjoy the protection of the Sixth Amendment because such a suspect was not yet an “accused.” *United States v Ash*, 413 US 300, 321; 93 S Ct 2568; 37 L Ed 2d 619 (1973) announced that even a post-indictment exhibition of a photograph of a subject, either in a group picture or as part of an array of individual photos, was unlike standing the suspect in a live lineup, not a critical stage. Kirby

diminished the ranks of the “accused” and Ash diminished incidence of a “critical stage.”

The post-indictment lineup essentially disappeared from the world of criminal investigation following *Kirby* and *Ash*. Along with it went any significant exclusion of identification evidence based on the Sixth Amendment right to counsel. Creative law enforcement procedures effectively finessed the Sixth Amendment. *Wade* and *Gilbert* are has-beens.

### **3. What’s the Bottom Line?**

*Simmons* refined the due process test of *Stovall*. Evidence of an identification will not be excluded unless the identification procedure was so impermissibly suggestive as to give rise to a “very substantial likelihood” of irreparable misidentification. *Id.* at 384. The focus is trustworthiness of the evidence, rather than behavior of police, unless procedures produce unreliable evidence. *Id.* at 383-384. *Simmons* favors reliability because an eyewitness identification will only be excluded if there is a very substantial likelihood of misidentification. *Id.* at 384. Mere possibility will not suffice. Accordingly, evidence won’t be suppressed if a court deems it reliable notwithstanding improper antecedent procedures.

*Perry v New Hampshire*, 565 US \_\_; 132 S Ct 716, 729; 181 L Ed 2d 694 (2012) made it abundantly clear that the introduction of eyewitness testimony without preliminary judicial assessment of its reliability does not render a trial fundamentally unfair. Moreover, due process does not require preliminary judicial inquiry into the reliability of eyewitness identification that is not procured under unnecessarily suggestive circumstances arranged by law enforcement. *Id.*

### **4. Totality of Circumstances**

Reliability is the linchpin in determining admissibility for pre and post *Stovall* encounters. *Manson v Brathwaite*, 432 US 98, 114; 97 S Ct 2243; 53 L Ed 2d 140 (1977). The factors to be considered are listed in *Biggers*, 409 US at 199-200. They include the (a) opportunity of witness to view suspect at the time of the crime, (b) witness’s degree of attention, (c) accuracy of the witness’s prior description of suspect, (d) level of certainty demonstrated by the witness at the confrontation, and (e) length of time between the crime and the confrontation.

## **B. Federal Opinions**

The standard used in the federal system stems from *Brathwaite*. Again, this standard permits in-court testimony of a suggestive lineup if it is found to be reliable.

### **1. *United States v Shakur*, 560 F Supp 353 (SDNY 1983)**

The defendants moved for suppression of all pretrial and in-court identification testimony based on several improprieties, the most important of which was the use of allegedly phony beards on the fillers in the lineup. *Id.* at 357. The court was not inclined to examine the totality of

the lineup, the totality of the crime, or the influence effected. *Id.* Rather, it focused on whether the fake beards worn by the fillers in the lineup rendered the lineup unduly suggestive when a determination of which fillers were wearing false beards could not be made from an examination of a photo of the lineup. *Id.* The defendants' motion was denied. *Id.*

## **2. *United States v Smithers*, 212 F3d 306 (6th Cir. 2000)**

In this bank robbery prosecution, evidence against the defendant consisted chiefly of bank teller and customer eyewitness identifications. *Id.* at 308. The court found that expert testimony should be admitted when there is no other inculpatory evidence presented against the accused with the exception of a small number of eyewitness identifications. *Id.* at 317. Further, the expert testimony should have been analyzed pursuant to the guidelines mandated in *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 469 (1993). *Id.* at 313.

## **C. Michigan Opinions**

There are states which have expressly declined to follow *Brathwaite*. Even so, Michigan's rulings are more closely aligned with those from the federal system.

### **1. How Long is Too Long?**

In this case, a five-year delay in arresting the defendant did not violate his due process rights absent showing of actual and substantial prejudice. *People v Woolfolk*, 304 Mich App 450, 455; 848 NW 2d 169 (2014). Further, the use of a single photograph by which the witness identified the defendant as the shooter did not create a substantial likelihood of misidentification, and thus did not violate the defendant's due process rights. *Id.* at 458. Fortunately, the birthday rule under which a person attains a given age on the anniversary of his or her birth applied, such that the defendant was a juvenile when he shot victim one day prior to his 18th birthday, thus precluding imposition of a mandatory life-without-parole sentence pursuant to *Miller v Alabama*, 567 US \_\_; 132 S Ct 2455; 183 L Ed 2d 407 (2012). *Id.* at 506.

### **2. When Can I Start Defending?**

*People v Hickman*, 470 Mich 602, 611; 684 NW2d 267 (2004) adopted the analysis of *Moore*, and held that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings. To the extent that Anderson went beyond the constitutional text and extended the right to counsel to a time before the initiation of adversarial criminal proceedings, it was overruled. *Id.*

### **3. May I Challenge Pre-Charge Identification?**

Yes, identifications conducted before the initiation of adversarial judicial proceedings can still be challenged. *Hickman*, 470 Mich at 607.

#### **D. Cases from Other States**

Indubitably, states cannot provide individuals with fewer due process rights than those provided under the Constitution; however, individual states are permitted to provide greater protection. *Brathwaite*, 432 US at 128-129. In New York for example, court decisions have put greater pressure on the police to conduct fair lineups.

##### **1. *Wood v State*, 196 Md App 146; 7 A 3d 1115 (2010)**

The defense's motion for suppression of an in-court identification failed after the court concluded that a reliability determination is classic grist for the jury's mill, as a matter of fact, and not for a suppression hearing judge, as a matter of law. *Id.* at 162. Although the reliability of an extrajudicial identification may sometimes serve as a counterweight to overcome what might otherwise be the exclusion of evidence based on impermissibly suggestive investigative procedures, the unreliability itself is not a basis for excluding such evidence. *Id.*

##### **2. *State v Henderson*, 208 NJ 208; 27 A 3d 872 (2011)**

Courts have held that a jury instruction on cross-racial identification should be given whenever cross-racial identification is in issue at trial. *Id.* at 219. Moreover, the panel explained why current standards overstate the ability of jurors to evaluate evidence offered by eyewitnesses who honestly believe that their testimony is accurate. *Id.* This 66-page opinion is a repository of information related to proof of misidentifications, the scope of current scientific research, and even how memory works.

### **v. Cross Examination of the Eyewitness at Trial**

When claiming mistaken identify, the accused must often wait until trial to prove his or her innocence. Cross examination of the identifying witness is critical in these cases. This section is not intended to be exhaustive, but it presents a checklist for preparing and conducting an effective cross examination.

#### **A. What is Your Defense?**

In preparing for any trial, one of the first considerations should be formulation of a theory. This may seem elementary, but many litigators fail to articulate, to themselves even, the arguments they will later present to the jury. Everything that is done during the trial should support that theory.

#### **B. Ammunition**

### **1. Police Reports**

These are the single most useful source of information regarding a witness's initial description regarding the perpetrator of a crime. Further, notes taken during the course of the investigation could be very useful if you can get your hands on them.

### **2. Other Statement by Witness**

Another source of pretrial statements is interviews conducted by an investigator. Whenever practical, a private investigator retained by the defense should interview the witness before trial. Counsel should not interview the eyewitness without a third party present unless the situation cannot be avoided. The goal is to prevent counsel from having to testify at a hearing or trial about what he or she was told.

### **3. Traditional Credibility Attacks Consistent with Theory of Case**

Credibility is always a relevant issue when a witness takes the stand. Discovery requests, subpoenas, and your own investigation are just a few of the tools that one can use to obtain impeachment information. The *Biggers* factors discussed above should not be ignored.

### **4. There are Always Exceptions**

No strategy or questions works in every single case that you will try. For example, you might decide that it is appropriate to broach a topic that is not entirely consistent with your theory. The takeaway is to remain flexible and be in the moment throughout trial. Trust your gut.

### **5. High Card Evidence**

Irrefutable truths, the crime scene, and alibi corroboration have been called high card evidence. Depending on your facts, irrefutable truths from sources like weather reports and even calendars could prove useful. Always visit your crime scene. There is often no better way to determine whether there were obstructions to a witness's opportunity to observe without first attempting to make the same observation. Prison records, employment records, and visitor's logs are examples of evidence that can often be dispositive regarding an alibi.

### **6. Effect of the Incident**

Consider the mental state of the witness at the time of the alleged crime. Fear, panic, and anxiety increase the likelihood of error. This is closely related to weapon focus and other psychological factors discussed previously.

### **7. Your Theory**

Your theory will determine your lines of inquiry. It will impact the tone and length of your examination, and even which points you wish to highlight. Recall the concepts of primacy and recency. Experienced litigators agree that one size does not fit all witnesses. It is not unusual to have no questions for certain witnesses.

### **8. Step Back**

Compare the testimony of eyewitnesses to the high value evidence, testimony of other witnesses, and the physical evidence. What is believable in isolation could appear fantastic when placed in a particular context.

## **V. Secondary Sources**

### **1. Stress and Memory**

*A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, LAW AND HUMAN BEHAVIOR, Kenneth A. Deffenbacher, Brian H. Bornstein, Steven D. Penrod, and Kieran McGorty, Vol. 28, No 6 (December 2004).

### **2. DNA Exoneration**

*Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, E. Connors, T. Lundregan, N. Miller, and T. McEwen, U.S. Department of Justice, National Institute of Justice (1996)

### **3. Inherent Unreliability**

*Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, Noah Clements, IND L REV (2007).

### **4. Expert Testimony**

*Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, Henry Fradella, 2006 FED CTS L REV 3 (June 2006)

### **5. Weapon Focus**

<https://webfiles.uci.edu/eloftus/LoftusLoftusMessoWeaponFocusLPagesHB87.pdf>

### **6. Overview**

History and Overview of Eyewitness Misidentification, THE INNOCENCE PROJECT, available at [www.innocenceproject.org](http://www.innocenceproject.org)

## **VI. Conclusion**

Wholesale change in case law related to eyewitness identification has been slow despite mounting evidence of how fallible this favored law enforcement tool is. Nonetheless, reform is in the works as evinced by a recent landmark decision by

the New Jersey<sup>2</sup> and North Carolina's Eyewitness Identification Reform Act<sup>3</sup>.  
Stay tuned!

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<sup>2</sup> <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.html>

<sup>3</sup> <http://www.ncdoj.gov/getdoc/6d266cb8-731d-478e-8c98-2979fba9a2f7/Eyewitness-ID-Materials.aspx>