

Eyewitness Identification: Is Reform in Sight? A Massachusetts Perspective

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July 2010

I. Background

As Justice Brennan noted, few things are more convincing than a person taking the stand, pointing a finger at the defendant, and saying “That’s the one!”² It is hard to overstate the significance of eyewitness identification to law enforcement.³ The procedures used by police to identify suspects generally fall into three categories: (1) lineups, where witnesses are asked to pick the culprit out of a group of people; (2) show-ups, where witnesses are presented with a single suspect and asked whether he or she is the person they saw commit the crime; and (3) photo arrays, where witnesses are asked whether the offender is present in a group of photographs. These procedures are typically followed by an in court identification.

Of course, eyewitnesses can be mistaken. And juries can be persuaded by a witness’s confident, though mistaken, identification. As the Supreme Court stated over forty years ago, “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identifications.”⁴ Over the past twenty years, DNA exonerations have

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² *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (“There is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”).

³ *See, e.g.*, James M. Cronin et al., Community Oriented Policing Services, U.S. Department of Justice, *Promoting Effective Homicide Investigations* 35 (2007) (“Eyewitness identification and testimony are fundamental to the United States criminal justice system. Eyewitnesses are crucial to solving crimes, and sometimes eyewitness identification is the only evidence available to police when charging someone with a crime....”).

⁴ *U.S. v. Wade*, 388 U.S. 218, 228 (1967).

put a spotlight on the problem of eyewitness misidentification, showing it to be the leading cause of wrongful convictions in the United States.⁵ According to the Innocence Project, almost 80 percent of post-conviction DNA exonerations have involved convictions based, at least in part, on eyewitness misidentification evidence.⁶

Mistaken identifications have also contributed disproportionately to wrongful convictions in Massachusetts.⁷ Misidentification has been a contributing factor in most of the acknowledged wrongful convictions in the state.⁸ The cases of Ulysses Rodriguez Charles, Stephan Cowans, Shawn Drumgold, Donnell Johnson, Dennis Maher, Neil Miller, Marvin Mitchell, Marlon Passley, Anthony Powell, Eric Sarsfield, Eduardo Velasquez all involved mistaken identifications.⁹

Though it is impossible to determine with any certainty the rate at which mistaken identifications lead to wrongful convictions (since the actual frequency of wrongful convictions is unknown), no one can deny the fact that mistaken identifications can and do occur and that mistaken identifications can result in wrongful convictions.

⁵ *State v. Dubose*, 699 N.W. 2d 582, 592 (Wisc. 2005); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523 (2005).

⁶ Innocence Project, Understand the Causes: Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>

⁷ Stanley Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. Pub. Int. L.J. 1, 64 (2002).

⁸ *See id.*; Innocence Project, Know the Cases: Search Profiles, <http://www.innocenceproject.org/know/Search-Profiles.php> (select “MA” from “Jurisdiction” pull-down menu and search).

⁹ *See id.*; Olivia DiFeterici et al., “The Price of Innocence,” Boston Magazine, March 19, 2007, available at http://www.bostonmagazine.com/articles/the_price_of_innocence/ (describing cases of Ulysses Rodriguez Charles, Dennis Maher, and Anthony Powell); David S. Bernstein, “Framed?,” Boston Phoenix, January 8, 2010, available at <http://thephoenix.com/boston/news/55890-framed/> (discussing Stephan Cowans’ wrongful conviction); Chris Wright, “Coming Home,” Boston Phoenix, December 19, 2003 (discussing Shawn Drumgold’s case); Shelley Murphy, “DA Will Seek to Vacate ’96 Murder Conviction,” Boston Globe, March 28, 2000, available at http://www.nodp.org/ma/stacks/d_johnson.html (discussing the case of Donnell Johnson); Sacha Pfeiffer, “After Serving 4 years, Man is Exonerated in ’95 Slaying,” Boston Globe, September 14, 2000 available at http://www.nodp.org/ma/stacks/m_passley.html (discussing the case of Marlon Passley).

Using the perspective of the development of the law in Massachusetts, this paper examines the law surrounding eyewitness identification and some trends and tactics that may be of interest to defense counsel.

II. The Science of Memory and Misidentification

In the early 1900's, psychologist Hugo Munsterberg proposed that psychology could help the justice system deal with "the chaos and confusion which prevail in the observation of witnesses."¹⁰ Munsterberg thought that psychologists could assist in the assessment of eyewitness testimony in individual cases.¹¹ Scientific research specifically targeting eyewitness error, however, did not begin until the 1970's.¹² Since then, psychologists have sought to understand the phenomenon of mistaken eyewitness identification by determining, through scientific experiments, the factors that make eyewitness identification evidence more or less reliable.¹³ Their research has produced a large body of scientific literature.¹⁴

The scientific literature draws a distinction between system and estimator variables. A system variable is a factor affecting the reliability of an identification that is or could be within the control of the criminal justice system, for example: instructions given to a witness before a lineup, the composition of a lineup, and the method of presentation.¹⁵ System variables are especially important from a policy standpoint because understanding and controlling their effects

¹⁰ Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 *American Psychologist* 581, 581-82, 596 (2000) (citing Hugo Munsterberg, *On the Witness Stand* (1908)).

¹¹ *Id.*

¹² *Id.*

¹³ Gary Wells, *Eyewitness Identification: Systemic Reforms*, 2006 *Wis. L. Rev.* 615, 615-16 (2006).

¹⁴ See, e.g., Brian Cutler & S.D. Penrod, *Mistaken Identification: The eyewitness, psychology, and the law* (1995) (finding, by 1995, over 2,000 psychology publications addressing issues of eyewitness reliability).

¹⁵ *Id.* at 16; Gary Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 *Ann. Rev. Psych.* 277, 279 (2003).

can help reduce the risk of misidentification before it occurs. An estimator variable, by contrast, is a factor that is not under the control of the government, such as the lighting conditions at the time of the witnessed event or the race of the witness and the suspect.¹⁶ Understanding the effect of estimator variables can help determine the reliability of an individual identification.¹⁷

While controversies remain about some issues, experts generally agree on a variety of principles regarding eyewitness identification.¹⁸ A 2001 survey of eyewitness identification experts found substantial agreement on a number of propositions that influence eyewitnesses:¹⁹

- (1) Wording of questions: The wording of questions posed to an eyewitness can affect the witness's testimony about an event.
- (2) Lineup instructions: The instructions given to the witness at a lineup can affect the witness's willingness to make an identification.
- (3) Confidence malleability: Factors unrelated to identification accuracy can influence a witness's confidence.
- (4) Mug-shot-induced bias: Exposure to mug shots of a suspect increases the likelihood that the witness will later choose that suspect in a lineup.
- (5) Post event information: Eyewitness testimony about an event often reflects not only what they actually saw but information they obtained after the event.
- (6) Child witness suggestibility: Young children are more vulnerable than adults to interviewer suggestion, peer pressures, and other social influences.
- (7) Attitudes and expectations: A witness's perception and memory of an event may be affected by his or her attitudes and expectations.
- (8) Hypnotic suggestibility: Hypnosis increases suggestibility to leading and misleading questions.

¹⁶ *Id.*

¹⁷ Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 *Cardozo Pub. L. Pol'y & Ethics J.* 327, 328 (2006).

¹⁸ Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research*, 56 *American Psych.* 405 (2001); Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 *Stetson L. Rev.* 727, 738-41 (2006).

¹⁹ *Id.*

(9) Alcohol intoxication: Alcohol intoxication impairs an eyewitness's later ability to recall persons and events.

(10) Cross-race bias: Eyewitness's are more accurate when identifying members of their own race than members of other races.

(11) Weapon focus: The presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face.

(12) Accuracy-confidence correlation: A witness's confidence is not a good predictor of his or her identification accuracy.

(13) Forgetting curve: The rate of memory loss for an event is greatest right after the event and then levels off over time.

(14) Exposure time: The less time an eyewitness has to observe an event, the less well he or she will remember it.

(15) Presentation format: Witnesses are more likely to misidentify someone by making a relative judgment when presented with a simultaneous (as opposed to sequential) lineup.

(16) Unconscious transference: Eyewitnesses sometimes identify as a culprit someone they have seen in another situation or context.

Besides improving our understanding of how eyewitness errors occur, researchers have devised procedures and protocols that could reduce the risk of mistaken identifications occurring in the first place. In particular, scientific research on eyewitness system variables has helped inform the justice system about how to increase the accuracy of eyewitness identification evidence and minimize the risk of misidentification. Most experts agree, for example, that double-blind, sequential presentation of suspects to witnesses greatly reduces the risk of eyewitness error by preventing witnesses from using relative judgments and being influenced by intentional or unintentional feedback from the person administering the procedure.²⁰ Double-blind testing procedures are essential to scientific experiments.²¹ Medical researchers have used

²⁰ Gary Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. at 625-30.

²¹ Gary Wells et al., *From the Lab to the Police Station*, 55 *American Psych.* 581, 594 (2000) ("The idea of double-blind testing is, of course, well understood and accepted in scientific circles."); *New Jersey v. Henderson*, Report of the Special Master, at 19-20 (citing testimony of Gary Wells).

such procedures for a long time in order to prevent contaminating experiment results by unintentional verbal or non-verbal influence on test subjects.²² Similarly, lineup administrators should be “blind” – not know the identity of the suspect – to prevent the influence of intentional or unintentional feedback on the witness.²³ If a “blind” administrator is not available, the influence of feedback can be minimized by using a “shuffle method” or “folder system,” in which the administrator presents the witness with shuffled photographs so that the administrator does not know their order.²⁴

There has been some controversy surrounding the effects of sequential vs. simultaneous presentation, but research strongly supports the hypothesis that “an innocent person is at greater risk of being misidentified in a simultaneous lineup than in a sequential lineup.”²⁵ When compared to traditional, simultaneous presentation, the use of a sequential procedure reduces both accurate and inaccurate identifications.²⁶ While the rate of reduction in inaccurate identifications is “well-established,” there is some disagreement among experts as to the reduction in accurate identifications.²⁷ The 2006 report of a Chicago field study (the “Mecklenburg study”) claimed to have shown that traditional, simultaneous presentation led to fewer mistaken filler selections and more suspect selections than sequential procedures.²⁸ The

²² *State v. Henderson*, Report, at 19-20.

²³ G.L. Wells & E. Luus, *Police lineups as experiments: Social methodology as a framework for properly-conducted lineups*. 16 *Personality & Soc. Psychol. Bull.* 106 (1990).

²⁴ *State v. Henderson*, Report. at 21; Innocence Project, *Reevaluating Lineups: How Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* (2009) 18-19; Innocence Project, “*The Folder System*”: *A Recommended Practice for the ‘Blind’ Administration of Eyewitness Procedures For Small Police Departments With Limited Resources* (2006), available at http://www.nacdl.org/sl_docs.nsf/Issues/eyewitnessid1.

²⁵ *State v. Henderson*, Report, at 39-40.

²⁶ *Id.* at 40.

²⁷ *Id.*

²⁸ *Id.* at 41.

study's results, however, have been rejected by the scientific community because of its questionable methodology.²⁹

III. Eyewitness Identification Reform

Although many criminal justice system participants have long recognized that eyewitness errors do occur, until the 1970's and 1980's there was little empirical data.³⁰ By the 1980's, scientific research had already produced compelling evidence regarding certain aspects of eyewitness error, the justice system remained largely unaffected by these scientific developments. The justice system, however, began to take notice in the wake of the first group of post-conviction DNA exoneration cases in the 1990's.³¹ In 1996 the Department of Justice ("DOJ") released a report entitled, *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial*.³² The report showed that 80 percent of the individuals exonerated by DNA had been mistakenly identified by eyewitnesses.³³ This figure prompted Attorney General Janet Reno to call for the creation of a panel to address the issues surrounding misidentification.³⁴ The National Institute of Justice, the research arm of the DOJ, formed a working group which brought together researchers, prosecutors, law enforcement personnel, and defense attorneys.³⁵ In 1999, the group produced *Eyewitness Evidence: A Guide*

²⁹ *Id. See, e.g.*, Gary Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 *Law Hum. Behav.* 6 (2008).

³⁰ There were some case surveys of wrongful convictions, but these surveys had little impact on the justice system. *See, e.g.*, E. Borchard, *Convicting the innocent: Errors of criminal justice* (1932).

³¹ Wells et al., *From the Lab to the Police Station*, at 589 ("[T]he justice system largely ignored the research literature until the DNA exoneration cases emerged.").

³² Nat'l Inst. of Justice, U.S. Dep't of Justice ("DOJ"), *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial* (1996).

³³ *Id.*

³⁴ Wells et al., *From the Lab to the Police Station*, at 590.

³⁵ *Id.*; Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* iii. (1999)

for Law Enforcement, which recommended various techniques and procedures meant to improve the practices of police in obtaining accurate identification evidence.³⁶ The release of the guide spurred reform of identification procedures in several jurisdictions. New Jersey and Northampton, Massachusetts, for example, adopted new eyewitness identification guidelines based on the report's recommendations.³⁷ In 2003, the DOJ published a training manual based on the best practice recommendations of the 1999 guide.³⁸

Eyewitness identification reform in Massachusetts began with the publication of the DOJ guide.³⁹ Reform legislation that would require police to follow a uniform set of procedures was first introduced in 2003.⁴⁰ Similar bills have been introduced and legislation is currently pending, but the legislature has yet to act on any of them.

The Massachusetts Supreme Judicial Court ("SJC") has taken steps to protect defendants from the risk of misidentification in a variety of ways. In 2004, for example, the court amended Massachusetts' Criminal Procedure Rule 14 to require the prosecution to disclose in pretrial discovery a "summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issues of identity or to the fairness or accuracy of the identification procedures."⁴¹ Defendants may have already had the right to this type of discovery, but the SJC's adoption of the amended rule made the court's position clear. In

³⁶ See DOJ, *Eyewitness Evidence* at iii-iv, 2.

³⁷ Office of the Attorney Gen., N.J. Dep't of Law and Pub. Safety, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (2001), available at www.state.nj.us/lps/dcj/agguide/photoid.pdf; Northampton Police Dep't, *Eyewitness Identification Procedure, Administration and Operations Manual* ch. O-408 (2005).

³⁸ Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (2003).

³⁹ Fisher, *Eyewitness Identification Reform*, at 55.

⁴⁰ *Id.* at 56 (citing S.B. 173 (Mass. 2003)).

⁴¹ Mass. R. Crim. P. 14(a)(1)(A)(viii).

response to this discovery requirement, prosecutors around Massachusetts engaged in training police in their jurisdictions.⁴² More recently, in the case *Commonwealth v. Silva-Santiago*, the SJC endorsed the DOJ guide's recommendations for conducting identification procedures.⁴³ Although the court declined to hold that the absence of such protocols or procedures made an identification procedure unnecessarily suggestive and thus inadmissible, the court stated that they expected such protocols to be used.⁴⁴

Reform of eyewitness procedures in Massachusetts has been primarily a matter of voluntary implementation by individual police departments and training programs conducted by prosecutors.⁴⁵ In 2004, the District Attorney of Suffolk County and the Boston Police Commissioner formed a Task Force on Eyewitness Evidence, whose task was to review “the investigative processes for cases in which eyewitness identification was a significant issue,” and to recommend “any appropriate changes in the means and manner of investigation.”⁴⁶ In their 2004 report, the Suffolk County Task Force incorporated all of the practices recommended by the DOJ guide.⁴⁷ The report also goes beyond the DOJ guide in requiring the use of double blind and sequential lineups.⁴⁸ If such a lineup is impracticable, the investigator is to document any deviation and articulate the reason why the double blind, sequential lineup procedure could not

⁴² Fisher, *Eyewitness Identification Reform*, at 56.

⁴³ *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 798 (Mass. 2009).

⁴⁴ *Id.*

⁴⁵ Fisher, *Eyewitness Identification Reform*, at 58.

⁴⁶ Executive Summary, *Report of the Task Force on Eyewitness Evidence* (2004); Fisher, *Eyewitness Identification Reform*, at 58.

⁴⁷ District Attorney's Office, Suffolk County, *Report of the Task Force on Eyewitness Evidence* (2004); Fisher, *Eyewitness Identification Reform*, at 58.

⁴⁸ *Id.*

be used.⁴⁹ The report also provides detailed instructions for prosecutors litigating identification cases.⁵⁰

More recently, the Boston Bar Association (“BBA”) formed the BBA Task Force to Improve the Accuracy and Reliability of the Criminal Justice System.⁵¹ The Task Force included a broad group of criminal justice system participants, including a former judge, defense attorneys, prosecutors, the Boston Police Commissioner, the Commanding Officer of the State Police Forensics Department, and four members of the New England Innocence Project (“NEIP”) Board of Trustees. A NEIP Board member also served as co-chair. The Task Force released its report, *Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts*, in December 2009. By the time the report was released, the Boston Police Department had already begun implementing some of the recommendations made in the report. The Task Force made the following recommendations regarding eyewitness identification procedures:⁵²

Complete description: Before conducting an identification procedure, police should obtain and document as complete a description of the suspect as possible.

Blind administration: To the extent possible, identification procedures should be conducted by “blind” administrators – officers who do not know which of the individuals in a lineup or photo array is the suspect.

Standard instructions: Police should provide witnesses with standard set of instructions, including:

That it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ BBA Task Force, *Getting it Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts* (2009).

⁵² *Id.* at 5-6.

That the person who committed the crime may or may not be in the lineup or photo array;

In the case of a photo array (or a lineup done some time after the crime), that individuals may not appear exactly as they did on the date of the incident;

That regardless of whether an identification is made or not made, the investigation will continue.

Sequential presentation: Individuals in lineups and arrays should be presented to witnesses sequentially, rather than simultaneously.

Level of certainty: At the conclusion of an identification procedure where the witness has made a positive identification, the officer should ask the witness to describe his or her level of certainty about the identification.

Documentation: Officers should carefully document every identification procedure, including the witness's statements.

Training: Law enforcement personnel should be trained in the use of recommended procedures for eyewitness identification. The Judiciary should receive training on the scientific bases for mistaken identifications, and the reasons why experts believe that the identification reforms reduce the risk of misidentifications.

The law enforcement community in Massachusetts has started to recognize the advantages of eyewitness identification reform. Informal surveys of police departments across the state indicate a general trend toward adoption of new identification policies.⁵³ Suffolk County District Attorney Daniel Conley has cited improved eyewitness identification procedures as one of the reasons Suffolk County's homicide conviction rate in 2009 was the highest in five years.⁵⁴ According to Conley, the use of expert-approved procedures such as double-blind administration has helped convince juries that "police are more careful about whom they arrest."⁵⁵ Avoiding mistaken identifications is important both because it reduces the risk of convicting innocents and because it reduces the risk of allowing the guilty to remain free to commit more crime.⁵⁶

⁵³ See Fisher, *Eyewitness Identification Reform*, at 60 n. 95; *Getting It Right*, at 22.

⁵⁴ Jonathan Saltzman, "Homicide conviction rate in '09 up sharply," in *Boston Globe*, December 28, 2009.

⁵⁵ *Id.*

⁵⁶ Ken Patenaude, "Improving eyewitness identification," in *Law Enforcement Technology*, October 2003, at 185.

According to the Innocence Project, in almost half of all misidentification cases in which the perpetrator was later identified by DNA analysis the perpetrator had committed (and was convicted of committing) additional violent crimes while the innocent person was incarcerated.⁵⁷

The New England Innocence Project (“NEIP”) is partnering with the FBI National Academy Associates (“FBINAA”), a non-profit, international organization of nearly 17,000 senior law enforcement professionals,⁵⁸ to develop a training session on eyewitness identification. The training will be given at the FBINAA’s annual conference in Boston in July 2010, to senior law enforcement personnel from across the country. NEIP is also creating an eyewitness identification resources web page, which the FBINAA and the members’ departments will be able to access from the FBINAA website. The FBINAA training conference chair, and Deputy Chief of Wellesley Police Department, is currently revising his department’s policy on eyewitness identification to implement the best practices recommendations. He intends to send a copy of the newly revised policy to every police chief in Massachusetts. NEIP will post this policy, in addition to other model guidelines and policies, on its eyewitness identification resources page.

One of the most significant recent developments in the area of eyewitness identification has come from the findings of a Special Master appointed by the New Jersey Supreme Court in the case of *New Jersey v. Henderson*. The Special Master released his report on June 21, 2010. His review covered the identification procedures currently used by law enforcement and the legal test used by 48 states, including New Jersey, and the federal courts to determine the reliability of

⁵⁷ Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification* 4 (2009).

⁵⁸ The FBI National Academy Associates, Inc. is a non-profit, international organization of nearly 17,000 senior law enforcement professionals providing communities, states, countries, and profession with law enforcement expertise, training, education and information. FBINAA, <http://www.fbinaa.org>.

eyewitness testimony.⁵⁹ The report recognized the major scientific developments in the area of eyewitness identification and concluded that the *Manson* test and procedures are not “valid and appropriate in light of recent scientific and other evidence.”⁶⁰ The Special Master made numerous findings to support his conclusion, including the following: suggestive procedures can falsely inflate the reliability of eyewitness testimony; eyewitness memory is more like physical trace evidence than a videotape recording and can be mishandled, contaminated, or degraded; non law enforcement actors can contaminate a witness’s memory.⁶¹ The report recommended that the reliability inquiry be expanded to include “all the variables left unaddressed” by *Manson*, that at least an initial burden be placed on the prosecution to produce evidence of the reliability of the eyewitness identification evidence, and that judges and juries be informed of and guided by the scientific findings regarding eyewitness identification.⁶² The New Jersey Supreme Court will consider the Special Master’s findings in reviewing the Henderson case. The effect that this litigation will have on other jurisdictions remains to be seen.

IV. Litigating eyewitness identification cases

Generally, getting the identification suppressed is the first goal of the defense. If the court denies the defendant’s motion to suppress, which will almost always be the case, the defense may seek to introduce eyewitness identification expert testimony to educate the jury about eyewitness identification reliability issues. Finally, the defense may ask for jury instructions regarding eyewitness identification evidence.

⁵⁹ *New Jersey v. Henderson*, Report.

⁶⁰ *Id.* at 79.

⁶¹ *Id.*; Innocence Project, Press Release, “Special Master Appointed by N.J. Supreme Court Calls for Major Overhaul of Legal Standards for Eyewitness Testimony,” June 21, 2010 (summarizing findings).

⁶² *New Jersey v. Henderson*, Report, at 84-86.

(A) Suppression of identification evidence

The Fourth, Fifth, and Sixth Amendments of the U.S. Constitution (“Fourth, Fifth and Sixth Amendments”), Articles 12 and 14 of the Massachusetts Declaration of Rights (“Articles 12 and 14”), and common law principles of fairness all provide grounds for challenging eyewitness identifications in Massachusetts.

To challenge the admissibility of identification evidence at trial, the defendant must first file a pre-trial motion under Mass. R. Crim. P. 13. Mass. R. Crim. P. 14(a)(1)(viii) entitles the defendant to a summary of the identification procedures used and all statements made in the presence of or by an identification witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.⁶³ If the information gathered through discovery is insufficient, the defendant can, as a matter of due process, request a hearing to uncover more details about the out-of-court identification procedure and the circumstances surrounding it.⁶⁴ At that point, suppression may be appropriate under a number of bases:

Fruit of the Poisonous Tree

Under the fruit of the poisonous tree doctrine, if an identification is considered the “fruit” of a violation of the defendant’s constitutional rights the identification is excluded.⁶⁵ In *Wong Sun v. United States*, the Court explained that the question is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by

⁶³ Mass. R. Crim. P. 14(a)(1)(viii).

⁶⁴ *Commonwealth v. Dougan*, 377 Mass. 303, 316 (Mass. 1979).

⁶⁵ See *Wong Sun v. US*, 371 U.S. 471 (1963) (holding that evidence obtained through illegal government activity is inadmissible as “fruits of the poisonous tree”). Note that while the fruit of the poisonous tree argument first arose in the Fourth Amendment context, the Court has applied it in the context of Fifth and Sixth Amendment violations. See *Nix v. Williams*, 467 U.S. 431, 442 (1984).

exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”⁶⁶

Unlawful Detention

In the case of a corporeal identification – a show-up or lineup –the defendant may have, for example, been unlawfully detained when the identification procedure was conducted. In Massachusetts, a suspect may not be detained and forced to participate in a lineup without probable cause.⁶⁷ An identification made under these circumstances may be considered the fruit of an unlawful detention.⁶⁸ The court, however, may still admit a later identification (e.g., in court) on the grounds that it was based on an independent source, such as the witness’s independent memory of the event.⁶⁹

Denying the Right to Counsel

A defendant can also seek the suppression of an identification if the pretrial confrontation violated his Sixth Amendment right to counsel. Under the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights, a defendant has a right to counsel at certain pre-trial confrontations. If the defendant can show that this right has been violated then the prosecution is precluded from introducing an in-court identification of the defendant by that witness, unless the prosecution can show by clear and convincing evidence that the in-court identification is not the

⁶⁶ *Wong Sun*, 371 U.S. at 487.

⁶⁷ See *Commonwealth v. Holland*, 410 Mass. 248, 258-59 n.10 (Mass. 1991) (stating that mere suspect had no duty to submit to police’s request that he participate in a lineup); *Commonwealth v. Bumpus*, 362 Mass. 672 (Mass. 1972).

⁶⁸ See *U.S. v. Crews*, 445 U.S. 463, 472 (1980) (noting that an out-of-court identification may be suppressed due to unlawful detention in violation of the Fourth Amendment).

⁶⁹ See *Wong Sun*, 371 U.S. 471.

fruit of the tainted out-of-court procedure.⁷⁰ To use the in-court identification, the prosecution must prove that the in-court identification relies on an independent source.⁷¹

The Sixth Amendment and Article 12 right to counsel attaches once adversary criminal proceedings have been initiated “whether by way of formal charge, preliminary hearing, indictment, information or arraignment.”⁷² There is, therefore, no right to counsel at corporeal identification procedures (procedures involving the physical presence of the suspect) that take place before the government has committed itself to prosecute the defendant by, for example, filing an indictment or formally charging the defendant.⁷³ There is also no right to counsel for photo arrays, regardless of whether formal charges have been filed.⁷⁴

Defense counsel must be present at a post-indictment or post-charge lineup or show-up unless the defendant validly waives his right to counsel.⁷⁵ If the police choose to conduct a lineup or show-up once adversarial proceedings have been initiated and the defendant is not represented by counsel, the defendant must be notified of his right to counsel.⁷⁶ In practice, the right to counsel in post-indictment or post-charge confrontations will usually not be at issue because most lineups and show-ups occur before the initiation of adversarial proceedings.

Identification Procedures that Violate Due Process

⁷⁰ *Wade*, 388 U.S. at 241.

⁷¹ *Wade*, 388 U.S. at 240-42; *Moore v. Illinois*, 434 U.S. 220, 224-27 (1977); *Gilbert v. California*, 388 U.S. 263, 272-73 (1967).

⁷² *Kirby v. Illinois*, 406 U.S. 682 (1972); *Moore v. Illinois*, 434 U.S. 220 (1977); *Commonwealth v. Simmonds*, 386 Mass. 234, 237 (Mass. 1982).

⁷³ *U.S. v. Wade*, 388 U.S. 218 (1967).

⁷⁴ *U.S. v. Ash*, 413 U.S. 300 (1973).

⁷⁵ *Commonwealth v. Torres*, 442 Mass. 554, 571-72 (Mass. 2004). See *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Wade*, 388 U.S. at 237.

⁷⁶ *Wade*, 388 U.S. at 237; *Commonwealth v. Mendes*, 361 Mass. 507, 509-10 (Mass. 1972) (overruled in part by, *Commonwealth v. Lopes*, 362 Mass. 448 (Mass. 1972)).

Under the Fourteenth Amendment, states are required to provide the minimum protections provided by the Due Process Clause of the Fifth Amendment. In *Stovall v. Denno*, the Supreme Court held that a criminal defendant has a due process right to exclude identification evidence obtained by impermissibly suggestive identification procedures.⁷⁷ Later, in *Manson v. Brathwaite*, the Court held that an unnecessarily suggestive identification may still be admitted if it is deemed reliable.⁷⁸ The SJC has rejected the *Manson* standard, electing instead to provide greater due process protection under Article 12 of the Massachusetts Declaration of Rights. Instead of the Supreme Court’s reliability test for assessing due process violations in the context of eyewitness identification evidence, Massachusetts courts apply a stricter per se exclusion rule.

In Massachusetts, the due process rights guaranteed by Article 12 require the exclusion of testimony regarding an out-of-court identification if the identification procedure used by the police was “so unnecessarily suggestive and conducive to irreparable misidentification” as to deny the defendant due process of law.⁷⁹ The burden is on the defendant to prove this by a preponderance of the evidence.⁸⁰ In determining whether a particular identification procedure was unnecessarily suggestive the court must consider the totality of the circumstances surrounding the confrontation.⁸¹

⁷⁷ *Stovall v. Denno*, 388 U.S. 293, 302 (1967) overruled on other grounds by *Griffith v. Kentucky*, 479 U.S. 314 (1987).

⁷⁸ *Manson v. Brathwaite*, 432 U.S. 98 (1977).

⁷⁹ *Commonwealth v. Odware*, 429 Mass. 231, 235 (Mass. 1999). *Stovall*, 388 U.S. at 302; *Neil v. Biggers*, 409 U.S. 188, 196 (1972).

⁸⁰ *Id.*

⁸¹ *Commonwealth v. Botelho*, 369, Mass. 860, 867 (Mass. 1976) (citing *Stovall*, 388 U.S. at 302).

If the identification resulting from the suggestive procedure is excluded, subsequent identifications are admissible only if the prosecution shows by clear and convincing evidence that the subsequent identifications have an independent source.⁸² In determining whether a subsequent identification was derived from an independent source the judge considers the following factors:

(1) The extent of the witness' opportunity to observe the defendant at the time of the crime; prior errors, if any, (2) in description, (3) in identifying another person or (4) in failing to identify the defendant; (5) the receipt of other suggestions, and (6) the lapse of time between the crime and the identification.⁸³

It is important to note that, in contrast to the Sixth Amendment context, the defendant can assert a due process claim regardless of when the identification occurred. In addition, the defendant may seek to exclude the testimony of a witness who identified the defendant from a pre-trial photo array on the grounds that admission of such evidence would violate due process.

Although Massachusetts' due process standard under Article 12 was originally derived from decisions of the United States Supreme Court, it differs significantly from the current federal due process standard under the Fifth Amendment. Massachusetts' per se exclusion rule for unnecessarily suggestive identification procedures is far more strict than the "reliability test" articulated in *Manson v. Brathwaite*. In *Manson*, the Supreme Court held that if a defendant proves by a preponderance of the evidence that an out-of-court identification procedure was unnecessarily suggestive, the resulting identification may still be introduced if it is deemed reliable under the totality of the circumstances.⁸⁴ The Court explained that "reliability is the

⁸² *Commonwealth v. Odware*, 429 Mass. 231, 235 (Mass. 1999); *Commonwealth v. Johnson*, 420 Mass. 458 (Mass. 1995); *Botelho*, 369 Mass. 860.

⁸³ *Botelho*, 369 Mass. at 869; *Johnson*, 420 Mass. at 464.

⁸⁴ *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

linchpin in determining the admissibility of identification testimony.”⁸⁵ In determining the reliability of the identification procedure, courts consider the following factors:

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 confrontation.⁸⁶

Note that the factors here are the same as the factors considered under the Massachusetts’ standard in determining whether a subsequent identification comes from an independent source. They are used here for a different purpose. Under the federal standard, if the out-of-court identification procedure is deemed unreliable and unnecessarily suggestive, the admission of evidence of the tainted identification would violate due process. Nevertheless, an in-court identification by the same witness may be permitted if the government proves that the tainted procedure did not create “a very substantial likelihood of irreparable misidentification.”⁸⁷

Reliability is not a relevant consideration under Massachusetts’ due process standard. If the circumstances of an identification procedure are shown to have been highly and unnecessarily suggestive, the identification is excluded regardless of whether the procedure could still be deemed reliable. In *Commonwealth v. Johnson*, the SJC found that the *Manson* reliability test does not satisfy the requirements of Article 12.⁸⁸ The court found the reliability test unacceptable “because it provides little or no protection from unnecessarily suggestive identification procedures, from mistaken identifications and, ultimately, from wrongful

⁸⁵ *Id.*

⁸⁶ *Biggers*, 409 U.S. at 199-200.

⁸⁷ *Simmons v. United States*, 390 U.S. 377, 384 (1968).

⁸⁸ *Johnson*, 420 Mass. at 465.

convictions.”⁸⁹ The court also noted that the per se approach was superior to the reliability test in deterring police from using suggestive practices, as “[a]lmost any suggestive lineup will still meet the reliability standards.”⁹⁰ In rejecting the federal standard and reaffirming its more strict, per se approach, the court concludes that “only a rule of per se exclusion can ensure the continued protection against the danger of mistaken identification and wrongful convictions.”⁹¹

There are no bright-line rules about what conditions make an identification procedure impermissibly suggestive. The fact that the defendant stuck out in a lineup or photo-array may render the procedure suggestive, but in some circumstances it may not. On the one hand, the SJC has held that a lineup is not impermissibly suggestive simply because each person in the lineup does not closely resemble the defendant.⁹² On the other hand, the court has expressed disapproval of photo arrays which distinguish one suspect from all the others on the basis of some physical characteristic.⁹³

The SJC has never held that certain procedures or protocols must be used for an identification procedure to meet the requirements of due process. In *Commonwealth v. Silva-Santiago*, the court outlined a protocol to be used before a photo array is presented to a witness.⁹⁴ The protocol is borrowed from the DOJ’s *Eyewitness Evidence: A Guide for Law Enforcement*. The SJC declined to hold that the absence of such a protocol would make the identification

⁸⁹ *Id.* at 466.

⁹⁰ *Id.* at 468 (citing Note, *Twenty Years of Diminishing Protection*, 15 Hofstra L.Rev. 583, 606 (1987)).

⁹¹ *Id.* at 472.

⁹² *Commonwealth v. Tanso*, 411 Mass. 640, 652 (Mass. 1992).

⁹³ *Commonwealth v. Thornley*, 406 Mass. 96, 100 (Mass. 1989).

⁹⁴ *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 798 (Mass. 2009).

inadmissible, but emphasized that they expected such a protocol to be used.⁹⁵ Just as sequential presentation and double-blind administration were not included in the DOJ guide recommendations, they were not included in the SJC's prescribed protocol. Citing disagreement between experts about the effects of simultaneous or sequential presentation, the court held that "the choice of simultaneous rather than sequential display of photographs shall go solely to the weight of the identification, not its admissibility."⁹⁶ Likewise, the SJC has ruled that the failure to use a double-blind procedure in administering a photo array goes to the weight, not the admissibility, of the identification evidence.⁹⁷

While the SJC has not held show-ups to be per se excludable, the court has noted that one-on-one confrontations are disfavored because they are inherently suggestive.⁹⁸ Show-ups are subject to the same standard as all other pre-trial identification procedures. But in determining whether the suggestiveness of a show-up was "unnecessary," the court will consider whether the police had a "good reason" to use a one-on-one procedure.⁹⁹ The court may consider factors such as the nature of the crime involved and concerns for public safety, the need for efficient investigation immediately after a crime, the usefulness of prompt confirmation of the accuracy of investigatory information.¹⁰⁰ Special or exigent circumstances are not required.¹⁰¹ This "good

⁹⁵ *Id.*; *Commonwealth v. Watson*, 455 Mass. 246, 252 (Mass. 2009).

⁹⁶ *Silva-Santiago*, 453 Mass. at 798-99.

⁹⁷ *Commonwealth v. Watson*, 455 Mass. 246, 253 (Mass. 2009). *See also Commonwealth v. Melvin*, 399 Mass. 201, 208 (Mass. 1987) (finding that the suggestiveness of an identification procedure goes to the weight, not the admissibility, of the identification evidence).

⁹⁸ *Johnson*, 420 Mass. at 461; *Commonwealth v. Austin*, 421 Mass. 357, 361 (Mass. 1995).

⁹⁹ *Austin*, 421 Mass. at 361.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

reason” inquiry must be engaged in on an case-by-case basis according to the particular facts of the case.¹⁰²

(B) Eyewitness Expert Testimony

In most cases, courts will deny the defendant’s motion to suppress the out-of-court identification. In order to mitigate the effects of the identification evidence, the defense will again argue that the identification procedure was so suggestive that it cannot be relied upon, this time to the jury. To the extent possible, the defendant will also highlight aspects of the event or characteristics of the witness that could undermine the reliability of the eyewitness’s testimony. To support these arguments, the defense may seek to introduce expert testimony on the reliability of eyewitness identification.

Admissibility of expert testimony on the issue of eyewitness identification is within the trial court’s discretion in Massachusetts.¹⁰³ The SJC has offered guidance to trial judges in exercising that discretion.¹⁰⁴ After surveying the law on eyewitness identification experts in other jurisdictions, the SJC noted that cases in which courts found that a trial judge abused his discretion in excluding the testimony of an identification expert are typically cases where there was little or no evidence to corroborate the eyewitness identification.¹⁰⁵ Furthermore, in order for eyewitness identification expert testimony to be admitted, the defendant must show that the opinion to be offered is relevant to the circumstance’s of the particular identification, rests on a

¹⁰² *Id.*

¹⁰³ *Commonwealth v. Bly*, 448 Mass. 473, 495 (Mass. 2007) (citing *Commonwealth v. Hyatt*, 419 Mass. 815, 818 (Mass. 1995)); *Commonwealth v. Zimmerman*, 441 Mass. 146, 153 (Mass. 2004).

¹⁰⁴ *Bly*, 448 Mass. at 495 (citing *Commonwealth v. Santoli*, 424 Mass. 837 (Mass. 1997)).

¹⁰⁵ *Commonwealth v. Santoli*, 424 Mass. 837, 842 (Mass. 1997)

reliable basis, is sufficiently tied to the facts of the case, and concerns a subject on which jurors need assistance.¹⁰⁶

One of the most common rationales cited by courts in excluding expert testimony on eyewitness identification is that eyewitness identification is a matter of common sense and thus something which jurors do not need help to assess.¹⁰⁷ While some aspects of eyewitness identification evidence may be matters of common sense, such as the general effect of lighting and distance on a witness's ability to accurately perceive a perpetrator, many of the factors that can influence the reliability of identification evidence are not matters of common sense. Some are even counter-intuitive.¹⁰⁸ The results of one survey of potential jurors in the District of Columbia showed that significant numbers of jurors "do not understand concepts like weapon focus, the effects of stress, the tendency of witnesses to overestimate exposure time, and the lack of meaningful correlation between witnesses' stated confidence and accuracy in making an identification."¹⁰⁹

It is important to note that eyewitness experts have not been permitted to assess the accuracy of an individual identification. And some argue that such an assessment is not scientifically supported.¹¹⁰ Likewise, an expert cannot indicate that a particular identification

¹⁰⁶ *Id.* at 844.

¹⁰⁷ Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence* 46 *Jurimetrics J.* 177, 188 (2006).

¹⁰⁸ Brian L. Cutler & Gary L. Wells, "Expert Testimony Regarding Eyewitness Identification," in *Psychological Science in the Courtroom: Consensus and Controversy* 100, 103-04 (eds. Jennifer L. Skeem, Kevin S. Douglas, & Scott O. Lilienfeld 2009) ("These studies converge on the conclusion that research on eyewitness identification is often at odds with common sense and supports the need for expert testimony.").

¹⁰⁹ Schmechel et al., *Beyond the Ken*, at 204. See also Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psych.* 115 (2006) (finding a large deficiency in knowledge of eyewitness issues among jurors, judges and law enforcement personnel).

¹¹⁰ Cutler & Wells, "Expert Testimony," at 113.

procedure cannot produce an accurate identification, since even suggestive procedures can produce correct identifications.¹¹¹ Eyewitness identification experts can, however, educate the judge and jury about the cognitive processes of perception and memory, and about the factors that have been shown to influence the accuracy of identifications.¹¹² They can describe the findings of research on the effects of system factors on identification accuracy and critique the types of identification procedures used in the individual case.¹¹³ This may be enough to shake a juror's confidence in the prosecution's key witnesses.

(C) Jury Instructions

In order to mitigate the effects of an eyewitness identification, the defense should seek jury instructions on eyewitness identification. The SJC has indicated that “on request, specific instructions concerning eyewitness identification are necessary.”¹¹⁴ Furthermore, in certain instances, the court will, on request, warn the jury that a witness may have made an honest but mistaken identification.¹¹⁵ In cases involving a show-up identification, the defendant is entitled to an instruction indicating that one-on-one identification procedures may be less reliable than identification procedures where the witness picks the suspect out of a lineup.¹¹⁶ The SJC has found, however, that the court is not required to instruct the jury that an eyewitness's confidence

¹¹¹ *Id.*

¹¹² *Id.* at 112.

¹¹³ *Id.*

¹¹⁴ *Commonwealth v. Jones*, 423 Mass. 99, 110 (Mass. 1996) (citing *Commonwealth v. Rodriguez*, 378 Mass. 296, 302 (Mass. 1979), which endorsed the model instructions from *US v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)).

¹¹⁵ *Commonwealth v. Pressley*, 390 Mass. 617, 620 (Mass. 1983) (“Fairness compels the trial judge to give an instruction on the possibility of an honest but mistaken identification when the facts permit it and when the defendant requests it.”).

¹¹⁶ *Commonwealth v. Cuffie*, 414 Mass. 632, 639-40 (Mass. 1993).

in his identification is not correlated to the accuracy of his identification.¹¹⁷ The SJC has declined to hold that a jury instruction on cross-racial identification is required when cross-racial identification testimony is in evidence.¹¹⁸

Conclusion

Mistaken eyewitness identification continues to be a major issue for the criminal justice system, but the risk of wrongful convictions based on misidentification can be reduced in various ways. Widespread use of scientifically supported identification procedures would help prevent mistaken identifications from occurring. Stricter suppression of identifications based on suggestive procedures would reduce the impact of powerful, but unreliable evidence. Finally, the use of eyewitness expert testimony and cautionary jury instructions would mitigate the effects of erroneous identifications. These changes are in various stages of development and implementation in Massachusetts, but the Commonwealth is headed in the right direction.

¹¹⁷ *Commonwealth v. Cruz*, 445 Mass. 589, 595 (Mass. 2005).

¹¹⁸ *Bly*, 448 Mass. at 496. The SJC has, however, acknowledged the scientific literature on the problems with cross-racial identifications and Justice Cordy has stated that expert testimony on cross-racial identification should generally be admissible in cross-racial, stranger identification cases. *Zimmerman*, 441 Mass. at 156 (Cordy, J., concurring).